

# NO. 21-631

21-633 (CON), 22-1587 (CON)

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United States Court of Appeals  
for the  
Second Circuit

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1199SEIU UNITED HEALTHCARE WORKERS EAST,

*Petitioner-Appellee,*

v.

CHINESE-AMERICAN PLANNING COUNCIL HOME  
ATTENDANT PROGRAM, UNITED JEWISH COUNCIL OF THE  
EAST SIDE HOME ATTENDANT SERVICE CORP.,

*Respondents-Appellees.*

*(Caption Continued on the Reverse)*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR LAW  
AND ECONOMIC JUSTICE, THE LEGAL AID SOCIETY AND  
CATHOLIC MIGRATION SERVICES IN SUPPORT OF  
APPELLANTS AND INTERVENORS-APPELLANTS**

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v.

GAIL YAN, ALVARO RAMIREZ GUZMAN, ELIDA AUGUSTINA MEJIA  
HERRERA, LETICIA PANAMA RIVAS, EUGENIA BARAHONA ALVARADO,  
RAFAELA CRUCETA, VIRTUDES DURAN, WAI KAM LOU, YUE MING WU  
AND CUI YING MAI,

*Appellants,*

MEI KUM CHU, SAU KING CHUNG, QUN XIANG LING, EPIFANIA  
HICHEZ, CARMEN CARRASCO, SEFERINA ACOSTA, MARIA DIAZ,

*Intervenors-Appellants,*

PSC COMMUNITY SERVICES, NEW PARTNERS, INC., DBA PARTNERS IN CARE,  
STELLA ORTON HOME CARE AGENCY, INC., RICHMOND HOME NEEDS, SUNNYSIDE  
HOME CARE PROJECT, SUNNYSIDE CITYWIDE HOME CARE, FAMILY HOME CARE OF  
BROOKLYN AND QUEENS, CARE AT HOME, THE FIRST CHINESE PRESBYTERIAN  
COMMUNITY AFFAIRS HOME ATTENDANT CORP., AZOR HOME CARE, BUSHWICK  
STUYVESANT HEIGHTS HOME ATTENDANT, INC., CABS HOMECARE, RIVERSPRING  
LICENSED HOMECARE SERVICES AGENCY, INC, ST. NICHOLAS HUMAN SUPPORTS  
CORP., WARTBURG, ALLIANCE FOR HEALTH, INC., REGION CARE, INC., SPECIAL  
TOUCH HOME CARE SERVICE, INC., RAIN, INC., PRESTIGE HOME CARE, INC.,  
PRESTIGE HOME ATTENDANT, INC., DBA ALL SEASON HOME ATTENDANT,  
PERSONAL TOUCH HOME CARE OF N.Y., INC., PRIORITY HOME SERVICES, PREMIER  
HOME HEALTH CARE, INC., BRONX JEWISH COMMUNITY COUNCIL HOME  
ATTENDANT SERVICES, CIDNY INDEPENDENT LIVING SERVICES, HOME CARE  
SERVICES FOR INDEPENDENT LIVING, NEW YORK FOUNDATION FOR SENIOR  
CITIZENS HOME ATTENDANT SERVICES, INC., COOPERATIVE HOME CARE  
ASSOCIATES, RISEBORO HOME CARE, INC., FECS HOME ATTENDANT SERVICES,  
HOME HEALTH MANAGEMENT SERVICES, INC., SCHOOL SETTLEMENT HOME  
ATTENDANT CORP., ROCKAWAY HOME ATTENDANT, BRONXWOOD HOME FOR THE  
AGED, INC., ACCENTCARE OF NY, INC., ISABELLA VISITING CARE, INC., SOCIAL  
CONCERN COMMUNITY DEVELOPMENT CORP., ABC HEALTH SERVICES REGISTRY,  
ALLIANCE HOME SERVICES, INC., COLLECTIVELY IDENTIFIED BY THE ARBITRATOR  
AS HOME HEALTH CARE AGENCIES,

*Respondents,*

*and*

RAMONA DE LA CRUZ, DULCE HERRERA PALMA,

*Intervenors.*

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amici curiae* state that none of *amici* has a parent corporation and that no publicly held company owns 10% or more of its stock.

### **INTEREST OF AMICI CURIAE**<sup>1</sup>

*Amici* are non-profit organizations that seek to promote economic and worker justice in New York and nationally. For years, *amici* have worked to protect low-wage workers from abusive employment practices, including mandatory arbitration that obstructs the ability of workers to recover wages stolen from them. *Amici* also have clients who are or have been employed as home care aides, including those who are or have been members of 1199SEIU and will be affected by the outcome of this case.

The National Center for Law and Economic Justice (NCLEJ) advances economic justice for low-income families, individuals and communities across the country through impact litigation, policy advocacy and support of grassroots organizing. NCLEJ works to build systems that provide economic security and full participation in society for all. NCLEJ has worked extensively to secure the rights of home care aides in New York State to be paid for all compensable hours,

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<sup>1</sup> *Amici* certify that no counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or its counsel contributed money towards its preparation or submission. FED. R. APP. P. 29(a)(4)(E).

including the successful challenge of emergency regulations promulgated by the New York State Department of Labor (“NYSDOL”) excluding “live-in” 24-hour home care aides from the right to receive pay for all hours worked and the recent filing of a Title VI complaint against NYSDOL and the New York State Department of Health (“NYSDOH”) for their various policies and practices related to “live-in” 24-hour home care services.

The Legal Aid Society (Legal Aid) is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. Legal Aid’s Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, discrimination and retaliation for objecting to wage theft or discrimination. Legal Aid has represented hundreds of home care aides, including members of 1199SEIU, in filing complaints of wage theft, including complaints against Respondents, at NYSDOL and in court.

