No. 15-683

IN THE

Supreme Court of the United States

HOME CARE ASSOCIATION OF AMERICA, et al.,

Petitioners,

v.

DAVID WELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ADAPT AND THE NATIONAL COUNCIL ON INDEPENDENT LIVING IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Council on Independent Living (NCIL) is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. NCIL works to advance independent living and the rights of people with disabilities. NCIL's members include individuals with disabilities, Centers for Independent Living, Statewide Independent Living Councils, and other disability rights advocacy organizations.

ADAPT is a national grassroots community comprised of disabled people, attendants, and allies who join together to ensure the civil and human rights of people with disabilities to live in freedom. For more than 25 years, ADAPT has been committed to changing laws and policies to enable disabled people to live in the community.

NCIL and ADAPT have a shared interest in protecting the rights of disabled people to live in the community. The right to receive long term supports and services in the most integrated setting, recognized in the Americans with Disabilities Act, 42 USC § 12101, and *Olmstead v. L.C.*, 527 U.S. 581 (1999), is illusory if individuals cannot secure this assistance. Accordingly, *amici* have a substantial interest in ensuring that attendants, who are indispensable for disabled people to live in the community, do not have their hours capped or their income reduced. *Amici* are not mere advocates for disabled people and attendants; both

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[1] No counsel for any party authored this brief in whole or part, and no person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file, and consented to the filing of this brief.

organizations are led by people who provide and receive attendant services. As demonstrated herein, this case is of vital importance to amici, this Court, and the over 3.2 million disabled people and older adults who, because of the Rule at issue, are at serious risk of losing the services that they need to live in the community.

Therefore, A*mici* oppose the Department of Labor's new Rule, as it has had, and continues to have, a detrimental impact on the lives of disabled people and their attendants, and urge this Court to grant Petitioners' Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Disability Community has fought for decades for the right to live in the community. As a result of that struggle, it is now the law and policy of the Federal government that people with disabilities have the right to live in integrated settings. As of 2012, over 3.2 million disabled people and older adults receive home and community based services through Medicaid alone. Kaiser Family Foundation, *Medicaid Home and Community-Based Services Programs: 2012 Data Update* 5 (Nov. 2015).[2] Nevertheless, the progress that the Disability Community has made on this issue can be too easily undone when disabled people are not able to receive the services they need to live in the community.

The Rule at issue in this case imposes increased costs on the provision of attendant[3] services; these costs incentivize State Medicaid programs and private

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[2] *Available at* http://goo.gl/oSv755

[3] In this brief, the term "attendant" is used to refer to both home health aides and personal care attendants.

insurers to limit the hours attendants can work, thereby reducing the number of worker-hours available to provide services to people with disabilities. As hours are capped, attendants' take-home incomes decrease, and attendants will leave the industry in search of better-paying employment. Affidavit of Buckland, Kelly, *Home Care Association of America v. Weil*, Case No. 1:14-cv-00967, (December 24, 2014), at ¶ 7. B. The Rule, therefore, requires disabled people to find additional attendants, while at the same time limiting the amount of work attendants can perform and driving attendants out of the market. Without additional attendants, many disabled people will be forced to receive services in institutional settings which they would not have otherwise chosen, in violation of their rights. The Rule will have the effect of making home and community based services, and with them, the rights of people with disabilities to live in freedom more difficult, if not impossible, to achieve, and therefore, an option, not a right.

ARGUMENT

This case involves a rulemaking action of the United States Department of Labor (DOL) that will likely harm people with disabilities and their attendants. The rulemaking changes the companionship exemption, altering the overtime requirements[4] of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(15). DOL promulgated this Rule by Notice of Proposed Rule-making on Dec. 27, 2011, 76 Fed. Reg. 81190 *et seq*., and put forward its Notice of Final Rule on October 1,

[4] *Amici* do not address the minimum wage requirement because DOL found no attendant was paid less than minimum wage (78 Fed. Reg. 60,454, 60,535) and because *amici* have fought to increase attendant base wages for years.

