[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 19-5125

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

STATE OF NEW YORK, ET. AL,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia (Nos. 1:18-cv-01747-JDB)

BRIEF OF AMICUS CURIAE SMALL BUSINESS MAJORITY FOUNDATION, INC. IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), Amicus Small Business Majority Foundation, Inc. certifies as follows:

(A) Parties and Amici. Plaintiffs in the district court, and appellants here, 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 in the district court, and appellees here, 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 supporting the plaintiffs in the district court were the American Medical Association, the Medical Society of the State of New York, and the following Members of the United States House of Representatives: 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.

The amici curiae supporting the defendants in the district court were the

States of Texas, Nebraska, Georgia, and Louisiana; the Chamber of Commerce of the United States of America; the Society for Human Resource Management; the Restaurant Law Center; and the Coalition to Protect and Promote Association Health Plans. The amici curiae supporting the plaintiffs-appellees in this Court will file their briefs by July 22, 2019, one week after this brief is filed. The amici curiae supporting the defendants-appellants in this Court are the States of Texas, Alabama, Georgia, Indiana, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia; Governors Phil Bryant of Mississippi and Matt Bevin of Kentucky; the Oklahoma Insurance Department and Montana State Auditor; the Chamber of Commerce of the United States of America, and state and local chambers of commerce, the National Federation of Independent Business, the Texas Association of Business and the United Service Association for Health Care; the Coalition to Protect and Promote Association Health Plans and AssociationHealthPlans.com; the National Association of Realtors and state and local associations of Realtors; and the Restaurant Law Center.

(A) Ruling under Review. Under review in this appeal are the Memorandum Opinion of the Honorable John D. Bates (Dkt. No. 79 in Case

No. 1:18-cv-1747), which is reported at 363 F. Supp. 3d 109 (D.D.C. Mar. 28, 2019); and the accompanying Order (Dkt. No. 78), which is not reported.

(B) Related Cases. The district court's order and the defendants' regulation have not previously been before this Court or any other courts. There are no other cases raising issues substantially similar to those raised in this case.

July 22, 2019

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

RULE 26.1 STATEMENT

Amicus is a nongovernmental, non-profit corporate party. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RULE 29 STATEMENTS

The parties have indicated their consent to the filing of this brief.

Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no party or party's counsel authored this brief in whole or in part, and that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), amicus states that a separate brief is necessary for the following reasons:

The Small Business Majority Foundation represents small businesses and their employees, and submits this brief to discuss the impact of the Final Rule at issue in this case. *See* Dep't of Labor, *Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans*, 83 Fed. Reg. 28,912 (June 21, 2018) ("Final Rule"), from the perspective of those small businesses and their employees. As far as the Foundation is aware, this brief will be the only one to consider the Final Rule from that unique perspective.

July 22, 2019

Respectfully submitted,

/s/ J. Carl Cecere

J. Carl Cecere

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"*" indicates authorities upon which we chiefly rely.

GLOSSARY OF ABBREVIATIONS

ACA	The Patient Protection and Affordable Care Act
AHP	association health plan
APA	Administrative Procedure Act
ERISA	Employment Retirement Income Security Act of 1974

STATEMENT OF INTEREST

The Small Business Majority Foundation, Inc. is a national nonpartisan organization founded and run by small business owners across the United States. As a leading representative for all the 28 million small businesses in America, the organization strives to advance policies that will help entrepreneurs and small employers thrive as part of an inclusive, equitable, and diverse economy. The Foundation engages in research addressing small business needs, job creation, and maximizing business opportunities and competitiveness for small businesses across the United States. And it represents the interests of small businesses before Congress, state legislatures, the Executive Branch, and the courts. In recent years, it has focused on policies that address health care costs, which limit workforce mobility and disproportionately burden small businesses. *See, e.g.*, Br. for Small Bus. Majority Found., Inc., et al., *Dep't of Health and Human Servs., et al.* v. *Florida*, 567 U.S. 519 (2012); Br. for Small Bus. Majority Found., Inc., *King* v. *Burwell*, 135 S. Ct. 2480 (2015).