Catholic Migration Services (CMS) provides free legal services to low-income immigrants residing or working in New York City. Through its offices in Brooklyn and Queens, CMS assists thousands of immigrants each year. CMS’ employment program provides legal advice and representation to low-wage workers who suffer minimum wage, overtime, discrimination, denial of sick and family leave, and other labor law violations. CMS has represented dozens of home care aides who have worked 24-hour shifts but have only been paid for thirteen

hours per shift.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Appellants are former members of 1199SEIU seeking to vacate the District Court’s June 24, 2022 Order.<sup>2</sup> They do not represent any certified classes because the disruptive nature of Appellee’s and Respondents’ actions have prevented Appellants from moving forward through the normal course of litigation. However, Appellants are leaders of a longstanding movement of home care aides who have organized together since at least 2015 to fight the multiple obstacles that have prevented them from simply getting their legal due – “merely a chance to win what they have already earned: a day’s wages for a day’s work.” *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 189 (2019) (Garcia, J., dissenting).

*Amici* submit this brief to provide history and background concerning the illegalities rampant in 24-hour “live-in” shifts. *Amici* begin by providing a snapshot of the affected workforce, focusing on the demographic information that shows that home care aides are overwhelmingly immigrant women of color and subject to poverty. *Amici* then show how the improper authorization of Medicaid consumers for 24-hour “live-in” services is a systemic, statewide problem that

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<sup>2</sup> To the extent this Court consolidates Appellants’ appeal of the District Court’s June 24, 2022 Order with Appellant’s appeal of the District Court’s February 18, 2021 Order, *amici* request that this brief also be construed as supporting Appellants’ request that the February 18, 2021 Order be vacated.

results in nearly universal violation of the so-called “13-hour rule” by all agencies that provide Medicaid-funded “live-in” 24-hour home care services, including Respondents. Finally, *amici* demonstrate how alarmist rhetoric regarding a collapse of the home care industry is used to justify chronic inaction and to perpetuate wage theft.

## ARGUMENT

### **I. THE WORKFORCE OF HOME CARE AIDES IN NEW YORK**

Home care aides make up one of the largest occupational groupings in New York State.<sup>3</sup> And this workforce is experiencing explosive growth: in 2006, approximately 212,000 people worked as home care aides in the state;<sup>4</sup> in 2021, almost 480,000 workers were employed as home care aides;<sup>5</sup> and that number is projected to rise above 700,000 by 2028.<sup>6</sup> More than 62% of these aides work in

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<sup>3</sup> U.S. Bureau of Labor Statistics, *May 2021 State Occupational Employment and Wage Estimates New York*, [https://www.bls.gov/oes/current/oes\\_ny.htm#31-0000](https://www.bls.gov/oes/current/oes_ny.htm#31-0000).

<sup>4</sup> PHI, *New York’s Home Care Aid Workforce*, <https://www.phinational.org/wp-content/uploads/legacy/clearinghouse/PHI-495%20NY%20ExecSummary.pdf>.

<sup>5</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Employment+Trends>.

<sup>6</sup> Isaac Jabola-Carolus, Stephanie Luce & Ruth Milkman, *The Case for Public Investment in Higher Pay for New York State Home Care Workers: Estimated Costs and Savings*, CUNY Graduate Center (2021), <https://slu.cuny.edu/wp-content/uploads/2021/03/The-Case-for-Public-Investment-in-Higher-Pay-for-New-York-State-H.pdf>.

New York City.<sup>7</sup> “[O]ver the ten-year period 2018-2028, nearly 1,000,000 job positions must be filled to meet the demand for aides.”<sup>8</sup> This is because of major demographic forces affecting not only New York but the larger U.S. population: people are getting older.<sup>9</sup> The NYS Office of the Aging has reported that by 2025, 25% of the population in 51 out of 62 New York counties will be age 60 or over.<sup>10</sup>

**A. Home care aides are overwhelmingly from protected, vulnerable segments of society.**

Similar to the rest of the United States, the home care aide population of New York is predominantly comprised of immigrant women of color. Home care aides are significantly more likely to be women, people of color and immigrants than both the general population of New York and workers in other health care

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<sup>7</sup>The New York City Council, *Maximum Working Hours for Home Care Aides*, Hearing on Int. 0175-2022 Before the Committee on Civil Service and Labor (Sept. 6, 2022) (testimony of Carlos Ortiz, NYC Dep’t of Consumer & Worker Prot.), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>.

<sup>8</sup> Jabola-Carolus, *et al*, *supra* note 6.

<sup>9</sup> Joe VerValin, Geer Wu & Wiling Zhang, *Impact of Increasing Wages for Home Health Care Workers in New York State*, NYS Office for the Aging (May 2018), [https://www.nysenate.gov/sites/default/files/cipa\\_capstone\\_final\\_report\\_office\\_of\\_aging2613.pdf](https://www.nysenate.gov/sites/default/files/cipa_capstone_final_report_office_of_aging2613.pdf).

<sup>10</sup> *Id.*

fields in the state. 90% of home care aides are women.<sup>11</sup> In 2020, 82% of all home care aides in New York identified as non-white: 32% as Black, 32% as Hispanic or Latino, 14% as Asian or Pacific Islander, and 4% as non-white other.<sup>12</sup> In that same year, 67% of home care aides were immigrants.<sup>13</sup> These demographics stand in stark contrast to workers in other direct care categories or medical fields: in 2020, 73% of “residential care home” workers are U.S. citizens by birth and 45% identified as white;<sup>14</sup> and, in 2021, almost 70% of nurse practitioners in New York identified as white.<sup>15</sup> In comparison, the general population of New York State is 17.6% Black or African-American, 19.5% percent Hispanic or Latino, 9.3% Asian,

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<sup>11</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Gender>.

<sup>12</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Race+and+Ethnicity>.

<sup>13</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Citizenship>.

<sup>14</sup> PHI, *supra* note 12. “Residential care home” workers includes workers employed in residential intellectual and developmental disability facilities, continuing care retirement communities and assisted living facilities for the elderly as these industries are defined by the North American Industry Classification System (NAICS). See <http://www.census.gov/eos/www/naics/>.

