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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.*;

Plaintiffs,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503; *et al.*;

Plaintiff-Intervenors.

v.

ALEX M. AZAR II, *et al.*,

Defendants.

Case No. 3:19-cv-02552-VC

BRIEF AMICI CURIAE OF NATIONAL DOMESTIC WORKERS ALLIANCE AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND INTEREST OF AMICI

Amici are worker advocacy and research organizations committed to developing practices and policies that protect the dignity, respect, and independence of those who receive and provide home care.

The National Domestic Workers Alliance (NDWA) is the nation's leading advocacy organization advancing the dignity, rights, and recognition of millions of domestic workers in the United States. NDWA is powered by sixty-four affiliates, plus local chapters in Atlanta, Durham, Seattle and New York City, of over 20,000 nannies, housecleaners, and home care workers in 36 cities and 17 states. Domestic workers continue to be excluded from basic federal labor and safety-net protections afforded to all other workers. NDWA fights for equal and improved treatment for domestic workers in every sector.

The National Employment Law Project (NELP) is a non-profit research and policy organization with 50 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all workers, and especially those more susceptible to exclusion, receive the workplace protections guaranteed in our nation's labor and employment laws. NELP seeks to ensure fair pay and collective bargaining for home care workers, and quality of care for all.

Amici write to describe the importance and everyday realities of home care workers, who provide essential supports that allow people with disabilities and seniors to remain independent at home, and how the 2019 Final Rule[1] will not only harm unions and their members but

[1] *Medicaid Program; Reassignment of Medicaid Provider Claims*, 42 CFR Part 447, Fed. Reg. Vol. 84, No. 87 (May 6, 2019). The "Final Rule" or "Rule", available at

dramatically undermine the quality of care for the millions who wish to age in place and receive services in their homes.

Our nation's 2.3 million home care workers are in high demand yet are among the lowest-paid in some of the most challenging jobs. Rooted in racist exclusions from basic labor protections, home care workers continue to be undervalued and suffer from high turnover due to the demanding conditions with low pay. This has led to alarming shortages of workers, precisely as the aging population increasingly seeks to live independently in the home.

In the face of these needs, home care workers have joined together in unions to improve wages, working conditions, and home care systems. Their working conditions improve in union settings, including in Medicaid-funded programs. States have recognized the benefits that come from collaboration with unions, including workforce stabilization, skills development, and quality of care for consumers.

The Rule interferes with the ability of workers to choose an efficient and effective way to pay their union dues and insurance premiums, imposing an added burden on them with respect to how they support the representation and benefits they have chosen. Many home care workers lack access to bank accounts and other financial services. Cutting off payroll deductions puts home care workers—a majority of whom are people of color—at risk of losing valuable member benefits they have worked hard to secure. The Rule undermines unionized home care programs that the states have set up. As a result, workers, consumers, and the state systems will suffer.

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https://www.federalregister.gov/documents/2019/05/06/2019-09118/medicaid-program-reassignment-of-medicaid-provider-claims.

ARGUMENT

I. Home care has historically been a difficult job, in part due to exclusions from legal protections.

Comprising a workforce that is nearly 90 percent female, 31 percent immigrant, and 62 percent people of color, home care workers provide the vital care that allows older adults and persons with disabilities needing care to remain in their own homes.[2] Their work can prevent or delay unnecessary and often more-costly institutionalization. Yet despite the social importance of their services, home care workers carry the historical burden of racist carve-outs from labor and other protections that perpetuate the poor conditions and undervaluation of their work.

A. The history of racist exclusions for domestic and home care work carries forward to today.

Our laws and institutions have historically devalued domestic work. Specific exclusions from our labor laws, rooted in slavery, meant that domestic workers did not gain federal minimum wage and overtime coverage until 1974.[3] Due to a carve-out meant for casual babysitters and companions, home care workers did not gain our most basic fair pay protections until 2015, after decades of fighting the for-profit home care industry.[4] Domestic workers remain excluded from the National Labor Relations Act.

