

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 19-5125

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

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STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants-Appellants.

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**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES  
OF AMERICA, 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 AS *AMICI CURIAE*  
IN SUPPORT OF APPELLANTS**

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## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    The Final Rule Aims to Solve Problems Working Owners and Small Businesses Have Long Experienced When Attempting to Secure Affordable Coverage. ....	3
II.   The Final Rule Provides a Common Sense, Highly Effective Solution that Improves Competition While Benefiting Millions of Small- Business Employees and Working Owners.....	7
A.   The Final Rule Provides a Common Sense Solution to the Problems Faced by Small Businesses and Working Owners.....	7
B.   The Final Rule Makes Working Owners and Small Businesses More Competitive by Enabling Them to Secure Affordable, Quality Health Coverage.....	14
III.  The Department’s Final Rule Builds on ERISA and the ACA to Offer More Americans Quality, Affordable Health Coverage. ....	17
CONCLUSION .....	20

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Air Transport Ass’n of Am. v. Nat. Mediation Bd.</i> , 663 F.3d 476 (D.C. Cir. 2011).....	18
<i>F.C.C. v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	18
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015).....	4
<i>Nat’l Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	20
<b>Statutes</b>	
42 U.S.C. § 300gg-3.....	19
42 U.S.C. § 300gg-11.....	19
42 U.S.C. § 300gg-12.....	19
42 U.S.C. § 300gg-13.....	19
42 U.S.C. § 300gg-14.....	19
Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010).....	<i>passim</i>
Administrative Procedure Act, Pub. L. No. 79-104 (1946).....	17-18
Employee Retirement Income Security Act, Pub. L. No. 93-406 (1974).....	2, 17
<b>Other Authorities</b>	
83 Fed. Reg. at 28,912 (June 21, 2018).....	<i>passim</i>
Amy B. Monahan & Daniel Schwarcz, <i>Saving Small-Employer Health Insurance</i> , 98 Iowa L. Rev. 1935, 1942-43 (July 2013).....	6

Ashley Stahl, Forbes, “Employers, Take Note: Here’s What Employees Really Want” (Oct. 16, 2016), <a href="https://bit.ly/2SHvoE9">https://bit.ly/2SHvoE9</a> .....	16-17
Chamber of Commerce of the United States of America Comment Letter (Mar. 6, 2018), <a href="https://bit.ly/2JKuxhM">https://bit.ly/2JKuxhM</a> .....	12
Jennifer Tolbert, Henry J. Kaiser Family Foundation, “The Coverage Provisions in the Affordable Care Act: An Update” (Mar. 2, 2015), <a href="https://bit.ly/2Pbs3yR">https://bit.ly/2Pbs3yR</a> .....	4-5
John G. Day, <i>The Patient Protection and Affordable Care Act: What Does It Really Do?</i> , 22 Conn. Ins. L.J. 121, 134-35 (2016).....	4
National Federation of Independent Business Comment Letter (Jan. 23, 2018), <a href="https://bit.ly/2D50rEw">https://bit.ly/2D50rEw</a> .....	12
Paul Fronstin, Employee Benefit Research Institute, <i>Fewer Small Employers Offering Health Coverage: Large Employers Holding Steady</i> (July 2016), <a href="https://bit.ly/2KhiCub">https://bit.ly/2KhiCub</a> .....	5
Paul Fronstin, Employee Benefit Research Institute, <i>Workers Rank Health Care as the Most Critical Issue in the United States</i> (Sept. 24, 2018), <a href="https://bit.ly/2Wrk18P">https://bit.ly/2Wrk18P</a> .....	15, 16
Reed Abelson, “While Premiums Soar under Obamacare, Cost of Employer-Based Plans Are Stable” (Sept. 19, 2017), <a href="https://nyti.ms/2fyyo3O">https://nyti.ms/2fyyo3O</a> .....	5
Society for Human Resource Management Comment Letter (Mar. 6, 2018), <a href="https://bit.ly/2yUFNnJ">https://bit.ly/2yUFNnJ</a> .....	15
Thomas J. Donohue, AHPs Are Key to Valuable Health Coverage (Apr. 29, 2019 ), <a href="https://uscham.com/2K0hU5n">https://uscham.com/2K0hU5n</a> .....	14
United States Congressional Budget Office, “Federal Subsidies for Health Insurance Coverage for People under Age 65: 2018 to 2028” (May 2018), <a href="https://bit.ly/2IIPtEL">https://bit.ly/2IIPtEL</a> .....	14
U.S. Chamber of Commerce, “Successful Association Health Plans” (last visited June 7, 2019), <a href="https://uscham.com/2XAXlj4">https://uscham.com/2XAXlj4</a> .....	<i>passim</i>

## **GLOSSARY**

ACA	Patient Protection and Affordable Care Act
APA	Administrative Procedure Act
ERISA	Employee Retirement Income Security Act
NFIB	National Federation of Independent Business

## **CORPORATE DISCLOSURE STATEMENTS**

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 National Federation of Independent Business (“NFIB”) states that it is a non-profit, tax-exempt organization. The NFIB has no parent corporation, and no publicly held company has 10% or greater ownership in the NFIB.