2013. 78 Fed. Reg. 60,453 *et seq*. ("the Rule"). In the Notice of Final Rule, DOL stated that "[l]ow wages and long, irregular hours may contribute to the high turnover rate in the industry, resulting in low continuity of care" and that the Rule would address these issues because "[i]ncreased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires." 78 Fed. Reg. at 60,543. As this brief demonstrates, the Rule has had the opposite of its intended effects; it has reduced both wages and worker income, driving attendants to seek other employment.

Amici are particularly concerned with two aspects of the Rule. First, the Rule reinterprets the companionship exemption to apply only to workers who work directly for the consumer; workers who work through an agency or third-party employer are no longer exempt. 78 Fed. Reg. 60483 et seq. States fund attendant services through Medicaid, the primary payer of long term services and supports, and reimbursement rates are set by the state agency which administers Medicaid services. *See* Kaiser Family Foundation, *Medicaid and Long-Term Services and Supports: A Primer* (Dec. 2015)[5]; U.S. Dep't of Labor, *Administrator's Interpretation No. 2014-2* (June 2014)[6]. Changing the exemption creates a powerful financial incentive for states and provider agencies to cap attendant hours in order to minimize overtime costs

Second, the Rule narrows the definition of companionship care to exclude workers who assist a consumer

[5] *Available at* http://goo.gl/aczzPu

[6] *Available at* https://goo.gl/kj8seK

with activities of daily living (ADLs)[7] and instrumental activities of daily living (IADLs)[8] for more than 20% of the worker's time. 78 Fed. Reg. at 60455. Assistance with ADLs and IADLs is a significant reason why people with disabilities rely on attendants. U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home and Community Services: A Primer*, at 65-78 (2010)[9]. Medicaid only pays for attendant services when they are medically necessary. *Id.* Attendant services are medically necessary when a person requires assistance with ADLs or IADLs. *Id.* Accordingly, the vast majority of Medicaid-funded attendant services will not fall under the revised companionship exemption, regardless of whether a disabled person is the sole employer, or whether the attendant works through a provider agency, and thus, will require overtime payment irrespective of who employs them.

As a result of the additional costs which the Rule imposes on Medicaid programs, States are capping attendants' hours. Capping hours reduces the supply of worker-hours in which to provide services that enable people with disabilities to live in the community. *Amici* are aware, through their representatives, that some workers whose hours are capped are leaving the industry, seeking other employment to make up their lost income. *Amici* are also aware that many workers who stay are making less money than they were before the Rule took effect. Accordingly, *amici* strongly believe that the notional benefit that workers receive due to having the right to receive FLSA overtime pay is significantly offset by the loss of worker income, the

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[7] ADLs defined, e.g., at 42 U.S.C. 1396n(k)(6)(A)

[8] IADLs defined, e.g., at 42 U.S.C. 1396n(k)(6)(F)

[9] *Available at* https://goo.gl/E09VPx

loss of workers in the industry, and the disruption that the Rule has caused in the delivery of attendant services.

DOL was aware that implementing this Rule could lead to these very results. In its *amicus* brief submitted in *Long Island Care at Home, Ltd. v. Coke,* DOL contemplated the problem of narrowing the companionship exemption to exclude workers who are jointly employed by an agency and consumers. Brief for the United States as *Amicus Curie, Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158 (2007) (No. 06-593). DOL found that this action would impede the delivery of attendant services, lead to institutionalization of disabled people, and reduce attendant pay due to hours being capped. *Id. Amici* believe that the Rule has had the precise effects that DOL identified in 2007.

I. THE RULE BEARS NO RATIONAL RELATION TO THE PROBLEM DOL INTENDED TO SOLVE BECAUSE THE RULE HARMS WORKERS BY CAUSING STATES AND HOME CARE AGENCIES TO CAP HOURS.

