NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5125

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF LABOR, et al.,
DEFENDANT-APPELLANT,
V.
STATE OF NEW YORK, et al.,
PLAINTIFF-APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF THE OKLAHOMA INSURANCE DEPARTMENT JOINED WITH THE MONTANA STATE AUDITOR, COMMISSIONER OF SECURITIES AND INSURANCE, IN SUPPORT OF APPELLANT UNITED STATES DEPARTMENT OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs are the State of New York; the Commonwealth of Massachusetts; the District of Columbia; the State of California; the State of Delaware; the Commonwealth of Kentucky; the State of Maryland; the State of New Jersey; the State of Oregon; the Commonwealth of Pennsylvania; the Commonwealth of Virginia; and the State of Washington.

Defendants are the U.S. Department of Labor; R. Alexander Acosta, in his official capacity as Secretary of the U.S. Department of Labor; and the United States of America.

Amici before the district court include: (1) the Chamber of Commerce of the United States of America and the Society for Human Resource Management; (2) the States of Texas, Nebraska, Georgia, and Louisiana; (3) Nancy Pelosi, Steny H. Hoyer, James E. Clyburn, Joseph Crowley, Linda T. Sánchez, Robert C. Scott, Frank Pallone, Jr., Jerrold Nadler, and Richard E. Neal; (4) the Restaurant Law

Center; (5) the American Medical Association and the Medical Society of the State of New York; and (6) the Coalition to Protect and Promote Association Health Plans.

Amici before this Court currently: the Oklahoma Insurance Department and the Montana State Auditor, Commissioner of Securities and Insurance, on behalf of Defendant Appellants the U.S. Department of Labor; R. Alexander Acosta, in his official capacity as Secretary of the U.S. Department of Labor; and the United States of America.

B. Rulings Under Review

Appellants seek review of the district court's order and memorandum opinion entered on March 28, 2019 (Dkt. Nos. 78, 79). The rulings were issued by the Honorable John D. Bates in Case No. 1:18-cv-1747.

C. *Related Cases.* None.

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INTEREST OF *AMICUS CURIAE* AND OVERVIEW

This appeal concerns the reasonableness of several provisions in the Department of Labor's ("DOL") Final Rule under the Administrative Procedures Act (APA) and under the judicially created *Chevron* standard. The Final Rule is an interpretation of section 3(5) of the Employees Retirement Income Security Act (ERISA) and an update to the test for determining whether a benefit plan of an employer group or association falls within the purview of ERISA. The Final Rule was adopted after an extensive notice-and-comment period. The Oklahoma Insurance Department ("OID") and the Montana State Auditor, Commissioner of Securities and Insurance (CSI), have a considerable interest in matters relating to insurance companies and the public with regard to insurance products and regulation. Although this brief illustrates the specific concerns of OID, CSI joins in the opinions expressed in this brief by OID because Montana shares these concerns as a state where small businesses predominate, and thus are uniquely effected by the district court's decision. Further, to address the changes in the federal insurance regulatory scheme, some states—including Oklahoma—enacted new state legislation to conform to the Final Rule.

The district court held that several provisions of the Final Rule were unreasonable interpretations of ERISA and therefore were vacated. We file this

brief to add our voice to the supporters of the Final Rule, and to illustrate the reasons why upholding the Final Rule is of vital interest to Oklahoma and other states. The district court opinion, if upheld, would result in less affordable healthcare—contradictory to both the purpose of ERISA and the Affordable Care Act (ACA)—and in place of the flexibility of the Final Rule, would create a single strict rule under the previous inflexible and outdated DOL sub-regulatory guidance. This result would obstruct access to affordable healthcare. The district court ruling would also result in significant harm to citizens and states that enacted laws as a result of the Final Rule. For those reasons, this Court should overrule the district court's holding in this case.

