

No. 24-2565

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**MARTIN J. WALSH,
Plaintiff-Appellee,**

v.

**WICARE HOME AGENCY, LLC, et al.,
Defendants-Appellants.**

**On Appeal from the United States District Court
for the Middle District of Pennsylvania**

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Pursuant to Federal Rules of Appellate Procedure 29(a)(3) and (6), proposed amicus curiae PHI, Economic Policy Institute, National Domestic Workers Alliance, Service Employees International Union, National Women’s Law Center, and the National Employment Law Project (together “Movants”) respectfully move for leave to file the brief attached hereto as Exhibit A. Appellee consents to Movants’ filing. Movants have requested Appellants’ consent, but have not yet received a response.

Movants submit that leave should be granted for the following reasons:

A. The Movants’ Interest (Rule 29(a)(3)(A)).

PHI is a national organization committed to strengthening the direct care workforce by producing robust research and analysis, leading federal and state advocacy initiatives, and designing groundbreaking workforce interventions and models. For more than 30 years, PHI has brought a 360-degree perspective on the long-term care sector to our evidence-informed strategies. As the nation’s leading authority on the direct care workforce, PHI promotes quality direct care jobs as the foundation for quality care. For nearly a decade, PHI provided research and policy analysis in support of extending wage and overtime protections to U.S. home care workers by eliminating their unfair exemption from the Fair Labor Standards Act.

The Economic Policy Institute (“EPI”) is a non-profit organization with over 35 years of experience analyzing the effects of economic policy on the lives of

working people in the United States. EPI has studied and produced extensive research on U.S. employment and wage trends. Further, EPI has produced research examining wages in the home care industry. EPI has participated as amici curiae in numerous cases impacting workers' rights under federal wage and hour laws. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all working people in the United States have good jobs with fair pay and receive pay for all hours worked.

The National Domestic Workers Alliance ("NDWA") is the nation's leading voice for dignity and fairness for 2.2 million domestic workers who work as home care workers, nannies and house cleaners in private homes, providing essential care and supportive services to children, aging parents, and family members with disabilities every day. NDWA works to raise wages and standards for domestic workers through policy change at the local, state and federal levels. NDWA reaches and engages over 395,000 domestic workers on a regular basis through our 68 affiliate organizations in 50 cities and 19 states, and through our digital platforms.

The Service Employees International Union ("SEIU") is a union of two million working people in the United States, Canada, and Puerto Rico employed in healthcare, property services, and public services. As the largest union of home care providers in the United States, SEIU represents approximately 800,000 home care workers across twenty-one states and the District of Columbia.

Home care workers deliver essential in-home care for millions of individuals, enabling them to live with dignity in the comfort of their own homes. The demand for in-home care and home care workers continues to grow, underscoring the need for strong worker protections. It is imperative that home care workers receive fair compensation for their work and are protected from third-party employers that attempt to evade the obligations of the Fair Labor Standards Act. SEIU remains committed to upholding these protections, advocating for fair pay and equitable treatment for home care workers, and expanding access to quality in-home care services.

The National Women’s Law Center (“NWLC”) fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQIA+ people, and low-income women and families. NWLC has participated as counsel or amicus curiae in a range of cases in state and federal courts across the United States to secure greater job quality for all workers, including those who provide critical care to others. NWLC is committed to closing the racial and gender wage gaps that harm women of color and their ability to care for themselves and their families.

The National Employment Law Project (“NELP”) is a non-profit legal organization with over 55 years of experience advocating for the employment and labor rights of low-wage and unemployed workers.¹ In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially those more susceptible to exclusion, receive the basic workplace protections guaranteed in our nation’s labor and employment laws. NELP’s Fair Pay for Caregivers campaign seeks to ensure fair pay for workers and quality of care for all. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of home care workers and the importance of job quality to service and care quality.

The instant appeal is important to Movants, their constituents, and their clients. The Department of Labor’s 2015 Home Care Rule (“DOL’s rule” or “the Rule”), 29 C.F.R. § 552, appropriately responded to the fundamental changes that have occurred in the homecare industry as well as to the persistent problems that plague it. Extending minimum wages and overtime protections to more home care workers has improved quality and continuity of care, and can be done without unduly increasing costs to consumers or rendering businesses unprofitable.

B. Reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case (Rule 29(a)(3)(A)).

¹ See generally <https://www.nelp.org/>.

