IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

State of New York, et al., Plaintiffs, v. United States Department of Labor, et al., Defendants.	Civil Action No. 18-1747 (JDB)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Society for Human Resource Management ("SHRM") states that it is a non-profit, tax-exempt organization. SHRM has no parent corporation, and no publicly held company has 10% or greater ownership in SHRM.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States (the "Chamber") and the Society for Human Resource Management ("SHRM"). They represent many of the nation's small businesses.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. A primary function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

SHRM is the world's largest human resources professional society, representing 300,000 members in more than 165 countries. For nearly seven decades, SHRM has been the leading provider of resources serving the needs of human resource professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India, and United Arab Emirates. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

This case raises an issue of significant importance to *amici*'s members and to all of America's small businesses—the availability of real opportunities for small employers to access

[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

quality, affordable health insurance coverage for their employees. *Amici* are intimately familiar with the problems small businesses encounter when attempting to secure such coverage, and have a strong interest in seeing the Labor Department's Final Rule go into effect.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on two points: the challenges faced by small businesses and working owners in securing affordable health insurance; and how the Labor Department's Rule and the Patient Protection and Affordable Care Act ("ACA") work together to help employers of all sizes to provide high-quality, affordable health coverage for their employees.

The Labor Department's Final Rule targets a serious problem: the significant decline in the percentage of small businesses offering health coverage to employees. Because of their size, small businesses and working owners face unique challenges in securing affordable health coverage. The ACA sought to address these challenges in several ways, most relevantly by imposing additional benefit requirements and rating restrictions on health plans offered in the small-group market. (The ACA imposed fewer benefit requirements and rating restrictions on plans in the large-group market because plans in that market were already providing quality, reliable, and robust coverage.) Unfortunately, the ACA's regulation of the small-group market had an unintended effect: it made matters worse for many small businesses by driving up the price of insurance to levels they simply cannot afford.

Now, the Labor Department's Final Rule offers hope to many small businesses and working owners that had been limited to plans offered in the individual and small-group markets. By allowing small businesses and working owners to band together and purchase coverage through "association health plans," or "AHPs," these companies can now enjoy health coverage in the large-group market, which offers a variety of quality options at more affordable prices. That is a logical, market-driven solution to the problems faced by small businesses and working owners. In addition to allowing more small businesses to provide health coverage, it will also make them more competitive in the marketplace, as they will be able to offer health coverage comparable to bigger businesses on a more even playing field. Providing quality, affordable health coverage

enables businesses of all sizes to attract and retain talent.

Plaintiffs repeatedly assert that the Final Rule will "overrid[e] the [ACA] and exempt[] a significant portion of the health insurance market from the ACA's core protections." Pls.' Moving Br. at 1. But the Final Rule does no such thing. The Rule does not permit AHPs to evade the ACA. Rather, AHPs are subject to the same ACA regulations that apply to large-group market plans. And the ACA's core consumer protections apply to *all* plans, including self-insured, individual, small-, and large-group market plans. Because of these ACA market-wide protections, AHPs cannot deny coverage to individuals with pre-existing conditions, charge higher premiums because of a pre-existing condition, rescind coverage, refuse to provide coverage of preventive health services, or ignore any of the other critical protections that the ACA requires plans to provide across all markets. The Final Rule only determines when small businesses and working owners will be allowed to band together; the ACA continues to govern insurance markets. Plaintiffs' motion for summary judgment suggesting otherwise should be denied, and the Department's motion should be granted.

ARGUMENT

I. The Final Rule Increases the Availability of Quality, Affordable Health Insurance for Employees of Small Businesses and Working Owners.

A. The Department's Final Rule Furthers Precisely the Same Goals as the ACA.

The ACA's purpose was to expand access, to the extent possible, to "quality, affordable health care for all Americans." Tit. I, 124 Stat. 130. As the Supreme Court has explained, the Act's overriding goal was to "increase the number of Americans covered by health insurance and decrease the cost of health care." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). So too here, "[t]he principal objective of the final rule is to expand employer and employee access to more affordable, high-quality coverage," 83 Fed. Reg. at 28,916, by facilitating the

creation and maintenance of AHPs for employees and working owners of small businesses, *id.* at 28,938-39.

B. Small Businesses and Working Owners Have Faced Particular Difficulties in Securing Affordable Coverage in the Small-Group Market, Forcing Many to Drop Coverage.