ARGUMENT

I. The Final Rule is a flexible and reasonable standard

Under Section 3(5) of title I of ERISA, an employer group or association is permitted to establish a single group health plan, known as an "association health plan" or AHP. The DOL's long standing sub-regulatory guidance provided an interpretation of an "employer group or association." In particular, the prior test was based on three broad sets of issues:

> (1) Whether the group or association [was] a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share[d] some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that

> participate[d] in a benefit program, either directly or indirectly, exercise[d] control over the program, both in form and substance.[1]

All of these elements substantially remain in the Final Rule promulgated by the DOL in June 2018, but the Rule now provides a more flexible regime, allowing employer groups or associations to continue using the existing DOL criteria, but also creating a new definition of ERISA-eligible AHPs, adding an additional method of satisfying the AHP commonality of interest requirement -- based on a geographic area -- and allowing AHPs to be formed for the primary purpose of offering health coverage, so long as the group of employers sponsoring the AHP has at least one other substantial business purpose. The Final Rule also allows sole proprietors to remain in or join ERISA-eligible AHPs. With regard to the existing sub-regulatory guidance, and the new interpretations, the DOL sought to fill the gap where the U.S. Congress included employer groups and associations under the ERISA definition of employer without further guidance.[2]

The Final Rule adds a new more flexible test to the existing sub-regulatory guidance. Flexibility is generally becoming more important in federal legislation,[3]

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[1] Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,912, 28,914 (Jun. 21, 2018).

[2] *See* 29 U.S.C. § 1002(5); *see also* Mem. Of Points and Authorities in Supp. of Defs.' Mot. To Dismiss, or, in the Alternative, for Summ. J., and Opp'n to Pls.' Mot. for Summ. J. 25, ECF No. 47-1.

[3] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012); *see also Summary of the Regulatory Flexibility Act, as Amended by the Small Business Regulatory*

as well as within the judiciary.[4] In particular, the U.S. Supreme Court has noted that a flexible rule may be necessary to comport with the ordinary meaning of a

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Enforcement Fairness Act, U.S. Environmental Protection Agency https://www.epa.gov/laws-regulations/summary-regulatory-flexibility-act-amended-small-business-regulatory-enforcement (last visited May 19, 2019).

[4] *See Ass'n of Admin. Law Judges v. Fed. Labor Relations Auth.*, 397 F.3d 957, 962 (D.C. Cir. 2005) ("Neither the finding in [this section], nor any other provision of the Statute, however, gives any indication 'the Congress has taken a position so [extraordinarily] rigid that it will not admit of a de minimis exemption.' On the contrary, the Congress took the unusual step of prescribing a practical and *flexible rule* of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government,'—that clearly invites the Authority to exercise its judgment, as it has done in the order under review. *Effectiveness and efficiency in government can hardly be thought to require bargaining over truly insignificant conditions of employment. As the Authority reasonably concluded, 'No interests are served by requiring bargaining over every single management action, no matter how slight the impact.'*" (second alternation in original) (emphasis added) (citations omitted); *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (10th Cir. 2003) (noting the court "purposefully fashioned a flexible rule"); *Graphic Prods Distribs, Inc. v. Itek Corp.*, 717 F.2d 1560, 1567 (11th Cir. 1983) (applying the flexible rule); *Tenn. Gas Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 606 F.2d 1094, 1124 (D.C. Cir. 1979) (Wilkey, J., concurring) ("In Judge Leventhal's opinion for the court the Commission has properly been allowed wide discretion in fashioning a new and more flexible rule on remand."); *Burlington N., Inc. v. Boxberger*, 529 F.2d 284, 290 (9th Cir. 1975) ("Rather, Judge Friendly, in speaking for the majority, adopted a flexible rule….a number of other Circuits that have endorsed the flexible…approach…"); *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, No. 4:15-cv-00539, 2016 WL 4502456, at *3 (M.D. Pa. Aug. 29, 2016); *Wade v. Brady*, 460 F. Supp. 2d 226, 240 (D. Mass., 2006) (noting that stare decisis is a flexible rule); *Homefinder's of Am., Inc. v. Providence Journal Co.*, 471 F. Supp. 416, 422 (D.R.I. 1979) (citing *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977)) (noting the U.S. Supreme Courts "recent[] embrace" of a more flexible interpretation of an existing law).

word.[5] The flexible rule may also be necessary to further the policies of the acts at issue.[6] Finally, a more flexible rule may be needed for a court to have the opportunity to look at the specific facts in a case or whether a specific situation furthers the purpose of the law at issue.[7] Congress' lack of clarification as to the definition of a group or association logically leads to an assumption that Congress intended a flexible approach to determining whether a group or association falls within the scope of ERISA.[8]

The district court acknowledges that Congress delegated to the Secretary of Labor the authority to "prescribe such regulations as he [or she] finds necessary or appropriate to carry out the provisions of [ERISA]." In the case of the Final Rule, we believe the Secretary reasonably acted on this authority by promulgating a regulation that not only updated an outdated, strict standard developed through sub-regulatory guidance, but the Secretary developed a flexible approach that will provide greater access to affordable and quality health coverage for small

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[5] See *Pioneer Inv. Servs Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 381 (1993) ("This flexible understanding comports with the ordinary meaning of 'neglect.'")