The Alaska Chamber of Commerce states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Alaska Chamber of Commerce.

The Louisiana Association of Business and Industry states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Louisiana Association of Business and Industry.

The Minnesota Chamber of Commerce states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Minnesota Chamber of Commerce.

The State Chamber of Oklahoma states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10%

or greater ownership in the State Chamber of Oklahoma.

The Tennessee Chamber of Commerce & Industry states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Tennessee Chamber of Commerce & Industry.

The Vermont Chamber of Commerce states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Vermont Chamber of Commerce.

Wisconsin Manufacturers & Commerce states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in Wisconsin Manufacturers & Commerce.

The Greater Fairbanks Chamber of Commerce (Alaska) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The East Valley Chambers of Commerce Alliance (Arizona) represents seven chambers in Arizona: the Carefree Cave Creek Chamber of Commerce, the Gilbert Chamber of Commerce, the Mesa Chamber of Commerce, the Queen Creek Chamber of Commerce, the Scottsdale Chamber of Commerce, the Superstition Region Chamber of Commerce, and the Tempe Chamber of Commerce. The East Valley Chambers of Commerce Alliance, and the Chambers therein, are non-profit, tax-exempt organizations. No publicly held company has 10% or greater ownership

in the East Valley Chambers of Commerce Alliance or the Chambers therein.

The Tucson Metro Chamber (Arizona) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Tucson Metro Chamber.

The Greater Miami Chamber of Commerce (Florida) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Miami Chamber of Commerce.

The Bolingbrook Area Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Carol Stream Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

Chamber630 (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Elgin Area Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.



The Elmhurst Chamber of Commerce & Industry (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Heritage Corridor Business Alliance (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Heritage Corridor Business Alliance.

The Orland Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The St. Charles Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The West Suburban Chamber of Commerce and Industry (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Wheaton Chamber of Commerce (Illinois) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Traverse City Area Chamber of Commerce (Michigan) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly

held company has 10% or greater ownership in the Chamber.

The Northwest Chamber of Commerce (Missouri) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Boulder City Chamber of Commerce (Nevada) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Henderson Chamber of Commerce (Nevada) is a non-profit, tax-exempt organization incorporated in Henderson, Nevada. The Henderson Chamber of Commerce has no parent corporation and no publicly held company has 10% or greater ownership in the Chamber.

The Las Vegas Asian Chamber of Commerce (Nevada) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Las Vegas Asian Chamber of Commerce.

The Las Vegas Latin Chamber of Commerce (Nevada) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Las Vegas Latin Chamber of Commerce.

The Las Vegas Metro Chamber of Commerce (Nevada) states that it is a non-

profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Las Vegas Metro Chamber of Commerce.

The Reno + Sparks Chamber of Commerce (Nevada) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Reno + Sparks Chamber of Commerce.

The Urban Chamber of Commerce (Nevada) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Urban Chamber of Commerce.

The Zebulan Chamber of Commerce (North Carolina) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Zebulan Chamber of Commerce.

The Chester County Chamber of Business and Industry (Pennsylvania) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Greater Lexington Chamber of Commerce and Visitor Center (South Carolina) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Lexington Chamber.

The Allen Fairview Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Cedar Hill Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Colleyville Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Chamber (Schertz-Cibolo-Selma Area) (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Denison Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The East Parker County Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Frisco Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company

has a 10% or greater ownership in the Chamber.

The Garland Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Granbury Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Grand Prairie Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Grapevine Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Grapevine Chamber of Commerce.

The Greater Arlington Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Arlington Chamber of Commerce.

The Greater Waco Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Waco Chamber of Commerce.

The Hurst Euless Bedford Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Lake Cities Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Lewisville Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Longview Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Lubbock Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Mansfield Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Melissa Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held

company has a 10% or greater ownership in the Chamber.

The Mesquite Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The North Texas Gay Lesbian Bisexual Transgender Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Plano Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Pottsboro Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Rockwall Area Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Rowlett Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The San Antonio Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Wichita Falls Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Wylie Chamber of Commerce (Texas) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Marshfield Area Chamber of Commerce & Industry (Wisconsin) states that it is a non-profit, tax-exempt organization with no parent corporation, and that no publicly held company has a 10% or greater ownership in the Chamber.

