To be argued
By: FREDERICK A. BRODIE
10 minutes requested

# Supreme Court of the State of New York
# Appellate Division – Third Department

In the Matter of the Application of

GUI ZHU CHEN, YA YUN LI, MARIA RODRIGUEZ, GUI HUA SONG, and CHUN FENG ZHUANG,

On behalf of themselves and all others similarly situated,

**No. CV-24-2037**
**No. CV-25-0784**

*Petitioners-Respondents,*

v.

ROBERTA REARDON, as Commissioner of the New York State Department of Labor,

*Respondent-Appellant.*

## BRIEF FOR APPELLANT

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Dated: November 14, 2025

Supreme Court, Albany County – Index No. 908146-23

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## PRELIMINARY STATEMENT

The principle of prosecutorial or enforcement discretion is firmly embedded in the power of the New York State Department of Labor (DOL) to enforce the laws governing wages. Indeed, for wage cases, that principle is incorporated expressly in Labor Law § 196(2), which vests DOL with discretion in investigating and prosecuting wage complaints. Notwithstanding that discretion, Supreme Court, Albany County (Connolly, A.J.) annulled DOL's determination to discontinue investigations of complaints for underpayment of wages submitted by home care aides whose unions had either obtained relief or were pursing claims for relief on their behalf.

Supreme Court's order thus forces DOL to reopen hundreds of investigations that it decided as a matter of enforcement discretion to close because those home care aides were obtaining relief through other means and DOL did not want to devote more of its limited resources to potentially duplicative investigations. In Supreme Court's view, however, the agency's determination constituted an unpromulgated rule that violated the State Administrative Procedure Act (SAPA) because the agency's exercise of discretion affected a class of claimants. Thereafter,

Supreme Court ruled by separate order that the case met all the requirements for class certification except for numerosity, which remains under review. DOL Commissioner Roberta Reardon appealed both orders.

Supreme Court's order on the merits should be reversed. The Labor Law entrusts the allocation of DOL's enforcement resources to the agency's discretion. Here, DOL exercised that discretion to prioritize its resources for claims that DOL reasonably determined were not addressed in other venues, ultimately rendering determinations to close investigations that reflected the circumstances present. The criteria that DOL used for rendering those determinations represented a reasonable exercise of the agency's enforcement discretion, rather than a fixed, rigid rule with binding legal effect requiring promulgation under SAPA. If left in place, Supreme Court's decision would produce the absurd result of requiring a law enforcement agency not only to announce publicly its determinations on how to allocate enforcement resources, but also to enshrine those determinations in a formal rule that would deprive the agency of flexibility going forward.

Further, because Supreme Court's order on the merits was mistaken and should be reversed, the petition should be dismissed in its entirety, and Supreme Court's ruling on class certification should be vacated as moot.

## QUESTIONS PRESENTED

1. Whether Supreme Court erred in holding that DOL was required to promulgate a rule before closing its investigations of wage complaints by home care aides who were represented by unions that were already seeking, or had already obtained, compensation for lost wages on the aides' behalf.

2. Whether Supreme Court's order partially granting petitioners' motion for class certification should be vacated as moot.

## STATEMENT OF THE CASE

### A. DOL Adopted What Is Known as the 13-Hour Rule

New York State's Minimum Wage Act, enacted in 1937, authorized the Commissioner of Labor to set minimum wages by issuing wage orders on the recommendation of a wage board. L. 1937, ch. 276, § 1 at § 557(2) (codified at Labor Law former § 557[2] and recodified by L. 1960, ch. 619,

as Labor Law § 656). In 1960, the Legislature granted broad authority to the Commissioner to set wage standards for specific occupations and to issue new wage orders for occupations not already covered. *See* L. 1960, ch. 619, § 2 (codified at Labor Law § 652). Pursuant to that authority, the Commissioner in 1960 adopted the Minimum Wage Order for Miscellaneous Industries and Occupations (the Wage Order), which has been codified at 12 N.Y.C.R.R. part 142.

Among other things, the Wage Order requires employers to pay employees the minimum wage for "the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer." 12 N.Y.C.R.R. §§ 142-2.1(b), 142-3.1(b).

DOL has construed the Wage Order's phrase "required to be available for work at a place prescribed by the employer," when applied to home care aides working on-site for a 24-hour shift, as excluding time for sleep and meals. (R370, 916, 1241-1242.) *See Andryeyeva v. New York Health Care, Inc.,* 33 N.Y.3d 152, 176 (2019). Accordingly, under what has become known as the "13-Hour Rule," employers may pay such workers for 13 hours rather than 24, but only if the workers are afforded

three one-hour meal breaks and eight hours for sleep, at least five hours of which must be uninterrupted. (R370, 896, 916, 939, 1242.)

