[NOT YET SET 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-Appellants.

On Appeal from the
United States District Court for the District of Columbia
No. 18-cv-1747 (JDB)

BRIEF OF THE STATES OF TEXAS, ALABAMA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA, GOVERNOR PHIL BRYANT OF MISSISSIPPI, AND KENTUCKY, BY AND THROUGH GOVERNOR MATT BEVIN, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and *Amici*

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

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

Amici before the district court include: (1) the Chamber of Commerce of the United States of America and the Society for Human Resource Management; (2) the States of Texas, Nebraska, Georgia, and Louisiana; (3) Nancy Pelosi, Steny H. Hoyer, James E. Clyburn, Joseph Crowley, Linda T. Sánchez, Robert C. Scott, Frank Pallone, Jr., Jerrold Nadler, and Richard E. Neal; (4) the Restaurant Law Center; (5) the American Medical Association and the Medical Society of the State of New York; and (6) the Coalition to Protect and Promote Association Health Plans.

Amici before this Court as of June 6, 2019, include: (1) the Oklahoma Insurance Department and the Montana State Auditor, Commissioner of Securities and Insurance, and (2) the Chamber of Commerce of the United States of America, State and Local Chambers of Commerce, the National Federation of Independent Business,

and the Texas Association of Business, on behalf of Defendant Appellants the U.S. Department of Labor; R. Alexander Acosta, in his official capacity as Secretary of the U.S. Department of Labor; and the United States of America.

B. Rulings under Review

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

C. Related Cases

None.

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Interest of Amici Curiae

Amici are the States of Texas, Alabama, Georgia, Indiana, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia, Governor Phil Bryant of the State of Mississippi, and Kentucky, by and through Governor Matt Bevin.[1] The States have an obvious interest in the health insurance market and in the health care options available to their citizens. *See Halbig v. Burwell*, 758 F.3d 390, 412 (D.C. Cir. 2014), *vacated on other grounds*, 14-5018, 2014 WL 4627181, at *1 (D.C. Cir. Sept. 4, 2014) (en banc) (per curiam). The Department of Labor's rule regarding Association Health Plans (AHPs) thus implicates those interests by expanding health insurance options for workers.

As noted by the Department, AHPs work to reduce the cost of health care coverage for the employers who would otherwise be too small to take advantage of the "increased bargaining power vis-a-vis hospitals, doctors, and pharmacy benefit providers" on which large groups rely. Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,912, 28,912 (June 21, 2018). By broadening the definition of a qualifying employer, more small businesses can take advantage of that purchasing leverage. Thus "a substantial number of uninsured

[1] Because amici are States and/or their elective representatives, and not corporate entities, amici need not file a disclosure statement. Fed. R. App. P. 26.1. Although States may ordinarily file as a matter of right, Fed. R. App. P. 29(a)(2), because amici include several State governors, amici have sought and received the consent of the parties to file. No party or party's counsel authored any part of this brief. No person or entity, other than amici or its counsel, has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

people will enroll in AHPs because the Department expects the coverage will be more affordable than what would otherwise be available to them." *Id.*

"Nearly all large employers offer health coverage to their employees"—due, at least in part, to lower costs stemming from the bargaining power of large groups—but only one-third of small employers do so. *See id.* at 28,940. The expansion of which employers may use the leverage of AHPs will thus lead to an increase in the number of employees provided health coverage by private monies. This will benefit States, such as amici, who might otherwise be left to cover uninsured individuals. Moreover, larger groups also distribute risk across greater numbers of people. This prevents anomalous events—such as a significant serious illness—from dragging an entire plan down, thus causing small employee groups to lose their coverage through increased rates and further burden limited state funds.

At the same time, the Rule "broadens the flexibility of states to tailor their laws and regulations to their local market conditions and policy preferences." *Id.* at 28,939. States are free—as they have been—to regulate the health plans at issue under ERISA section 514. *Id.* at 28,953, 28,959. As the Department has conceded, the Final Rule "does not directly preempt state law." DOL Br. at 22 (quoting Slip Op. at 11). And so without relinquishing the ability to protect their citizens, States will have more covered individuals at a lower cost to the States. The win-win is created by the increased market flexibility the AHPs provide that will help States in ensuring their residents receive proper and adequate health care.

