To be argued
By: CARMELA HUANG
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,

Petitioners-Respondents,

v.

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

Respondent-Appellant.

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

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

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PRELIMINARY STATEMENT

Petitioners and the putative class members are all home care aides who provided "live-in" services to elderly and disabled Medicaid recipients. For years, these aides worked 24-hour shifts, providing continuous, around-the-clock care that enabled their care recipients to avoid institutionalization and to live safely in the community. Their employers systematically stole their wages by violating the so-called "13-hour rule," which allows employers of home care aides to pay an aide who works a 24-hour, "live-in" shift for just 13 hours *if and only if* the aide receives five continuous, uninterrupted hours of sleep during an eight-hour period of sleep and three hours of completely duty-free meal breaks. These aides could not take those breaks because of the regular needs of their care recipients, but they were still paid for only 13 hours. As a result, the aides made less than the hourly minimum wage and received little to none of the overtime pay owed to them by their employers.

The New York State Department of Labor ("DOL") is the agency tasked with vindicating the public interest by preventing and remedying

abuses of the New York Labor Law ("NYLL"). Section 196 of the NYLL sets forth the duties, power, and authority of the Commissioner of Labor, including that: "[n]othing in [that] section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignment of wage claims." No party in this case disputes that DOL has discretion over which cases to investigate, at least on a case-by-case basis.

However, DOL's discretion is not unfettered. If DOL institutes a policy articulating a fixed, general principle to be applied regardless of any other facts or circumstances, or that establishes a pattern or course of conduct for the future that permits no case-by-case analysis of the facts or significant discretion on the part of agency officials, its power becomes subject to the rulemaking requirements of the State Administrative Procedures Act ("SAPA"). *See Matter of New York City Tr. Auth v. New York State Dep't of Labor*, 88 N.Y.2d 225, 229 (1996); *Matter of Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999). SAPA defines a rule as "the whole or part of each agency statement, regulation or code of general applicability

that implements…the procedure or practice requirement" of the agency. N.Y. SAPA § 102(2)(a)(i). And when DOL chooses to adopt a rule, it must comply with SAPA's rulemaking procedures. A failure to comply with those procedures results in the reversal of any determinations based on the improperly promulgated rule and a declaration that the rule is invalid.

In this instance, the Supreme Court correctly found that DOL adopted a rule when it made the policy decision to no longer investigate wage theft claims filed by home care aides whose unions and employers have entered into mandatory arbitration agreements covering violations of the 13-hour rule. Based on that one criterion, DOL closed Petitioners' and the class members' claims. And because DOL did not go through the rulemaking requirements of SAPA prior to adopting the rule, the Supreme Court also correctly found that DOL's rule must be invalidated and the actions it took in reliance on the improper rule—namely closing its investigations into Petitioners' and the class members' claims—must be annulled.

After correctly concluding that DOL applied an improper rule, the Supreme Court ended its analysis there. However, DOL's single decision to suddenly close its investigation into Petitioners' and the class members' claims after spending years investigating them and finding the evidence "overwhelmingly corroborative" of their claims was also arbitrary and capricious, without rational connection to: the evidence obtained during its investigations, the DOL's statutory directive to eliminate the employment of persons "at wages insufficient to provide adequate maintenance for themselves and their families," and its own investigative priorities. N.Y. Lab. Law § 650. Moreover, its single decision was also affected by an error of law because DOL adopted its rule after it erroneously concluded that its statutory authority to enforce the NYLL was superseded by collectively bargained arbitration agreements.

Respondent-Appellant defends its action by arguing that its decision was a proper exercise of agency discretion and not a rule subject to SAPA's requirements. It wrongly characterizes NYLL § 196 as an absolute grant of authority that allows it to make blanket decisions regarding its

enforcement priorities without heed to the limitations imposed by SAPA and Article 78. DOL has also manufactured an administrative record filled with "alternative facts" in order to hide the arbitrary, capricious, and erroneous nature of its action. DOL's disingenuous assertions should be rejected by the Court and the decision of the Supreme Court should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court correctly held that DOL closed Petitioners' claims in reliance on a rule that was not adopted in compliance with the State Administrative Procedures Act.

2. Whether DOL's decision to close the Petitioners' claims was arbitrary and capricious.

3. Whether DOL's decision to close the Petitioners' claims was affected by an error of law.

4. Whether the Supreme Court's order partially granting petitioners' motion for class certification should not be vacated as moot.