Some of the ACA's reforms targeted specific market dysfunctions, mostly within the individual and small-group markets. Before the ACA, various efforts to make health coverage more affordable caused severe malfunctions in the individual and small-group markets, including skyrocketing premiums and insurers leaving the markets. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Insurers weeded out small groups with potentially costly members by imposing volatile rate increases, implementing lengthy exclusions for pre-existing conditions, applying broad coverage exclusions, and engaging in post-claims underwriting. *See* John G. Day, *The Patient Protection and Affordable Care Act: What Does It Really Do?*, 22 Conn. Ins. L.J. 121, 134-35 (2016). The ACA sought to change the way individual and small-group health insurance is pooled, priced, structured, and delivered. *Id.* The ACA, therefore, imposed different regulatory burdens on coverage offered in the individual and small-group markets because those markets had specific failings that were not present in the large-group market.

Like any statute, not all of the ACA's reforms had their intended effect. After the ACA, employees working for large employers continued to retain stable coverage. Employees of small businesses, however, did not fare as well as expected. Many employees of small businesses faced disruptions in coverage due to canceled health insurance plans, "either because the plans did not comply with the new ACA requirements or because insurers chose not to continue offering the plans." Jennifer Tolbert, Henry J. Kaiser Family Foundation, "The Coverage Provisions in the Affordable Care Act: An Update" (Mar. 2, 2015), https://bit.ly/2Pbs3yR. Many small business owners have explained that increasing costs are the primary reason that they cannot offer health

coverage to employees and their families. 83 Fed. Reg. at 28,914-15. Certain local markets face exacerbated problems due to sharp premium increases and an ever-declining number of coverage options. *See id.* at 28,915.

Consequently, while employees of larger companies typically receive quality ACA-compliant coverage through their employers, millions of Americans employed by small companies have struggled to access quality, affordable coverage through their employment. For instance, from 2012 to 2017, "the percentage of businesses with under 50 workers offering coverage has fallen from 59 percent to 50 percent. In 2001, two thirds of those employers offered benefits." Reed Abelson, N.Y. Times, "While Premiums Soar under Obamacare, Cost of Employer-Based Plans Are Stable" (Sept. 19, 2017), https://nyti.ms/2fyyo3O. Meanwhile, health insurance offer rates among small employers with less than 10 employees decreased by 36% from 2008 to 2015. *See* Paul Fronstin, Employee Benefit Research Institute, "Fewer Small Employers Offering Health Coverage: Large Employers Holding Steady" (July 2016), https://bit.ly/2AOPeX0. Overall, as the Final Rule explains, the percentage of small businesses offering health coverage for employees "has declined substantially from 47 percent of establishments in 2000 to 29 percent in 2016." 83 Fed. Reg. at 28,947; *id.* at 28,947, n. 113. Although the exact numbers vary from study to study, based on the time period and size of employer studied, the results consistently show a marked decline in health insurance offerings by small businesses.

Many of *amici*'s members and their employees have experienced these very hardships. These small employers incur much greater per capita administrative costs than their large employer counterparts. *See, e.g.*, Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 Iowa L. Rev. 1935, 1942-43 (July 2013). They often do not have the in-house expertise necessary to navigate the complex process of choosing a quality health plan, and, by one

estimate, "administrative expenses account for 25-27% of premiums in small-group markets, but only 5-10% in large-group markets." *Id.* at 1942. Even more troublesome, the poor health of "just one or two employees can disproportionately affect the cost and availability of small-employer coverage." *Id.* at 1943. Since small establishments often purchase their coverage on an annual basis, the poor health of one employee can result in dramatic premium increases. *Id.* at 1942-43. Consequently, rates have risen dramatically for businesses in the small-group market. And the natural result has been that fewer and fewer small employers have been able to offer their employees quality, affordable health coverage.

Moreover, the structure of certain small employers, such as farms and franchises, make it difficult for these employers to provide affordable health coverage for employees. Often times, health carriers are either "unavailable or unwilling to provide coverage for the less populated areas, and if it was available it was extremely expensive for minimal protection." Washington Farm Bureau Comment Letter (Mar. 2, 2018), https://bit.ly/2JHSnuL. In those situations, AHPs provide an opportunity for small businesses and working owners to band together to improve their health coverage options. *See id.*; *see also* International Franchise Association Comment Letter (Mar. 5, 2018), https://bit.ly/2PFBeHf (explaining how AHPs enable small employer franchisees and their franchisor partners to promote their already-established economies of scale and "vertical distribution models" to offer health coverage to employees of franchisees "regionally among multiple small business[es]").

C. The Final Rule Provides a Common Sense Solution to the Problems Faced by Small Businesses and Working Owners.

The Department adopted the Final Rule after observing how such significant changes in the "law, market dynamics, and employment trends" adversely affected the ability of many Americans to access affordable, quality coverage. 83 Fed. Reg. at 28,914. Under the Final Rule,

small employers facing these problems can band together to join AHPs, which will allow those small firms to purchase coverage in the large-group market and form broader pools to negotiate better coverage terms.