Plaintiff States are free, under federal law, to discontinue the use of AHPs within their respective States at any time. But amici States have seen AHPs work successfully in municipalities and other local government entities (such as school districts) for years. It is plainly reasonable to conclude AHPs will also be helpful for small businesses and self-employed individuals across their respective States, and thus amici have an interest in supporting the Department's Final Rule here.

Introduction and Summary of the Argument

The district court should have upheld the Department's rule under standard APA review. Instead, it purported to resolve this case at *Chevron* Step Two, holding that the DOL's definition of "employer" was unreasonable. *See Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The court believed that "[t]he Final Rule is clearly an end-run around the ACA" and that it "does violence to ERISA." Slip Op. at 2. To reach its merits determination, the district court focused on the requirements for a bona fide association that can sponsor health benefits for employees under the statute. Slip Op. at 24-33. The resulting analysis was flawed in several respects. *See* DOL Br. at 30-39. Particularly problematic, though, was the district court's incorrect conclusion that geographic proximity cannot serve as a basis for "commonality of interest." Slip Op. at 27-30. Amici's experience confirms the opposite.

The "commonality of interest" between employers within the same State is shown by the regulations and oversight that each of the States uniquely applies to the companies within their borders. AHP members—like all businesses within a State—must know the rules and regulations specific to the jurisdiction in which they are

domiciled, and the employers within that jurisdiction will each answer to the same law-enforcement authority. That includes things such as tax law, corporate reporting requirements, and workers' compensation rules. This is doubly true for the rules that each State applies to multiple employer welfare arrangements (MEWAs) such as AHPs. These are rules designed on a State-by-State basis to reduce the chances of harm caused by fraudulent plans. Among these is the New York law that prohibits smaller-sized employers from participating in large group plans. Ultimately, then, the state laws that have been put in place over time to combat fraud and abuse in the health care space serve as yet another tie between all of the employers—especially small employers—that reside in that State.

Because employers within the same State share many common interests, it was not unreasonable for the Department to use such a criterion for consideration of which companies should be allowed to band together to form an association health plan. That means the Final Rule at issue is subject only to the minimal standards of APA review. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.").

Properly applying these standards, the Department's rule is lawful. The district court's contrary judgment should be reversed.

ARGUMENT

I. The Primary Test for Bona Fide Associations—a "Commonality of Interest"—Is Met by State Regulation of Employers Within Their Borders.

The district court found that the Final Rule's test for what constitutes a "bona fide association" was too permissive. Slip Op. at 24-33. While addressing all three prongs of that test, the district court focused primarily on the second one: commonality of interest. The court believed that the "commonality of interest test is arguably the most important of the three criteria [for determining a bona fide association] because it most directly relates to the core concern of the statute: employers' interests." Slip Op. at 27. The district court went on to reject the Department's arguments for why businesses in the same State should qualify under the common interest prong, relying heavily on its assertion that "courts interpreting ERISA's requirements have declined to extend ERISA's protections and privileges to organizations based simply on geography[y]." Slip Op. at 28.

The district court's error stems from what is evidently a focus on *mere* geography as being the "proxy for common interest." Slip Op. at 28. But location on a map is hardly the only consideration at work here—the Department's rule does not operate "simply on geographic proximity." Businesses operating within a State are subject to the particular laws of that State. Employers will be subject to the specific regulations in their State for things such as corporate accountability and reporting, as well as rules outlining how to treat workers injured on the job. *See, e.g.*, Tex. Lab. Code § 406.002(a) (giving employers the option of carrying workers' compensation insurance or self-insuring). Tax assessments and rates charged to consumers are also

among the common concerns that any business operating in a State will have—and these will differ, of course, from State to State and based on the size of the company. *See, e.g.*, Tex. Tax Code §§ 171.001-.002, .202, & .203; *see also* Comptroller.Texas.Gov, Franchise Tax, https://comptroller.texas.gov/taxes/franchise/ (noting a $1.13 million threshold for owing the franchise tax, in addition to other rate and limit information). Geography matters to companies because of the consequences of political boundaries, not because of mere proximity. That is precisely why States with less corporate regulation often benefit by companies relocating from other States.[2]