STATEMENT OF THE CASE

Home care aides working 24-hour shifts "care for some of the most vulnerable members of our society, doing work essential to the survival of their patients." *Andryeyeva v. New York Health Care*, 33 N.Y.3d 152, 168 (2019). They are also "part of a workforce that is predominantly composed of women and recent immigrants, and one that…is easily exploited and vulnerable to various forms of wage theft." *Id.* Their employers "reap huge profits from both private and taxpayer funds, while refusing to pay the minimum wage for each hour worked to those who do challenging labor, at all hours of the day and night, often four of five times a week." *Id.*

Since at least 1980, DOL has advised employers of home care aides that they may lawfully discharge their obligations under the Minimum Wage Act by paying aides according to the "13-hour rule." This rule allows their employer to pay an aide working a 24-hour "live-in" shift for just 13 hours if and only if the aide receives both eight hours of sleep (five of which must be continuous and uninterrupted) and three hours of completely duty-free meal breaks. (R45 ¶ 21)

"Industry practice has been to presume that home care workers working 24-hour shifts always work just 13 hours." (R46 ¶ 25) However, aides are systematically assigned to work 24-hour shifts where they are required to work continuously throughout the entire 24-hour period, in violation of state Medicaid regulations. (R46 ¶ 26) "[A]n uninterrupted five hours of sleep for these workers is rare…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…" (R46 ¶ 27) As a result, violation of the 13-hour rule is the norm, not the exception.

A. DOL Closes Claims After Years of Investigation Proving Widespread Abuse.

In December 2018, Petitioner Gui Hua Song and other members of the class filed claims with DOL alleging violations of the 13-hour rule. (R261-265) The aides' claims had previously been part of class action complaints that had been stayed or adjourned pending resolution of a mandatory arbitration process that was initiated by their union, 1199SEIU.

DOL knew that the aides' claims were covered by the class-wide grievance filed by 1199SEIU and subject to mandatory arbitration. (R267-270) Nevertheless, on February 7, 2019, DOL agreed to investigate the aides' claims, because the mandatory arbitration threatened to foreclose the aides' ability to recover their stolen wages. (R272, 1480-1483) By December 2019, DOL had determined that the evidence supporting the aides' allegations of widespread and systematic violation of the 13-hour rule was "overwhelmingly corroborative." (R97-99) It then expanded its investigation, examining employer timekeeping policies and procedures, looking into the role of managed long-term care companies ("MLTCs") in setting terms and conditions of aides' work, subpoenaing documents, and calculating underpayments. (R558-570, 1480-1483, 1485-1486)

On February 25, 2022, an award was issued in the 1199SEIU class-wide grievance. (R138-217) The award was certified by the United States District Court for the Southern District of New York on July 24, 2022. *See 1199SEIU United Healthcare Workers East v. PSC Cmty. Servs*., No. 20-cv-3611-JGK (S.D.N.Y.), Dkt. # 262. Pursuant to the award, the covered

employers were required to contribute $250 per employee to a settlement fund that would then be distributed among a class of more than 110,000 aides who had experienced violations of the NYLL through October 31, 2021. (R138-217) Only aides who agreed to release all claims that were or could have been asserted—including claims that had already been filed with DOL—were permitted to participate in the distribution. (R243-244) The largest distribution to any single aide would be approximately $18,000 while the minimum distribution would be $10. (R246-248) Aides interested in participating in the award were required to submit claim forms by September 27, 2022. (*Id*.) Petitioner Gui Zhu Chen is estimated to be owed approximately $171,000 in unpaid wages, not including statutory liquidated damages and penalties; Petitioner Ya Yun Li is estimated to be owed at least $249,000 in unpaid wages, not including statutory liquidated damages and penalties; Petitioner Maria Rodriguez is estimated to be owed approximately $80,000 in unpaid wages, not including statutory liquidated damages and penalties; and Petitioner Gui Hua Song is estimated to be owed approximately $164,000 in unpaid wages, not including statutory

liquidated damages and penalties. (R48, 50-51, 52-53 ¶¶ 35, 46, 53, 58) Petitioners were each covered by the arbitration award but declined to participate and release their DOL claims. (R58 ¶ 84) The deadline to file claims under the 1199SEIU arbitration decision passed on September 27, 2022. (R243-244)