When it proposed the Rule, DOL stated that the Rule was intended to attract and sustain more attendants. 76 Fed. Reg. 81190, 81191-92. Rather than creating better conditions for attendants, the Rule imposes unfunded costs on State Medicaid programs, incentivizing States and providers to cap attendants' hours, cut wages, and reduce attendants' income. The Rule, therefore, confers upon workers a theoretical benefit (a right to receive overtime pay), and a practical harm (a cut in pay due to an hours cap). In addition, the Rule introduces serious complications to the provision of attendant services for disabled people,

which jeopardize their fundamental civil rights. Accordingly, the Rule is not rationally related to its intended effect.

a. The Rule Establishes an Incentive for Employers to Cap Attendant Hours in Order to Avoid Paying Overtime.

The Rule requires attendants who work through an agency, or under joint employment with the consumer, to be paid overtime for hours worked above 40. 29 C.F.R. § 552.100(b). Many attendants who provide community based services for disabled people are paid through State Medicaid programs.[10] Others are paid for through private insurance, or are paid for directly out of the consumer's pocket. The Rule creates a powerful financial incentive for individual consumers, State Medicaid programs, private insurance providers, and provider agencies to cap a workers' hours at or below 40 per week in order to avoid paying overtime.

People with disabilities who hire their own attendants directly have a strong incentive not to cap their attendants' hours; attendants who assist disabled consumers with ADLs and IADLs are necessary to secure the consumer's independence, health, and well-being. Some people with disabilities hire their attendants directly, either out of their own pocket or through a Medicaid cash-and-counseling service

[10] In some States, Managed Long Term Services (MLTS) are provided through agreement with Managed Care Organizations (MCOs). MCOs are independent insurers who assume the risk of insuring a population in return for a capitated payment from the State. In this brief, the terms "State" and "State Medicaid" include MCOs, with respect to those States in which MCOs, rather than the States themselves, administer or reimburse for MLTS.

model. Robert Wood Johnson Foundation, *Cash and Counseling* (Feb. 2015)[11]. With the Rule, however, DOL has narrowed the definition of companionship to include assistance with ADLs and IADLs only when that assistance amounts to less than 20% of the attendant's time. 29 C.F.R. § 552.6(b). Under the Rule, a disabled person who relies on their attendants to perform ADLs such as eating, transferring, toileting, bathing, and dressing may easily require assistance with ADLs more than 20% of the time. The 20% restriction means that people with disabilities are likely to be unable to avail themselves of the companionship exemption even if they hire their attendants directly. This, in turn, will require them to pay overtime to these essential care givers, and thus will likely cap worker hours in order to avoid the additional costs imposed by the Rule. As is discussed below, capping hours reduces the income of workers in an industry where low wages have already created a worker shortage. Attendants who have their income reduced by an hours cap are likely to seek other employment, exacerbating the existing shortage of workers who perform these services that are vital to the lives of disabled individuals who wish to remain at home.

b. States are Responding to the Rule by Capping Attendant Hours.

States and private insurers have a direct financial incentive to cap attendant hours. In response to the Rule, States are indeed capping the hours that attendants can work.

[11] *Available at* http://goo.gl/VEEOzo

Arkansas has amended its Administrative Code to cap attendants at 40 hours per week. Ark. Admin. Code 016.06.10-242.311 (Jan. 2015). Perhaps to manage liability as a potential joint employer under the Rule,[12] Arkansas also restricted attendants to working with only one consumer per day. *Id.* California amended its laws in September, 2014, to establish that an attendant could work only 66 hours per week, but only if the Rule took effect. Cal. Welf. & Inst. Code § 12300.4 (West). This maximum is itself subject to a seven percent reduction to approximately 61 hours. Cal. Welf. & Inst. Code § 12301.2 (West).