In the accompanying brief, amici curiae support Appellee’s request that this Court uphold the DOL Rule. Movants submit that the attached brief offers insights and perspectives that are relevant to the Court’s consideration of the Rule. Specifically, Movants’ member attorneys have witnessed the economic feasibility of providing basic wage protections to home care workers, as well as the advantages to consumers and workers of doing so. Movants submit that their perspective – as summarized in the accompanying brief – is worthy of this Court’s consideration.

WHEREFORE, Movants PHI, Economic Policy Institute, National Domestic Workers Alliance, Service Employees International Union, National Women’s Law Center, and the National Employment Law Project respectfully ask the Court to grant this motion and enter an order permitting them to file the accompanying amicus curiae brief.

Dated: January 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 21, 2025

Respectfully submitted,

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EXHIBIT A

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**BRIEF OF AMICI CURIAE PHI, ECONOMIC POLICY INSTITUTE,
NATIONAL DOMESTIC WORKERS ALLIANCE, SERVICE EMPLOYEES
INTERNATIONAL UNION, NATIONAL WOMEN’S LAW CENTER AND
NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF
PLAINTIFF-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae PHI, Economic Policy Institute (“EPI”), National Domestic Workers Alliance (“NDWA”), Service Employees International Union (“SEIU”), National Women’s Law Center (“NWLC”), and National Employment Law Project (“NELP”) represent the following per Rules of Appellate Procedure 26.1 and 29(a)(4)(A):

All parties are nonprofit, nonstock corporations. No parties have parent corporations. No party issues stock, and thus no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI

Amici PHI, Economic Policy Institute, National Domestic Workers Alliance, Service Employees International Union, National Women’s Law Center and National Employment Law Project are organizations advocating for work and service quality improvements in the home care industry. Amici are committed to developing practices and policies that protect the dignity, respect, and independence of those who receive care and those who provide it. In this case, Defendants maintain that the requirement to pay their workers the \$7.25-per-hour minimum wage and overtime premium is somehow new and untenable, nearly ten years after the federal rule became final. But home care agencies like Defendants-Appellants (“Defendants”) have operated under the minimum pay and hours requirements of the Fair Labor Standards Act for decades, and at the very least since the Department of Labor’s 2015 clarification in 29 C.F.R. § 522 (“2015 Rule,” “DOL’s Rule,” or “the Rule”) that home care agencies are covered by the Fair Labor Standards Act (“FLSA”)—as they should be.¹

Amici submit this brief to highlight three principal factors in support of the 2015 Rule. First, the brief documents the vast expansion and structural transformation of the home care industry and workforce from largely informal to

¹ The District Court refers to 29 C.F.R. § 522 by the year the Rule was effectuated (2015), while the DOL refers to 29 C.F.R. § 522 by 2013 by the year the Rule was promulgated (2013). Amici will use the year the Rule was effectuated.

regulated, commercial, and complex. Second, the brief establishes that the contemporary home care industry is plagued by severe job turnover and labor shortages which adversely impact the availability, quality, and continuity of care. This case starkly illustrates the poor quality of jobs in this growing and important industry: Defendants admit that 88 of their workers were not paid the federal minimum wage of \$7.25 an hour, and that an astonishing 181 workers at the agency did not receive overtime premium pay. Finally, the brief draws on research about industry finances and practices to show that the last decade of a clear rule extending federal minimum wage and overtime protections to more home care workers has improved the quality and continuity of care, without increasing costs to consumers or rendering home care businesses unprofitable.

Amici’s brief shows that the 2015 Rule, and in particular its clarifying coverage of agencies like Defendants, properly “define[s] and delimit[s]” the scope of the statutory exemptions at 29 U.S.C. 213(a)(15). The Rule is therefore entitled to full deference under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and this Court should uphold it.

PHI is a national organization committed to strengthening the direct care workforce by producing robust research and analysis, leading federal and state advocacy initiatives, and designing groundbreaking workforce interventions and models. For more than 30 years, PHI has brought a 360-degree perspective on the

long-term care sector to our evidence-informed strategies. As the nation's leading authority on the direct care workforce, PHI promotes quality direct care jobs as the foundation for quality care. For nearly a decade, PHI provided research and policy analysis in support of extending wage and overtime protections to U.S. home care workers by eliminating their unfair exemption from the Fair Labor Standards Act.