Key in these efforts has been the Foundation's efforts in helping to craft the ACA, and participating in proceedings before the Department of Labor over the adoption of the Final Rule at issue in this case. *See* Dep't of Labor,

Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 28,912 (June 21, 2018) ("Final Rule"). The Foundation writes to provide its considered view on the likely effects on health insurance markets that will result if the Final Rule goes into effect, and to give the same warning it gave the Department of Labor during consideration of that rule: The ACA's successes for small businesses and their employees are built in large part on the longstanding definition of "employer" that existed before the Final Rule, which Congress adopted and ratified when it created the ACA. DOL's abrupt reversal of that policy threatens to undo much of that progress, leading to higher premiums, unbalanced risk pools, and lower-quality insurance for small businesses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Final Rule purports to be an interpretation of the term "employer" under section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, 29 U.S.C. § 1001 *et seq.*, a matter within DOL's regulatory authority. But as the district court correctly noted, this regulatory guidance is actually an attempt to expand the Department's regulatory grasp far beyond its proper boundaries. Final Rule, 83 Fed. Reg. at 28,922, 28,964. This is because the Final Rule is a deliberate attempt to control the operation

of the ACA, which incorporates ERISA's definition of the term "employer," and reverse the decades-old DOL interpretation of the term that existed before the Final Rule, which was ratified by Congress when it enacted the ACA. See, *e.g.*, Advisory Opinion 94-07A; Advisory Opinion 2001-04A. By relaxing the definition of the term "employer" under ERISA to include associated health plans (AHPs) (associations of numerous unrelated employers that join together primarily to provide health insurance) and sole proprietors (who are not "employers" at all), DOL really hopes to expand the types of entities that can avoid the most stringent requirements of the ACA, by allowing smaller employers and sole proprietors to combine to meet the less-stringent requirements imposed on large employers. Exec. Order 13,813, 82 Fed. Reg. 48,385 (Oct. 12, 2017); Final Rule, 83 Fed. Reg. at 28,912 (citing Executive Order); *see also* Alexander Acosta, *A Health Fix for Mom and Pop Shops*, Wall St. J., June 18, 2018.

The district court properly invalidated the Final Rule, recognizing the misguided nature of the DOL's Trojan Horse effort, and the violence that it does to both ERISA and the ACA. That result is not only dictated by statutory text, but also by the regulatory economics that make the ACA function—and which the Final Rule strives to undermine. The Final Rule's relaxed

conception of the term "employer" will ultimately lead to more companies with healthy workers pulling out of the small group market, leaving fewer and sicker insureds in the pool, and less money to cover costs. The end result would be skyrocketing premiums, unbalanced risk pools, and lower-quality insurance for small businesses—in short, a complete unraveling of the ACA's invaluable benefits for small business.

ARGUMENT

Rejecting the Final Rule is essential to protect the ACA's gains for small businesses and their employees.

A. Before the ACA, small businesses faced disproportionately large health care costs.

Employer-sponsored health insurance has been an economic fixture in the United States since World War II. *See* David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 Yale J. Health Pol'y & Ethics 23, 25-26 (2001) (describing the rise of employment-based coverage "fueled by federal labor and tax policy" and labor unions). Not only do "[a] majority of Americans rely on private insurance for health coverage," U.S. Gov't. Accountability Off., GAO-12-166R, *Health Care Coverage: Job Lock and the Potential Impact of the Patient Protection and Affordable Care Act* 3 (2011) (hereinafter "GAO Report"), but "[t]he majority of privately insured Americans obtain their health insurance through their own or a family

member's employment," Brigitte C. Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q.J. Econ. 27, 27 (1994).