The Final Rule thereby promotes economies of scale and administrative efficiency for small businesses. *See* Chamber of Commerce of the United States of America Comment Letter (Mar. 6, 2018), https://bit.ly/2JKuxhM. As the data cited above demonstrate, small employers currently purchasing health insurance in the individual and small-group markets experience economic disadvantages compared to larger employers. They lack the "potential for administrative efficiencies," "negotiating power" and "large, naturally cohesive risk pools." *Id.* at 28,940. They also face more rigorous regulatory requirements, which generally "limit[] choice and rais[e] premiums for those who do not expect to have high medical needs." *Id.*

The Final Rule addresses that problem by giving small employers in an association access to coverage through the large-group market, which generally provides better choices of coverage at lower premiums by spreading risk across larger populations. *See* National Federation of Independent Business Comment Letter (Jan. 23, 2018), https://bit.ly/2D50rEw. Like single large-group plans, AHPs operating under the Final Rule should be able to amass large shares in local health care markets and exercise greater bargaining power with local health care providers to achieve economies of scale in purchasing higher quality, more affordable health coverage options. 83 Fed. Reg. at 28,942-43. Additionally, the Final Rule authorizes AHPs sponsored by geographically-based, multi-industry organizations, which are more likely than the AHPs currently permitted to garner sufficient numbers of insureds in local healthcare markets to achieve such economies of scale. *Id.* at 28,939.

The Final Rule also allows small employers to offer health coverage that operates under

the regulatory regime that large employers enjoy. As the Rule explains, the Department expects that the Rule's modifications will enable small employers to benefit from "the same, more flexible rules to which large employer plans are subject, consistent with leveling the federal regulatory playing field between small and large employers." *Id.* at 28,941. Thus, by participating in AHPs, small employers and working owners may be able to obtain coverage that is not subject to the regulatory complexity and burdens that the ACA placed on the markets for individual and small-group health coverage in order to address the unique problems within those markets. As a result, those businesses will enjoy greater flexibility with respect to benefit package design comparable to that enjoyed by large employers. *Id.*

As one would expect, therefore, the Department anticipates that a "substantial number of uninsured people" who currently cannot obtain affordable health coverage through their small firms will enroll in AHPs. *Id.* at 28,912. And the Congressional Budget Office has predicted that approximately "400,000 people who would have been uninsured will enroll in AHPs." *Id.*; United States Congressional Budget Office, "Federal Subsidies for Health Insurance Coverage for People under Age 65: 2018 to 2028" (May 2018), https://bit.ly/2IIPtEL.

D. The Final Rule Makes Small Businesses More Competitive.

AHPs under the Final Rule promote competition at two levels. First, by giving groups of small employers "increased bargaining power [*vis-à-vis*] hospitals, doctors, and pharmacy benefit providers, and creating new economies of scale, administrative efficiencies, and a more efficient allocation of plan responsibilities," AHPs can reduce the cost of health coverage to participating small employer members, as discussed above. 83 Fed. Reg. at 28,912.

Second, these increased efficiencies and cost reductions will allow smaller businesses to compete more effectively with larger businesses. Providing quality, affordable health coverage options enables smaller firms to attract and retain talent. *See* Society for Human Resource

Management Comment Letter (Mar. 6, 2018), https://bit.ly/2yUFNnJ. A recent survey conducted by the Employee Benefits Research Institute found that workers are largely dissatisfied with the cost of their health insurance. *See* Paul Fronstin, Employee Benefit Research Institute, "Workers Rank Health Care as the Most Critical Issue in the United States" (Sept. 24, 2018), https://bit.ly/2JIx77Z. "Just 22 percent are extremely or very satisfied with the cost of their health insurance plan, and only 21 percent are satisfied with the costs of health care services not covered by insurance." *Id.* Approximately half of those surveyed "reported having an increase in health care costs in the past year." *Id.* And these rising health care costs impact employees' general financial wellbeing: Roughly "24 percent state that they have decreased their contributions to retirement plans, and 41 percent have decreased their contributions to other savings" due to the increased costs of health insurance. *Id.*

A firm's ability to provide quality health coverage is among the most important factors Americans consider before taking a new job. "In 2018, 26 percent of workers rank health care as the most critical issue in the United States," and "73 percent of workers report that health insurance is one of the top three most important benefits when considering whether to stay in or choose a new job, whereas only 57 percent report that a retirement savings plan is in the top three." *Id.* One study concluded that "[g]ood health insurance" ranked as the "most important benefit" among job applicants. Ashley Stahl, Forbes, "Employers, Take Note: Here's What Employees Really Want" (Oct. 16, 2016), https://bit.ly/2SHvoE9.