On August 16, 2022, a representative from DOL informed Petitioners' counsel that it was waiting for the outcome of the 1199SEIU arbitration decision before proceeding further. (R576-579) On December 1, 2022, Petitioners' counsel responded that the arbitration award had already been certified and urged DOL to move forward with its investigation and continue to implement the strategy that had been outlined by prior DOL leadership. (R558-570) On March 3, 2023, DOL reiterated that "the 1199 complaints are on hold as we work with DOL Counsel to understand the decision's impact on our ability to investigate and collect." (*Id.*) Then, without further communication, beginning on April 27, 2023, DOL started sending out closing letters to Petitioners and the class members. (R581-601, 603-608, 903, 962) In many of the closing letters, DOL stated that "[w]e

understand other means are available for a resolution of your claim," although the deadline for aides covered by the 1199SEIU arbitration to participate in the award had already passed by more than six months. (R581-583)

On July 6, 2023, a Supervising Labor Standards Investigator for DOL informed the representative for Petitioner Chun Feng Zhuang that Ms. Zhuang's claim and the claims of all other aides whose claims were covered by arbitration agreements between their union and employer were being closed following the advice of DOL's counsel's office that "[t]he CBA supersedes our authority in this case. There is no getting around it. The same is true in each case we have closed on this basis." (R101-103)

DOL closed Petitioners' and the class members' claims on that single basis. Though hundreds of aides were affected by DOL's decision making, the contemporaneous record contains no evidence of any individualized consideration or fact finding for any of the aides. Instead, the record shows only that DOL closed the aides' claims for just one reason: the aides' claims

were covered by a mandatory arbitration agreement between the aide's unions and employers. (R1102-1106) No other criteria were considered.

On August 1, 2023, DOL issued a press statement announcing a new de facto rule that it would no longer investigate claims of violations of the 13-hour rule filed by home care aides whose unions have entered into mandatory arbitration agreements with the aides' employers where the agreements cover the aides' claims. (R976-980) DOL did not undertake any of the rulemaking procedures required by the SAPA prior to instituting its new rule.

B. DOL Manufactures "Alternative Facts."

In order to avoid nullification of its improper rule and action closing Petitioners' and the class members' wage theft claims, DOL submitted two affidavits to the Supreme Court replete with misrepresentations and post hoc justifications that are not supported by the contemporaneous record. Those same misrepresentations and justifications are repeated by Respondent-Appellant in the instant appeal.

DOL has misrepresented its knowledge of the 1199SEIU grievance at the time Petitioners filed complaints, as well as the extent of its investigative activities before the arbitration award. The contemporaneous record reflects clear documentary proof that DOL knew about the class-wide grievance in January 2019 before it agreed to investigate the aides' claims. (R266-270, 272) However, DOL submitted an affirmation from its Director of the Division of Labor Standards to the Supreme Court stating that DOL did not became aware that 1199SEIU had filed a grievance covering many of the wage claims filed by Petitioners and the class members until March 2019 and did not become aware that the grievance was a class-wide grievance until September 2019. (R1341 ¶ 23; Brief for Appellant at 12) DOL then stated that, had it known that Petitioners' and the class members' claims were included in the grievance, "it would have likely exercised its discretion and not have opened an investigation." (R1341 ¶ 25)

DOL continued its dissembling before the Supreme Court by implying that that it engaged in no investigation and simply "monitor[ed]

the arbitration proceeding" despite email correspondence showing that an active investigation, which uncovered evidence that was "overwhelmingly corroborative," extended far into at least June 2021. (R1341-1342 ¶¶ 25, 32, 34; Brief for Appellant at 12) DOL also admitted that:

> A Labor Standards investigation often begins as a field assignment and the investigative file typically includes the following records: (1) a complaint form, including a "Letter of Representation," if any; (2) employee interview notes and correspondence; (3) record of site visit and any notice of revisit or request for employer records; (4) employer interview notes and correspondence, including payroll records; (5) sampling of employer payroll and time records; (6) narrative reports; (7) research; and (8) a contact log, which notes investigative steps such as internal case discussions or verbal communications with claimants, employers, or witnesses. If an investigation reveals potential Labor Law violations, the investigative file will typically include a computation of underpayments, a copy of the notice to the employer identifying the violations and a calculation of the underpaying with interest, liquidated damages, and civil penalties as well as an interim and final report.