In 2019, the New York Court of Appeals upheld the interpretation of the Wage Order reflected in DOL's 13-Hour Rule. *See Andryeyeva*, 33 N.Y.3d at 176-80, 182.

### B. Petitioners Worked as Home Care Aides

The federally mandated transition from institutional to community-based care, *see Olmstead v. L.C. by Zimring,* 527 U.S. 581, 589-92 (1999), resulted in a need for in-home care for many elderly and disabled people who previously would have been confined in nursing homes. (*See* R374.) That task has fallen to home care aides who are typically employed by home-care agencies (*see, e.g.,* R141-143), most of which are reimbursed by Medicaid (*see* R442, 447, 863).

Petitioners were employed as home care aides providing live-in services to elderly patients. (R8.) Each petitioner worked for a home-care agency. (R8.) Each petitioner belonged to a union. (R8, 56, 65.) Petitioners Chen, Li, Rodriguez, and Song were members of 1199SEIU United Healthcare Workers East (1199SEIU), the nation's largest union

representing health-care workers,[1] and petitioner Zhuang belonged to Local 1770, Home Healthcare Workers of America (Local 1770). (R8, 56.)

Both unions had entered into collective-bargaining agreements with petitioners' respective employers. (R8, 57, 59.) Each agreement included an alternative dispute resolution provision that culminated in the submission of a dispute to an arbitrator for "final and binding arbitration." (*See, e.g.,* R226-227, 422-423; *see also* R8, 56, 57, 59, 1243.)

Petitioners allege that they were assigned to work 24-hour shifts. (R48, 50, 52, 53.) They further allege that their employers failed to comply with the 13-Hour Rule by paying them for no more than 13 hours per shift, even though they did not receive the time required for sleep and meals. (R48, 49, 51, 52-53.)

### C. Unions Enforced Their Collective-Bargaining Agreements Against Petitioners' Employers

In January 2019, 1199SEIU filed a class-action grievance on behalf of at least 110,000 of its members alleging violations of the 13-Hour Rule

[1] *See* "About 1199SEIU," *available at* https://www.1199seiu.org/about (last visited October 26, 2025).

by 42 separate home-care agencies that were parties to collective-bargaining agreements with 1199SEIU. (R8, 57, 239, 1243.)

On February 25, 2022, the arbitrator issued a class-wide award (the Award) in favor of 1199SEIU. (R8, 1243, 1341; *see* R1160-1239.) The arbitrator found that, in general, all of the employers named violated the 13-Hour Rule and that their violations resulted in the underpayment of required wages to union members. (R1205; *see also* R1243.) The employers thus faced some degree of liability for the claims presented. (R1207.)

The arbitrator also found that it would be impracticable, if not impossible, to schedule and complete individual hearings on all of the claims within a reasonable period of time and in a manner that would ensure that employees could recover amounts owed. (R1206.) Determining liability and damages on an individualized basis would have required 1,000 or more trials, lasting far longer than the three years the arbitration had already consumed, and thereby delaying relief to the home care aides. (R1206.) Moreover, the arbitrator concluded that pursuing that route could leave the employees without any meaningful recovery because the costs of extended litigation could force employers to

seek bankruptcy protection or put them out of business entirely. (R1206-1207.)

Consequently, the arbitrator crafted a per-capita contribution remedy by which employers would pay into a "Special Wage Fund" (the Fund) $250 for each home care aide that it employed during the relevant period, without regard to whether each such aide potentially had a claim for underpayment of wages. (R1209-1214, 1225.) Having examined all relevant factors in great detail, the arbitrator concluded that a per-capita contribution of $250 was the maximum liability that could be imposed on the employers without causing serious disruption and upheaval to a vital service (R1213) and thus "the only reasonable course" (R1208).

The employers' contributions to the Fund were expected to total between $30 million and $35 million, from which the covered employees could receive fair compensation in amounts consistent with previous dispositions in similar cases. (R1215.) The arbitrator crafted a detailed formula for computing each employee's recovery from the Fund (R1216-1218) based on the number of hours and 24-hour shifts the employee worked (R246-247).