* * *

For all of these reasons, a broad cross-section of employees, employers, and working owners support this sensible policy. For instance, associations of court reporters, realtors, and contractors submitted comments during the rule-making process supporting the Department's new

rule and requesting that a pathway to AHPs be paved to allow access to improved health coverage. *See* Arizona Court Reporters' Association Comment Letter (Mar. 3, 2018), https://bit.ly/2ztP1Xn; Louisiana Realtors' Comment Letter (March 5, 2018), https://bit.ly/2qtwiar; Air Conditioning Contractors of America's Comment Letter (Mar. 1, 2018), https://bit.ly/2RAHs8y. At a minimum, the Department exercised its regulatory discretion in a reasoned manner to improve the health coverage options available to small businesses and working owners.

II. Rather than Undermine the ACA, the Department's Final Rule Builds on It To Offer More Americans Quality, Affordable Health Coverage.

Despite the Final Rule's express statement that it is aimed at *expanding* the availability of quality, affordable health coverage, 83 Fed. Reg. at 28,916, Plaintiffs repeatedly accuse the Department of enacting the Final Rule "for the express purpose of negating the ACA's most important consumer protections." Pls.' Moving Br. at 12. Nothing could be further from the truth. As Plaintiffs grudgingly admit, *see id.* at 5, n. 6, the ACA's core consumer protections apply equally to plans across the individual, small-, and large-group markets.

Thus, as the Final Rule explains, AHPs must follow the same rules as other large-group plans. AHPs, like other single large-group health plans, cannot "charg[e] participants and beneficiaries higher premiums because they have a pre-existing health condition," nor can they "deny[] coverage of an otherwise covered but pre-existing health condition." *Id.* at 28,941; 42 U.S.C. § 300gg-3. AHPs must also provide the remainder of the ACA's core consumer protections, *see* 83 Fed. Reg. at 28,941-42, including those that prohibit lifetime or annual limits on benefits, *see* 42 U.S.C. § 300gg-11; prohibit insurers from rescinding coverage except in cases of fraud or misrepresentation, *see* 42 U.S.C. § 300gg-12; require the coverage of certain preventive health services without cost-sharing, *see* 42 U.S.C. § 300gg-13; and require the extension of dependent coverage to children up to age 26, *see* 42 U.S.C. § 300gg-14.

Plaintiffs also claim that the Final Rule will destabilize the small-group health insurance market. But Plaintiffs offer no more than conjecture to support this argument, while the Department offers reasoned explanations for why the potential value of AHPs, discussed above, outweighs the risk of market disruption. *See* 83 Fed. Reg. at 28,947-50; Defs.' Moving Br. 50-51. And, despite the ACA's intentions, the individual and small-group markets are currently unstable, unaffordable, and inaccessible to millions of Americans working for small businesses—which is precisely why many small employers want the opportunity to participate in the more stable large-group market. The Labor Department made the rational policy choice to provide those smaller employers—and their employees—with that opportunity.

Plaintiffs' legal arguments ultimately rest on the flawed theory that the ACA treats *employees* of small and large businesses differently. But that is not the case. The ACA treats the small-group and large-group *markets* differently. *See, e.g.*, 42 U.S.C. § 300gg-6(a) ("A health insurance issuer that offers health insurance coverage in the individual or small group *market* shall ensure that such coverage includes the essential health benefits package required under section 18022(a) of this title." (emphasis added)). Whether an individual is ultimately best served through the small- or large-group market depends in part on market forces (such as the size of his or her employer) and in part on ERISA (which regulates when small employers and working owners can band together). The ACA then regulates the relevant market, and the Final Rule does not change that one bit: employers must still provide insurance that complies with the small-group market requirements if they purchase or offer a plan that is regulated by that market, and must comply with large-group market requirements if they purchase or offer a plain that is regulated by that market, through AHPs or otherwise.

In short, the Final Rule aims to *promote*, not undermine, the very objectives the ACA seeks

to achieve. Congress enacted the ACA to "increase the number of Americans covered by health insurance and decrease the cost of health care." *Sebelius*, 567 U.S. at 538. And as the Department has expressly stated, "[t]he principal objective of the final rule is to expand employer and employee access to more affordable, high-quality coverage" to ensure that more Americans purchase and maintain health insurance coverage. 83 Fed. Reg. at 28,916. The Final Rule thus provides a thoroughly considered, logical, and lawful exercise of the Department's regulatory discretion. It is consistent with the ACA, and it is not arbitrary or capricious. It should therefore be upheld.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, and Defendants' motion to dismiss, or in the alternative, for summary judgment, should be granted.

Dated: November 6, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7(o), this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 3,559 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the type-face requirements and the type-style requirements of Local Rule 5.1(d) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 12-point font.

CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2018, I electronically filed the foregoing Brief of the Chamber of Commerce of the United States of America and the Society for Human Resource Management as *Amici Curiae* in Support of Defendants' Motion to Dismiss, or, in the Alternative, Cross-Motion for Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment with the Clerk of the District Court for the District of Columbia by using the electronic CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: November 6, 2018

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