[6] *See id.*

[7] *See McCracken v. McConnell*, 56 Pa. D. & C.2d 681, 686 (Pa. Ct. Com. Pl. 1972) (quoting *Griffith v. United Air Lines, Inc.*, 203 A. 2d 796 (Pa. 1964)) ("'We are of the opinion that the strict…rule should be abandoned…in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the Court.'").

[8] *See Local 3489, USW v. Usery*, 429 U.S. 305, 313 (1977) (noting that Congress' use of a general term showed "Congress clearly contemplated [use of] a flexible [rule]").

businesses and sole proprietors, which is consistent with ERISA's underlying purpose.

Contrary to the district court's conclusion, we believe that the Secretary's interpretation of ERISA was reasonable. Specifically, employers in different industries that share the same geography do indeed share a "commonality" that will strengthen the required "genuine organizational relationship." The common bond among these geographically-based employers stems from their common interest in promoting a vibrant local economy and protecting the well-being of the men and women and their families living in their local community. The control test strengthens this common bond among geography-based employers by requiring the participating employers in an AHP to elect a governing Board that is required by law to "act in the best interest" of the AHP participants (*i.e.*, ERISA's fiduciary duties apply to the governing Board). This control, coupled with the commonality and genuine organizational relationship that geography-based employers share, reasonably creates an bona fide employment-based arrangement operated and managed by employers, as opposed to the commercial insurance-type arrangements which the Department of Labor has sought to address in *all* of its AHP guidance.

The Secretary also acted reasonably when clarifying that self-employed individuals with no employees (*i.e.*, "working owners") can participate in an AHP.

There is clearly an employment relationship that exists when a working owner generates taxable income for himself or herself through the performance of services for a third-party. And, as our nation's economy continues to evolve into a competitive, global economy, there is no denying that more and more working owners are providing services in a non-traditional employment-based setting.

The U.S. Supreme Court allows a federal agency or department (in this case the DOL) with properly delegated authority to supersede its previous interpretations, especially as articulated in sub-regulatory guidance such as non-binding advisory opinions, to address marketplace developments and new policy and regulatory issues.[9] Consistent with this authority, and consistent with Congress' intention to allow the Secretary to carry out the provisions of ERISA, allowing working owners to access workplace benefits through an ERISA-covered employee benefit plan is not only reasonable, but necessary in today's economic climate.

II. The Final Rule promotes insurance coverage for a significant number of small business employees and sole-proprietors that are currently uninsured, especially in Oklahoma and similar states with a high percentage of small businesses.

The Final Rule, if upheld, will result in a decrease in the uninsured population because it offers a new, more flexible option to the existing DOL

[9] *See Perez v. Mortgage Bankers Ass'n*,-----U.S. ------,135 S.Ct. 1199,1210-1211 (2015); *see also*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

guidance on AHPs. While this may not be an important consideration in places like the District of Columbia, it is vital in states like Oklahoma. Oklahoma is ranked second in the nation for the highest percentage of non-elderly without health insurance. Oklahoma's non-elderly uninsured population is 16.4% compared to the District of Columbia's 4.1% uninsured population, and the nation with a 10.2% non-elderly uninsured population.[10] The only state that has a higher uninsured non-elderly population than Oklahoma is Texas.[11]

In Oklahoma, there are approximately 287,233 employed Oklahomans without insurance,[12] not including the spouses and children of employed Oklahomans without insurance. Further, the employer's size impacts the likelihood of sponsoring health insurance benefits because the administrative costs and risk are spread across fewer employees resulting in higher insurance costs.