Under the Award, union members were not given the opportunity to opt in or out, notwithstanding Supreme Court's contrary suggestion in this case (*see* R8, 25). Petitioners who belonged to 1199SEIU were automatically deemed members of the class established by the Award, and they could not opt out of the mandatory dispute resolution process to which they, through their union, had agreed. (R60.) The operative collective-bargaining agreements established a contractual dispute resolution process as the exclusive remedy for all claims brought by the Union or employees for violations of the Labor Law. (R1186.) And the Award addressed this issue expressly in a section entitled "Frequently Asked Questions." There, in response to the question whether an employee could decline to file a claim and pursue claims elsewhere, the arbitrator answered: "No, pursuant to your collective bargaining agreement and the Award your claims have already been decided and ruled on by the Arbitrator." (R1239.) And in response to the question about what would happen if an employee did not submit a claim form, the arbitrator responded that, not only would the employee be ineligible for a payment from the Fund, but further advised that "even if you do not submit a Claim Form, the Award precludes you from seeking relief, either on your

own or through the 1199 Union, beyond what is provided for in the Award for any Covered Claims, as the Award provides complete relief for all Bargaining Unit Members covered by the Award." (R1239.)

1199SEIU's grievances covered Chen, Rodriguez, and Song, and were later expanded to cover Li. (R57.) Petitioner Zhuang's union, Local 1770, informed her employer and DOL that it would likewise file a grievance on behalf of petitioner Zhuang under the 13-Hour Rule. (R9, 59, 103, 1247, 1344.)

The Award was confirmed by the U.S. District Court for the Southern District of New York in May 2022. *See 1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs.,* 608 F. Supp. 3d 50 (S.D.N.Y. 2022). An appeal from that decision was argued in January 2024; it remains pending as of November 14, 2025, but there is no reason to think the outcome could affect this appeal.[2]

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[2] More specifically, the appeal to the Second Circuit was brought by putative intervenors and others who left their employment as home care aides before the operative arbitration agreements with 1199SEIU became effective. *See 1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs.,* No. 22-1587, Joint Brief and Special Appendix for Appellants and Intervenor-Appellants, ECF #54 at 1-2 (2d Cir. filed Nov. 8, 2022). (*See also* R1394.) To the extent those home care aides filed claims with DOL, their claims would have been subject to a review and analysis different from that applied to the claims at issue; thus, the appeal's resolution should not affect the present proceeding.

### D. Petitioners Complained to DOL

Those petitioners who belonged to 1199SEIU—Chen, Li, Rodriguez, and Song—declined to submit claim forms to the Fund (R58), explaining in the underlying petition that they thought the payouts provided through the arbitration process were too small (R60, 65-66). The deadline for submitting those claim forms was September 27, 2022. (R240.) At least three petitioners—Chen, Rodriguez, and Song—had received advice of counsel by that date. (*See* R274, 1112, 1339 [Chen], 282, 1108 [Rodriguez], 261, 265 [Song].)

Meanwhile, beginning on December 26, 2018, DOL received hundreds of complaints from or on behalf of home care aides alleging violations of the 13-Hour Rule. (R1339.) Petitioners filed their own complaints with DOL individually between 2018 and 2022. (R1339, 1349 [Chen]; R1340, 1360 [Song]; R1341, 1364-1369 [Rodriguez]; R1342, 1374-1380 [Li]; R1405-1411 [Zhuang].) DOL initially accepted those complaints and began investigating them. (R8, 60.)

### E. Following the Award, DOL Declined to Investigate Petitioners' Complaints Further

In or around March 2019, DOL became aware that 1199SEIU had filed a grievance against two employers, the Chinese-American Planning Council Home Aide Program (CPC) and the First Chinese Presbyterian Home Health Agency (FCP),[3] and that the grievance covered many of the wage complaints filed with DOL by or on behalf of home care aides. (R1341.) By September 2019, DOL learned that the grievance was a class-action grievance. (R1341.) DOL thereupon placed on hold its investigations of 1199SEIU members' complaints pending the outcome of the arbitration. (R1130-1131.) Following the Award, DOL continued that hold while it considered the effect of the Award (R1383) and the federal district court's order confirming it (R1244).

DOL ultimately determined that, notwithstanding those developments, it retained authority to investigate the 1199SEIU members' complaints because it was not a party to the arbitration. (R9-10, 1244.)

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[3] For reasons unclear in the record, the collective-bargaining agreements that 1199SEIU entered into with CPC and FCP state the names of those entities as Chinese-American Planning Council Home Attendant Program, Inc. (R760) and First Chinese Presbyterian Community Affairs Home Attendant Corporation (R772), respectively.

Nevertheless, after additional internal deliberation, DOL decided to close investigations as a matter of enforcement discretion where the claimants were represented either by 1199SEIU or another union that was actively seeking relief by filing grievances on their behalf. (R11-12, 1343-1344.) DOL made that decision only after monitoring the arbitration process and related litigation for two years (R1246); meeting with organizations representing home care aides (R578, 1343); considering the arguments submitted by petitioners' counsel (R1120); and engaging in internal deliberations (R1342).