(R1337-1338 ¶¶ 8-9) Significantly, DOL withheld almost all of the documents listed from the record it produced to the Supreme Court in

order to support its false narrative that it never investigated Petitioners' complaints.[1]

DOL also submitted an affirmation from its Deputy Commissioner for Worker Protection stating that DOL closed its investigations into the aides' claims after considering many factors, including:

> (1) long-standing labor policy of promoting labor stabilization through collective bargaining agreements and a clear preference for private arbitration of grievances; (2) the investigative and enforcement resources needed to assess whether covered home health aides are entitled to additional compensation; (3) the facts that the complainants were represented by a union and have not alleged any bad-faith or unfair dealing by their union; (4) the need to deploy DOL's investigative and enforcement resources to other wage and hour

[1] Petitioners note that they filed a motion for limited disclosure on April 26, 2024 in order to contest Respondent-Appellant's position that its decision was rationally based on the record. *See In the Matter of Chen v. Reardon*, Index No. 908146-23 (Albany Sup. Ct.), NYSCEF 125. Specifically, Petitioners sought to depose James Rogers, DOL's former Deputy Commissioner for Worker Protection who authorized and directed the investigation of Petitioners' and the class members' claims until his departure from the agency after November 2021. *Id.*, NYSCEF 140. Petitioners also sought permission to subpoena from DOL the documents either referenced in DOL's Verified Answer and supporting files or alluded to in previous communications with agency staff. Petitioners argued that the disclosure was necessary to correct and complete the record. *Id.* The Supreme Court denied the motion. *Id.*, NYSCEF No. 165.

> claims brought by New York State workers…including 677 unionized and non-unionized claimants employed by 72 separate home care agencies; (5) the high likelihood that any monetary remedy sought by DOL would need to be reduced by the monies already received by individual home health aides; and (6) the potential of protracted litigation brought by the 42 Employers subject to the Arbitration award seeking to enjoin DOL from taking any investigative or enforcement action.

(R1244-1245 ¶ 23) However, the Supreme Court properly found no evidence in the contemporaneous record that DOL actually considered any of these factors prior to closing Petitioners and the class members' claims. (R16) Moreover, most of these post hoc justifications articulated by DOL weigh in favor of it continuing its investigation. Respondent-Appellant had already developed a class model to efficiently resolve Petitioners' and the class members' claims, (R1052, 1060-1061 ¶¶ 4, 94, 101-102) (Factor 2), which would have allowed DOL to better address the hundreds of claims filed by unionized aides against 72 separate home care agencies all arguably operating under the same or similar collective bargaining agreements (Factor 4). DOL also had a demonstrated history of allowing the employers at issue to "self-audit," thereby saving additional DOL

resources. (R1102-1106) Respondent-Appellant's intervention was especially necessary since aides who were members of 1199SEIU had filed more than eight charges with the National Labor Relations Board alleging that the union had violated its duty of fair representation during the arbitration process (Factor 3). (R86-96, 1525-1584) In fact, Petitioners' counsel had already alerted DOL to the aides' allegations of bad faith on January 30, 2019, when counsel informed DOL that "[m]any of the workers have already suffered retaliation from their employers…and many who have been involved in the lawsuits have not had positive experiences with the union either." (R267-270) There would also be no reduction in the monetary remedies recovered by Respondent-Appellant because no Petitioner or class member had received compensation from a union arbitration (R58, 63 ¶¶ 84, 110) (Factor 5). And since DOL is not bound by private arbitration proceedings, any action by employers to enjoin DOL from engaging in investigative or enforcement action would be frivolous (Factor 6). If anything, it is DOL's unlawful closing of Petitioners and the

class members' cases that has resulted in the protracted litigation the agency seeks to avoid.

DOL has also misrepresented the existence of any ongoing investigations into complaints made by home health aides subject to mandatory arbitration agreements. The Deputy Commissioner's affirmation claims that DOL "continues to investigate the claims of underpayments of home health aides and will consider claims of underpayments alleged after the period covered by the Arbitration Award." (R1245¶ 24) In fact, DOL closed the claims of all aides who are members of 1199SEIU without exception, including aides like Petitioner Ya Yun Li who continued to experience violations of the 13-hour rule well past October 31, 2021. (R50-52 ¶ 46-51, 903) Besides the conclusory assertion in the Deputy-Commissioner's affirmation, the contemporaneous record reflects no ongoing investigations into the kinds of complaints Petitioners brought to DOL.

ARGUMENT

A. The Supreme Court's Correctly Concluded That DOL Applied a Rule.

SAPA defines a rule as "the whole or part of each agency statement, regulation or code of general applicability that implements…the procedure or practice requirements" of the agency. N.Y. SAPA § 102(2)(a)(i); *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771, 773 (1992). Policies that concern "the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public" and "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" are excepted from SAPA's definition of a rule. N.Y. SAPA §§ 102(2)(b)(i), (iv).