<sup>15</sup> Center for Health Workforce Studies, *Nurse Practitioner Diversity in New York State*, [https://www.chwsny.org/wp-content/uploads/2021/01/NP-Diversity-Brief\\_2021.pdf](https://www.chwsny.org/wp-content/uploads/2021/01/NP-Diversity-Brief_2021.pdf).

and 1.1% non-white other.<sup>16</sup> Even in New York City, home care aides are more likely to be immigrants and people of color than the general population: approximately 24% of people residing in New York City identify as Black or African-American, 29% identify as Hispanic or Latino and 37% are immigrants.<sup>17</sup>

**B. Home care aides suffer from high levels of poverty.**

Despite holding primary responsibility for the delivery of life-sustaining services that enable many elderly and disabled New Yorkers to maintain their independence in the community, between 2020 and 2021, the median hourly wage for home care aides actually declined.<sup>18</sup> Approximately 58% of home care aides receive some form of public assistance, in no small part because their wages are so low.<sup>19</sup> According to a recent report issued by the New York City Council’s Committee on Civil Service & Labor, “a full-time home care aide [working in New York City] can expect to earn just \$31,200 per year, well under New York City

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<sup>16</sup> United States Census Bureau, *QuickFacts, New York*, [census.gov/quickfacts/NY](https://www.census.gov/quickfacts/NY).

<sup>17</sup> The Mayor’s Office for Econ. Opportunity, *An Economic Profile of Immigrants in New York City 2017*, <https://www1.nyc.gov/site/opportunity/reports/immigrant-economic-profile.page>.

<sup>18</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Wage+Trends>.

<sup>19</sup> PHI, *Workforce Data Center*, <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Public+Assistance>.



poverty thresholds.”<sup>20</sup> The New York Senate Aging Committee reports that one in four home care workers in New York City lives below the federal poverty line, with poverty rates for home care aides in other parts of the state hovering between 39-50%.<sup>21</sup>

These statistics are borne out in the lives of *amici*’s clients. Xue Rou Xie, a client of Legal Aid, worked for Respondent Chinese-American Planning Council Home Attendant Program, Inc. (“CPC”) and is covered by the arbitration award. From January, 2013 until she retired in June, 2018, Ms. Xie alternated between three and four consecutive, 24-hour shifts per week.<sup>22</sup> Ms. Xie did not sleep or have meal breaks when she worked, but she was never paid for more than 13 hours per shift.<sup>23</sup> Ms. Xie’s monthly expenses were extremely modest: each month, she

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<sup>20</sup> The New York City Council, Briefing Paper and Comm. Report of the Hum. Serv. Div. (Sept. 6, 2022), at 3, <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11203884&GUID=2A1ED593-4D4C-4D22-B5A1-3BBCBA6A93AB>.

<sup>21</sup> New York State Senate, *Addressing the Crisis in the Long-term Care Workforce*, at 7, [https://www.nysenate.gov/sites/default/files/article/attachment/long-term\\_care\\_workforce\\_hearing\\_report\\_2021.pdf](https://www.nysenate.gov/sites/default/files/article/attachment/long-term_care_workforce_hearing_report_2021.pdf).

<sup>22</sup> NCLEJ, *Re: Complaint Under Title VI of the Civil Rights Act of 1964*, 42 U.S.C. § 2000d, at Exhibits-Page 65, <https://nclej.org/wp-content/uploads/2022/10/Title-VI-Complaint-CSWA-NMASS-FWC.pdf>.

<sup>23</sup> *Id.*; *Chan v. Chinese-American Planning Council Home Attendant Program*, 15-cv-9605-LGS (S.D.N.Y.), Dkt. # 19 (“Xie Declaration”) at ¶ 4.

paid \$400 in rent, \$300 for food, \$120 in transportation costs, \$100 for clothing and \$20 for her telephone bill.<sup>24</sup> Ms. Xie also sent approximately \$200 each month to support her son and elderly mother-in-law in China.<sup>25</sup> Nevertheless, despite working between 72 and 96 hours each week, Ms. Xie was left with only \$20-\$40 per month in savings to cover emergencies because the wages she received were so low.<sup>26</sup>

Belkis Cid de Bruno is another worker who embodies the difficult circumstances of home care aides. Since March, 2014, Ms. Cid de Bruno has always been scheduled to work three, consecutive 24-hour shifts for Respondent Cooperative Home Care, which has only ever paid Ms. Cid de Bruno for thirteen hours of every 24-hour shift.<sup>27</sup> In September, 2016, Ms. Cid de Bruno began working three, consecutive 24-hour shifts for a second, non-Respondent agency, Royal Care Certified Home Health Care, that also paid her for only 13 hours per shift.<sup>28</sup> For three years, until September, 2019, Ms. Cid de Bruno worked six, 24-hour shifts per week between the two agencies. She never received five hours of

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<sup>24</sup> Xie Declaration at ¶ 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 9.

<sup>27</sup> NCLEJ, *supra* note 21, at Exhibits-Page 204.

<sup>28</sup> *Id.* at Exhibits-Page 197.

sleep or three hours of meal breaks.<sup>29</sup> In May, 2022, Ms. Cid de Bruno “retired.” She now receives \$1,050 per month in retirement benefits – \$998 from Social Security and \$52 from her 1199SEIU pension.<sup>30</sup> Undoubtedly, her benefits would be higher if they were based on her true earnings, but they are not. Instead, Ms. Cid de Bruno was paid less than half of her earned income and less than half of her earned income was covered by Social Security and credited towards 1199SEIU’s pension benefits. Due to the years of wage theft she experienced, Ms. Cid de Bruno also has no savings.<sup>31</sup> Now, since her monthly rent alone is \$1,200 per month and she still needs to feed herself and her sick husband, Ms. Cid de Bruno continues to work three, 24-hour shifts per week, even though the years of working “live-in” shifts, caring for consumers who required total assistance, has left her with chronic health problems.<sup>32</sup>

## **II. WAGE THEFT IS ENDEMIC TO RESPONDENTS’ PROVISION OF 24-HOUR “LIVE-IN” SERVICES**

The arbitrator’s award is based on an agreement between Appellee and Respondents that 1199SEIU members working 24-hour “live-in” shifts did not care for consumers who required continuous, around-the-clock assistance:

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<sup>29</sup> *Id.*

<sup>30</sup> Based on an NCLEJ interview with Belkis Cid de Bruno on July 13, 2022.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

The parties agree that the level of care for each client is determined by the payor (i.e., the Medicaid managed care plan or managed long-term care plan), on a case-by-case basis, according to the client's nighttime needs...Where a client truly needs continuous care for twenty-four (24) hours of the day, continuous care may be sought with two (2) aides for twelve (12) hours each ("split shifts") in order to meet the requirement the assigned aide be alert and available at all times. For cases assigned to 24-hour "live-in" shifts, it is agreed a health provider has made a determination the client does not require continuous care over the course of twenty four (24) hours.