The Texas Association of Business states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has a 10% or greater ownership in the Texas Association of Business.

The United Service Association for Health Care is a non-profit corporation chartered in Washington, D.C. It has no parent corporation, and no publicly held company has a 10% or greater ownership in the United Service Association for Health Care.



**STATEMENT REGARDING**  
**CONSENT TO FILE AND SEPARATE BRIEFING**

All parties have consented to the filing of this brief. *Amici curiae* filed their notice of intent to participate as *amici curiae* on June 5, 2019.

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* hereby certify that it is not practicable to file a joint *amicus curiae* brief with other potential *amici* in support of Appellant and that it is therefore necessary to file a separate brief.

Counsel for these *amici* reached out to other trade associations that may have been interested in participating as *amici* in this case, in hopes that all non-governmental *amici* could file a single brief. This effort resulted in the present coalition, which reduced the number of potential *amicus curiae* filings.

The State and Local Chambers have a unique perspective, as many of them have offered, or planned to offer, geographically-based, multi-industry association health plans under the Final Rule. *Amici* have endeavored to reduce the overlap between this brief and other briefs that may be filed by other *amici* with different perspectives.

## **IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are the Chamber of Commerce of the United States of America (the “Chamber”), 63 State and Local Chambers of Commerce, the National Federation of Independent Business (“NFIB”), the Texas Association of Business, and the United Service Association for Health Care. They represent many of the nation’s small businesses and working owners who will benefit from Final Rule at issue here.

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.

The NFIB, based in Nashville, Tennessee, is the nation’s leading small

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* state that the parties have consented to the filing of this brief. 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.

business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files *amicus curiae* briefs in cases that threaten to harm small businesses.

A number of State and Local Chambers of Commerce also join this brief as *amici curiae*. Those "State and Local Chambers" include: the Alaska Chamber of Commerce, the Louisiana Association of Business and Industry, the Minnesota Chamber of Commerce, the State Chamber of Oklahoma, the Vermont of Chamber of Commerce, the Tennessee Chamber of Commerce & Industry, Wisconsin Manufacturers & Commerce, the Greater Fairbanks Chamber of Commerce (Alaska), the East Valley Chambers of Commerce Alliance (Arizona),<sup>2</sup> the Tucson Metro Chamber (Arizona), the Greater Miami Chamber of Commerce (Florida), the Bolingbrook Area Chamber of Commerce (Illinois), the Carol Stream Chamber of Commerce (Illinois), Chamber630 (Illinois), the Elgin Area Chamber of Commerce (Illinois), the Elmhurst Chamber of Commerce & Industry (Illinois), the Heritage Corridor Business Alliance (Illinois), the Orland Chamber of Commerce (Illinois),

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<sup>2</sup> The East Valley Chambers of Commerce Alliance represents seven chambers in Arizona: the Carefree Cave Creek Chamber of Commerce, the Gilbert Chamber of Commerce, the Mesa Chamber of Commerce, the Queen Creek Chamber of Commerce, the Scottsdale Chamber of Commerce, the Superstition Region Chamber of Commerce, and the Tempe Chamber of Commerce.

the St. Charles Chamber of Commerce (Illinois), the West Suburban Chamber of Commerce and Industry (Illinois), the Wheaton Chamber of Commerce (Illinois), the Traverse City Area Chamber of Commerce (Michigan), the Northwest Chamber of Commerce (Missouri), the Boulder City Chamber of Commerce (Nevada), the Henderson Chamber of Commerce (Nevada), the Las Vegas Asian Chamber of Commerce (Nevada), the Las Vegas Latin Chamber of Commerce (Nevada), the Las Vegas Metro Chamber of Commerce (Nevada), the Reno + Sparks Chamber of Commerce (Nevada), the Urban Chamber of Commerce (Nevada), the Zebulan Chamber of Commerce (North Carolina), the Chester County Chamber of Business and Industry (Pennsylvania), the Greater Lexington Chamber of Commerce and Visitor Center (South Carolina), the Allen Fairview Chamber of Commerce (Texas), the Cedar Hill Chamber of Commerce (Texas), the Chamber (Schertz-Cibolo-Selma Area) (Texas), the Colleyville Chamber of Commerce (Texas), the Denison Area Chamber of Commerce (Texas), the East Parker County Chamber of Commerce (Texas), the Frisco Chamber of Commerce (Texas), the Garland Chamber of Commerce (Texas), the Granbury Chamber of Commerce (Texas), the Grand Prairie Chamber of Commerce (Texas), the Grapevine Chamber of Commerce (Texas), the Greater Arlington Chamber of Commerce (Texas), the Greater Waco Chamber of Commerce (Texas), the Hurst Euless Bedford Chamber of Commerce (Texas), the Lake Cities Chamber of Commerce (Texas), the Lewisville Area Chamber of