In November, 2015, Illinois modified its Home Services Policy in the following ways: consumers are now required to hire a particular number of attendants based on the number of service hours authorized, and attendants must not work more than 40 hours without authorization. Illinois Dep't of Human Servs, *Home Services Program Overtime Policy* (Nov. 2015)[13]. Authorization for overtime will be given only in limited circumstances, and if a consumer schedules overtime because she is not able to recruit or retain enough workers to avoid it, that overtime is an instance of non-compliance. *Id.* This means disabled people who cannot find more attendants must choose between complying with the rule or receiving the services they need. Furthermore, the attendant will be punished if she provides overtime services. After three instances of non-compliance, the attendant will no longer be authorized to provide services through the

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[12] See DOL Wage & Hour Division, *Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA),* June, 2014. *Available at* http://goo.gl/GvmcOr

[13] *Available at* http://goo.gl/X7OQxH

Home Services Program. *Id.* In both California and Illinois, attendants who violate the overtime cap may lose their ability to work as an attendant, further exacerbating the shortage of attendants.

Oregon has limited attendants to working no more than 50 hours per week for a single individual. Oregon Dep't of Human Servs, *Policy Transmittal APD-PT-15-021* (June 2015)[14]. As in Illinois, consumers in Oregon are able to schedule attendants for additional hours only under limited circumstances. *Id.*

Texas has advised provider agencies to reduce the minimum compensation rate for attendants to $8 per hour in order to ensure that overtime can be paid. Texas Dep't of Aging and Disability Servs, *Information Letter 14-66: Impact of Department of Labor Companionship Exemption on Financial Management Services Agencies and Consumer Directed Services Employers* (Sept. 2015)[15].

Additionally, Massachusetts, New York, and New Mexico, along with Illinois, have identified capping hours as a way states can control the costs which the Rule imposes. See Corrected Brief for the States of New York, et al., as *Amici Curiae* supporting Appellants, *Home Care Association v. Weil,* 799 F.3d 1084 (2015) (No. 15-5018) at 22-23. Not only was this response foreseeable, but in the Notice of Proposed Rulemaking, DOL even noted that states could contain costs by capping hours so that attendants could not earn overtime. 76 Fed. Reg. at 81226.

All of the above restrictions, imposed in response to the Rule, make it harder for attendants to make a

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[14] *Available at* https://goo.gl/4rd6My

[15] *Available at* https://goo.gl/QTsZS6

living, drive attendants to seek work in other industries, and reduce the number of attendants available to assist people with disabilities. Of particular concern is the limitation on attendants working for more than one consumer; attendants cannot replace lost income by taking on care for another consumer, and disabled people whose service hours do not evenly divide into 40-hour blocks will have difficulty finding attendants to pick up their remaining hours.

c. Providers are Capping Hours Because Reimbursements Have Not Included the Additional Cost of Overtime and Travel Time.

The Rule contains no obligation for States to increase reimbursement to providers for the additional costs of overtime which they incur under the Rule. As a result, even where States have not imposed a direct cap, with no additional reimbursement to pay the overtime cost, provider agencies must either cap attendant hours or cut the base pay of workers in order to pay the cost of overtime. Affidavit of Darling, *Bruce, Home Care Association of America v. Weil*, Case No. 1:14-cv-00967, (December 24, 2014), at ¶ 4. b. 1. Where agencies have chosen the latter option, attendants are now required to work overtime in order to maintain their existing income. This is no idle concern! While not in the record, representatives of *amici* in Kansas, Texas, and New York have observed provider agencies capping hours and reducing base wages because reimbursement has not increased to cover overtime costs.

d. The Effects of the Rule Reduce the Income of Attendants in an Industry Where Low Wages Have Already Caused a Shortage of Workers.