Another source of common interest between employers stems comes from the host of regulations that have sprung up across the States to deal with MEWAs. These rules have been designed to cure the fraud and abuse that took place previously with AHPs, and they are especially impactful on all smaller employers within a State who must follow strict guidelines for things such as whether their insurance group can self-insure or whether they can form an AHP at all. Ironically, then, laws designed to remedy the very things about which plaintiffs are the most concerned (fraud and

[2] While they are sufficient, state boundaries are certainly not necessary for a common interest—even if the businesses operate in different areas. Companies within certain geographic areas have a vested interest in seeing other businesses do well. When one corporation moves into an area, other businesses follow in order to serve the needs of the growing population. The rising tide means that all companies in the same geography will have a common interest, a fact that may even be true across state lines when companies are close to one another. This shows the "most important" of the bona fide association characteristics can also be met even when businesses are not within the same State.

abuse) also serve as a common interest between businesses who would want to participate in an AHP.

In the past, AHPs that were self-insured were most subject to fraud and abuse. That is why Congress, in 1983, amended ERISA to give States the exclusive authority to regulate self-insured AHPs and other self-insured MEWAs as they see fit. That is why some States—such as California,[3] Illinois,[4] Washington,[5] and Wisconsin[6]—prohibit the establishment of any new self-insured AHP. Other States—such as Indiana,[7] Michigan,[8] Nebraska,[9] Ohio,[10] and South Dakota,[11]—have enacted MEWA laws that set forth a comprehensive certification and approval process for operating an AHP in their State. Those approvals must come from the State's insurance commissioner and are granted only when all requirements have been met.

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[3] *See* Cal. Ins. Code §§ 742.20-.43.

[4] *See* Ill. Dep't of Ins., CB-2018-07–Association Health Plans Memorandum (Sept. 19, 2018), http://insurance.illinois.gov/cb/2018/CB2018-07.pdf.

[5] *See* Wash. Rev. Code § 48.125.020.

[6] *See* Wisc. Office of the Ins. Comm'r, Bulletin, June 4, 2003, Regulatory Alert to Stop Loss Carriers and Third Party Administrators (updated Feb. 3, 2006), https://oci.wi.gov/Pages/Regulation/Bulletin20030604MEWA.aspx.

[7] Ind. Code § 27-1-34-1; 760 Ind. Admin. Code. 1-68-2 (certificate of registration).

[8] *See* Mich. Office of Fin. & Ins. Servs. Div. of Ins., Instructions for Application for Certificate of Authority, https://www.michigan.gov/documents/MEWA_filing_package_88530_7.pdf.

[9] *See* Neb. Rev. Stat. §§ 44-7605, 44-7613(1), (2), & 44-7615.

[10] Ohio Dep't of Ins., [MEWA] Application for a Certificate of Authority (revised Jan. 2019), https://www.insurance.ohio.gov/forms/documents/INS5025.pdf.

[11] *See* S.D. Codified Laws 58-18-88; S.D. Admin. R. ch. 20:06:57.