Commerce (Texas), the Longview Chamber of Commerce (Texas), the Lubbock Chamber of Commerce (Texas), the Melissa Area Chamber of Commerce (Texas), the Mansfield Area Chamber of Commerce (Texas), the Mesquite Chamber of Commerce (Texas), the North Texas Gay Lesbian Bisexual Transgender Chamber of Commerce (Texas), the Plano Chamber of Commerce (Texas), the Pottsboro Area Chamber of Commerce (Texas), the San Antonio Chamber of Commerce (Texas), the Rockwall Area Chamber of Commerce (Texas), the Rowlett Chamber of Commerce (Texas), the Wichita Falls Chamber of Commerce (Texas), the Wylie Chamber of Commerce (Texas), and the Marshfield Area Chamber of Commerce & Industry (Wisconsin). These State and Local Chambers represent small employers in their communities. Following the Labor Department's adoption of the Final Rule, many of these State and Local Chambers formed association health plans that offered quality, affordable health coverage options that were otherwise unavailable to their members. Other Chambers were preparing to do so, and had invested considerable time and resources into their efforts, before the District Court's ruling put those plans on hold.

The Texas Association of Business is the leading employer organization in Texas and serves as the state's chamber of commerce. It represents small businesses in nearly every community in Texas. It works to improve the Texas business climate and to help make the state's economy the strongest in the world. For more than 95

years, the Texas Association of Business has fought for issues that impact small businesses to ensure that their opinions are heard. After investing considerable time and resources, the Texas Association of Business was in the final stages of forming an association health plan when the District Court’s ruling put the Texas Association of Business’s formation plans on hold.

The United Service Association for Health Care is a non-profit corporation chartered in Washington, D.C. It was formed to promote the adoption of equitable health care policy in the United States. To do so, the United Service Association for Health Care engages in nonpartisan research for the benefit of the general public regarding the health care system of the United States. The organization is committed to the promotion of equal access to health care for all Americans. It is intimately familiar with the challenges small employers face when attempting to secure quality, affordable health care. Therefore, the United Service Association for Health Care supports the Final Rule’s measured approach to providing better opportunities for Americans to access quality, affordable health coverage.

This case raises an issue of significant importance to *amici*’s members and to all of America’s working owners and small businesses—the availability of real opportunities for working owners and small employers to access quality, affordable health insurance coverage. *Amici* are intimately familiar with the problems that working owners and small businesses encounter when attempting to secure such

coverage. The State and Local Chambers are especially well-situated to address the practical consequences of the District Court's decision because of their experience in forming association health plans and providing high-quality, affordable coverage that was not otherwise available to their members.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Small businesses and working owners face unique challenges in securing quality, affordable health insurance. That has been true for decades, and while the Patient Protection and Affordable Care Act (“ACA”) attempted to improve the situation, it has only gotten worse. In recent years, small businesses and working owners have seen their health insurance premiums sky-rocket, making it more and more difficult to secure quality coverage. These difficulties have affected both the businesses’ owners—who face greater costs and more difficulty in attracting talent—and their employees, who are either not receiving employer-sponsored health care or are paying higher premiums for lower quality plans. The Labor Department’s Final Rule tackles this problem through a lawful and commonsense solution that has already proven highly successful. Indeed, before the District Court’s ruling, a number of State and Local Chambers had created association health plans, with great success, and many more were on the verge of doing so. This real-world experience confirmed that plans formed under the Final Rule were already significantly lowering premiums and vastly improving coverage options. For businesses covered by those plans and their hard-working employees, the Final Rule’s value was real, and the impact of the District Court’s ruling was devastating.

The Labor Department’s Final Rule offered hope to many small businesses and working owners that had been unable to purchase affordable, comprehensive



coverage. By banding together to purchase coverage through association health plans, small businesses and working owners can finally offer a variety of quality options at more affordable prices. That is a logical, market-driven solution to the problems faced by small employers.