For people with disabilities who need attendant services, finding an attendant was difficult even prior to the Rule, due to the shortage of workers in the attendant field. In a 2007 survey, 97% of States that responded reported either a "serious" or "very serious" shortage of qualified home-care workers. PHI, *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (Dec. 2009)[16]. Even supporters of this rule have acknowledged significant problems with the attendant shortage. The American Association for People with Disabilities explained that:

> "[I]individuals with disabilities who seek personal assistance face a significant obstacle:[i]t is difficult to attract and retain high-quality workers for in-home care jobs. Consumers of [personal assistant services] consistently report difficulty in recruiting and retaining personal assistants. Many commentators have noted the unacceptably high rates of vacancies and turnover among personal assistants. And these problems, in turn, are caused by a shortage of workers available to serve for the compensation provided. In issuing its final rule, the Department of Labor specifically noted this high turnover rate for workers in the home care industry has been estimated to range from 44 to 65 percent per year, and that other studies have found turnover rates to be

[16] *Available at* http://goo.gl/mCXqcG

> much higher, up to 95 percent and, in some cases, 100 percent annually." Brief for American Association of People with Disabilities, as *Amicus Curiae* in support of Appellants, *Home Care Association v. Weil*, 799 F.3d 1084 (2015) (No. 15-5018) at 6-7. (Internal citations omitted).

Low attendant pay contributes to this shortage. PHI, *supra* note 12. DOL, in its Notice of Final Rule, concluded that the Rule would address this shortage issue because "[i]ncreased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires." 78 Fed. Reg. at 60,543. However, this is not the case. Attendants likely will not see increased pay for the same amount of work; instead, as a result of States capping hours, attendants will likely see their hours limited and their pay decreased. Because low attendant wages are already contributing to the shortage of workers, lowering attendant pay even further through hour caps will only exacerbate this shortage.

It is true that some attendants remain in the workforce, whether out of loyalty to their consumers or a lack of other options. But those attendants, having suffered a significant cut to their earning potential, have not had their lot improved by the Rule. Because wages and reimbursements for these workers have historically been low, and have not increased in decades, the Rule will so reduce some attendants' wages that they will, themselves, be eligible for Medicaid and other poverty assistance, while working 40 hours per week 78 Fed. Reg. at 60,522, 60,545.

Not only were these effects of the Rule foreseeable; they were foreseen by DOL itself. In 2007, DOL argued, in its *amicus* in *Long Island Care at Home v. Coke*, that:

> "…[e]liminating the third-party employer regulation would have a substantial impact on home care beyond increased costs, and could cause disruption in the care that frail elderly and disabled individuals currently receive. For example, a number of home care providers believe that they would need to limit workers to 40 hours of work each week to control costs if the exemption were not available. Such a reduction in workers' hours would likely disrupt continuity of care, as many individuals requiring companionship services need care for a significant portion of the day and night, including, in some cases, round-the-clock care. In addition, home care providers have expressed concern that restricting companions to 40 hours of work each week could make it more difficult for those needing care to find it. Such difficulties would lead to increased institutionalization, which is contrary to government policy. Nor is it obvious that the care givers would benefit. Some providers predict that caregivers' total pay would actually be reduced because they would no longer be able to depend on working overtime hours to supplement their income. Moreover, the effects of limiting the companionship services exemption to individual employment would visit the greatest hardship on those elderly or infirm individuals-for example, those with Alzheimer's disease-who may be incapable of acting as employers." Brief for

> the United States as *Amicus Curie, Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158 (2007) (No. 06-593) at 22-23. (Internal Citations omitted).

This position was echoed in many public comments submitted during the public comment process for this Rule.[17] Indeed it is this very position which *amici* wish to demonstrate before the Court. These foreseeable effects undermine DOL's stated purpose in promulgating the Rule; harming, rather than helping, attendants, and threatening, rather than securing, the rights of disabled people.

II. THE RULE THREATENS THE CIVIL RIGHTS OF DISABLED PEOPLE WHO RELY ON ATTENDANT SERVICES TO LIVE IN THE COMMUNITY.

Over the past four decades, our nation has made great advances in recognizing the freedom, integration, and civil rights of disabled people, including the right to choose to receive services in the community. However, by harming the attendants who make community