This history has suppressed wages for this workforce, consigning millions of caregivers to working in poverty. Lower wages lead to higher workforce turnover and increased costs for

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[2] PHI, *U.S. Home Care Workers: Key Facts (2019)* September 3, 2019, available at: https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/.

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

[4] *Application of the Fair Labor Standards Act to Domestic Service,* 29 CFR Part 552, RIN 1235-AA05 (July 2013).

employers as they try to replace and train their labor pool. Higher turnover also lowers the quality of care received by consumers.

B. Caregivers earn low wages in demanding jobs and have few benefits.

Home care workers in this country earn a median hourly wage of $11.52, which leads to typical annual earnings of just $16,200.[5] In two-thirds of states, full-time home care workers at the average hourly wage earn below 200% of the federal poverty level for individuals in single person households.[6] Those with children or other dependents are likely to be near the poverty level. Approximately one third of home care workers lack health insurance; 45 percent of those working outside of agencies lack insurance.[7] Over half of home care workers live in households that receive some form of government assistance, including medical assistance or food stamps.[8]

Low wages are compounded by the part-time, episodic nature of home care employment. In 2011, 59 percent of aides reported working part-time for at least part of the year[9], resulting in median annual earnings of only $13,689.[10]

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[5] PHI, *Key Facts, supra,* at 5.
[6] *See* PHI, *State Chart Book on Wages for Personal Care Aides, 2002-2012* 6 (Dec. 2013), *available at* http://tinyurl.com/PHI-ChartBook (listing each state's mean wage as compared to the federal poverty level).
[7] PHI, Facts 4: Health Care Coverage for Direct-Care Workers (March 2011), *available at* http://tinyurl.com/PHI-Facts4.
[8] *See* Dorie Seavey & Abby Marquand, PHI, *Caring in America: A Comprehensive Analysis of the Nation's Fastest Growing Jobs: Home Health and Personal Care Aides* 67 (2011) [hereinafter PHI, *Caring in America*], *available at* http://tinyurl.com/PHI-Caring.
[9] PHI, *Facts 3: America's Direct-Care Workforce* 4 (Nov. 2013), *available at* http://phinational.org/sites/phinational.org/files/phi-facts-3.pdf.
[10] Heidi Shierholz, *Low Wages and Scant Benefits Leave Many In-Home Workers Unable to Make Ends Meet* 18 (Nov. 2013), *available at* https://www.epi.org/publication/in-home-workers/. This figure includes any fringe benefits that workers receive.

Home care workers also experience high levels of job stress[11] and face a significant risk of workplace injury.[12] Although patients' homes are "rarely designed as safe workplaces," workers frequently must perform physically demanding tasks, and they "often lack appropriate assistive devices for lifting, carrying, and supporting clients."[13] They have few or no opportunities for job advancement.[14] A New Hampshire study concluded that although the typical home care aide has "significant knowledge and insight concerning the client's condition, he or she is often ignored, treated as invisible by the rest of the health care system."[15]

Working at dispersed worksites, home care aides may fail to report the extent of workplace injuries.[16] For a variety of reasons, ranging from the lack of workers' compensation or other income support, to a sense of responsibility for clients who will otherwise be left unattended, home care workers often find themselves trying to work while injured. Without adequate support, injured workers leave the home care field.

Finally, caregiving can be very isolating. Home care workers do not report to a central worksite. They may never meet another coworker or have a chance to talk with and learn from other workers. Unions can and have stepped in to make those linkages and create community for workers.

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[11] Seavey, *supra* note 8, at 45.
[12] Brian J. Taylor & Michael Donnelly, *Risks to Home Care Workers: Professional Perspectives*, 8 Health, Risk & Soc'y 239, 245 (2006) (describing the hazards home care workers face, which include "access issues, hygiene and infection, manual handling, aggression and harassment, domestic and farm animals, fleas and safety of home equipment").
[13] PHI, *Caring in America*, *supra*, at 48.
[14] Health Resources and Services Administration, *Nursing Aides, Home Health Aides, and Related Health Care Occupations—National and Local Workforce Shortages and Associated Data Needs* 10 (Feb. 2004), *available at* https://bhw.hrsa.gov/sites/default/files/bhw/RNandHomeAides.pdf., note 64, at ix.
[15] *Id.* at 16.
[16] *Id.* at 49; *see also* Abby Marquand, PHI, *Personal Care Aide Training Requirements: Summary of State Findings* 4-5 (2013), *available at* http://tinyurl.com/PHI-Marquand.