[A87-88.] Accordingly, violations of the 13-hour rule were treated by the arbitrator as aberrations that could be adequately addressed by a \$250 per capita contribution.

Contrary to Appellee and Respondents' agreement, though, violation of the 13-hour rule is pervasive and systemic. As the New York City Department of Consumer Affairs testified to NYSDOL in July, 2018, "[i]ndustry practice has been to *presume* that home care workers working 24-hour shifts always just work 13 hours."<sup>33</sup> However,

an uninterrupted five hours of sleep for these workers is rare... Home care workers sleep by their patients' bedsides at night "with one eye and one ear open" as one court described it, and must remain vigilant throughout all 24 hours ready to provide assistance...Workers routinely report that they are not able to effectively use the sleep and meal periods for their own purposes; that they must regularly work during scheduled meal and sleep breaks and are never relieved from work during those breaks...Finally, no less rare than uninterrupted sleep on 24-hour

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<sup>33</sup> NYC Dep't of Consumer Affairs, *Re: New York State Department of Labor's Proposed Rule on Hours Worked (Jul. 10 2018)*, <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-NYSDOL-24-Hour-Rule-071018.pdf>.

home care workers' shifts are meal breaks.<sup>34</sup>

**A. The cascading problems that lead to widespread violation of the 13-hour rule originate at the state-level.**

In order to receive home care services through Medicaid, consumers must have their needs assessed by using mandatory assessment tools designed by NYSDOH.<sup>35</sup> Consumers with the highest level of need may be authorized for 24-hour home care services in the form of either “live-in” 24-hour services or continuous services. 18 N.Y.C.R.R. § 505.14. Continuous services, also known as split-shift services, are defined as:

the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain on a regular basis, five hours daily of uninterrupted sleep during an aide's eight hour period of sleep.

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<sup>34</sup> *Id.*

<sup>35</sup> Up until recently, the assessments were performed by managed long-term care companies (MLTCs). NYSDOH, *Managed Long Term Care: Frequently Asked Questions*, [https://www.health.ny.gov/health\\_care/medicaid/redesign/mltc\\_faq2\\_final.htm](https://www.health.ny.gov/health_care/medicaid/redesign/mltc_faq2_final.htm). On July 15, 2020, NYSDOH initiated a regulatory change to give an independent assessor responsibility to perform initial assessments for consumers seeking to receive home care services for the first time. *See infra* at note 38. Although the regulations were intended to become effective on November 8, 2021, the implementation date has been pushed back at least three times. They are now scheduled to become effective December 1, 2022.

*Id.* at § 505.14(a)(2). “Live-in” 24-hour services are defined as “the provision of care by one personal care aide for a patient...whose need for assistance is sufficiently infrequent that a ‘live-in’ 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight hour period of sleep.” *Id.* at § 505.14(a)(4). “Live-in” 24-hour services may not be authorized for personal care services if a consumer’s home does not have “adequate sleeping accommodations” for the aide. *Id.* at §505.14(b)(2)(iii)(c). Instead, under those circumstances, continuous services must be authorized. *Id.*

Since 2013, New York has required that all individuals seeking home care services be assessed using the Uniform Assessment System (UAS-NY).<sup>36</sup> However, the UAS-NY does not capture any information about the ability of aides to obtain uninterrupted sleep or the availability and adequacy of sleeping accommodations. As a result, consumers who should receive split-shift care are systematically under-authorized for “live-in” 24-hour services and aides are forced to work shifts that do not adequately provide for their need to sleep.<sup>37</sup>

On July 15, 2020, NYSDOH published a notice of proposed rulemaking that it intended to amend the sections of the state Medicaid regulations governing the

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<sup>36</sup> NYSDOH, *Uniform Assessment System (UAS) for New York*, [https://www.health.ny.gov/health\\_care/medicaid/redesign/uniform\\_assessment\\_system/index.htm](https://www.health.ny.gov/health_care/medicaid/redesign/uniform_assessment_system/index.htm).

<sup>37</sup> *Supra* note 7 (testimony of Bryan O’Malley, CDPAANYS).

provision of home care services.<sup>38</sup> Although no changes were proposed to the regulations defining “live-in” and split-shift services, during the notice and comment period, NYSDOH received comments from advocates highlighting the failure of the UAS-NY to properly assess for night-time needs:

A few commenters recommended that the regulations be amended to require...reviews be inclusive of a night-time needs evaluation, inclusive of sleeping accommodations for any personal assistance or home health aides. Commenters stated that this part of the assessment is critical for properly identifying what services should be authorized for an individual and for allowing individuals to remain safely in the community, as MMCOs and LDSS could inaccurately assume that an individual does not require authorization for any night-time need services if this component is not included...<sup>39</sup>

In response to these comments, NYSDOH stated:

The regulations maintain the requirement to assess and document the frequency of needs throughout a calendar day for cases that involve live-in or 24-hour continuous care...As described in the current guidance from the Department, this would include identifying night-time needs. These requirements work in concert with the current [UAS-NY] tool, which has been used for years by MMCOs and LDSS...The Department has maintained responsibility to assess frequency of needs with MMCOS and LDSS because the current [UAS-NY] tool does not ask these questions...To the extent that changes to the [UAS-NY] tool itself are proposed, the Department has taken them under advisement, but has determined that such changes are not immediately

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<sup>38</sup> New York State Dep’t of State (“NYSDOS”), *New York State Register*, July 15, 2020, at 16, <https://dos.ny.gov/system/files/documents/2020/10/071520.pdf>.