Before many of ACA's reforms took effect in 2014, small businesses employees and the self-employed comprised a disproportionate share of the working uninsured. In 2011 more than six in ten of the nation's uninsured workers were self-employed or working at a company with fewer than 100 employees. Paul Frostin, Emp. Benefit Research Inst., *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey* 15 (2012). Small businesses were "less likely to offer their employees health coverage, citing the cost of coverage as a key reason." GAO Report at 3. And when small businesses did offer insurance, it was more expensive—for both employers and employees alike. Before the Act was implemented, small business employees typically paid "nearly 30 percent" of "the average share of … policy premiums," as compared to employees of larger firms who pay "about 7 percent." Congressional Budget Office, Economic and Budget Issue Brief, *Effects of Changes to the Health Insurance System on Labor Markets* 1 (2009). And small businesses paid 18% more on average for health coverage than larger companies, usually for less

comprehensive plans. Sean Lowry & Jane G. Gravelle, Cong. Research Serv., R43181, *The Affordable Care Act and Small Business: Economic Issues* 4 (2015).

The resulting financial strain could be significant. In a survey of small business owners in a large U.S. market undertaken as ACA's reforms were first being implemented in 2014, nearly 37% of small businesses reported that they were "directing between 5 and 10 percent of their [annual] budgets to employee health benefits," and approximately 16% noted that they were spending "more than 15% of annual budgets on health insurance." Health and Disability Advocates, *Chicago Area Small Businesses and the Affordable Care Act* 2 (2014). And small business owners employing skilled labor or operating in tight labor markets often had no choice but to bear these costs. Because health care benefits are significant to employees, ensuring employee access to health care is a significant factor in determining a small business's ability to attract top talent and succeed. *See id.* at 3 (noting 71.8% of small business respondents reported that "providing health insurance benefits helps them recruit new employees"); Adela Luque *et al.*, *The Effect of Employer Health Insurance Offering on the Growth and Survival of Small Business* 91, Upjohn Institute Technical Report No. 13-030 (2013) ("[H]ealth insurance offering

firms … are … more likely to survive….”). As a result, for the 24 million self-employed Americans and many employees of the country’s 5.8 million small businesses with employees, coverage options were both limited and undesirable before the ACA. And for many, health insurance was simply out of reach. “[O]ne in four entrepreneurs went without health insurance.” William Craig, *Four Reasons the Affordable Care Act is a Boon to Entrepreneurs*, Forbes, June 17, 2014. Small business employees were almost twice as likely to be uninsured as large business employees, and 30% of the self-employed were uninsured. *See* U.S. Small Bus. Admin., *Small Business Facts* (June 2012), <https://bit.ly/2J2OP5Y>.

B. The ACA’s small-employer protections, which build upon the conception of the term “employer” that existed before the Final Rule, have been critical in providing quality health insurance for small businesses.

The ACA’s reforms of the individual and small-employer health insurance have been critical in protecting small businesses and their employees. They have expanded access to quality care with requirements that small group plans provide “comprehensive” benefits packages, 42 U.S.C. § 300gg-6(a), and they have done so while controlling costs, with ACA-mandated “community rating” that forbids premium variations except based on certain narrow factors, 42 U.S.C. § 300gg; state exchanges enabling marketplace

shopping for individual and small group plans, 42 U.S.C. § 18031; and mandates requiring that insurers treat all enrollees in individual and small group markets as "members of a single risk pool"—which spread the costs of caring for the few, very sick people in the pool among many healthy ones. 42 U.S.C. § 18032(c).

The result has been significantly improved health care for small businesses and their employees. Gone are days of huge premium increases that were so common before the ACA—which often soared into the double digits. U.S. Dept. of Health and Human Services, Fiscal Year 2017 Budget in Brief 115 (Feb. 2016), <https://bit.ly/2GkutVl>. (reporting average yearly premium increases of 10.4% in the small group market between 2008 and 2010). After the ACA, that rate has dropped by half or more. *See id.* (reporting average yearly premium increase in small group market of 5.2% between 2011 and 2015); Sabrina Corlette *et al.*, Urban Institute and the Robert Wood Johnson Foundation, *Small Business Health Insurance and the ACA: Views from the Market 2017* 5 (2017), <https://urbn.is/2YmU2zi> (reporting 3.1% annual increase for businesses with fewer than 50 employees).