II. Poor working conditions create high turnover and recruitment challenges, as the demand for in-home care increases.

Low pay and poor benefits define the home care industry and lead to significant staff shortages and turnover. Research shows that "[a] major factor in the deficit of direct-care workers is the poor quality of these types of jobs"[17] and that "[o]ne of the reasons for the high turnover in the direct care workforce is . . . low wages and inadequate benefits."[18]

A. Home care worker shortages and turnover persist in the industry.

Plagued by high job vacancy rates, shortages of qualified staff, and difficulties recruiting and retaining workers, [19] the home care industry faces "a critical shortage" of workers.[20] Labor shortages have adverse effects on consumers, who are often left unable to obtain home care workers to aid with self-care and everyday tasks. Recent studies indicate that the lack of an adequate workforce is a key barrier to successfully transitioning individuals from nursing homes back into the community.[21] Worker shortages also have serious effects on consumers' loved ones: A reduced pool of workers places more pressure on family caregivers, who face significant physical, mental, and emotional challenges in their caregiving roles.[22]

Compounding the problems caused by labor shortages, the industry also suffers from stunningly high turnover rates. Turnover rates in home care are rising, especially in non-unionized home care segments. In 2017, a survey of home care company owners reported a 67

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[17] Institute of Medicine, *Retooling for an Aging America: Building the Healthcare Workforce* 200 (2008).
[18] AARP comment on NRPM, WHD-2011-0003-9483 at 4 (Mar. 22, 2012) (reporting that 89 percent of older adult respondents preferred to remain in their own homes if they need care).
[19] *See* Seavey, *supra* note 8, at 68.
[20] Melissa A. Simon et al., *Path Toward Economic Resilience for Family Caregivers: Mitigating Household Deprivation and the Health Care Talent Shortage at the Same Time*, 53 Gerontologist 861, 862 (2013).
[21] *See* PHI comment, WHD-2011-0003-9159, March 21, 2012, at 8.
[22] *See* AARP comment, *supra* note 18, at 3.

percent turnover rate.[23] In 2018, it reached an all-time high of 82 percent.[24] The same survey revealed a direct connection between wages and turnover.

High turnover rates also decrease quality of care. When workers leave their jobs, consumers "experience an interruption of services and the burden of getting used to and training [a] new employee" and "may have to accept a period of potential low quality or unsatisfactory care while the new employee gains experience."[25] Left unremedied, this turnover poses significant costs for both the state providing care and the beneficiaries receiving it. And the state cannot rely on beneficiaries or individual providers to solve the problem. Neither individual low-income Medicaid beneficiaries nor individual low-income aides have the expertise, resources, or incentives to address labor market imperfections.

Though states could choose to attack the labor supply issue unilaterally, many states, including the parties in this case, have decided instead that cooperative labor-management solutions are more promising. These states have reasonably concluded that unionization enables the state to capture the benefits of a consumer-directed model while also retaining many benefits of a more structured work relationship.

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[23] Amy Baxter, *Median Home Care Turnover Hit 66.7% in 2017,* Home Health Care News (April 19, 2018), available at: https://homehealthcarenews.com/2018/04/median-home-care-turnover-hit-66-7-in-2017/.

[24] Robert Holly, *Home Care Industry Turnover Reaches All-Time High of 82%,* Home Health Care News, May 8, 2019, available at: https://homehealthcarenews.com/2019/05/home-care-industry-turnover-reaches-all-time-high-of-82/.