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break down the barriers that harm all of us—especially women of color, LGBTQIA+ people, and low-income women and families. NWLC has participated as counsel or amicus curiae in a range of cases in state and federal courts across the United States to secure greater job quality for all workers, including those who provide critical care to others. NWLC is committed to closing the racial and gender wage gaps that harm women of color and their ability to care for themselves and their families.

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RULE 29(a)(4)(E) STATEMENT

Amici do not repeat arguments made by the parties. Neither party’s counsel authored this brief, in whole or in part, and nor did either party or party’s counsel

contribute money intended to fund the preparation or submission of the brief. No person, including amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Over the last fifty years, including the last ten years since the Rule has been in effect, more older adults and persons with disabilities have foregone institutional care, transforming the home care industry. Once comprised of a relatively small group of casual “elder sitters,” today, the workforce encompasses nearly three million workers in a vocation requiring skill and training. As discussed below, the provision of home care services is now commercial, regulated, and complex. At the same time, the contemporary home care industry suffers from significant labor shortages and high turnover. These problems—caused in large part by the combination of rising demand and poor job quality—adversely impact the availability, quality, and continuity of care.

The 2015 Rule, 29 C.F.R. § 552, appropriately responded to the fundamental changes that have occurred in the industry as well as to the persistent problems that plague it. Extending minimum wages and overtime protections to more home care workers has improved quality and continuity of care, and can be done without unduly increasing costs to consumers or rendering businesses unprofitable. Indeed, the home care industry has been profitable and growing in the decade since the

DOL's Rule became effective. These results demonstrate that providing basic wage protections to home care workers is economically feasible and advantageous to consumers.

ARGUMENT

I. THE HOME CARE INDUSTRY HAS UNDERGONE DRAMATIC TRANSFORMATION SINCE THE 1970S, BECOMING SUBSTANTIALLY LARGER, MORE PROFESSIONALIZED, AND COMMERCIAL.

The home care industry of today bears little resemblance to that of 1974. When Congress enacted the 1974 amendments to the Fair Labor Standards Act (FLSA), widespread institutionalization created a narrow use for in-home companionship services, primarily preserved for individuals who required minimal care.² Home care was provided primarily by neighbors, extended family members, or untrained employees known as “elder sitters,” who provided “fellowship, care,” and “protection” when their nuclear family members were unavailable.³ Although some professional caregivers existed, home care was neither a typical vocation nor a large-scale commercial enterprise.⁴

² 119 Cong. Rec. 24801 (daily ed. July 19, 1973) (statement of Sen. Williams); 29 C.F.R. § 552.6

³ *Id.*

⁴ *Id.*

Since 1974, the home care industry has undergone several fundamental transformations. Chief among these, it has multiplied in size due to the exponential growth of the older adult population in the United States, and the number of people living with disabilities and chronic conditions.⁵ Second, consumers of long-term care and services prefer to receive such care in their homes or in other community-based settings, rather than in institutions.⁶ Third, public policy has encouraged the use of home care in lieu of institutional settings.⁷

⁵ The U.S. Census Bureau projects that in 2050, the U.S. population ages 65 and over will be 83.9 million, nearly double what it was (43.1 million) in 2012. See U.S. Census Bureau, *An Aging Nation: The Older Population in the United States* (2014), <https://www.census.gov/library/publications/2014/demo/p25-1140.html#:~:text=In%202050%2C%20the%20population%20aged%2065%20and%20will%20be%20over%20the%20age%20of%2085>.

⁶ PHI, *Direct Care Workers in the United States: Key Facts 2024 1* (2024), <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2024/>.

⁷ Federal law has supported these programs. See, e.g., Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2175-2176, 95 Stat. 357, 809-12 (codified as amended at 42 U.S.C. § 1396n, waiving the pre-existing requirement that Medicaid-funded care be provided in institutions); Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 6085-6086, 120 Stat. 4, 121-127 (codified as amended at 42 U.S.C. § 1396n, formally authorized states to offer “home- and community-based services” as part of state Medicaid programs.) The U.S. Supreme Court’s *Olmstead v. L.C.*, 527 U.S. 581 (1999) case interpreted the Americans with Disabilities Act of 1990 to give persons with disabilities a statutory right to be placed whenever feasible in community settings rather than institutions. And the Patient Protection and Affordable Care Act of 2010 provided new options for states to increase the availability of home- and community-based services. See generally Carol V. O’Shaughnessy, Nat’l Health Policy Forum, *Medicaid Home- and Community-Based Services Programs Enacted by the ACA: Expanding Opportunities One Step at a Time* (2013),