Five considerations informed DOL's exercise of discretion.

First, DOL has a longstanding labor policy of promoting labor stabilization through collective-bargaining agreements and a clear preference for private arbitration of grievances. (R1244-1245.) Thus, DOL has in the past declined to investigate wage complaints when the claimants pursued their rights through that process. (R1245, 1343.)

Petitioners here were represented by 1199SEIU or, in petitioner Zhuang's case, by Local 1770. (R56.) Petitioners have not alleged bad

faith or unfair dealing by their union in this proceeding.[4] (R10, 1244, 1245.) In the case of CPC, FCP, and the United Jewish Council Home Attendant Service Corporation (UJC), the 13-Hour Rule was reflected in the employers' contracts with 1199SEIU. (*See* R760 [CPC], 772 [FCP], 824 [UJC].) The contracts also provided that claims asserting Labor Law violations were subject "exclusively" to contractual grievance and arbitration procedures. (*See* R768-769 [CPC], 781-783 [FCP], 831-833 [UJC].)

While the availability of contractual remedies does not preclude a DOL investigation, it remains a consideration in determining whether DOL should investigate a complaint for which the claimant's union had already sought arbitration. Indeed, DOL generally declines to investigate the wage complaints of claimants who assert their rights in other venues or whose unions do so on their behalf. (R11, 1245, 1343.)

Second, DOL considers its own resources and the expected time and expense it would incur in investigating and enforcing an alleged violation. (R10, 1245, 1246; *see also* R1342-1343.) Assessing whether

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[4] Allegations that 1199SEIU breached its fiduciary duty to home-care aides in connection with the arbitration were raised before the National Labor Relations Board. The Board found against the charging parties. (R1561-1562.)

home care aides are entitled to additional compensation requires significant investigative and enforcement resources. (R10-11, 1246.) The investigations are complex. (R1246, 1343.) Home care aides work in private homes, making site visits difficult, if not impossible. (R10, 1246.) Further, many such aides fail to notify their employers of sleep interruptions, which makes it difficult to prove violations on a case-by-case basis. (R10-11, 1246.) And patient privacy concerns present an additional evidentiary hurdle. (R1343.)

Even ordinary investigations are time consuming. After a worker submits a complaint, the resulting investigation usually involves an employee interview; one or more site visits; an employer interview and/or correspondence; review of employer payroll and time records; research; and maintaining a contact log that records communications with claimants, employers, or witnesses. (R1337-1338.) Each investigation requires multiple internal reports. (R697-698, 736-738.) If the investigation reveals potential Labor Law violations, there will also typically be a notice to the employer identifying the violations; a calculation of the underpayment with interest, liquidated damages, and civil penalties; and an interim and final report. (R1338.)

Here, DOL inquired whether other governmental agencies were willing to assist in any investigations of the 13-Hour Rule violations; none volunteered. (R1342.)

Third, DOL's limited investigative and enforcement resources are subject to competing demands. DOL's priority areas for investigation include critical areas such as child-labor violations, large-scale failures to pay wages such as sudden business closures; cases where employers fail to pay any wages at all; failures to pay the State's minimum wage; and failures to pay overtime or proper overtime rates. (R1337.) Approximately 14,000 new wage and hour cases were filed with DOL between January 2020 and December 2023. (R10, 1245.) Each day, DOL's Division of Labor Standards receives approximately 1,000 inquiries by phone, email, or walk-in visits from employers and employees. (R656.)

To handle that caseload, DOL employs 115 investigators who are responsible for investigating an average of 3200 new cases per year and are routinely called upon to testify at administrative hearings and court proceedings. (R1337.) When DOL decided to close petitioners' investigations, it was handling open home care aide investigations of complaints

submitted by 677 unionized and non-unionized claimants employed by 72 separate home-care agencies. (R10, 1245.)

Fourth, DOL recognized the risk of protracted litigation brought by the 42 employers who were subject to the Award. (R10, 1245.) In fact, two of those employers—CPC and UJC—successfully moved to intervene below. (*See* R1037-1043 [CPC], 1044-1050 [UJC].) The employers asserted an interest in preserving the Award and the judgment confirming it, as well as the exclusivity of the grievance process set forth in their collective-bargaining agreements with that union. (R1039, 1046; *see also* Sup. Ct. NYSCEF #85 at 15-16;[5] Sup. Ct. NYSCEF #86 at 3.)