*Amici's* first-hand experience proves the point. In the brief period while the Final Rule was in force, more than 21,000 individuals enrolled in association health plans formed by State and Local Chambers. See U.S. Chamber of Commerce, "Successful Association Health Plans" (last visited June 7, 2019), <https://uscham.com/2XAXlj4>. More than 300,000 other Americans were expected to enroll in the plans offered by those Chambers, as well as association health plans that other State and Local Chambers were deep in the process of creating. *Id.* These statistics confirm that the Final Rule was functioning precisely as the Labor Department predicted: The association health plans formed by those State and Local Chambers offered a variety of health coverage options for their members to utilize, with premium savings up to 30%. *Id.* And the quality of those plans matched the coverage that many Americans receive through the plans that larger employers offer to employees. The District Court's invalidation of the Final Rule thus deprives working Americans of continuous, stable, and affordable health coverage through association health plans.

Nothing in the Employee Retirement Income Security Act ("ERISA")

prohibited the Labor Department from authorizing small businesses and working owners to pool their resources and market power to provide better health coverage to their employees. Certainly, the Department's prior sub-regulatory guidance does not prevent it from expanding on its previous approach through this notice-and-comment rulemaking. Nor does the Final Rule permit association health plans to evade the ACA, as Appellees incorrectly suggested below. Rather, these plans are subject to the ACA, including its core consumer protections, which apply to *all* plans. Because of those market-wide protections, association health plans 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 ACA's other critical protections.

In short, the Department's authorization of association health plans is a lawful and highly-effective solution that will improve the lives of working owners and the millions of Americans employed by small businesses. This Court should accordingly reverse the District Court's decision and uphold the Rule.

## **ARGUMENT**

### **I. The Final Rule Aims to Solve Problems Working Owners and Small Businesses Have Long Experienced When Attempting to Secure Affordable Coverage.**

Small employers and working owners have long experienced significant problems when attempting to secure affordable, quality health coverage. In the years

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.* And it did so by imposing 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 relatively stable and comprehensive coverage. However, working owners and employees of small businesses did not fare as well as expected. Many 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. And working owners face the same difficulties when searching for affordable, quality coverage on the individual market.

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 [fell] 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>. “For employers with fewer than 10 employees, those offering health benefits declined from 35.6 percent in 2008 to 22.7 percent in 2015 (a 36 percent decrease).” Paul Fronstin, Employee Benefit Research Institute, *Fewer Small Employers Offering Health Coverage: Large Employers Holding Steady* (July 2016), <https://bit.ly/2KhiCub>. 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 n.113. Although the exact numbers vary from

study to study, based on the time period and size of employers evaluated, the studies 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 drastic premium increases. *Id.* at 1942-43.

Consequently, rates have risen significantly for businesses in the small-group market. A sample of testimonials from *amici*'s members—now enrolled in Chamber association health plans—illustrates these difficulties: One member noted that she and her husband, who own a painting business, saw the annual cost of their health insurance premiums rise more than \$10,000 in a single year. *See* "Successful

Association Health Plans,” *supra* at 2. The natural result of such rapidly rising premiums is many small businesses, including non-profits, have been forced to drop their group coverage. *See id.* (noting that a non-profit animal shelter with six employees was forced to drop group coverage in 2014 due to ever-increasing costs). Others had never been able to offer health insurance coverage as an employee benefit because of the high cost. But the Department’s Final Rule opened a pathway for them to access affordable, quality coverage on par with the plans offered in the large group market.

**II. The Final Rule Provides a Common Sense, Highly Effective Solution that Improves Competition While Benefiting Millions of Small-Business Employees and Working Owners.**

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

Before the District Court’s ruling, many of the State and Local Chamber *amici* were offering—or in the process of offering—association health plans authorized by the Final Rule. Their real-world experience shows that the Department’s Rule worked as intended, and allowed more people to access and receive affordable, higher-quality health coverage. The Final Rule authorizes association health plans sponsored by geographically-based, multi-industry organizations, which can then garner large numbers of covered lives to achieve economies of scale. 83 Fed. Reg. at 28,939. Through that pathway, many State and Local Chambers had formed association health plans and begun offering higher-quality and more competitive

health coverage plans to their members.<sup>3</sup> In other instances, State and Local Chambers were in the process of forming associations and creating similar plans for their member companies when the District Court's decision halted the Final Rule's implementation.<sup>4</sup>