In 1963, just prior to the enactment of Medicare, only 1,100 home health care establishments existed in the United States. In 2020, there were nearly 11,400 Medicare-certified home health care agencies.⁸ The home care workforce has more than doubled in size over the past ten years, from 1.4 million in 2014 to more than 2.9 million in 2023.⁹ And home care jobs are projected to grow the largest over any other occupation in the U.S. – almost double the growth rate across all occupations.¹⁰

The expansion of home care has been accompanied by fundamental changes in the industry's structure. What was once a small industry has exploded, generating \$102.7 billion in estimated revenue in 2020, a 50% growth from 2013.¹¹ Many agencies are national franchise chains traded on Wall Street and increasingly

https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1270&context=sphhs_centers_nhpf.

⁸ Center for Disease Control, *Home Health Care*, CDC.gov, <https://www.cdc.gov/nchs/fastats/home-health-care.htm>.

⁹ PHI, *supra* note 6, at 8.

¹⁰ Suzanne Kahn, *Investing in Care: Exploring an Industrial Strategy for Care Work*, Roosevelt Institute, https://rooseveltinstitute.org/wp-content/uploads/2024/05/RI_Exploring-Industrial-Strategy-for-Care-Work_Brief_202405.pdf.

¹¹ Adam Grundy, *Aging Population Linked to Increased Need for Select Health Care and Social Assistance Services*, U.S. Census Bureau (Aug. 9, 2022), <https://www.census.gov/library/stories/2022/08/revenues-for-home-care-elderly-services-increase.html>.

are of interest to private equity investors.¹² Home care workers can be hired by individuals and their families through private arrangements, work for for-profit organizations and agencies, or be employed jointly by public authorities and individuals through publicly-financed programs.¹³ Like the rest of the healthcare industry, most home care services are now regulated by both state and federal authorities, and the funding stream is complex, deriving from a combination of Medicare, Medicaid, other public programs, insurance, and private payments.¹⁴ Along with the rest of the healthcare industry, some portions of the home care workforce are now unionized, where the jobs are much higher quality.¹⁵

As the industry has transformed, so too have the duties and expectations of

¹² See Private Equity Stakeholder Project, *Private Equity at Home: Wall Street's Incursion into Home Healthcare and Hospice Industries*, PEStakeholder.org (Mar. 2022), <https://pestakeholder.org/wp-content/uploads/2022/03/Home-Healthcare-and-Hospice-report.pdf>; Anna Claire Vollers, *Private Equity's Growing Footprint in Home Health Care Draws Scrutiny*, Stateline.org (Jan. 31, 2024), <https://stateline.org/2024/01/31/private-equitys-growing-footprint-in-home-health-care-draws-scrutiny/>; Merrill Goozner, *The Wall Street Takeover of In-Home Care*, Jacobin (Jun. 2024), <https://jacobin.com/2024/06/the-wall-street-takeover-of-in-home-care>.

¹³ Sarah Leberstein, Irene Tung, & Caitlin Connolly, *Upholding Labor Standards in Home Care: How to Build Employer Accountability into America's Fastest-Growing Jobs*, NELP, at 9-17 (Dec. 2015). <https://s27147.pcdn.co/app/uploads/2015/12/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf>.

¹⁴ *Id.* at 6-8.

¹⁵ National Employment Law Project, *Surveying the Home Care Workforce: Their Challenges & The Positive Impact of Unionization*, at 7-10 (Sept. 2017), <https://www.nelp.org/app/uploads/2017/09/surveying-home-care-workforce.pdf>.

home care workers. Among other responsibilities, they shop for food, prepare meals, and feed consumers; they make beds, do laundry, and clean care recipients' homes; they provide personal care services, such as help with toileting, bathing, exercising, and grooming; and they might pay bills, run errands, and travel with consumers to doctor's offices and other appointments.¹⁶