An agency policy that is a "fixed, general principle to be applied…without regard to other facts and circumstances" constitutes a rule subject to SAPA's requirements. *Matter of New York City Tr. Auth. V. New York State Dep't of Labor*, 88 N.Y.2d 225, 229 (1996) (citing *Matter of Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985)). A "rigid, numerical policy invariably applied across-the-

board to all claimants without regard to individualized circumstances or mitigating factors…falls plainly within the definition of a 'rule' for State Administrative Procedure Act purposes." *Matter of Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301-302 (1994).

On the other hand, ad hoc decision making based on individual facts and circumstances does not rise to the level of a rule, nor do policies that permit case-by-case analysis of the facts or significant discretion and flexibility on the part of agency officials. *See Matter of Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999) (finding no rule where Office of General Services set withdrawal criteria for one particular contract); *Matter of Teresian House Nursing Home Co. Inc. v Chassin*, 218 A.D.2d 250, 254 (3d Dep't 1996) (no rule where agency's evaluation included individualized review of criteria that were factually specific); *Matter of New York City Tr. Auth.*, 88 N.Y.2d at 229 (no rule where penalty guidelines vested inspectors with significant discretion and allowed for flexibility in the imposition of penalties).

However, a policy that establishes a pattern or course of conduct for the future or has general applicability and prescribes a procedure or practice requirement, will be considered a rule. *Matter of Alca Indus., Inc.*, 92 N.Y.2d at 778; *Matter of Roman Catholic Diocese of Albany*, 66 N.Y.2d at 951. A rule will be found where the policy establishes a mandatory procedure. *Matter of Cordero*, 80 N.Y.2d at 773.

Prior to the adoption of a rule, an agency must "submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." N.Y. SAPA § 202(1). An agency's failure to comply with SAPA's rulemaking procedures shall result in the reversal of any determinations based on the improperly promulgated rule and a declaration that the rule is invalid. *Matter of Cordero*, 80 N.Y.2d at 772; *Matter of Schwartfigure*, 83 N.Y.2d at 302; *Entergy Nuclear Indian Point 2, LLC v. New York State Dep't of State*, 130 A.D.3d 1190, 1195 (3d Dep't 2015) ("When an agency engages in a course of regulatory action that amounts to

formal rulemaking but does not comply with the procedural requirements of [SAPA], that regulatory action must be annulled.").

In this case, the Supreme Court correctly found that DOL adopted a rule when it made its single decision to close Petitioners' and the class members' claims based on the sole criterion that the aides' claims were covered by their union and employer's mandatory arbitration agreements. DOL applied its decision across the class of aides without any consideration of individualized facts or circumstances. Although DOL offers several post hoc justifications for its actions, the Supreme Court rightly concluded that there is no evidence in the record to show that DOL actually considered any of the factors it articulated or applied the factors on a case-by-case basis with respect to any Petitioner or class member. (R16) After making its decision to close Petitioners' and the class members' claims, DOL then announced that its decision would be applied to claims that had not yet been filed, predetermining its investigatory and enforcement practices into the future. DOL adopted a rigid policy that falls plainly within the definition of a rule. And because DOL admittedly failed

to follow any of the rulemaking procedures required by SAPA before adopting and relying on its rule, the Supreme Court correctly determined that DOL's actions terminating its investigations must be annulled.

B. Arguments That SAPA Does Not Apply Should Be Rejected.

Respondent-Appellant offers two arguments on appeal. First, it argues that DOL's decision to close its investigations into Petitioners' and the class members' claims was not a rule because it was simply an exercise of DOL's enforcement discretion. Second, it argues that its decision is excepted from SAPA's requirements because it only reflected a statement of general policy with no legal effect. Both arguments should be rejected.

1. *The Court should reject DOL's argument that SAPA does not apply to acts of discretion.*

In relevant part, SAPA defines a rule to be "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law…or the procedure or practice requirement of any agency…" N.Y. SAPA § 102(2)(a)(i). SAPA also expressly lists exceptions to the definition of a rule, including rules "concerning the

internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public" and "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." N.Y. SAPA §§ 102(2)(b)(i), (iv). Nowhere, though, does SAPA provide an exception for exercises of enforcement discretion.