Finally, Oklahomans are more likely to work for a small business. In 2018, the U.S. Small Business Administration Office of Advocacy stated in a Small Business Profile that Oklahoma had 347,165 small businesses—99.4% of

[10] *See Key Facts About the Uninsured Population*, Henry J Kaiser Family Foundation (Dec. 7, 2018), https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/

[11] *See id.*

[12] *See Percentage Without Health Insurance Coverage: United States*, U.S. Census Bureau,https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last viewed May 31, 2019).

Oklahoma businesses—and 712,797 small business employees.[13] Agriculture and construction were each significantly comprised of small businesses at 86.0% and 88.1% respectively.[14] As expected, the highest impact will be in rural communities of Oklahoma where farming and construction are providing many jobs.[15] In the Oklahoma panhandle, farm workers make median hourly earnings of $12.99.[16] Yet in central Oklahoma, a construction worker can make as little as $14.18 in the area of Oklahoma considered to be "one of the engines promoting economic development and job growth in the state."[17] With such low earnings and such high concentration of small businesses, Oklahoma has been a perfect storm for creating a harsh deficit in the number of the insured.

III. The Final Rule should be permitted because it promotes a new and efficient path to providing citizens with affordable healthcare.

The Final Rule was promulgated as an attempt to "address changes in the 'law, market dynamics and employment trends' that had left many employers unable to provide quality healthcare coverage for their employees at reasonable

[13] *See Oklahoma Small Business Profile*, U.S. Small Bus. Admin. Off. Advoc. 149 (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-OK.pdf.
[14] *See id.*
[15] *See id.*
[16] *See Northwest Oklahoma Regional Ecosystem Report*, Okla Dep't Com. (2014), https://okcommerce.gov/assets/files/data-and-research/workforce-data/ecosystem-profiles/Ecosystem_Profile_Northwestern.pdf.
[17] *See Central Oklahoma Workforce Briefing*, Okla Dep't Com. (2014), https://okcommerce.gov/assets/files/data-and-research/workforce-data/ecosystem-profiles/Ecosystem_Profile_Central.pdf.

costs."[18] This followed President Trump's broad policy to "facilitate…the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people."[19] Similarly, ACA's purpose "is to make health insurance more affordable for those with little or no coverage."[20]

However, in our opinion, healthcare has not become more affordable under ACA. The Kaiser Family Foundation systematically analyzes the costs of healthcare in the United States and determined that healthcare costs continue to rise at constant and staggering rates.[21] An important note from this research is that the spending on public health has increased, particularly by state and local governments.[22] The states ultimately bear this burden.

The district court criticized the Final Rule as circumventing ACA. As others have argued before this court, we do not agree that the Final Rule circumvents the ACA. ERISA and ACA have a common goal: to provide affordable healthcare. As

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[18] Mem. Points & Authorities Supp. Defs.' Mot. Dismiss, or, Alternative, Summ. J., & Opp'n Pls.' Mot. Summ. J. 11, ECF No. 47-1.
[19] 82 Fed. Reg. 48,385 (Oct. 12, 2017).
[20] Steve Adams, Jules Clark, & Luke F. Delorme, *Understanding the ACA: How the Affordable Care Act Affects Your Health Insurance Costs*, Am. Inst. for Econ. Res. (May 8, 2014), https://www.aier.org/research/understanding-affordable-care-act.
[21] *See* Rabah Kamal & Cynthia Cox, *How Has U.S. Spending on Healthcare Changed Over Time?*, Peterson-Kaiser Health Sys. Tracker, https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/#item-spending-on-public-health-has-increased-particularly-by-state-and-local-governments_2017 (last visited May 21, 2019).
[22] *See id*.

such, the Final Rule sought to further this common goal. Some Members of Congress asserted in an *amicus* brief before the district court that the Final Rule is not consistent with the text, structure, and history of ACA.[23] Yet the brief illustrated the concern that Congress had with the small and individual market.[24] This is the very issue which the DOL attempted to address with the Final Rule. Despite this, the *Amici* in the district court appear to be merely concerned with *how* they want citizens to get affordable healthcare, and not the reality as to whether citizens actually get affordable healthcare. The *Amici* concerns do not address that Congress delegated the authority to the Department of Labor to define the terms of an AHP, and to do so in a manner that is protective of participants and beneficiaries. And that is what the Final Rule does.