In addition, home care workers provide skilled labor and draw on specific knowledge. Many are certified home health aides who undertook coursework to obtain their qualifications and are federally required to complete at least seventy-five hours of training, pass a competency exam, and complete annual continuing education.¹⁷ Some workers insert catheters, administer enemas, turn clients in bed, tube-feed, insert suppositories, check vital signs and functions, and administer medications.¹⁸ Since many publicly-funded home care programs condition

¹⁶ U.S. Bureau of Labor Statistics, *What Home Health and Personal Care Aides Do*, BLS.gov, <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm#tab-2>; Molly Biklen, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev. 113, 132 (2003); Dorie Steavey & Abby Marquand, *Caring in America: A Comprehensive Analysis of the Nation's Fastest Growing Jobs: Home Health and Personal Care Aides*, PHI, at 7-9 (Dec. 2011) <https://www.phinational.org/wp-content/uploads/legacy/clearinghouse/caringinamerica-20111212.pdf>.

¹⁷ See Molly Biklen, *supra* note 16; PHI, *supra* note 6, at 8; PHI, *Understanding the Direct Care Workforce*, <https://www.phinational.org/policy-research/key-facts-faq/>.

¹⁸ See Molly Biklen, *supra* note 16; PHI, *supra* note 6, at 8; Steavey & Marquand, *supra* note 24.

consumers’ eligibility on the level of care they require—often equal to what the individuals would receive in a nursing home—those receiving services at home are older, frailer, and require more care than consumers did in the past.¹⁹ As a result, home care workers often perform the same tasks that workers employed in nursing homes do.²⁰

In recognition of this reality, the DOL initiated rulemaking in 2011 to clarify the scope of the companionship exemption, as specifically permitted by the FLSA’s “define and delimit” language at 29 U.S.C. §213(a)(15), and now subject to full deference under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion”). After substantial public input from stakeholders, the DOL’s 2015 final rule provides clarity for household employers, workers, and home care agencies.

II. THE CONTEMPORARY HOME CARE INDUSTRY IS PLAGUED BY SIGNIFICANT LABOR SHORTAGES AND HIGH TURNOVER, WHICH STEM FROM LOW JOB QUALITY AND ADVERSELY AFFECT THE DELIVERY OF SERVICES.

Because of the population and policy trends discussed above, the demand for home care services continues to grow. Between 2023 and 2033, demand is

¹⁹ Steavey & Marquand, *supra* note 24, at 7-9.

²⁰ *Id.*

projected to increase by 21 percent, much faster than the average for all occupations.²¹ Yet the current number of home care workers is insufficient to meet demand,²² and turnover rates average around 80 percent annually.²³ These factors adversely affect quality of home care services and highlight the need for job quality improvements. This case illustrates the challenges of poor job quality; Defendant admits that it paid 88 home care workers less than the federal minimum wage of \$7.25 per hour, and it is undisputed that Defendant did not pay 181 workers overtime premium pay after they worked more than 40 hours in a week. The low pay and long hours in jobs like the ones in this case exacerbate the turnover and make recruiting workers difficult.

²¹ U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook: Home Health and Personal Care Aides*, BLS.gov, <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm#:~:text=in%20May%202023.-,Job%20Outlook,force%2C%20such%20as%20to%20retire.>

²² Nancy Stedman, *Home Health Care Workforce Not Keeping Up with Community Needs*, UPennLDI (Jun. 9, 2023), <https://ldi.upenn.edu/our-work/research-updates/home-health-care-workforce-not-keeping-up-with-community-needs/>.

²³ Joyce Famakinwa, *Home Care's Industry-Wide Turnover Rate Reaches Nearly 80%*, Home Healthcare News (Jul. 3, 2024), <https://homehealthcarenews.com/2024/07/home-cares-industry-wide-turnover-rate-reaches-nearly-80/>.

A. Increasingly severe shortages of home care workers and high turnover rates inhibit the system’s ability to meet service needs and results in higher costs.

The home care industry faces a “devastating” shortage of workers.²⁴ The industry is plagued by high job vacancy rates as well as difficulties recruiting and retaining workers due to poor job quality. These shortages caused two-thirds of providers to turn down clients in 2023.²⁵ The ongoing lack of home care workers negatively impacts individuals who receive care and services, their loved ones, and home care employers.