On the contrary, courts have found that agency exercises of discretionary authority are subject to SAPA. For example, in *Matter of Consumer Directed Personal Assistance Ass'n of New York State v. Zucker*, the Supreme Court found that the Department of Health's rate setting policy was subject to SAPA, even though state regulations gave the Department the discretion to establish reimbursement rates over fiscal intermediaries, because the policy was applicable to all fiscal intermediaries without consideration of each fiscal intermediary's individual facts and circumstances. 65 Misc 3d 1005, 1010, 111 N.Y.S. 3d 826, 830-831 (Albany Sup. Ct. 2019). Because DOH failed to comply with SAPA's rulemaking requirements, the rule and the actions taken in reliance on the rule were

declared null and void. *Id*. Similarly, in *Matter of Household and Com. Prod. Ass'n v. New York State Dep't of Env't.*, the Supreme Court rejected the Department of Environmental Conservation's argument that its "guidance document" was exempted from SAPA's requirements because the guidance was "properly established within the broad authority granted it by ECL § 35-0107 and 6 NYCRR § 659.6." 65 Misc 3d 832, 840, (Albany Sup. Ct. 2019). Instead, the Court found that the guidance constituted a rule because it provided "no opt out provision whereby petitioner may choose to deviate from the program," and the Department's failure to implement the rule in compliance with SAPA rendered it null and void. *Id*. at 841.

Respondent-Appellant cites two cases to stand for the idea that an act of agency discretion affecting a class of individuals is not sufficient to render that determination a "rule" under SAPA. (Memo at 28) However, both cases concern an agency's denial of a single petitioner's application and not, as suggested, a class of individuals. Moreover, in both cases, the agency engaged in an individualized determination based on the circumstances of the petitioner. In *Matter of Vladyka v. DiNapoli*, the court

found that the comptroller's denial of petitioner's application for retirement benefits was not the application of a rule even though the comptroller denied petitioner's application on the basis of a policy that applicants provide evidence of their actual retirement. 238 A.D.3d 1362, 1365 (3d Dep't 2025). Not only was the comptroller's decision making individualized to the petitioner's specific facts and circumstances (petitioner was still working even after the date of his alleged retirement), the policy applied was not one that could substantially alter the result of future agency adjudications because the relevant statute required applicants to be retired in order to be eligible for retirement benefits. *Id*. at 1365-1366. In *Matter of Personal-Touch Home Care v. City of New York*, the court found that the New York State Department of Health did not apply a rule in denying the petitioner's request to divert unspent Medicaid funds to offset workers' compensation assessments against a self-insured trust because the agency made a fact-specific determination that the trust had been mismanaged. 201 A.D.3d 532, 533-534 (1st Dep't 2022). In neither case did the agency simply apply a rigid policy of general applicability across a

class of individuals without consideration to the individual's specific facts or circumstances. Therefore, Respondent-Appellant's cases are wholly distinguishable.

Petitioners agree that NYLL § 196 grants the Commissioner of Labor the authority to exercise discretion over its enforcement actions. However, DOL may not choose to reject classes of complaints such as Petitioners' in a rigid, across-the-board manner—in other words, it may not adopt a rule—without first complying with SAPA. To hold otherwise would defeat the purpose of SAPA. The Court should therefore reject Respondent-Appellant's argument.

2. *The Court should reject DOL's argument that its action is a statement of general policy expressly excepted by SAPA.*

Respondent-Appellant also argues that DOL's decision is expressly excepted from SAPA's requirements because it only reflected a statement of general policy with no legal effect since DOL's decision "neither created nor foreclosed home care aides' eligibility for compensation." (Memo at 31) This argument, too, should be rejected.

When a change in policy goes "beyond merely providing clarification" and instead imposes new legal consequences, it will be found to have legal effect and subject to SAPA. *People by James v. Commons W., LLC*, 85 Misc 3d 1055, 1060 (N.Y. Sup. Ct. 2024); *see also Kahrmann v. Crime Victims Bd.*, 14 Misc 3d 545, 550 (Albany Sup. Ct. 2006) ("[s]ince the purpose of the policy is to preclude reimbursement to crime victims for telephone counseling…[i]t is not interpretive, and is not merely explanatory…Rather it directly impacts recipients of psychotherapy counseling…by denying reimbursement for the costs of such services").

In this case, DOL implemented its new policy by closing Petitioners' and class members' cases, foreclosing enforcement of their rights under the Labor Law. DOL's determination did not itself alter the 13-hour rule or change the fact of the employers' violation of the NYLL. Nevertheless, the legal effect of DOL's decision on most of the Petitioners and many of the class members is incontrovertible and profound. As a direct consequence of DOL's decision to cease investigations into claims filed by aides also covered by mandatory arbitration agreements *after the deadline to participate*

in the 1199SEIU arbitration award had already passed, many aides immediately lost their one remaining avenue to recover their unpaid wages. Additionally, many of the claims filed by Petitioners and the class members involve wage theft violations that took place prior to 2019 and would be outside the NYLL's six-year statute of limitations even if DOL determined to re-open investigations sometime in the future. N.Y. Lab. Law §§ 198(3), 663(3)) ("an action to recover upon a liability imposed by this article must be commenced within six years. The statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation…until the date on which the commissioner notifies the complainant that the investigation has concluded"). (R261-265, 274-276, 282-288, 905-911, 964-970, 1443-1450, 1470-1472)