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

III. Unions help to alleviate turnover, stabilizing the workforce and boosting the quality of care.

A. States have built and stabilized their home care workforces by collaborating with unions in Medicaid programs.

Because consumers of long-term care prefer to receive care in their homes or in other community-based settings, rather than in institutions, states have innovated for decades to provide stable and quality care and services. For persons who require Medicaid-funded long-term care, many states have shifted away from institutional care, which can isolate individuals from their families and communities, and towards home-based care.[26] Providing care in one's own home maximizes autonomy and dignity. AARP reports that a vast majority—89 percent—of Americans aged fifty and older prefer to remain in their own homes as long as they can.[27]

Unions play a particularly important role with independent provider programs, where worker isolation can be even more profound and the need for specialized skills more acute. In recent decades, hundreds of thousands of home care workers have organized unions and negotiated wage increases and other benefits. Unionization allows states to capture the benefits of a consumer-directed model while creating an efficient infrastructure. Consistent with states'

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

[27] AARP comment, WHD-2011-0003-9483 at 3 (Mar. 22, 2012).

experiences with other portions of their workforce, collective bargaining channels and communicates worker preferences so that states can best manage their workforce in an efficient manner.[28] Regular, effective dialogue between the state and its workforce's selected representative is essential to designing benefit programs and dispute resolution systems, training opportunities and needs, and determining workers' collective preferences.[29]

B. Unionization in home care improves job quality and quality of care.

Improving workers' wages, benefits, and working conditions is not simply a matter of worker self-interest—it enhances consumer care.[30] One study found "a very strong relationship between job satisfaction and quality of patient care."[31] As economists have observed, "[t]he outcomes of care recipients are deeply intertwined with the fortunes of care workers."[32] States that have extended minimum wage and overtime protections to home care workers report advantages to consumers, providers, and employees. In 2006, Michigan eliminated its version of the companionship exemption; disability rights advocates, who supported the state's change, "saw minimum wage and overtime protections as essential to protecting the civil rights of people with disabilities as well as the right, moral treatment of valued working people."[33]

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[28] *See, e.g.*, Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 94-110 (1984) (one of the primary benefits of unions is to provide "discontented workers with a voice alternative to quitting" and permits workers to communicate their preferences at a low cost in a way that increases management's legitimacy).
[29] *See, e.g.*, Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Council Act*, 69 Mo. L. Rev. 607, 609-16 (2004).
[30] Institute of Medicine, *supra*, note 18, at 214.
[31] Alex Robertson, et al., *Nurses' Job Satisfaction and the Quality of Care Received by Patients in Psychogeriatric Wards*, 10 Int'l J. Geriatric Psychiatry 575, 575 (1995).
[32] Eileen Appelbaum and Carrie Leana, *Improving Job Quality: Direct Care Workers in the US* 8, Center for Economic and Policy Research (Sept. 2011).
[33] Dohn Hoyle & RoAnne Chaney, *Guest Commentary: It Worked in Michigan; Raise Wages for Home Care Workers across the Nation*, Detroit Free Press (Feb. 24, 2013).

In a 2008 paper, Rutgers University's Dr. Leslie Hendrickson found that unionization resulted in an increase in wages and benefits that led to lower turnover; improved quality of care as a result of increased reporting and oversight; and improved worker performance due to union-provided support services to workers.[34] A 2017 survey by the National Employment Law Project confirmed these findings. The survey of roughly 3,000 home care workers across the country found that union workers were paid around $2 per hour more than non-union workers; 61 percent of union workers had health insurance, versus 28 percent of non-union workers; and union respondents were more likely to be able to take a sick day, with 55 percent of workers receiving paid time off, compared to 28 percent of non-union respondents.[35] 44 percent of unionized workers had access to employer-offered training, versus only 24 percent of non-union.[36]

In Illinois, collective bargaining led to state-funded health benefits through a union-administered, state-audited program; jointly administered training and orientation programs; development of a registry to assist beneficiaries locate bargaining unit members for work opportunities; and a grievance procedure.[37] Collective bargaining in other states has developed

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[34] Hendrickson, Leslie, Scala, Elise, and Regan, Carol. *A Compendium of Three Discussion Papers: Strategies for Promoting and Improving the Direct Service Workforce: Applications to Home and Community-Based Services*, page 47 (May 2008).