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<sup>3</sup> Examples of locally-based, multi-industry plans include those provided by the Vermont Chamber of Commerce, the State Chamber of Oklahoma, Wisconsin Manufacturers & Commerce, the Southern Arizona Chamber of Commerce Association (Arizona), Tucson Metro Chamber (Arizona), One Southern Indiana Chamber of Commerce (Indiana), the Allendale Area Chamber of Commerce (Michigan), the Alger County Chamber of Commerce (Michigan), the Alpena Area Chamber of Commerce (Michigan), the Benzie County Chamber of Commerce (Michigan), the Cadillac Area Chamber of Commerce (Michigan), the Cornerstone Chamber of Commerce (Michigan), the Detroit Regional Chamber (Michigan), the Gaylord Area Chamber of Commerce (Michigan), the Greater Albion Chamber of Commerce (Michigan), the Greater Brighton Area Chamber of Commerce (Michigan), the Huron Valley Chamber of Commerce (Michigan), the Leelanau Peninsula Chamber of Commerce (Michigan), the Muskegon Lakeshore Chamber of Commerce (Michigan), the Reese Chamber of Commerce (Michigan), the Rockford Chamber of Commerce (Michigan), the Tawas Area Chamber of Commerce (Michigan), the Traverse City Area Chamber of Commerce (Michigan), the Boulder City Chamber of Commerce (Nevada), the Henderson Chamber of Commerce (Nevada), the Las Vegas Metro Chamber (Nevada), the Latin Chamber of Commerce (Nevada), the Reno + Sparks Chamber of Commerce (Nevada), the Allen Fairview Chamber of Commerce (Texas), the Celina Chamber of Commerce (Texas), the Farmersville Chamber of Commerce (Texas), the Frisco Chamber of Commerce (Texas), the Grapevine Chamber of Commerce (Texas), the Longview Chamber of Commerce (Texas), the Lubbock Chamber of Commerce (Texas), the Melissa Chamber of Commerce (Texas), the McKinney Chamber of Commerce (Texas), the Plano Chamber of Commerce (Texas), the Princeton Chamber of Commerce (Texas), the San Antonio Chamber of Commerce (Texas), the Wylie Chamber of Commerce (Texas), and the Economic Alliance of Snohomish County (Washington). *See* U.S. Chamber of Commerce, "Successful Association Health Plans" (last visited June 7, 2019), <https://uscham.com/2XAXlj4>.

<sup>4</sup> Examples of locally-based, multi-industry plans that were in the process of being formed include those proposed by the Alaska Chamber of Commerce, the Illinois

Take the experiences of constituents enrolled in the Vermont Chamber of Commerce’s association health plan as just one example of how these plans were already benefitting individuals. *See* “Successful Association Health Plans,” *supra* at 2. The Vermont Chamber of Commerce’s association health plan covers over 200 employers and their employees. Its plan designs offer, at a minimum, all “essential health benefits” under the ACA and additional state-mandated benefits. *Id.* And its members greatly benefitted from enrolling in the plan: One restaurant with six employees moved from a high-deductible plan on the Vermont Individual Market Exchange to the association health plan. It now pays just \$3 more in premiums per policy, but reduced its employees’ annual deductibles by \$3,650 each. *Id.* A solar panel installation company reported similar results: the employer pays 100% of the premium and has saved \$14,500 this year by switching from a plan found on the Exchange to the association health plan. *Id.* Its employees realize savings each time

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Chamber of Commerce, the Minnesota Chamber of Commerce, the Louisiana Association of Business & Industry, the Texas Association of Business, the Greater Fairbanks Chamber of Commerce (Alaska), the East Valley Chambers of Commerce Alliance (Arizona), the Northern Arizona Chamber of Commerce (Arizona), the Greater Miami Chamber of Commerce (Florida), the Greater Naples Chamber of Commerce (Florida), the Wayne County Area Chamber of Commerce (Indiana), the Greater Bethesda Chamber of Commerce (Maryland), the Washington County Chamber of Commerce (Maryland), the Carson City Chamber of Commerce (Nevada), the Schuylkill Chamber of Commerce (Pennsylvania), the Bulverde Spring Branch Chamber of Commerce (Texas), the Chamber Schertz-Cibolo-Selma Area (Texas), the Greater Waco Chamber (Texas), the Salt Lake Chamber (Utah), the Marshfield Area Chamber of Commerce (Wisconsin), and the National Association of Independent Automobile Dealers Association.



they visit the doctor: they save \$35 on each urgent care visit and \$25 on each specialty visit. A non-profit animal shelter was forced to drop coverage for its employees in 2014 due to ever-increasing costs. Now, it can offer employees health insurance again through the association health plan's more affordable options. *Id.* A pediatric physician with five employees who enrolled in the plan saves over \$4,000 in annual premium expenses, while offering his employees a nearly identical plan design, with two additional benefits: (1) the plans are stacked so employees have less out-of-pocket exposure and (2) prescriptions are now subject to a small copay instead of the previous \$2,850 deductible employees were provided. *Id.* Last, a self-employed couple enrolled in the plan saves over \$82 per month in premium costs, which they used to purchase dental and vision insurance through the Vermont Chamber's association health plan. *Id.* This one set of examples is a glimpse into the real benefits that the Final Rule is offering for real people who enrolled before the District Court invalidated the Rule. Under the District Court's ruling, all of those people will lose health coverage through the association health plan; if this Court reverses that ruling, many more people will be able to enroll in these new and affordable comprehensive coverage options.