Contrary to Respondent-Appellant's assertion, DOL's decision to close its investigation of Petitioners' and the class members' claims was not simply a reflection of a statement of general policy with no legal effect. Therefore, DOL could not have lawfully applied its rule without first

undertaking the steps required by SAPA. Having failed to meet SAPA's requirements, DOL's rule and its decision to terminate its investigations should be annulled and the Supreme Court's decision should be affirmed.

C. DOL's Decision to Close the Aides' Cases Was Also Arbitrary and Capricious.

DOL's decision to close the aides' claims was also arbitrary and capricious. The Supreme Court did not reach this question because it found that DOL applied an improper rule. But should the Court decide that DOL did not violate SAPA by implementing and applying a rule, the Court should nevertheless nullify DOL's decision because it is arbitrary and capricious.

Agency action may be overturned as arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. *Wooley v. New York State Dep't of Corr. Servs*., 15 N.Y.3d 275, 280 (2010) (citing *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)); *Matter of Pell v. Board of Educ. of Union Free School Dist. No 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty.*, 34 N.Y.2d 222, 231 (1974.) If there is no rational basis for

the decision, an agency's determination will be found to be arbitrary and capricious. *Matter of Gilman v. New York State Div. of Housing and Cmty. Renewal*, 99 N.Y.2d 144, 149 (2002) (citing *Matter of Nehorayoff v. Mills*, 95 N.Y.2d 661, 675 (2001)).

For nearly four decades, the New York Court of Appeals has consistently upheld the rule that "when an agency determines to alter its prior stated course it must set forth its reasons for doing so…Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made." *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 520 (1985). Policies must be adopted "in a coherent and consistent manner with appropriate regard for those previously taken or must explain the reasons for variations among policies." *Matter of Liquidation Union Indem. Ins. Co. of NY*, 92 N.Y.2d 107, 123 (1998) (citing *Field*); *also Leggio v. Devine*, 34 N.Y.3d 448, 461-462 (2020) (applying *Field* to policies developed outside of formal processes that were instead the result of ad hoc decision making over time).

Respondent-Appellant has falsely suggested that it engaged in no investigation of Petitioners' and the class members' claims and has produced a deliberately limited record to support its misrepresentation. However, Petitioners have presented clear documentary evidence showing that an investigation did, in fact, take place, after DOL learned of the class-wide grievance. (R97-99, R266-270, 272, 549, 554-556, 572, 574-576, 1474-1475, 1488, 1061 ¶ 102, 1338 ¶ 11) Moreover, Respondent-Appellant admitted that DOL determined through an investigation that the evidence overwhelmingly corroborated Petitioners' and the class members' claims that they had been regularly robbed of their wages. (R1051-1052, 1061 ¶¶ 3-5, 102-103) Respondent-Appellant also admitted that DOL had adopted an efficient method for handling the aides' claims to conserve agency resources. (R1052, 1060-1061 ¶¶ 4, 94, 101) In light of these circumstances, DOL's decision to close Petitioners' and the class members' claims has no rational basis in the facts.

DOL's determination to close its investigation into the aides' claims also has no rational basis in law or policy. The Minimum Wage Act was

enacted to eliminate the occupation of persons at wages insufficient to provide adequate maintenance for themselves and their families. N.Y. Lab. Law § 650. Home care aides as an occupational class overwhelmingly rely on public assistance because the wages they receive are so low. Petitioners and the other class members worked full-time schedules that frequently stretched to 72 or 96 consecutive hours per week, yet they still struggled to meet their basic needs. (R261-265, 274-276, 282-288, 290-547, 1443-1450, 1470-1472) Therefore, DOL's abandonment of Petitioners' and the class members claims' is especially irrational given its role to protect the public interest and enforce the New York Labor Law.