Previously, when home care aides sued intervenor UJC and other employers in state court in a putative class action, UJC sought and obtained an injunction in federal court that prevented the aides from proceeding with their class-wide wage claims. *See 1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs.,* 634 F. Supp. 3d 158, 170-71, 174 (S.D.N.Y. 2022); *see also* Sup. Ct. NYSCEF #85 at 9-11. And intervenor CPC previously obtained dismissal with prejudice of a similar

[5] "Sup. Ct. NYSCEF #" refers to the docket number of papers filed in *Matter of Chen v. Reardon,* Index No. 908146-23 (Sup. Ct. Albany County).

putative class action brought in federal court. *See Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, No. 15-cv-9605, ECF #138 (S.D.N.Y. Sept. 6, 2022).

Finally, DOL considered the Award's effect on its ability to collect monetary relief (R1120), as well as the high likelihood that any monetary remedy it sought would need to be reduced by the monies already received by individual home care aides (R10, 1245).

In light of these considerations, DOL later explained that, had it known earlier that an active union grievance was being prosecuted on behalf of a large class of home care aides, it likely would have exercised its discretion in the same manner and would not have opened investigations in the first place. (R1341.)

In May 2023, DOL informed petitioners other than Zhuang that it was terminating its investigation of their complaints and closing their cases. (R63; *see* R1096-1099.) Zhuang was informed in August 2023 after DOL was persuaded that Zhuang's union was pursuing a grievance on Zhuang's behalf. (R1100.) DOL nonetheless continues to investigate retaliation complaints included with the original wage-and-hour complaints covered by the Award because the arbitral process did not

consider or resolve those complaints. (R10, 12, 1245, 1340, 1343.) For the same reason, DOL has continued to investigate complaints that are not covered by the Award. (R1245.) For example, DOL will consider complaints of underpayments that occurred after the period covered by the Award. (R1245.)

### F. Petitioners Challenged DOL's Decision in the Underlying Article 78 Proceeding

Petitioners filed the underlying article 78 petition on August 24, 2023. (*See* R42-85.) The petition sought an order in the nature of mandamus directing DOL to "re-open and fully investigate" petitioners' closed complaints. (R40, 74.) Among other things, petitioners contended that DOL's closure of investigations of the category of complaints subject to mandatory arbitration constituted a "rule" adopted without a notice of proposed rulemaking, in violation of SAPA. (R9, 64, 69-70, 73.)

DOL answered the petition (*see* R1051-1070) and denied having violated SAPA (*see* R1062, 1065, 1067). To explain its discretionary decision to close its investigations of petitioners' complaints, DOL provided affirmations from Jeanette Lazelle, the Deputy Commissioner for Worker Protection (R1240-1247), and from Maura McCann, Director of

DOL's Division of Labor Standards (R1336-1344), providing the information set forth above. McCann issued the direction to discontinue the investigations at issue. (R1343.)

### G. Supreme Court Issued an Order on the Merits

By decision and order entered October 9, 2024 (the Merits Order), Supreme Court granted the article 78 petition. (R7-18.) Although the court acknowledged DOL's evidence that it had closed its investigations of petitioners' complaints in an exercise of enforcement discretion (R10-12), the court nonetheless concluded that, by closing a category of wage complaints based on seemingly fixed criteria, DOL adopted an unpromulgated rule in violation of SAPA.

More particularly, the court concluded that DOL had not made multiple decisions to close each petitioner's investigation but rather had made a single decision to close every investigation involving home care aides whose complaints were being advanced by their unions. (R16.) The court further concluded that the criteria DOL considered in closing those investigations constituted "generalizations" that did not necessarily apply to each home care aide. (R16.) Rather than adopt formal rules or regulations to guide its discretion in investigating wage complaints

(R13), DOL's decision, in the court's view, was "applied rigidly across-the-board to every member of the class." (R16.) As a result, the court opined that DOL was left without flexibility or discretion to investigate any individual claim. (R16.)

Based on those conclusions, Supreme Court held that DOL's decision constituted a "rule" within the meaning of SAPA, and the agency was required to comply with SAPA's procedural requirements before adopting it. (R16-17.) The court therefore granted the petition and annulled DOL's decisions terminating its investigations into petitioners' complaints. (R17.) Supreme Court did not address whether full investigation of the complaints was necessary or appropriate. (*See* R26 n.1.)

Respondent timely appealed from the Merits Order on November 26, 2024. (R3-4.)

### H. Supreme Court Issued an Order on Class Certification

In a footnote in the Merits Order, Supreme Court noted that it was denying petitioners' request to certify a class. The court explained that petitioners had failed to move for class certification within 60 days after respondent's time to file a responsive pleading expired, as required by C.P.L.R. 902. (R17 n.2.) Petitioners responded by moving for reargument.