<sup>39</sup> NYSDOH, *Summary of Assessment of Public Comment*, at 185, [https://health.ny.gov/health\\_care/medicaid/redesign/mrt2/docs/express\\_terms\\_summary.pdf](https://health.ny.gov/health_care/medicaid/redesign/mrt2/docs/express_terms_summary.pdf).

needed...<sup>40</sup>

However, to date, no changes to the UAS-NY tool have been made or announced, and there is no evidence of NYSDOH making any efforts to “assess frequency of needs with MMCOs and LDSS” for consumers wrongly authorized for “live-in” 24-hour services based on its admitted awareness that the assessment tool that has been “used for years” is profoundly deficient.

**B. Employers take their cue to commit wage theft from NYSDOL’s failure to enforce the 13-hour rule.**

Beginning in 1972, when domestic workers were extended some protections of the New York Labor Law, NYSDOL advised employers of home care aides that they could lawfully discharge their obligations under the New York Minimum Wage Act by paying “live-in” home care aides for only 13 hours per shift so long as they also provided aides with eight hours of sleep (five of which had to be uninterrupted) and three hours of meal breaks.<sup>41</sup> Known as the “13-hour rule,” NYSDOL’s informal guidance over the years clearly stated that this pay structure was permissible only when the qualifying conditions around sleep and meal breaks were met.<sup>42</sup> However, in practice NYSDOL never inquired into meal or sleep

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<sup>40</sup> *Id.* at 185-186.

<sup>41</sup> NCLEJ, *supra* note 21, at Exhibits-Page 15-51.

<sup>42</sup> *Id.*; also NYSDOL, *Re: Request for Opinion, Live-In Companions, RO-09-0169*, <https://statistics.labor.ny.gov/legal/counsel/pdf/Other/RO-09-0169%20-%20Live-In%20Companions.pdf>.



breaks when determining wage claims by aides, rendering the qualification meaningless.

For example, in May, 2014, NYSDOL entered into a stipulation of settlement with Respondent CPC, concluding an investigation of CPC's wage practices for all of its current and former employees from August 25, 2007 to December 27, 2013.<sup>43</sup> During that period, Lai Yee Chan, a client of Legal Aid and NCLEJ, worked between three and five consecutive, 24-hour shifts per week caring for a consumer in his eighties who had dementia, prostate problems and required the assistance of breathing equipment.<sup>44</sup> Ms. Chan did not receive five hours of continuous sleep because, at least five times per night, Ms. Chan had to assist the consumer with toileting.<sup>45</sup> Ms. Chan never received three hours of meal breaks per shift.<sup>46</sup> But pursuant to Appellee and CPC's collective-bargaining agreement, Ms. Chan, like all of her colleagues who worked "live-in" shifts, was

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<sup>43</sup> NCLEJ, *supra* note 21, at Exhibits-Page 56-58.

<sup>44</sup> *Chan v. Chinese-American Planning Council Home Attendant Program*, Index No. 65037/2015 (Sup. Ct. N.Y.), NYSCEF Doc. No. 1 (Summons + Complaint) ("*Chan* Complaint") at ¶ 33, <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=XupgvsVX8ClvIamUnOk7HA==>; NCLEJ, *supra* note 21, at Exhibits-Page 61.

<sup>45</sup> NCLEJ, *supra* note 21, at Exhibits-Page 61.

<sup>46</sup> *Id.*

only paid wages for the first 12 hours of work plus a per diem of \$16.95.<sup>47</sup> She received no overtime or “spread of hours” pay.<sup>48</sup> Despite these working conditions, NYSDOL determined that Ms. Chan was owed only \$362.05 for the entire six-year period.<sup>49</sup>

NYSDOL’s policy of enforcing the Minimum Wage Act up to a maximum of 13 hours has become so widely relied upon that paying for only 13 hours has become the industry standard: the managed long-term care plans (MLTCs) contracted by the state to provide home care services reimburse licensed home care services agencies (“LHCSAs”), including Respondents, for “live-in” shifts at per diem rates that cover only 13 hours, even though MLTCs improperly authorize many consumers who require continuous care for “live-in” services only.<sup>50</sup>

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<sup>47</sup> *Chan* Complaint at ¶ 33; NCLEJ, *supra* note 21, at Exhibits-Page 72.

<sup>48</sup> *Chan* Complaint at ¶ 34; N.Y.C.R.R. §§ 142-2.4, 142-3.4 (providing for “spread of hours” pay).

<sup>49</sup> NCLEJ, *supra* note 21, at Exhibits-Page 77.

<sup>50</sup> NYSDOH, *Personal Care Agencies*, [https://www.health.ny.gov/facilities/long\\_term\\_care/reimbursement/pcr/docs/personal\\_care\\_rates\\_2022-10.pdf](https://www.health.ny.gov/facilities/long_term_care/reimbursement/pcr/docs/personal_care_rates_2022-10.pdf).

**C. Respondents hide their violation of the 13-hour rule with “live-in” agreements, CBA provisions and retaliation.**

The structural deficiencies discussed above make it extremely difficult for non-profit agencies, as many Respondents are, to comply with their wage payment obligations. Yet rather than focus their attention on fixing these structural problems, Respondents choose to commit wage theft.

In an attempt to shield themselves from liability, Respondents and other LHCSAs have begun to require aides to sign agreements stating that their working time shall not exceed thirteen hours, that they have been provided with eight hours of sleep and three hours for meal breaks and that they have been paid if they report interrupted sleep.<sup>51</sup> Frequently, though, these agreements are not explained to aides, are provided in a language aides are unable to read or understand, or are required to be signed by aides as a condition of employment even before they have begun case assignments.<sup>52</sup> Mirroring provisions in Appellee and Respondents’ CBAs, these agreements also place the burden on already overtaxed aides to

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<sup>51</sup> See, e.g., Personal Touch Home Care, *HHA Live In Agreement*, <https://www.pthomecare.com/hhaliveinagreement>; NCLEJ, *supra* note 21, Exhibits-Page 209-210.