First and foremost, labor shortages harm individuals receiving care, who are often unable to obtain home care workers to aid with self-care and everyday tasks. Recent studies indicate that the lack of an adequate workforce is a key barrier to successfully transitioning individuals from nursing homes back into the community.²⁶ Shortages also force individuals into less preferable forms of care, such as institutionalization, or to forego care completely, which increases the risk of adverse health events and imposes subsequent costs on government-funded

²⁴ PHI, *supra* note 17; see also Stedman, *supra* note 22.

²⁵ Audrie Martin, *Caregiver Turnover, Referral Rejections Continue to Increase in Home Care*, Home Health Care News (Aug. 15, 2024), <https://homehealthcarenews.com/2024/08/caregiver-turnover-referral-rejections-continue-to-increase-in-home-care/>.

²⁶ M Toles et al., *Transitional care from skilled nursing facilities to home: Study Protocol for a Stepped Wedge Cluster Randomized Trial*, 22:120 *Trials – National Library of Medicine*, 2 (Feb. 5, 2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7863858/>.

services.²⁷ Even where individuals can find home care workers, high turnover is proven to decrease the quality of care provided.²⁸

Labor shortages also have serious effects on care recipients' families and loved ones. A reduced pool of workers places more pressure on family caregivers, who face significant physical, mental, and emotional challenges in their caregiving roles.²⁹ Family caregivers face severe economic challenges as well. Research shows that family caregivers who return to full-time employment after caregiving are more likely to earn lower wages and fewer benefits.³⁰ The lower a family's income, the more significant these obstacles become.³¹

²⁷ U.S. Dept. of Health and Human Services, *HHS Announces a Multi-Pronged Effort to Strengthen Direct Care Workforce*, HHS.gov, (Feb. 27, 2024), <https://www.hhs.gov/about/news/2024/02/27/hhs-announces-multi-pronged-effort-strengthen-direct-care-workforce.html#:~:text=As%20a%20result%20of%20the,community%20are%20put%20at%20risk>.

²⁸ Lori Simon-Rusinowitz et al., *Expanding the Consumer-Directed Workforce by Attracting and Retaining Unaffiliated Workers*, 11 Care Mgmt. Js. 74, 74 (2010).

²⁹ Richard Schulz & Paula Sherwood, *Physical and Mental Health Effects of Family Caregiving*, 108 Am J Nurs. Suppl. 9 23, 26 (2008); Christian Weller et al., *Making Care Work Pay: How Paying at Least a Living Wage to Direct Care Workers could Benefit Care Recipients, Workers, and Communities*, Leading Age 7 (2020), <https://www.ltsscenter.org/wp-content/uploads/2020/09/Making-Care-Work-Pay-Report-FINAL.pdf>.

³⁰ Melissa A. Simon et al., *Path Toward Economic Resilience for Family Caregivers: Mitigating Household Deprivation and the Health Care Talent Shortage at the Same Time*, 53 Gerontologist 861, 862 (2013).

³¹ *Id.*

Finally, turnover places major financial burdens on home care employers. It increases costs, such as those associated with temporary staffing, as well as replacement and training costs associated with new hires.³² Studies predict the homecare industry could cut significant costs, potentially over a billion dollars annually, by increasing wages and thereby decreasing turnover rates.³³

B. Poor job quality is a major driver of these labor market problems.

Despite the great value of the service provided, home care work is low paid and comes with few benefits and high stress. In 2023, the median hourly wage for home care workers was \$16.12, nearly \$7.00 less than the national median.³⁴

Wages have increased over the past decade since the DOL implemented the Rule, yet over 40 percent of home care workers still live below 200% of the federal poverty level for individuals in single person households.³⁵

The part-time, sometimes episodic nature of home care employment amplifies the effect of low wages. In 2024, 46 percent of aides reported working part time for at least part of the year, resulting in median annual earnings of only

³² Weller, *supra* note 29, at 16-18.

³³ *Id.*

³⁴ U.S. Bureau of Labor Statistics, *May 2023 National Occupational Employment and Wage Estimates*, BLS.gov, https://www.bls.gov/oes/2023/may/oes_nat.htm#00-0000; U.S. Bureau of Labor Statistics, *supra* note 21.

³⁵ PHI, *supra* note 6, at 9-10.