(R1608-1609.) Among other things, petitioners contended that a motion for class certification had, in effect, been made because the notice of petition that brought on the article 78 proceeding sought that relief. (R1618-1619.) Respondent opposed the motion. (R1635-1645.)

In a decision and order entered January 15, 2025 (the Class Certification Order), Supreme Court granted petitioners' reargument motion in part. (R23-38.) The court explained that it had overlooked the request for class certification in the notice of petition (R28) and proceeded to address the merits of that issue (R29-37). The court thereupon accepted most of petitioners' proposed class definition, but stated that the class should be limited to those claimants whose cases were closed through DOL's decision to close investigations where the union was advancing the claims under a mandatory arbitration agreement. (R32.) Subject to that limitation, the court approved the following class definition:

> All home care aides:
>
> (i) who filed claims with NYSDOL alleging that they were paid for no more than 13 hours per shift when they worked 24 hours;
>
> (ii) whose unions entered into arbitration agreements with their employers covering their claims;

(iii) who have not filed claims pursuant to a union arbitration award; and

(iv) whose cases were closed by NYSDOL through application of NYSDOL's policy or rule of closing cases where claimants were subject to mandatory arbitration[.]

(R37.)

With the class so defined, the court concluded that the case appeared appropriate for class certification. (R33.) The court found no questions of law or fact that would affect only individual class members; there was no need to fashion individual awards; and "the relief would be the same for every class member." (R33.) The court additionally stated that it was unaware of any other litigation involving the claims before it. (R33.)

Supreme Court did not proceed to certify a class, however, because it was not confident that numerosity had been adequately established. (R34.) The court therefore ordered limited discovery on that issue. (R36, 37.)

Respondent timely appealed from the Class Certification Order on February 14, 2025. (R19-20.) The numerosity issue remains unresolved in Supreme Court.

## ARGUMENT

## POINT I

### DOL'S DETERMINATION TO DISCONTINUE INVESTIGATING PETITIONERS' CLAIMS WAS NOT A RULE REQUIRING COMPLIANCE WITH THE STATE ADMINISTRATIVE PROCEDURE ACT

SAPA requires formal rulemaking procedures only for a "rule," which is defined to include "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law." SAPA § 102(2)(a).[6] SAPA expressly excludes from that definition "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." SAPA § 102(2)(b)(iv).

As the Court of Appeals has explained on multiple occasions, "only a fixed, general principle to be applied by an administrative agency

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[6] The full definition under that section is: "'Rule' means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability."

without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule" that must be promulgated formally. *Matter of New York City Transit Auth. v. New York State Dep't of Labor,* 88 N.Y.2d 225, 229 (1996); *Matter of Roman Catholic Diocese of Albany v. New York State Dep't of Health,* 66 N.Y.2d 948, 951 (1985); *see also Matter of Council of the City of New York v. Dep't of Homeless Servs.*, 22 N.Y.3d 150, 154 (2013) (similar).

Contrary to Supreme Court's holding, DOL's determination declining to continue investigating petitioners' complaints was not a rule requiring formal promulgation under SAPA. Rather, it represented an exercise of DOL's enforcement discretion—the reasonableness of which Supreme Court properly did not question—and reflected a non-binding internal decision about how best to allocate DOL's limited law-enforcement resources. Surely SAPA does not require a law-enforcement agency to publicize, let alone formally promulgate under SAPA, an internal decision about the categories of cases it currently is declining to pursue.

### A. The Determination at Issue Represented an Exercise of DOL's Enforcement Discretion.

Decisions whether to investigate claimed violations of the Labor Law and commence enforcement actions are committed to DOL's sound discretion. In conferring investigative powers on the Commissioner, the Labor Law makes clear that "[n]othing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignments of wage claims, or to institute criminal prosecutions." Labor Law § 196(2). Rather, the Commissioner "shall be deemed vested with discretion in such matters." *Id.*

In this case, after opening investigations into hundreds of wage complaints by home care aides, DOL learned that 1199SEIU had filed a grievance against two employers of such aides, and later learned that the grievance was a class-action grievance involving thousands of union members and over 40 employers. (R1341.) At that point, DOL placed on hold its investigations of 1199SEIU members' complaints pending the outcome of the arbitration and resulting Award. (R1130-1131, 1383.) As explained above, DOL carefully considered its options and ultimately decided to close investigations as a matter of its enforcement discretion

for those claimants who were represented either by 1199SEIU (and thus were included in the class-action grievance) or by another union that was actively seeking relief by filing grievances on their behalf. (R11-12, 1343-1344.)