<sup>52</sup> *Kinkead v. Human at Home, Inc.*, 330 F.R.D. 338, 351 (D. Conn. 2019); *Rodriguez v. Avondale Care Group, LLC*, 16-CV-03084 (SN), 2018 WL 1582433 at \* 5-6 (S.D.N.Y. Mar. 27, 2018).

immediately report sleep and meal break interruptions,<sup>53</sup> which allows Appellee and Respondents to disclaim knowledge and responsibility to remediate pervasive wage theft when interruptions are not reported. But even when aides report night-time work, the result is not proper wage payment.

Zhao E. Jiang is a client of Legal Aid and NCLEJ. Ms. Jiang has been working as a home care aide for CPC since 2013.<sup>54</sup> From approximately March, 2015 to February, 2019, Ms. Jiang cared for a consumer who required assistance with toileting every 30 minutes to one hour throughout the night.<sup>55</sup> When Ms. Jiang submitted forms to CPC to be compensated for her interrupted sleep, she was accused by CPC's head nurse of attempting to defraud the government and threatened with jail.<sup>56</sup>

Other workers from CPC reported similar stories.<sup>57</sup> Xiao Wen Zhen is a

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<sup>53</sup> *Alvarado v. Alliance for Health, Inc.*, Index No. 155417/2018 (Sup. Ct. N.Y.), NYSCEF Doc. No. 10 (Exhibit(s) C, *February 2016 Memorandum of Understanding*), <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=c1nLdF50kNmMnYtaa4F3w==>.

<sup>54</sup> NCLEJ, *supra* note 21, at Exhibits-Page 159.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; also David A. Lee, *The Nonprofit War on Workers*, at 94, [https://assembly.state.ny.us/write/upload/member\\_files/040/pdfs/20220104\\_0100283.pdf](https://assembly.state.ny.us/write/upload/member_files/040/pdfs/20220104_0100283.pdf).

<sup>57</sup> Lee, *supra* note 56, at 92-98.

client of Legal Aid. Because of medication her client was taking, Ms. Zhen's client required frequent help with toileting during the night.<sup>58</sup> When CPC learned of this, "[m]y client's nurse has told my client that they can only get up with my assistance twice during the night, and that there is not enough money to pay me to help the client more than twice each night."<sup>59</sup>

Xiao Huan Yu, is another client of Legal Aid and NCLEJ, who has been working 24-hour shifts for CPC since 2009.<sup>60</sup> From approximately October, 2016 until February, 2018, Ms. Yu worked two, consecutive 24-hour shifts per week caring for a consumer who required turning and repositioning every two hours.<sup>61</sup> Ms. Yu also assisted the patient with toileting at least three times each night.<sup>62</sup> Ms. Yu began to submit forms seeking to be paid for her extensive night-time work:

My agency told me not to get up at night, unless something bad had happened to the patient. The patient needed 24 hours of care, so of course I had to look after her 24 hours a day. But the agency told the patient, "We don't pay for the night hours, so don't call the home attendant at night. If you insist on calling the home attendant, you should either change agency or install a surveillance

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<sup>58</sup> NCLEJ, *supra* note 21, at Exhibits-Page 224.

<sup>59</sup> *Id.*

<sup>60</sup> NCLEJ, *supra* note 21, at Exhibits-Page 65-66; Zishun Ning, *Shao Huan Yu home attendant*, <https://vimeo.com/278986294> at 0:10-0:36.

<sup>61</sup> NCLEJ, *supra* note 21, at Exhibits-Page 65-66.

<sup>62</sup> *Id.*

camera.”<sup>63</sup>

When Ms. Yu continued to submit her night-work forms, CPC terminated her employment.<sup>64</sup>

Similar to Ms. Yu, Lai Yee Chan was instructed by CPC to stop attending to her consumer after 9pm.<sup>65</sup> Instead, she was told, she should simply call 911 if the patient developed any serious night-time issues.<sup>66</sup> Ms. Chan’s patient was also told that if she continued to request help at night, CPC would have no choice but to send her to a nursing home.<sup>67</sup> Ms. Chan refused to comply; she continued to assist the consumer and submit forms for compensation.<sup>68</sup> In response, Ms. Chan was fired.<sup>69</sup>

**D. The proportion of wages that is stolen from “live-in” aides is enormous.**

Prior to October 1, 2022, a home care aide employed by a Respondent LHCSA based in New York City was entitled to a minimum hourly compensation

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<sup>63</sup> Ning, *supra* note 60, at 0:58-1:21.

<sup>64</sup> NCLEJ, *supra* note 21, at Exhibits-Page 66.

<sup>65</sup> NCLEJ, *supra* note 21, at Exhibits-Page 61.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

rate of \$19.09, which was comprised of the statutory minimum wage of \$15 and an hourly premium of \$4.09 required by the New York Home Care Worker Wage Parity Act (“Wage Parity Act”). 12 N.Y.C.R.R. §§ 142-2.1, 3-1; N.Y. Pub. Health Law § 3614-c(3)(a).<sup>70</sup> When working more than forty hours per week, she should have been paid at an overtime premium rate of \$28.64 per hour (\$19.09 x 1.5). If she worked two, consecutive 24-hour shifts and did not receive three hours of meal breaks and five hours of uninterrupted sleep, then her weekly, pre-tax earnings should have been:

$$\begin{array}{rcc} \text{minimum wage} & \text{overtime premium} & \text{total} \\ [(\$19.09) \times 40 \text{ hrs}] & + [\$28.64 \times (48-40 \text{ hrs})] & = \$992.72 \end{array}$$

Instead, she was almost certain to bring home pre-tax earnings of approximately \$390.00. This is because her employer paid her only for 13 hours per shift at the minimum wage rate and credited only 13 hours per shift towards overtime. As a result, she was paid 61% less than what she is entitled to under the law.