\$21,889.³⁶ Similarly, due to low pay, nearly three in five home care workers in 2024 relied on at least one public assistance program.³⁷ And many home care workers rely on publicly funded healthcare, such as Medicaid, either because their employers do not offer health insurance coverage or because they cannot afford the required employee contribution.³⁸

Home care workers also experience high levels of job stress and face a rising risk of workplace injury, which has more than doubled over the past 15 years.³⁹ They have few or no opportunities for job advancement and perceive a general lack of respect for their work.⁴⁰ As Susie Young, a Washington state home care worker for over four decades, describes:

We've fought too long and too hard to go back. The dignity of our work would be taken away from us if home care workers lost employee rights. If you take those things away from us, you also hurt our clients. We should be improving and strengthening worker rights, never going backwards. It took 50 years for home care workers to win labor protections, which gave us the right to workers compensation and minimum wage and overtime — but there are still workers out there

³⁶ *Id.*

³⁷ *Id.* at 10

³⁸ *Id.*

³⁹ AFL-CIO, *Death on the Job: The Toll of Neglect*, 138 (Apr. 2024), <https://aflcio.org/sites/default/files/2024-04/2411%20DOTJ%202024%20DIG%20NB%20REV.pdf>

⁴⁰ Stedman, *supra* note 22; Cassandra Robertson et al., *All States Must Set Higher Wage Benchmarks for Home Health Care Workers*, Economic Policy Institute 7-9 (2022), <https://www.epi.org/publication/state-home-health-care-wages/>

who are not protected by labor law. If you're a worker, you deserve labor protections. Period."⁴¹

In short, low pay and poor benefits too often characterize the home care industry and lead to significant staff shortages and turnover.⁴²

III. PROVIDING MINIMUM WAGE AND OVERTIME PROTECTIONS TO HOME CARE WORKERS IMPROVES QUALITY OF SERVICES WITHOUT UNDULY INCREASING COSTS TO CONSUMERS OR RENDERING HOME CARE BUSINESSES UNPROFITABLE.

Federal minimum wage and overtime protections have not prevented the home care industry from continuing to generate profit. In 2023, revenue in the industry increased by \$1,000 per care employee, resulting in \$14,822 in revenue per worker hired.⁴³ While turnover is at the highest it has been in the past four years, revenue is also at its highest.⁴⁴ Rather than render businesses unprofitable, increased wage and hour protections provide necessary economic security to underpaid workers and improve quality of care.

A. Extending wage protections improves quality of care by improving job satisfaction, reducing turnover, and ameliorating labor shortages.

Since federal minimum wage and overtime protections for home care workers took effect, wages in the past decade have increased, with a neutral to

⁴¹ National Employment Law Project, *Worker Voices: Susie Young, Home Care Worker*, NELP.org (Apr. 16, 2024), <https://www.nelp.org/story/susie-young-homecare-worker/>

⁴² Weller, *supra* note 29.

⁴³ Martin, *supra* note 25.

⁴⁴ *Id.*

positive effect on hiring depending on the competitiveness of the area's labor market.⁴⁵ These pay increases are vital to closing the gap between home care and other comparable jobs,⁴⁶ which significantly helps retain home care workers and enhances the quality of care.⁴⁷ Yet relative to recent significant growth in Medicaid spending on home care, wage growth has stagnated.⁴⁸ FLSA protections are vital to ensuring that workers can afford to remain in this occupation.

Furthermore, FLSA coverage is vital to combating occupational segregation, a major driver of gender and racial wage gaps that inhibit economic security, especially for women of color.⁴⁹ The home care workforce is currently occupied by over 80% women and over 60% people of color, echoing the historical composition

⁴⁵ Di Yan et al., *Did Minimum Wage Policy Changes Impact Home Health Workforce?*, 35 *Home Health Care Manag. Pract.* 3 206, 212 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10686279/>.

⁴⁶ *Id.* at 213.

⁴⁷ Weller, *supra* note 29; Cassandra Robertson et al., *All States Must Set Higher Wage Benchmarks for Home Health Care Workers*, Economic Policy Institute (2022), <https://www.epi.org/publication/state-home-health-care-wages/>.

⁴⁸ Audrie Martin, *Home Care Worker Wages Stagnate, Despite Surge in Medicaid Spending*, *Home Health Care News* (Dec. 10, 2024), <https://homehealthcarenews.com/2024/12/home-care-worker-wages-stagnate-despite-surge-in-medicaid-spending/>.