DOL made that determination, however, only after monitoring the arbitration process and related litigation for two years (R1246); meeting with organizations representing home care aides (R578, 1343); and considering the arguments submitted by petitioners' counsel (R1120). And it did so in recognition of its limited resources so that it could avoid duplicative investigations and prioritize investigations of complaints submitted by those who were not represented by unions actively seeking relief on their behalf. (*See* R1244-1246.)

Supreme Court did not hold that DOL's determination was unreasonable. Nor could it have done so, given the broad discretion that the Labor Law vests in DOL to utilize its investigatory and enforcement resources as it deems appropriate. Instead, Supreme Court concluded that because DOL's determination affected a class of complainants (R16), it necessarily did not reflect case-by-case decision making and thus

constituted a rule requiring formal rulemaking procedures under SAPA. That was mistaken.

The fact that an agency determination affects a class of individuals is not sufficient to render that determination a "rule" under SAPA. In *Matter of Vladyka v. DiNapoli,* for example, this Court recently held that the Office of the State Comptroller did not adopt an unpromulgated rule with its policy requiring applicants for service retirement benefits to show that they are actually retired, even though the policy necessarily affected a large class of prospective retirees. 238 A.D.3d 1362, 1365-66 (3d Dep't 2025). Similarly, in *Matter of Personal-Touch Home Care v. City of New York Human Resources Admin.,* the Department of Health did not adopt an unpromulgated rule by denying offset requests from home-care agencies that participated in a financially distressed self-insurance trust, even though all participating agencies were affected. 238 A.D.3d 1362 (1st Dep't 2022). As these cases illustrate, agency policies may affect classes of individuals without constituting "rules" requiring formal promulgation.

Nor would it make sense to require a law-enforcement agency to publicize via formal rulemaking a determination about the categories of

cases the agency currently does not plan to pursue. Such a requirement would communicate to members of the public the illegal activities in which they could engage without fear of regulatory enforcement, and would thereby undermine the deterrent purpose served by the potential for regulatory enforcement. Compounding that problem, a formal rule would also bind the agency going forward until it formally changed the rule in accordance with SAPA's notice-and-comment procedures. Enshrining an agency's discretionary allocation of enforcement resources in a rule would thus prevent the agency from responding quickly to a change in circumstances that might warrant regulatory enforcement in an area it had previously decided not to prioritize.

DOL's discretionary determination declining to pursue the investigations at issue here, in contrast, left room for DOL to change course and widen its enforcement efforts if it found circumstances warranting such action. Law-enforcement agencies like DOL continually monitor and reallocate their enforcement resources to respond to current conditions and to prioritize the issues most requiring their attention. DOL should not be required to freeze its enforcement priorities and make a new rule each time it undertakes a new initiative or rolls back an old one.

### B. The Determination at Issue Was Not a Fixed, Rigid Rule But, At Most, a Statement of General Policy with No Legally Binding Effect.

DOL's determination to discontinue investigating petitioners' claims was not a fixed, rigid rule requiring promulgation, but rather a non-binding internal decision about how best to allocate the agency's limited investigatory and enforcement resources and was consistent with DOL's prior practice. To the extent the determination reflected a generally applicable policy at all—as opposed to an internal reallocation of resources—it was a general policy with "no legal effect" and thus not a "rule" under SAPA. *See* SAPA § 102(2)(b)(iv) (expressing providing that a "rule" does not include "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory").

In rendering the determination at issue, DOL adhered to its general practice of refraining from investigating the complaints of those who had sought remedies in other venues or were represented by unions that had pursued or were pursing remedies on their behalf. (R1245, 1343.) Petitioners here were all home care aides represented by unions who either had pursued or were pursuing remedies for the underpayment of wages

caused by non-compliance with DOL's 13-Hour Rule. As explained *supra* at 5-6, four of the petitioners—Chen, Li, Rodriguez, and Song—were represented by 1199SEIU. That union's class-wide grievance filed on behalf of petitioners and others similarly situated resulted in the Award that was thereafter confirmed by a federal district court. *See 1199SEIU United Healthcare Workers*, 608 F. Supp. 3d at 70. And petitioner Zhuang was represented by Local 1770, which assured DOL that it was pursuing a grievance on her behalf. (*See* R59, 103, 1344.)

Consistent with its longstanding practice, DOL determined not to pursue petitioners' wage complaints further. And because the Labor Law does not require DOL to pursue specified investigations or enforcement actions, but rather leaves decisions to do so to DOL's enforcement discretion, a determination to discontinue an investigation necessarily does not "create or deny substantive rights of members of the public." *Cubas v. Martinez*, 8 N.Y.3d 611, 621 (2007).