Other State and Local Chambers' experiences similarly provide first-hand evidence that small employers were able to access better, more affordable options using association health plans authorized under the Final Rule. For example, the

Clark County Health Plan Association in Nevada, led by the Henderson Chamber of Commerce, covers more than 10,000 people. Since September 2018, it has offered a range of health plans for working owners and small businesses that save members up to 30% on annual premiums, with no rate increases until summer or fall of 2020. *Id.* The Reno + Sparks Chamber of Commerce, also in Nevada, formed an association health plan with premium savings of up to 30%. *Id.* Additionally, the North Texas Employer Health Plan Cooperative, joined by 36 local chambers,<sup>5</sup> covers thousands of individuals and offers a wide variety of plan designs. *Id.* The Lubbock Chamber of Commerce created an association health plan that offered several plan designs and resulted in savings of up to 30% on premium rates. *Id.* And

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<sup>5</sup> Those chambers include: the Greater Arlington Chamber of Commerce, the Bridgeport Chamber of Commerce, the Cedar Hill Chamber of Commerce, the Colleyville Chamber of Commerce, the Coppell Chamber of Commerce, the Corsciana & Navarro County Chamber of Commerce, the Decatur Chamber of Commerce, the Denison Area Chamber of Commerce, the Denton Chamber of Commerce, the DeSoto Chamber of Commerce, the East Parker County Chamber of Commerce, the Ennis Chamber of Commerce, the Farmers Branch Chamber of Commerce, the Flower Mound Chamber of Commerce, the Fort Worth Chamber of Commerce, the Garland Chamber of Commerce, the Granbury Chamber of Commerce, the Grand Prairie Chamber of Commerce, the Hurst Euless Bedford Chamber of Commerce, the Irving Chamber of Commerce, Jacksboro Chamber of Commerce, Lake Cities Chamber of Commerce, the Lake Highlands Chamber, the Lewisville Area Chamber of Commerce, the Mansfield Area Chamber of Commerce, the Mesquite Chamber of Commerce, the North Texas Gay Lesbian Bisexual Transgender Chamber of Commerce, Northwest Metroport Chamber of Commerce, Pottsboro Area Chamber of Commerce, Rockwall Chamber of Commerce, Rowlett Chamber of Commerce, the Weatherford Chamber of Commerce, the Wichita Falls Chamber of Commerce, the Balch Springs Chamber of Commerce, and the Sanger Chamber of Commerce.

the San Antonio Chamber of Commerce was able to establish an association health plan that allowed its members to realize savings of approximately 21% from their original premium rates. *Id.*

The Final Rule thereby promoted economies of scale and administrative efficiency for small businesses—just as it was predicted to do. *See* Chamber of Commerce of the United States of America Comment Letter (Mar. 6, 2018), <https://bit.ly/2JKuxhM>; *see also* National Federation of Independent Business Comment Letter (Jan. 23, 2018), <https://bit.ly/2D50rEw>. As expected, association health plans operating under the Final Rule amassed large shares in local health care markets and exercised greater bargaining power to achieve economies of scale in purchasing higher quality, more affordable health coverage options. *See* 83 Fed. Reg. at 28,942-43. For instance, the Las Vegas Metro Chamber has reported that it was able to negotiate terms, such as a two-year rate lock, to prevent precisely the sort of premium volatility that made the individual and small-group markets untenable before the Final Rule. *See* “Successful Association Health Plans,” *supra* at 2.

The Final Rule also allowed small employers to cut through some regulatory red tape. Participants in an association health plan 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.” 83 Fed. Reg.

at 28,941. That provides greater flexibility with respect to benefit package design. *See id.* For example, Wisconsin Manufacturers & Commerce reports that it provided several benefit package designs and a wider variety of health coverage options that were previously unavailable to small employers. *See* “Successful Association Health Plans,” *supra* at 2. Additionally, the State Chamber of Oklahoma established an association health plan that offers eight health coverage plans, each of which covered all ten categories of essential health benefits, and several additional benefits as well. *Id.* And the Reno + Sparks Chamber of Commerce’s association health plan provided six different plan design options for employers to offer to their employees. *Id.*

At the time of the District Court’s ruling, other State and Local Chambers were only weeks away from finalizing association health plans for their constituents. For example, the Minnesota Chamber of Commerce was days away from finalizing an association health plan that would have offered more than sixteen plan designs with a variety of benefits typically not available to small businesses. This plan would have been available to more than 10,000 individuals in its first year alone. Premium savings would have exceeded 15% for most businesses, and a second-year renewal rate cap was guaranteed. Similarly, the East Valley Chambers of Commerce Alliance was less than a month away from finalizing an association health plan that would have offered a wide variety of benefits to more than 300,000 individuals.