⁴⁹ Rebecca Dixon and Amy M. Traub, *Desegregating Opportunity: Why Uprooting Occupational Segregation is Critical to Building a Good-Jobs Economy*, National Employment Law Project, 1-5 (May 2024), <https://www.nelp.org/app/uploads/2024/05/Desegregating-Opportunity-May-2024.pdf>

of domestic service marked by exploitative and undervalued work.⁵⁰ Exemptions from basic protections for home care workers originated in Jim Crow-era and later racist exclusions from U.S. labor laws, resulting in decades of depressed wages and working conditions.⁵¹ Improving the quality of home care jobs is thus essential to properly valuing the work of all workers across the country, including those marginalized at the intersection of race and gender.

Just as poor job quality for home care workers reduces quality of care for home care consumers, the opposite is also true: improving workers' wages, benefits, and working conditions enhances consumer care.⁵² One study found “a very strong relationship between job satisfaction and quality of patient care.”⁵³ Other studies of the correlation between workers' job satisfaction and the effects on consumers have reached similar conclusions.⁵⁴ As economists have observed, “[t]he outcomes of care recipients are deeply intertwined with the fortunes of care workers.”⁵⁵

⁵⁰ PHI, *supra* note 6, at 6.

⁵¹ *See generally* Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 *Am. U. L. Rev.* 851 (1999).

⁵² Weller, *supra* note 29.

⁵³ Alex Robertson, et al., *Nurses' Job Satisfaction and the Quality of Care Received by Patients in Psychogeriatric Wards*, 10 *Int'l J. Geriatric Psychiatry* 575, 575 (1995).

⁵⁴ *Id.*

⁵⁵ Eileen Appelbaum and Carrie Leana, *Improving Job Quality: Direct Care Workers in the US* 8, Center for Economic and Policy Research (Sept. 2011).

In addition to reducing turnover, increased job quality boosts the productivity of the entire profession. With a more stable workforce, employers have more incentives to invest in their employees to increase their productivity, such as by providing more training and technical support.⁵⁶ Furthermore, higher pay will attract workers with more experience, education, and relevant certifications.⁵⁷ Greater financial flexibility ensures that workers may stay home when they are sick or have other obligations, which increases worker safety and focus while on the job.⁵⁸ While these benefits will take longer to realize, productivity increases are predicted to eventually offset the costs of wage increases entirely.⁵⁹

B. Since the DOL took regulatory action, the home care industry has remained profitable and grow exponentially.

Even as wages have trended upwards since the DOL took regulatory action, the home care industry continues to grow in size and revenue. As previously highlighted, home care revenues are at an all-time high and demand is projected to grow exponentially for this industry.⁶⁰ Research has indicated that increased wages

⁵⁶ Weller, *supra* note 29, at 19-20.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Analysis of Medicaid spending confirm that medical spending is adequate, in part because home health agencies continue to enjoy large profit margins. Medicare Payment Advisory Commission (MedPAC), *Medicare Payment Policy*,

can actually decrease overall costs for home care businesses through increased productivity and retention. Furthermore, higher pay in home care is projected to add billions to local economies by increasing consumption.⁶¹

Defendants argue that employers cannot afford to extend overtime and minimum wage protections without raising costs to clients or risking the profitability of their businesses. These claims are without merit. As discussed above, employers who extend minimum wage and overtime protections to home care workers continue to run profitable home care agencies, while delivering better care, sometimes even at lower cost.

CONCLUSION

For all the foregoing reasons, this court should affirm the District Court's ruling.

Dated: January 21, 2025

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237-238 (Mar. 2024), https://www.medpac.gov/wp-content/uploads/2024/03/Mar24_MedPAC_Report_To_Congress_SEC.pdf.

⁶¹ Weller, *supra* note 29, at 26-27.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of the Court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Fed. R. App. Proc. 32(a)(5), Fed. R. App. Proc. 32(a)(4), and Fed. R. App. Proc. 32(a)(7). I certify that I am a member of the bar of this Court. I further certify that the foregoing brief complies with the applicable typeface and length limits in Fed. R. App. Proc. 32(a)(5) and Fed. R. App. Proc. 32(a)(7) because it uses 14-point Times New Roman font and is 4,869 words long, counted with the word-count function on Microsoft Word for Office 365. I certify that the text in the electronic version is identical to the paper copies and that a virus scan has been run on the electronic file and that no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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