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[17] *See, e.g.*, ADAPT and NCIL, *Joint Comment on the Proposed Revisions to the Companionship Exemption Regulations*, (March 21, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=WHD-2011-0003-9429; National Disability Leadership Alliance, *Letter to Hilda Solis* (March 9, 2012), available at http://www.regulations.gov/#!documentDetail;D=WHD-2011-0003-9360; National Association of Medicaid Directors*, Comments on the Application of the Fair Labor Standards Act to Domestic Service Proposed Rule* (March 21, 2012), available at http://www.regulations.gov/#!documentDetail;D=WHD-2011-0003-9179; National Association of States United for Aging and Disabilities, *Letter to Thomas Markey*, (March 21, 2012), *available at* http://regulations.com/#!documentDetail;D=WHD-2011-003-9408.

based services a possibility, the Rule has the potential to harm disabled people and turn back the clock on 40 years of progress.

a. The Rule Conflicts with 40 Years of Congressional Intent to End Segregation of People with Disabilities.

The right to choose to live in the community has been secured in part through the use of home and community based services, including attendant services. Community organizations, States, Congress, and this Court have all supported the progress of the Independent Living Movement.

In 1973, Congress took its first major action toward ending the unnecessary segregation of disabled people when it passed the Rehabilitation Act, which states that no program or activity receiving federal funds may discriminate against people with disabilities. 29 U.S.C. § 794(a). With this legislation, Congress for the first time articulated that disabled people must receive federally funded services on an equal basis as non-disabled people.

Congress reaffirmed its intention to end unnecessary segregation of disabled Americans in 1974, when it exempted companionship workers from the FLSA, enabling disabled people to live at home through the use of affordable attendant services. 29 U.S.C. § 213(a)(15). At that time, attendant services were already an integral, paid, paraprofessional component of the Disability Rights Movement, not a mere informal support. *See* National Council on Disability, *The Case for Medicaid Self-Direction: A White Paper on Research, Practice, and Policy Opportunities*

(2013)[18]. The companionship exemption has remained undisturbed by Congress to the present date. In that time, Congress has made 13 amendments to 29 U.S.C. § 213, including the amendment that created the companionship exemption. In those 13 amendments, Congress has eliminated 15 exemptions, but has left the companionship exemption. The intention of Congress, both in creating and in preserving the exemption, is clear: Congress intended attendant services to be exempt from overtime requirements.

In 1990, Congress again reaffirmed its intent to end segregation of disabled people when it passed the Americans with Disabilities Act (ADA), which states in its findings that "discrimination against individuals with disabilities persists in. . . institutionalization." 42 USC § 12101(a)(3). Ending institutionalization of people with disabilities who can live in the community with appropriate support was, and remains, an important part of the ADA. Using the ADA for it's basis, this Court propelled the Independent Living Movement forward with *Olmstead v. L.C.,* 527 U.S. 581 (1999), which the Disability Community heralds as its Emancipation Proclamation, when this Court recognized that unnecessary institutionalization of people with disabilities constitutes discrimination. 527 U.S. at 600.

Most recently, Congress reaffirmed its intent for disabled people to live at home through affordable attendant services when it created programs such as the Money Follows the Person in 2005, Pub. Law 109-171 § 6071, the Workforce Innovation & Opportunity Act, 29 U.S.C. § 3101, and the Community First Choice Option, 42 U.S.C. § 1396n(k). These programs create

[18] *Available at* https://goo.gl/IEjU25

incentives to provide people with disabilities the choice to live and receive services in the community.

These intentional acts of Congress, and of this Court, underscore the importance our nation has placed on community living for people with disabilities. The Rule goes against 40 years of Congressional intent to make living at home a real possibility for disabled Americans.

b. The Rule Will Likely Cause Attendant Hours to be Capped, Resulting in Harm to Disabled People.

As discussed above, states and providers have capped worker hours in response to the Rule. This requires consumers to hire new attendants to work the hours that their current attendants are no longer allowed to work. In some cases, the current attendant, having had her income reduced by the cap, will leave the industry entirely, and the disabled consumer will have to find new attendants. In this way, capping hours will likely disrupt the continuity of care, increase costs for individuals privately paying for services, inhibit the ability to travel, and risk the loss of bodily integrity and personal safety of disabled people.