Respondent-Appellant's decision is also unsound when considered against its own investigative priorities. According to DOL, it prioritizes investigations involving large scale failures to pay wages, such as where multiple employees are unpaid over multiple weeks; the failure to pay any wages; the failure to pay the State Minimum Wage; and the failure to pay overtime rates. (R1337 ¶ 6) It also considers the employer's history of previous violations. Petitioners' and the class members' claims therefore

fall squarely into DOL's investigative priorities. Each Petitioner and class member was paid less than the statutory minimum wage and little to no overtime over years of employment. The same is true across the entire industry of aides who work 24-hour shifts, including the approximately 110,000 aides covered by 1199SEIU's collective bargaining agreements and arbitration award. (R45-47, 57-58 ¶¶ 23-31, 82; R1341 ¶ 27, 1243 ¶¶ 13-16) Despite multiple lawsuits, arbitrations, and DOL investigations, their employers show no sign of reforming their practices because violations of the 13-hour rule continue unabated. (R50-52 ¶¶ 46-52) Furthermore, DOL admits that between 2020 and 2023, approximately five-percent (5%) of all wage theft claims filed at DOL were filed by home care aides who were employed by 72 separate home care agencies, some of which were unionized workplaces. (R1244-1245 ¶ 23)

DOL also acknowledges that aides covered by the 1199SEIU arbitration award would receive less compensation than if their underpayments had been individually calculated. (R1342 ¶ 30, 1244 ¶ 18) Aides who were owed tens—sometimes hundreds—of thousands of

dollars in unpaid wages, overtime, and spread of hours pay received only hundreds of dollars. For example, He Ping Zhou, who is not a member of the proposed class, received an award payment of just $619.42 (of which only $360.76 was for wages) even though she is estimated to be owed more than $82,000, not including statutory liquidated damages and interest. (R984-986) Even more importantly, most Petitioners and many class members will recover none of their unpaid wages through their union and employer's mandatory arbitration process because the deadline to participate in the award distribution has already passed. (R243-244) Contrary to DOL's misrepresentations to the Supreme Court, it knew of the 1199SEIU class-wide grievance when it opened the Petitioners' and most of the class members' cases, evincing a concern for the likelihood that the arbitration process would not vindicate the workers' rights and the Labor Law. (R266-270, 272) Therefore, DOL's sudden deference to arbitration in this instance is particularly irrational.

The NYSDOL's failures to explain why it suddenly reversed course – declining to continue its investigations into the aides' claims and closing

Petitioners' and the other class members' meritorious cases before any resolution had been reached – necessitate reversal on the law as arbitrary. *See, e.g., Era Steel Const. Corp. v.* Egan, 145 A.D.2d 795, 799-800 (3d Dep't 1988); *Collins v. Governor's Office of Employee Relations*, 211 A.D.3d 1001 (3d Dep't 1995).

Because DOL's decision to close its investigations into Petitioners' and the class members' claims was made without a sound basis in reason or with regard to the facts, it should be overturned as arbitrary and capricious.

D. DOL's Decision to Close the Aide's Claims Was Affected by an Error of Law.

A finding that DOL's enforcement authority remains unaffected by private arbitration agreements to which it is not a party is supported by the weight of judicial authority. For example, the United States Supreme Court has held that an arbitration agreement between an employer and employee does not limit the Equal Employment Opportunity Commission's statutory authority to enforce the law. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294

(2002). The Court of Appeals has similarly found that the Attorney General was not barred from seeking damages on behalf of life-insurance policy holders who had agreed to arbitrate all claims arising from their policies. *People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108, 114 (2009). And other courts have also upheld the power of government actors to pursue enforcement actions when they are not parties to private arbitration agreements. *See People v. Maplebear, Inc.*, 81 Cal.App.5th 923, 940 (2022) (City of San Diego not precluded by arbitration agreement from enforcing laws against misclassification and seeking restitution); *Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 735-36 (Iowa 2014) (FAA reach does not extend to Commission that was not a party to the arbitration agreement); *State ex rel. Hatch v Cross Country Bank, Inc.*, 703 N.W.2d 562, 570 (Minn. Ct. App. 2005) (State's suit covering bank's numerous harms against credit card holders with whom it had arbitration agreements not precluded).

In this case, the contemporaneous record clearly shows that the DOL incorrectly concluded that the collective bargaining agreements between

the aides' unions and employers superseded its authority to investigate and then closed Petitioners' and the class members' claims on this erroneous basis. (R101-103, 1102-1106) Because DOL's determination was affected by this error of law, the Court should reverse DOL's decision to close Petitioners' and the class members' claims.

E. The Court Should Not Vacate the Supreme Court's Class Certification Order.

Because the Supreme Court's decision should be affirmed, its class certification order should not be vacated as moot.

CONCLUSION

The Decision and Order of the Supreme Court entered on October 9, 2024 should be affirmed, and the Decision and Order of the Supreme Court entered on April 8, 2024 should not be vacated as moot.

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