DOL's application of its longstanding policy to petitioners' wage complaints did not reflect a fixed, rigid rule with binding legal effect. The determination neither created nor foreclosed home care aides' eligibility for compensation. *See Cubas*, 8 N.Y.3d at 621. As DOL's letters to the

home care aides advised, the agency's decision to discontinue petitioners' investigations was "not a determination as to the validity of your claim." (*See, e.g.,* R581-583, 585-589.) Home care aides retained their rights under their respective collective-bargaining agreements. (*See, e.g.,* R591-595.)

And nothing prevents DOL from reopening the investigations at issue, if it has reason to do so. A home-care agency faced with the reopening of an investigation could not obtain a court ruling *prohibiting* DOL from moving forward on the basis of the purported general policy reflected in the determination at issue. Such an employer might seek to raise other arguments in response to the reopening of an investigation, but an earlier discretionary determination to discontinue that investigation would have no preclusive effect. Nor would the earlier determination provide a basis for relief on other grounds, so long as DOL had a reason for reopening the investigation.

To be sure, the four petitioners who are represented by 1199SEIU declined to submit claims for their share of the Award because they hoped or expected that DOL could provide them with a larger recovery. (R60, 65-66.) They made that choice, however, knowing that their collective-

bargaining agreements established an exclusive dispute-resolution mechanism (*see* R1186), and knowing that the Award purported to foreclose other avenues of recovery (*see* R1239). Indeed, petitioners Chen, Rodriguez, and Song made that choice while advised by counsel. *See supra* at 11. Petitioners' risky strategic choice does not entitle them now to control DOL's allocation of its investigative resources going forward.

Finally, while not necessary to support reversal of the Merits Order here, DOL's discretionary decision to cease investigating complaints of petitioners did in fact involve individualized decision making based on the facts of each case. DOL's individualized approach is evidenced by the agency's continued investigation of some wage complaints by home care aides. (*See* R1245.) For example:

- DOL continues to investigate complaints under the 13-Hour Rule for home care aides who are not unionized. (R66; *see, e.g.,* R976-77, 1343-1344.)
- For those home care aides who are union members, DOL continues to investigate complaints that were not the subject of a union grievance (R1120)—for instance, claims of retaliation

based on a home care aide's complaints about violations of 13-Hour Rule (R10, 12, 1245, 1340, 1343).

- Even for home care aides who were subject to the Award, DOL will consider complaints that arose after the period covered by the Award. (R1245.)

DOL thus reviewed and continues to review each complaint alleging underpayment to a home care aide to determine, at a minimum, whether the home care aide belonged to a union; whether the union has commenced a proceeding against the home care aide's employer; and whether the union's grievance covers the home care aide's complaint.

In this respect, this case resembles *Matter of Senior Care Servs., Inc. v. New York State Dep't of Health,* where this Court rejected an unpromulgated-rule challenge to the Department of Health's general policy against allowing mail-order suppliers of durable medical goods to participate in Medicaid because the Department did not enact an "absolute ban" on mail-order delivery. 46 A.D.3d 962, 964-65 (3d Dep't 2007). The criteria in Supreme Court's detailed class definition (R37) identify as class members home care aides to whom DOL's individualized decision making has *already been* applied. The Court should thus hold,

as it did in *Matter of Senior Care Services,* that the agency's policy does not constitute an unpromulgated rule, but rather a guide to individualized decision making.

## POINT II

### THE CLASS CERTIFICATION ORDER SHOULD BE VACATED

Because DOL is entitled to judgment on the merits for the reasons set forth in Point I, the Class Certification Order should be vacated as moot. *See, e.g., Sheth v. New York Life Ins. Co.*, 308 A.D.2d 387, 387 (1st Dep't) (affirming order that granted summary judgment to defendant and denied plaintiffs' motion for class certification as moot), *lv. denied,* 1 N.Y.3d 505 (2003); *B&R Children's Overalls Co. v. New York Job Devpt. Auth.*, 257 A.D.2d 368, 368-69 (1st Dep't) (similar), *lv. denied,* 93 N.Y.2d 810 (1999); *Jurman v. Sun Co., Inc.,* 248 A.D.2d 246, 246 (1st Dep't) (similar), *lv. denied,* 92 N.Y.2d 805 (1998).

## CONCLUSION

The Decision and Order of Supreme Court entered October 9, 2024, should be reversed; the Decision and Order of Supreme Court entered April 8, 2024, should be vacated as moot; and the petition should be dismissed.

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## PRINTING SPECIFICATIONS STATEMENT

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