[35] National Employment Law Project, *Surveying the Home Care Workforce* (September 2017), ("NELP Survey"), available at: https://s27147.pcdn.co/wp-content/uploads/surveying-home-care-workforce.pdf

[36] *Id.*; *see, also*, Paul Osterman & Beth Shulman, *Good Jobs America: Making Work Better For Everyone* 90, 105-115 (2011) (finding that unions can provide opportunities for workers to upgrade their occupational skills and abilities and can help construct career pathways that enable workers to advance in the field).

[37] See Agreement between the State of Illinois and the Service Employees International Union, *available at* http://tinyurl.com/PHI-Agree.

similar benefits. For example, union contracts in some California counties provide for a "Job Development Fund that reimburses homecare workers for continuing education."[38]

At the same time, because of frequent input from their members, unions are well positioned to help states in developing high-quality care standards. For instance, in Washington State, the union collaborated with the state to create and sponsor a nonprofit school that delivers training to more than 40,000 home care aides across more than 100 sites annually in 13 languages.[39] This training partnership not only builds a career pathway for home care workers, but it provides training in the areas that providers have identified.

A collaborative relationship between the union and state can also produce more creative solutions to home care problems. For example, a California home care union partnered with a network of federally qualified health centers in a program where providers became part of the beneficiary's medical team to better coordinate treatment, identify gaps in care, and follow physician diagnoses.[40] Over two-thirds of patients receiving care from providers enrolled in the pilot "reported an improvement in their health-related quality of life."[41]

Finally, unions can help in the matching process that undergirds consumer-directed care. Local unions often work with the state to create and operate referral and registry systems.[42]

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[38] Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector*, *in Academics on Employee Free Choice* 83, 89 (John Logan ed., 2009).
[39] *Addressing LTSS Service Delivery and Workforce Issues: Hearing Before the Comm'n on Long-Term Care*, U.S. Senate 108-10 (Aug. 20, 2013) (testimony of Charissa Raynor, Exec. Dir., SEIU Healthcare Nw. Training P'ship & Health Benefits Trust), *available at* http://tinyurl.com/PHI-Hearing.
[40] St. John's Well Child & Family Ctr, *The Power of Partnership: Annual Report 2012* 12 (2012), *available at* http://tinyurl.com/PHI-StJohns.
[41] St. John's Well Child & Family Ctr., *Development Newsletter* (Feb. 2013), *available at* http://tinyurl.com/PHI-StJohns2.
[42] Dorie Seavey & Abby Marquand, *Building Infrastructure to Support CLASS: The Potential of Matching Service Registries* 3 (The SCAN Found., CLASS Technical Assistance Brief Series No. 16, 2011), *available at* http://tinyurl.com/PHI-SCAN.

Without such systems, some consumers may be unable to find providers who have the right skills and availability. Union-assisted referral and registry systems can assist workers in finding initial positions, relief and respite for vacations or illness, and successor employment.

In California, for example, "unions and home care consumers who recognized their mutual interest in a well-paid, stable workforce" have transformed home healthcare.[43] Once workers in San Francisco achieved significant wage increases through collective bargaining, annual retention of new workers increased from 39% to 74%.[44] Giving health insurance to providers in California also increased the probability that a worker remained in his job for at least one year by 21%.[45] In fact, the study concluded that one of the most important factors in attracting and retaining workers in California was providing health insurance.[46] Prior to unionization, no counties in California offered health insurance to in-home providers through their job. But as of 2008, 45 of 58 counties offered health insurance, 31 offered dental coverage, and 20 offered vision coverage.[47]

By empowering workers to negotiate fair contracts, wages, and benefits, unions help attract and retain workers in the field. In the 2017 NELP survey, a greater share of unionized workers reported that they expect to be employed as a home care worker in a year compared to

[43] Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization*, *in The State of California Labor* 71, 72 (Univ. of Cal. Inst. for Labor & Emp't, 2004).
[44] Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 Indus. Rel. 139, 139 (2005).
[45] *Id.* at 141.
[46] Candace Howes, *Love, Money, or Flexibility: What Motivates People to Work in Consumer-Directed Home Care?*, 48 Gerontologist 46, 58 (2008).
[47] Rhee & Zabin, *supra*, note 39, at 88.

non-union workers. Fewer unionized home care workers reported that they were trying to find a job in addition to or other than being a home care worker.[48]

Critically, workers who have formed a union and improved wages and working conditions do so not only for their gain, but also to the benefit of non-unionized workers. As wages, benefits, and resources increase, competition forces other employers to meet those bargained-for standards.