Still other States—such as New York, a plaintiff here—use their congressional authority to prohibit small employers from participating in a "large group" AHP. N.Y. Ins. Law §§ 3231(g), 4317(d) (requiring coverage issued to an association to be rated based on its underlying member employers, and not based on the size of the association group). In such a State, large employer members must be issued large group coverage, small employer members must be issued small group coverage, and individual members must be issued individual coverage. This requirement is often referred to as the "look through" provision, which precludes individuals and small groups from combining for purposes of obtaining large group coverage. Importantly, under New York Insurance Law sections 3221(h) and 4303(ll), coverage issued to an association that includes one or more individual or small employer members must provide coverage for essential health benefits for all the association's members. Additionally, New York prevented the exception developed for bona fide groups under the Obama Administration from allowing single group health plans from leaving out ACA consumer protections such as community rating, essential health benefits, metal tiering, and risk adjustment. N.Y. Ins. Law §§ 3231(g), 4317(d), & 4235(c).[12]

The power to regulate MEWAs includes state authority to ban AHPs altogether. So if it is true, as plaintiffs claim, that the States are harmed by AHPs, the solution

[12] Like New York, Massachusetts and New Jersey prohibit fully insured AHPs from being treated as a single group health plan. *See* Mass. Gen. Laws ch. 176J; N.J. Stat. §§ 17B:27A-19(j)(1), 17B:27A-2. New Jersey law also provides that if coverage through an AHP does not comply with the "small group" market insurance requirements, the AHP coverage is not "creditable coverage" for purposes of avoiding a penalty tax. N.J. Stat. § 54A:11-4.

is for those States to ban them—not to ask this Court to reach out and resolve an alleged problem within each State's power to address.[13] Despite each State's ability to independently regulate their own insurance markets, allowing the district court's ruling to stand will effectively dictate what types of health coverage are available for citizens of states other than those that have challenged the Department's Final Rule.

Finally, this commonality of interest shows the reasonableness of the Department's Final Rule by satisfying the other two prongs of the bona fide association test as well. As the district court admitted, "it is likely that nearly every employer association that exists today already satisfies the Final Rule's substantial business purpose requirement"—the first prong of the test. Slip Op. at 26. By offering training on its state health care rules—the sharing of which is part and parcel of an AHP's activities—the business purpose prong is easily satisfied. The commonality of interest set forth by the Department also satisfies the third prong of the bona fide association test: the control test. The district court only speculated that the control test might be a problem because the "employer members' interests [were not] already aligned." Slip Op. at 31. But because it was reasonable for the Department to treat employers in the same States as having common interests—or, at the least, it was

[13] In addition to these state laws, the ACA itself helps prevent fraud and abuse in the AHP context. The ACA, even if imperfect, provides "working owners" and small businesses with an alternative for obtaining comprehensive health benefits. This option forces AHPs to operate in a manner that attracts business owners and will inherently curb abusive activity.

not unreasonable—the third prong is no obstacle. The control test exists to "complement[] and supplement[] the commonality of interest test but cannot replace it." Slip Op. at 31.

In fact, the control test strengthens the common bond shared by geography-based groups because it requires these geographically based employers to serve the best interests of their employees living and working in their local communities. According to the control test, employees and individuals in the AHP elect a governing board that operates and manages the AHP. *See* Slip Op. at 30-31. ERISA's fiduciary duties apply to the board, requiring it to act in the best interest of the AHP participants. *See* 29 U.S.C. § 1104(a). The control test thus serves as a counterweight to potential fraud and abuse because the board is subject to strict requirements that ensure that the AHP operates in a way that benefits participants. *See* DOL Br. at 33-34. When employers are located in the same geographic area, this type of employer group can ensure that an AHP providing coverage to employees and individuals living and working in the local community is providing affordable, quality health coverage.

II. The DOL's Decision Satisfies APA Review.

Because the Department's interpretation of ERISA was not unreasonable, it may be measured only under the narrow scope of review set forth in the APA and the guidelines set forth by the Supreme Court for judging agency action that changes course on policy. Here, the Department engaged in reasoned decision making by interpreting ERISA's definition of "employer" to allow more companies to band together in order to sponsor a multiple-employer "employee welfare benefit plan." *See*

83 Fed. Reg. at 28,913-14. The interpretive expansion allows small businesses to participate more easily in the AHP process and take advantage of the group buying power that large employers naturally use. It was of note to the Department that many "small business owners currently do not offer health coverage to their employees" with "ever-increasing costs [being] the primary reason they cannot offer affordable health coverage to their employees and their families." *Id.* at 28,914-15. Once the cost barrier is removed from the equation, it is more likely that small business owners will be able to provide health coverage to their employees. *Id.* at 28,912, 28,940.