Nevertheless, the impact of ACA is important to look at here. ACA was enacted in 2010. From 2010 to 2013, there was a minimal change to the number of uninsured.[25] From 2013 to 2016, there was a significant decrease in the number of uninsured.[26] However, from 2016 to present, there has been an increase in the

[23] *See* Br. Members Congress *Amici Curiae* Supp. Pl.s 1, ECF No. 57.
[24] *See id.* at 1–2.
[25] *See* Chris Lee, *The Number of Uninsured People Rose in 2017, Reversing Some of the Coverage Gains Under the Affordable Care Act*, Henry J Kaiser Family Found. (Dec. 10, 2018), https://www.kff.org/uninsured/press-release/the-number-of-uninsured-people-rose-in-2017-reversing-some-of-the-coverage-gains-under-the-affordable-care-act/.
[26] *See id*.

number of uninsured.[27] This is a reverse in the coverage gains seen under ACA.[28] While evidence of this trend was supported in prior briefs before the district court,[29] it was not presented with statistics in states like Oklahoma—which has a staggering 99.4% of all businesses being a small business.[30] Seeing the trend in light of states with a strong small business market is important. While the trend has been that ACA provided an avenue for increased affordable healthcare, that trend is now clearly reversing, especially in states like Oklahoma with a large number of small businesses. The Final Rule is the most efficient way to increase affordable healthcare to U.S. citizens in light of this reversal.

IV. The cost of rejecting the DOL's Final Rule is significant in light of state legislative changes.

The OID anticipates significant cost associated with the district court's decision. In particular, Oklahoma enacted significant changes to the Oklahoma Small Employer Health Insurance Reform Act to work in tandem with the Final Rule.[31] Thus, if the Final Rule is invalidated, there will be considerable cost for

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[27] *See id*.
[28] *See id*.
[29] *See* Br. Chamber of Commerce U.S. of Am. & Society Human Resource Management *Amici Curiae* Supp. Defs.' Mot. Dismiss, or, Alternatively, Cross-Mot. Summ. J., & Opposition Pls.' Mot. Summ. J. 4, ECF No. 51-1.
[30] *See Oklahoma Small Business Profile*, U.S. Small Bus. Admin. Off. Advoc. 149 (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-OK.pdf.
[31] *See* S.B. 943, 57th Gen. Sess. (Okla. 2019); H.B. 2424, 57th Gen. Sess. (Okla. 2019).

Oklahoma, as for other states that enacted legislation in reliance upon the Final Rule—which, to date, includes eight states, in addition to Oklahoma.[32] Each of these states will likely need to spend hundreds of more hours proposing and passing new legislation if the district court's decision is upheld. This cost does not even take into account the number of employers and other individuals in Oklahoma and elsewhere who have made changes to their benefit plans in reliance on the Final Rule.

Importantly, the OID does not anticipate fraud or insolvency risks under the Final Rule's expansion of AHPs. While concerns of fraud have been raised in previous *amicus* briefs,[33] the states are still able to exert authority when fraud is discovered.[34] Importantly, the states are currently exerting authority over small business health insurance fraud. That fact has not and will not change. Further, bad faith claims litigation is a well-developed area of law. Regarding solvency, the states' laws on solvency are not preempted by ERISA. The states will still have authority with regard to solvency issues and financial examinations.[35] Therefore, the cost to change laws recently enacted and the unlikely probability of additional fraud and solvency issues favor upholding the Final Rule.

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[32] Arizona, Arkansas, Florida, Hawaii, Iowa, Kansas, Kentucky, and South Dakota.
[33] *See* Br. *Amici Curiae* Am. Medical Ass'n & Medical Society of the State of New York Supp. Pls.' Mot. Summ. J. 21–23, ECF No. 62.
[34] 83 Fed. Reg. at 28,953.
[35] Okla. Stat. tit. 36, §§ 638 and 640 (1993).

CONCLUSION

This Court should overturn the district court's finding that provisions of the Final Rule, codified at 29 C.F.R. §§ 2510.3-5(b), (c) and (e), were unreasonable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(g). This brief contains 4,596 words.

/s/ Susan Elizabeth Rees
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellant CM/ECF system.

/s/ Susan Elizabeth Rees
SUSAN ELIZABETH REES