The Department anticipated that a “substantial number of uninsured people” who currently cannot obtain affordable health coverage through their small firms would enroll in association health plans. 83 Fed. Reg. at 28,912. And the Congressional Budget Office predicted that approximately “400,000 people who would have been uninsured will enroll in” association health plans. *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>. Again, the Chamber’s data from State and Local Chambers across the country confirms that, if anything, these predictions were conservative: To date, more than 21,000 individuals have enrolled in association health plans provided by State and Local Chambers, and if the Final Rule is reinstated, more than 300,000 Americans are expected to enroll in those and similar Chamber association health plans in the near future. *See* Thomas J. Donohue, AHPs Are Key to Valuable Health Coverage (Apr. 29, 2019), <https://uscham.com/2K0hU5n>. In short, we know that the Final Rule was working precisely as the Labor Department predicted, because *amici*’s members were on the front line of its success, and now suffer the brunt of the harm that has resulted from the District Court’s ruling.

**B. The Final Rule Makes Working Owners and Small Businesses More Competitive by Enabling Them to Secure Affordable, Quality Health Coverage.**

Moreover, association health plans under the Final Rule promote competition

at two levels: First, as explained above, 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,” association health plans reduce the cost of health coverage to participating small employer members. 83 Fed. Reg. at 28,912. Small employers that enrolled in association health plans in the brief period when the Final Rule was in force have enjoyed dramatic savings. For instance, the Las Vegas Metro Chamber of Commerce created a plan that reduced employees’ and employers’ costs by an average of 49% and 13%, respectively. *See* “Successful Association Health Plans,” *supra* at 2. And to note just one other example, the West Texas Employer Health Plan allowed small employers to save up to 30% on premiums. *Id.* The Final Rule thus successfully tackled one of the primary challenges facing the small-group and individual markets, by enabling businesses and working owners to band together to increase their market power and spread risk in order to secure better health coverage options.

Second, these increased efficiencies and cost reductions allowed 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/2Wrk18P>. “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.*

It is thus no surprise that 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[ed] health care as the most critical issue in the United States,” and “73 percent of workers report[ed] 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[ed] 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>. By enabling small employers to provide affordable, high quality health coverage that would otherwise be available only from large employers, the Final Rule permits small businesses to compete for talent on a more even playing field.

### **III. The Department’s Final Rule Builds on ERISA and the ACA to Offer More Americans Quality, Affordable Health Coverage.**

The Labor Department’s expansion of association health plans is also consistent with law. ERISA’s statutory text does not clearly define what constitutes a permissible “association” of employers, but the Labor Department has long interpreted the statute’s “group or association” provision to permit association health plans in certain circumstances. The Final Rule made a measured change consistent with that long-standing interpretation, by offering an additional pathway for *bona fide* associations to qualify to create association health plans. 83 Fed. Reg. at 28,915. The Final Rule was crafted only after taking into consideration and balancing the interests expressed in a lengthy notice-and-comment process under the Administrative Procedure Act (“APA”).

Moreover, the District Court’s suggestion that the Final Rule must be invalidated because it expands on the Department’s previous sub-regulatory guidance gets things exactly backwards. As an initial matter, agencies properly set regulatory policy through the sort of notice-and-comment rulemaking that the Labor Department utilized to adopt the Final Rule here; sub-regulatory guidance issued



outside the normal APA procedures cannot displace the agency’s authority to later adopt a different policy. Thus, to the extent they are inconsistent—which, in truth, they are not—the Final Rule necessarily must prevail over a non-binding guidance document. And, in all events, the Supreme Court and this Court have squarely held that agencies may change course on regulatory matters, and may do so without having to satisfy any heightened showing. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *see also Air Transport Ass’n of Am. v. Nat. Mediation Bd.*, 663 F.3d 476, 484 (D.C. Cir. 2011). The District Court’s reasoning is flatly inconsistent with these bedrock principles of administrative law.

Likewise, 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, Appellees have repeatedly accused 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 Appellees grudgingly admitted in their briefing below, *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, association 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-