1. Continuity of Care for People with Disabilities Will Likely Be Disrupted, Resulting in Negative Health Consequences.

As a result of overtime restrictions, continuity of care will likely be disrupted because disabled people no longer have uninterrupted, consistent service delivery from attendants who know their needs and can skillfully work with them. Disabled people who use attendant services will be at risk of institutionalization as

a result of the loss of hours due to a cap. In its own findings in the proposed rule, DOL identified that some people would be institutionalized because of the Rule. 76 Fed. Reg. 81190, 81224. Those likely to be most seriously impacted are the people who are most difficult to serve due to their high level of need, undesirable hours, location, or language.

First, people with the most significant disabilities are likely to be harmed because these individuals require constant, high-level assistance. Individuals with complex needs are likely to have to hire more new attendants than other disabled people because these consumers require extensive hours of attendant services. However, due to the complexity of their needs, these individuals are less attractive for many attendants, who would prefer to work for an individual who requires a lower level of assistance. Since the attendant workforce is already facing a shortage, and the Rule will only exacerbate that shortage, attendants will be incentivized to avoid working for individuals with the most significant disabilities in favor of working with individuals who require less assistance. As a result, individuals with complex needs are more likely to go without necessary attendant services.

Second, individuals with "orphan hours" are likely to be harmed because they may not find attendants to work these hours. "Orphan hours" are the small number of hours that exceed a cap. For example, a person with 49 hours of service in a state that has capped hours at 40 has nine "orphan hours." From experience, *amici* know that it is very difficult to hire workers for these small shifts, because an attendant will prefer to work the full 40 hours. A significantly disabled person with 24 hour attendant services, totaling 168 hours per week, may not find an attendant to work the eight

orphan hours in their authorization. This individual may be unable to obtain the around-the-clock assistance that he needs. It can be dangerous and even deadly to leave a person with significant needs without an attendant. For instance, a person who requires the use of a ventilator must be attended at all times. *See*, *e.g.,* LCDR Kimberly Love, BS, et al, *Take Precautions with Audible Alarms on Ventilators, Nursing* (Sept. 2011)[19]. Without around-the-clock attendance, a ventilator user can suffocate and die a preventable death.

Third, individuals in rural, frontier, and tribal communities will likely be harmed due to the limited attendant workforce in these areas. *See* D. Kip Brown et al., *Strengthening the Direct Service Workforce in Rural Areas* (Aug. 2011)[20]. Because it is difficult to find attendants in these areas, disabled people often depend on one attendant to perform over 40 hours of service. The Rule will cause attendants' hours to be capped, leaving disabled people with no other attendants in the geographical area to fill the gaps. As a result, disabled people will not receive critically necessary services.

Similarly, people who are members of language minority groups are at risk of institutionalization because of the limited attendants in those groups. Language differences are barriers to receiving services in the community. *See* Nan Greenwood et al., *Barriers to Access and Minority Ethnic Carers' Satisfaction with Social Care Services in the Community: A Systematic Review of Qualitative and Quantitative*

[19] *Available at* http://goo.gl/aPjSWX

[20] *Available at* https://goo.gl/d7H98Y

Literature (Aug. 2014)[21]. Capping attendant hours will only exacerbate this barrier because disabled individuals who are members of a language minority may not be able to find additional attendants who speak their language. As with people in rural areas, members of language minorities may have no choice but to move into an institution to receive the services they need.