IV. The Rule's denial of voluntary payroll and dues deduction for home care workers creates hardships for many who lack access to banking facilities and will weaken unions.

Payroll deduction is important for all low-wage workers, but especially for home care workers who face other challenges to making paper-copy payments from isolated and unbanked areas.[49] The Rule creates nearly insurmountable barriers for workers who most need the support of union benefits and retirement security.

Many home care workers are disconnected from a central office where they could pick up paychecks, pay dues and insurance premiums, and meet with coworkers.[50] Voluntary dues and other payroll deductions that many unions make available allow workers to overcome their physical isolation to receive benefits. By disallowing common paycheck deductions for vital benefits, the Rule uniquely burdens those workers who lack access to electronic payments, direct deposit options, and bank accounts.

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[48] NELP Survey, *supra,* note 36.
[49] Sophie Quinton, *Unions, States Confront Trump Home Care Worker Rule*, Stateline, May 28, 2019, *available at*: https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/28/unions-states-confront-trump-home-care-worker-rule; Shefali Luthra, *Medicaid Officials Target Home Health Aides' Union Dues*, Kaiser Health News, Aug. 13, 2018, *available at*: https://khn.org/news/medicaid-officials-target-home-health-aides-union-dues/.
[50] NELP Survey, *supra,* note 36.

A 2017 Federal Deposit Insurance Corporation (FDIC) National Survey of Unbanked and Underbanked Households suggests, based on demographic findings, that many home care workers are disproportionately unbanked or underbanked, meaning they lack access to a checking or savings account at a federally-insured bank or use alternative financial services such as check cashing or money orders.[51] Unbanked and underbanked rates are higher among Black and Hispanic individuals, people without a high school diploma, and lower-income households.[52] Home care workers disproportionately are Black or Hispanic, people with less than a high school education, and low-income.[53] According to the FDIC survey, unbanked households overwhelmingly pay bills with cash or nonbank money orders.[54] Taking away automatically-deducted payments such as union dues, health care premiums, or retirement contributions as the Final Rule does creates an unfair burden on workers and directly undermines the unions that have boosted home care services in states with independent provider programs.

Further, in those states that offer health insurance, including Washington and California, workers are penalized when they miss a premium payment or co-pay, as the parties' briefs show. Some states simply are not set up to accept individually-sent health insurance payments. By creating unnecessary barriers to pay insurance premiums, the Final Rule will jeopardize workers' access to healthcare—a cruel irony for those who provide critical home care to among the most sick and needy in society.

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[51] *2017 FDIC National Survey of Unbanked and Underbanked Households*, Fed. Deposit Insurance Corp., *available at*: https://www.fdic.gov/householdsurvey/.
[52] Gerald Apaam et al., Fed. Deposit Insurance Corp., 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 61 (2018), *available at:* https://www.fdic.gov/householdsurvey/2017/2017report.pdf. ("FDIC Survey").
[53] PHI Key Facts, supra, note 2.
[54] FDIC Survey, *supra,* at note 53.

Finally, home care workers face significant barriers to retirement security. Recognizing this, some state programs are setting up or already have in place a retirement plan that workers can participate in via a monthly contribution, as the parties' briefs describe. NELP's 2017 study revealed that 20 percent of unionized home care workers surveyed had an employer-offered retirement fund, compared with just 8 percent of non-union.[55] The Rule prevents workers from setting up individual contributions to their accounts via a voluntary deduction, and it may prevent the state from contributing to those accounts. The effects are devastating to workers already facing hurdles in reaching retirement security.

CONCLUSION

For the reasons stated herein, the Court should deny Defendants' motion to dismiss, grant the States' request for a permanent injunction, and grant Intervenors' summary judgment motion.

November 22, 2019

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[55] NELP Survey, supra, note 36.