The Department's definitional expansion is consistent with the Supreme Court's determination in *FCC v. Fox Televisions Stations* that the Commission's decision to depart from prior practice and implement a new enforcement policy to find even so-called "fleeting expletives" actionably indecent was neither arbitrary nor capricious. 556 U.S. at 512. The Commission acknowledged that its course of action represented a shift in policy. *Id.* at 521-22. In deciding to expand the scope of its enforcement activity, the FCC examined and expressly disavowed inconsistent past practice and dicta supporting the "prior Commission and staff action." *Id.* at 517. The Court analyzed the Commission's reasoning to find it entirely rational. *Id.* Thus, the Second Circuit's reversal of the Commission's orders was erroneous. *Id.* at 518-21. There was no basis in the APA or Supreme Court precedent authorizing a more probing review to undermine the agency's decision making. *Id.* at 513-15. Accordingly, undoing or reversing agency action is permissible so long as the agency demonstrates awareness of the change and offers a satisfactory reason for it. *Id.*; *see also*

FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) (confirming that reviewing court is tasked only with ensuring agency engaged in review of relevant data and provided reasoning for the action taken).

Fundamentally, an agency's change in policy must satisfy only the standard it would be held to in the first instance under the APA. *Fox Television Stations*, 556 U.S. at 515. Stated differently, "[t]his means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* The Supreme Court has repeatedly held that heightened review is not called for under the plain language of the APA. "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard." *Id.* at 514; *see also Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n*, 891 F. Supp. 2d 162, 187 (D.D.C. 2012) (mem. op.), as amended (Jan. 2, 2013), *aff'd sub nom*, *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370 (D.C. Cir. 2013). Precedent does not impose such a requirement either. *See Fox Television Stations*, 556 U.S. at 514 ("[A]nd our opinion in [*Motor Vehicle Manufacturers Association v.*] *State Farm* [*Mutual Auto Insurance Co.*, 463 U.S. 29 (1983)] neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.").

This is not to say an agency should act beyond the scope of its statutorily defined authority or that such actions can never be reviewed. If an agency's policy was "not in accordance with the law" in the first place, it is owed no deference. Courts, however, are not permitted to broadly apply heightened standards of review to pass on

an agency's otherwise lawful policy decisions. The scope of review is narrow and, in reviewing agency action, a court is prohibited from substituting its judgment for that of the agency. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782; *Fox Television Stations*, 556 U.S. at 514. Ultimately, an agency's change in policy must be sustained when it passes muster under the same standard it would have been held to in the first instance under the APA. *Fox Television Stations*, 556 U.S. at 513.[14]

All this explains why many legal challenges arising from the transition from the Bush to Obama-led executive failed. Courts upheld the new policy directives against challenges that these policy decisions were arbitrary and capricious departures from prior policy. *See EPA v. EME Homer City Generation L.P.*, 572 U.S. 489, 524 (2014) (upholding EPA Transport Rule); *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017) (per curiam) (refusing rehearing en banc of panel decision upholding the FCC's 2015 Open Internet Order); *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 149 (D.C. Cir. 2012) (per curiam) (rejecting challenges to EPA Endangerment Finding and Tailpipe Rule); *Sherley v. Sebelius,* 689 F.3d 776, 778 (D.C. Cir. 2012) (regarding policy reversal in embryonic stem-cell research directives of NIH); *Nat. Res. Def. Council v. EPA,* 571 F.3d 1245, 1276 (D.C. Cir. 2009) (per curiam) (upholding Reasonably Available Technology Certification provision of Clean Air Act while invalidating elimination of attainment demonstration requirement and New Source Review exemptions); *Envtl. Integrity Project v. U.S. EPA,* 610

[14] Indeed, such agency reversals can be accomplished as an exercise of the same authority supporting the initial action. Similarly, if the agency lacked the authority to act in the first instance then undoing that agency action cannot be impermissible.