The ACA's adoption of ERISA's definition of "employer"—and its concomitant ratification of the longstanding DOL interpretation of the term

that accompanied it before adoption of the Final Rule—have been an integral part of the ACA's success by providing vital balance. By allowing certain AHPs to qualify as employers, it offered companies flexibility in determining how best to offer insurance to their employees. But by keeping that window for AHPs narrow, to include only "bona fide associations" with close economic and representational ties to their employees, the traditional rule ensured that the risk pools in the small-group markets would retain sufficient numbers of insureds to ensure that the risk pools would remain healthy and balanced—a balance that was only further fostered by including sole proprietors in the pools.

C. The Final Rule's expanded definition of "employer" and its loosening of restraints on AHAs and sole proprietors would reverse the ACA's gains for small businesses and their employees.

Yet much of the ACA's gains for small businesses and their employees will be undone if the district court's judgment is reversed and the Final Rule goes into effect. The Final Rule might make it easier for a select number of small businesses with younger, healthier employees to purchase association health plans, but those marginal gains would come at a huge systemic cost to the stability of the health insurance markets as a whole.

If the definition of "employer" is relaxed and businesses are encouraged

to leave the individual and small-business risk pools, the insurance market for small businesses will be split in two, leading to major disruptions in the individual and small-business insurance markets. Small-group markets will suffer because when small firms with healthy employees depart the small-group market to take part in AHPs, the risk pool will become unbalanced, with too many sick people's medical expenses covered by too few healthy people. That will cause health insurance premiums to soar for the small businesses and employees remaining in the small-business market. And the departures of self-employed individuals into AHPs from the individual market will have similar repercussions for the individual marketplace. That will make coverage in the individual and small group markets—where the vast majority of small businesses and employees purchase coverage—far more expensive, rolling back the gains fostered by the ACA.

Things will not be much better for the businesses that opt to leave the small-group market for an AHP. They may get less expensive coverage, but it will be less comprehensive. Because AHPs can be regulated as a single large employer under the Final Rule, they will not be subject to the rules requiring "comprehensive" benefits packages (42 U.S.C. § 300gg-6(a)) that small-group coverage must provide. Nor will AHPs be prohibited from excluding certain

core coverage such as maternity care or mental-health treatment. AHPs would also be permitted to charge higher fees based on gender, occupation, industry, or even age. Accordingly, these plans will not provide the coverage needed if someone gets sick, thus undermining one of the ACA's cornerstone values of guaranteeing universal basic coverage.

AHPs would also offer fewer consumer safeguards against fraud or other deceptive marketing practices. Indeed, employees covered by these association plans could lose the protections of the states where they live, because the regulations created for a specific plan could supersede state laws that protect consumers from rate increases and poor coverage. But state regulation of multiple employer welfare arrangements (MEWAs) has shown that such regulation is critical to protecting consumers from fraud or insolvency, and weakening states' abilities to enforce consumer protections could threaten the health and financial security of small business enrollees.

The employees of small business that opt in to AHPs could be put in particular peril under the Final Rule. Employees earning less than four-hundred percent of the federal poverty level working for small employers could lose eligibility for premium tax credits because their employer offered them an AHP. That would price them out of a plan in the individual market

that would offer the essential health benefits that the AHP would not cover. That harm to employees, who have no say in whether their employers join AHPs, should make the Court especially hesitant to reinstate the Final Rule, and allow the DOL's statutorily and economically infirm position to become law.

* * * * *

Small business owners, their employees, and self-employed individuals have benefitted significantly from the many different reforms enacted as part of the Affordable Care Act, especially the small group market reforms. Millions more working Americans, who are self-employed or employees of the Nation's small businesses, now have health insurance that they would not have had without the Act. The harm they will suffer if those protections are reversed is just one of many reasons why the public interest is not served by the Final Rule. Amicus respectfully requests that in resolving this case, the Court consider the consequences of the DOL's draconian position on the health of America's small businesses.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because this brief contains 2,513 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2013 in 14-point Century Expanded BT font, which is a proportionately spaced typeface.

/s/ J. Carl Cecere

J. Carl Cecere

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 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 using the CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ J. Carl Cecere

J. Carl Cecere