2. Disabled People Who Directly Hire Attendants Will Likely Be Harmed By the Increase in Attendant Service Costs.

Individuals who directly hire attendants and privately pay for services, including working disabled people and veterans who have served our country, will likely be harmed because the redefinition of "companionship" means that even attendants directly hired by consumers must be paid overtime. 29 C.F.R. § 552.6(b). Veterans who receive an "Aid and Attendance" ("A&A") stipend, disabled people who use Medicaid cash-and-counseling, and people with disabilities paying out of pocket for attendants, are all likely to be affected by this change. A&A is cash paid directly to veterans with service connected disabilities who meet a certain level of need. *See* U.S. Dep't of Veteran Affairs, *Aid & Attendance and Housebound*[22]. A&A may be used to pay for attendant services. Previously, veterans could claim the companionship exemption from overtime, but because the Rule has narrowly defined "companionship," they must now pay overtime. The A&A funds will remain the same, but the Rule has

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[21] *Available at* http://goo.gl/0rkSPT

[22] *Available at* http://goo.gl/sHlCGb (Last visited December 22, 2015)

increased the cost of attendant services. In the proposed rule, DOL noted that, if the cost of home care increases, private payers may search for lower cost "alternatives," including institutionalization, 76 Fed. Reg. 81190, 81224, or even go without needed care to remain at home. This may, indeed, become the case for veterans who have become disabled while serving our country. Their increased cost of overtime, combined with their flat funded A&A may result in a loss of attendant services because veterans will not have enough funds to pay the overtime.

For the same reason, many other disabled people who privately pay for assistance because they are employed, have high levels of savings, or are otherwise not eligible for Medicaid may also be at risk of institutionalization or harm while living at home because they also cannot afford the cost of overtime for the services they need.

3. The Rule Will Likely Inhibit Disabled People from Traveling.

Disabled people will likely be inhibited from traveling because they require attendant services, when, due to the caps on attendant hours, attendants will not be allowed to provide services for extended travel periods. This Court has previously struck down rules that inhibited individuals from traveling by limiting their access to free healthcare. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *see also Shapiro v. Thompson*, 394 U.S. 618 (1969) (describing a longstanding Constitutional right to interstate travel) (overturned in part on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974)). As a result of the Rule, a disabled person's access to Medicaid covered attendant services is, in many states, limited to a certain number of hours per week, per attendant. An

attendant who can only work 40 hours per week will not be able to assist a disabled person on a weeklong trip. A disabled person who is traveling will have to undertake the complicated logistical problem of ensuring that they have sufficient attendant coverage not to exceed the cap with any one attendant. Under the Rule, disabled people will find it significantly more difficult to travel for work, leisure, or medical or rehabilitative services because the Rule has made it hard or impossible to arrange attendant services. As a result, disabled people may be prevented from working, vacationing, and receiving medically necessary treatment.

4. People with Disabilities Risk Loss of Bodily Autonomy and Personal Safety Due to Having to Replace Trusted Attendants.

Disabled people who require assistance with ADLs, including showering, toileting, and dressing, will lose even more of their personal autonomy and bodily integrity because of this Rule. While disabled people must already allow a trusted attendant to assist with these personal tasks, as a result of capping attendant hours, disabled people will be required to hire new attendants, likely strangers, to help them with their most intimate tasks.

Together with the loss of bodily autonomy under the Rule, many disabled people will put at risk their personal safety. Disabled people experience personal violence at a significantly higher rate than non-disabled people, often at the hands of their caregivers. *See* Ericka Harrell, U.S. Dep't of Justice, *Crime Against Persons with Disabilities, 2009-2011—Statistical*

Tables (Dec. 2012)[23]; Trish Erwin, *Intimate and Caregiver Violence Against Women with Disabilities* (July 2000)[24]. With each new attendant a disabled person is required to have, their risk of being victimized increases. Some disabled people may choose not to hire more attendants because they are the victims of abuse and do not wish to re-traumatize themselves or expose themselves to potential offenders. The consequence of this choice must not be institutionalization.

CONCLUSION

The Rule fails to accomplish its intended purpose of protecting workers. It provides them a theoretical benefit — the right to receive FLSA overtime wages— which has the practical effect of causing their hours to be capped and their income cut. In the process, the Rule disrupts the provision of services which are integral to the health, well-being, and civil rights of people with disabilities. For all of these reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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[23] *Available at* http://goo.gl/d8AwIs

[24] *Available at* http://goo.gl/ylW8R6