This is what happened to Shao Ning Meng, a client of Legal Aid, while she was employed as a home care aide by Scharome Cares, Inc., a LHCSA based in Brooklyn. Throughout the entire time of her employment, Ms. Meng worked

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<sup>70</sup> On October 1, 2022, the minimum hourly compensation for home care workers was raised to \$21.09, comprised of the statutory minimum wage, a \$2.00 increase, and the \$4.09 hourly premium. N.Y. Pub. Health. Law § 3614-f. It remains to be seen by *amici* if employers will comply with the wage increase.

consecutive, 24-hour shifts.<sup>71</sup> In March, 2020, Ms. Meng was caring for a woman in her seventies who could not walk without assistance.<sup>72</sup> Between 10pm and 6:45am each night, Ms. Meng assisted her client with using a bedside commode at least five, and occasionally more than seven, times.<sup>73</sup> Ms. Meng never received five hours of continuous sleep or three hours of meal breaks.<sup>74</sup> For that work, Ms. Meng was paid \$420.00 per week because Scharome also paid her \$15 per day in “spread of hours” pay.<sup>75</sup>

But, because she was not bound by any mandatory arbitration agreement, Ms. Meng and five of her coworkers succeeded in recovering the majority of their unpaid wages. In December, 2021, Scharome settled with Ms. Meng and her co-plaintiffs for a total of \$600,000, representing all of the plaintiffs’ unpaid minimum wage and overtime damages based on their actual rate of pay for all 24 hours of every shift worked, the total amount of all minimum compensation due pursuant to the Wage Parity Act for the additional eleven hours per shift Scharome did not

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<sup>71</sup> *Feng v. Elderplan*, No. 20-CV-2049 (GHW) (JLC) (S.D.N.Y.), Dkt. #49 (Amended Complaint) at ¶¶ 90-110.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> NCLEJ, *supra* note 21, at Exhibits-187



credit as compensable hours, and approximately 20% in liquidated damages.<sup>76</sup>

Such an outcome is impossible, though, for Xiao Huan Yu. When Ms. Yu worked two, 24-hour shifts per week, CPC paid her only \$338.00.<sup>77</sup> Now, because of the arbitration award Appellee and Respondents seek to certify, Ms. Yu will never get just compensation.

### **III. ALARMIST RHETORIC ABOUT THE COLLAPSE OF THE HOME CARE INDUSTRY IS USED TO JUSTIFY CONTINUED WAGE THEFT**

For years, alarmist rhetoric warning that the home care industry will collapse if home care aides are paid for all 24-hours of “live-in” shifts has been used to preserve the status quo and justify the continued wage theft against aides who are forced to work 24-hour “live-in” shifts. However, an industry collapse has never been likely or imminent.

#### **A. NYSDOL first introduced the specter of industry collapse to justify the promulgation of unlawful emergency regulations.**

In 2017, the First and Second Departments of the New York State Supreme Court, Appellate Division found that the plain language of the Miscellaneous Industries and Occupations Minimum Wage Order (“Wage Order”), the set of regulations published by NYSDOL implementing the New

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<sup>76</sup> *Feng v. Elderplan, Inc.*, 20-CV-2049 (JPC)(JLC) (S.D.N.Y.), Dkt # 84 (Joint Letter) at 3.

<sup>77</sup> NCLEJ, *supra* note 21, at Exhibits-Page 189.

York Minimum Wage Act and covering home care aides, required that home care aides scheduled to work 24-hour “live-in” shifts be paid for all hours of their shifts. *Tokhtaman v. Human Care, LLC*, 149 A.D.3d 476, 476-477 (App. Div. 1st Dep’t 2017); *Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216, 1218 (App. Div. 2nd Dep’t 2017); *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254, 1255 (App. Div. 2nd Dep’t 2017). In direct response to the Appellate Division rulings, NYSDOL issued emergency regulations rewriting the Wage Order expressly to exclude sleep and meal times from the compensable time of “live-in” aides.<sup>78</sup> In describing the specific reasons for why NYSDOL deemed emergency rulemaking necessary, NYSDOL stated:

This emergency regulation is needed to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the fact of recent decisions by the State Appellate Divisions that treat meal periods and sleep time by home care aides who work shifts of 24 hours of more as hours worked for purposes of state (but not federal) minimum wage. As a result of those decisions, home care agencies may cease to provide home care aides thereby threatening the continued operation of this industry that employs and serves thousands of New Yorkers by providing vital, lifesaving services and averting the institutionalization of those who could otherwise be cared for at home.<sup>79</sup>

On September 28, 2018, the State Supreme Court struck down the

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<sup>78</sup> NYSDOS, *New York State Register*, Oct. 25, 2017, at 6, <https://dos.ny.gov/system/files/documents/2019/11/102517.pdf>.

<sup>79</sup> *Id.*

emergency regulations, finding that the record did not justify the use of the emergency rulemaking procedures found in the New York State Administrative Procedures Act. *Matter of Chinese Staff & Workers' Assn. v. Reardon*, No. 450789/2018, 2018 WL 4616294 at \*5 (Sup. Ct. N.Y. Sept. 25, 2018). In its decision, the Court noted that NYSDOL had been aware of problems with the 13-hour rule “when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, [NYSDOL] chose to wait until after the Appellate Division decisions were rendered to promulgate the ‘emergency’ rulemakings rather than pursue the normal rulemaking procedure.” *Id.*

In fact, on July 14, 2017, NYSDOH had distributed guidance to all of its providers informing them that NYSDOH and NYSDOL were monitoring the development of cases concerning the 13-hour rule and “evaluat[ing] whether action may be needed to prevent unnecessary disruption to home care services in New York State.”<sup>80</sup> In its letter, NYSDOH explicitly directed providers not to convert cases from “live-in” to split-shift, signaling its recognition that making changes to consumers’ authorizations was the clearest way to address any funding shortfalls that might prevent providers from being able to pay for all 24-hours of

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<sup>80</sup> NYSDOH, *Services for Live-In Home Care*, <http://hca-nys.org/wp-content/uploads/2017/07/Live-In-Home-Care-Guidance-7-14-17.pdf>.