F. App'x 409, 411 (5th Cir. 2015) (per curiam) (upholding EPA final rule regarding State Implementation Plans to meet NAAQS); *BCCA Appeal Grp. v. U.S. EPA,* 476 F. App'x 579, 586 (5th Cir. 2012) (per curiam) (declining review of EPA rejection of Texas's Qualified Facilities Program); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.,* 867 F.3d 338, 366 (3d Cir. 2017) (upholding ACA contraceptive mandate).

As noted previously, in addition to the challenge here, certain States and public interest groups have mounted numerous legal challenges to the policy shifts directed by the Trump administration. *See, e.g.*, *Regents of Univ. of Cal. v. U.S. DHS*, 279 F. Supp. 3d 1011, 1026-27 (N.D. Cal. 2018) (DACA); *Trs. of Princeton Univ. v. United States*, No. 1:17-cv-2325-JDB (D.D.C. filed Nov. 3, 2017) (same); *New York v. Trump*, No. 1:17-cv-5228-NGG-JO (E.D.N.Y. filed Sept. 6, 2017) (same); *NAACP v. Trump*, No. 1:17-cv-1907-JDB (D.D.C. filed Sept. 18, 2017) (same); *Vidal v. Nielsen*, No. 1:16-cv-4756-NGG-JO (E.D.N.Y. filed Aug. 25, 2016) (same); *New York v. Pruitt*, No. 1:18-cv-1030-JPO (S.D.N.Y. filed Feb. 6, 2018) (delaying applicability of Clean Water Rule); *Sierra Club v. Zinke*, No. 4:18-cv-00524-HSG (N.D. Cal. filed Jan. 24, 2018) (BLM Fracking Rule); *California v. EPA*, No. 18-1114 (D.C. Cir. filed May 1, 2018) (emission standards); *Nat'l Coal. for Advanced Transp. v. EPA*, No. 18-1118 (D.C. Cir. May 3, 2018) (same); *Ctr. for Biological Diversity v. EPA*, No. 18-1139 (D.C. Cir. May 15, 2018) (same); *California v. U.S. Dep't of Interior*, No. 4:17-cv-00042-BMM (D. Mont. filed May 9, 2017) (coal lease program); *Hawaii v. Trump*, No. 1:17-cv-00050-DRW-KSC (D. Haw. filed Feb. 3, 2017) (travel ban); *IRAP v. Trump*, No. 8:17-cv-00361-TDC (D. Md. filed Feb. 7, 2017) (same); *California v.*

Health & Human Servs., No. 4:17-cv-05783 (N.D. Cal. filed Oct. 6, 2017) (ACA contraception rule rollback); *Pennsylvania v. Trump*, No. 2:17-cv-04540-WD (E.D. Pa. filed Oct. 11, 2017) (same); *California v. Trump*, No. 3:17-cv-05895-VC (N.D. Cal. filed Oct 13, 2017) (ACA cost sharing); *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. filed Mar. 26, 2018) (census questionnaire); *Doe v. Trump*, No. 1:17-cv-01597 (D.D.C. filed Aug. 9, 2017) (admission of transgender troops).

And those challenges, like the ones raised in response to Obama-era policy reversals complaining that the agency's change of position is arbitrary and capricious, must fail so long as the agency has cleared the APA's minimal threshold. The decision to "broaden the types of employer groups or associations that may sponsor a single group health plan under ERISA for the benefit of the employees of the group," 83 Fed. Reg. at 28,914, aligns with the multitude of cases upholding shifts in agency policy based on the Executive's priorities. Because the DOL engaged in reasoned decision making and provided an explanation for its policy shift, its Final Rule should be upheld.

Conclusion

The district court's judgment should be reversed.

Respectfully submitted.

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Certificate of Service

On June 7, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Kyle D. Hawkins
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1) because it contains 4,146 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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