“live-in” shifts.<sup>81</sup>

**B. New York State is bound by its *Olmstead* obligations to avoid an industry collapse.**

States may provide home care services pursuant to the Medicaid Home and Community-Based Services (HCBS) waiver program authorized in § 1915(c) of the Social Security Act. 42 U.S.C. § 1936n. Under the waiver program, states have broad discretion to design their services programs, subject to approval by the Centers for Medicaid and Medicare (CMS). *Id.*; CMS, *Home and Community-Based Services 1915(c)*, <https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html>. States have wide latitude to determine eligibility criteria for program participants, but their programs may not discriminate against persons with disabilities. *Olmstead v. L.C.*, 527 U.S. 581, 607, 119 S.Ct. 2176, 2190 (1999). Any action leading to the unjustified isolation of persons with disabilities constitutes unlawful discrimination in violation of the integration mandate of Title II of the American with Disabilities Act and § 504 of the Rehabilitation Act. *Id.* at 600, 2187. Even policies that put people with disabilities at risk of institutionalization constitute unlawful discrimination in violation of *Olmstead* principles. *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016) (“courts of

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<sup>81</sup> *Id.*

appeal applying the disability discrimination claim recognized in *Olmstead* have consistently held that the risk of institutionalization can support a valid claim under the integration mandate”) (citing *Pashby v. Delia*, 709 F.3d 307, 322 (4<sup>th</sup> Cir. 2013)). Further, a state may not absolve itself of its obligations under the integration mandate by citing to budgetary constraints or fiscal problems alone. *Pennsylvania Prot. & Adoc., Inc. v. Pennsylvania Dep’t of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005). Once services programs are approved, states are obligated to provide the specified services to all willing and qualified persons unless provision would “entail a fundamental alteration of the States’ services and programs.” *Olmstead*, 527 U.S. at 603, 119 S.Ct. at 2188. Fiscal impact alone is not sufficient to establish the existence of a fundamental alteration. *Pennsylvania Prot. & Adoc., Inc.*, 402 F.3d at 381; *Townsend v. Quasim*, 328 F.3d 511, 520 (9<sup>th</sup> Cir. 2003); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1182-1183 (10<sup>th</sup> Cir.2003).

New York has participated in the HCBS waiver program since 1991 to “decrease rates of institutionalization and support community-based service delivery in the most independent setting possible.”<sup>82</sup> Without a doubt, permitting a collapse of the home care industry would violate not only the terms of the

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<sup>82</sup> Office for People with Developmental Disabilities, *Current Waiver*, <https://opwdd.ny.gov/system/files/documents/2021/06/cms-approved-7-1-21-amendment.pdf>.

waiver but also of the integration mandate. Especially where relatively simple solutions exist to rectify the problems that are now inherent to the delivery of 24-hour home care services, *Olmstead* requires New York to take those measures if a collapse of the industry becomes truly imminent. While New York has chosen to pit Appellee and Respondents against workers by advancing the false narrative that stealing workers' wages is the only way to prevent a collapse of the home care industry, more equitable and sustainable alternatives in fact exist.

**C. There are options to address budget shortfalls that do not rely on wage theft and avoid threat to the home care industry.**

The clearest and most equitable way to address the problems with 24-hour "live-in" shifts would be for NYSDOH to revise the tools used to authorize care services and to ensure that MLTCs do not assign consumers to "live-in" services when they actually need split-shift services. These actions, if taken by NYSDOH, would ensure that consumers get the services they need, home care aides get paid what they are owed and employers receive reimbursements that meet their labor costs.

**CONCLUSION**

By refusing to rehabilitate the tools used to authorize care services and ensure that consumers receive the appropriate level of care required by state Medicaid regulations, New York is able to provide home care services at a greatly discounted cost. But this savings has ramifications not just for workers, but for

consumers, who are forced to accept care that is inadequate to their needs.

Until recently, New York has been able to avoid scrutiny of the grievous harm it causes both home care aides and consumers by incentivizing and facilitating employers to commit wage theft against “live-in” aides. Using fear around the collapse of the home care industry, New York has been able to eschew more equitable – albeit costlier – alternatives. Certification of the arbitration award would further reduce New York’s accountability to repair a system it knows discriminates against home care aides and causes them serious, disproportionate harms.

With this arbitration award, the long-term pain and suffering of thousands of “live-in” aides will be reduced to no more than a \$250 per capita contribution – a manifestly unfair outcome that will be forced on more than 110,000 of some of New York’s most vulnerable workers. As Staci Henry has said, “It doesn’t make any sense that I’m sitting here working so hard to get nothing for it. I feel like it’s slavery.”<sup>83</sup> Respondents’ uninterrupted efforts to steal wages from home care aides who work 24-hour “live-in” shifts will continue, unabated, with Appellees’ collusion. And despite the years of litigation, arbitration, public testimony and protests by home care aides, the “picture of rampant and unchecked years-long

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<sup>83</sup> Zishun Ning, *24-Hour Workdays*, <https://vimeo.com/286121886> at 12:55-13:00; NCLEJ, *supra* note 21, at Exhibits-Page 131.

exploitation”<sup>84</sup> described by the Court of Appeals in 2019, will never be remedied.

For the foregoing reasons, this Court should vacate the District Court’s June 24, 2022 Order.

Dated: November 15, 2022

Respectfully submitted,

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<sup>84</sup> *Andryeyeva*, 33 N.Y.3d at 179.



**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), that this brief complies with the type-volume limitation of Circuit Rules 29.1(c) and 32.1(a)(4) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 6,611 words, as counted by Microsoft Word.

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and a(6) because it has been prepared using Microsoft Word in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ Carmela Huang  
Carmela Huang

Dated: November 15, 2022