NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5125

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

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

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

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® JOINED WITH THE BALDWIN COUNTY ASSOCIATION OF REALTORS®, THE GREATER LAS VEGAS ASSOCIATION OF REALTORS®, THE KANSAS CITY REGIONAL ASSOCIATION OF REALTORS®, THE NEVADA REALTORS®, AND THE TENNESSEE REALTORS,® IN SUPPORT OF APPELLANT UNITED STATES DEPARTMENT OF LABOR WITH THE CONSENT OF ALL PARTIES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

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

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

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

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

B. Rulings Under Review

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

C. *Related Cases.* None.

D. Corporate Disclosure Statement

The National Association of REALTORS® ("NAR") is a nationwide, nonprofit professional association that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private

ownership of real property, and to promote the interests of its members and their professional competence. NAR's membership includes 54 state and territorial Associations of REALTORS®, approximately 1,200 local Associations of REALTORS®, and more than 1.3 million members.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of REALTORS® ("NAR"), the Baldwin County Association of REALTORS®, the Greater Las Vegas Association of REALTORS®, the Kansas City Regional Association of REALTORS®, the Nevada REALTORS®, and the Tennessee REALTORS® (collectively, "the REALTOR® Associations") have a considerable interest in the Department of Labor's ("Department's" or "DOL's") regulations (1) allowing geographic-based employer groups establish an AHP and (2) permitting self-employed individuals (i.e., "working owners") with no employees to participate in an AHP (the "Final Rule").

The REALTOR® Associations' membership consists of primarily self-employed individuals, or working owners, with no employees, as well as small and large business owners with common-law employees involved in all aspects of residential and commercial real estate sales transactions that have varying health care concerns. Members have long struggled to find affordable health insurance coverage, where historically the rate of uninsured members has ranged between 20 and 30 percent. While some real estate professionals are able to obtain health insurance from a spouse, former employer, or government program, such as Medicare, many are purchasing health insurance on their own, through an exchange or with the help of a broker, in the individual insurance market.

Passage of the Patient Protection and Affordable Care Act ("ACA") resulted in significant regulatory changes to the individual insurance market (and the small group market), some of which have benefited REALTORS®. For example, with many real estate professionals falling in the baby boomer generation, maintaining protections for pre-existing conditions and ensuring guaranteed availability of coverage have been top priorities when considering health insurance options. However, ACA changes have also resulted in significant increases in health care costs, leaving many individuals to forgo coverage, which jeopardizes the health, safety, and financial stability of their families and others.

The REALTOR® Associations therefore support the DOL's efforts to expand health insurance options through Association Health Plans ("AHPs"), which are typically ACA-compliant, providing comprehensive, attractive, and cost-effective health insurance plans to those in need. The Department's Final Rule brings new freedom to working owners across the country to choose from a variety of insurance providers offering quality coverage plans, which was not possible in the limited individual and small group insurance markets before the DOL expanded eligibility for to AHPs. In short, real estate professionals need and deserve access to quality and affordable health care coverage and the Final Rule has made this possible.

To date, the Baldwin REALTORS® in Alabama, the Greater Las Vegas Association of REALTORS®, the Kansas City Regional Association of

REALTORS® (KCRAR), the Nevada REALTORS®, and the Tennessee REALTORS® have each established a fully-insured AHP formed in accordance with the Final Rule with an effective date on after January 1, 2019.

NAR has long championed efforts on behalf of America's real estate professionals that promote access to AHPs and supports the DOL's actions that make it possible for self-employed individuals and small employers to purchase health insurance through a professional or trade associations. The Final Rule has already resulted in significant financial savings and, more important, better access to health care to improve well-being, for many real estate professionals and their families. The Court should protect these benefits, enjoyed by so many, and ensure that the expanded eligibility for working owners continues so that REALTORS® across the country have the flexibility and the freedom to choose a health insurance plan that best fits their needs.

ARGUMENT

I. The DOL Has the Authority to Supersede Its Prior Sub-Regulatory Guidance and Interpret ERISA's Definition of Employer and Employee Through the Final Rule

A. The DOL Has the Authority to Supersede Its Prior Sub-Regulatory Guidance Through the Final Rule

The Final Rule provision permitting working owners to participate in an ERISA-covered AHP supersedes prior Departmental sub-regulatory guidance (i.e., DOL Advisory Opinions) to the contrary. DOL Advisory Opinions serve as interpretive rules. *See* DOL Adv. Op. Procedure 76-1.[1] The Supreme Court has explained that "[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *See Perez v. Mortgage Bankers Ass'n*, *575 U.S.*___, 135 S. Ct. 1199 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). The Supreme Court has also held that a federal agency has the authority to modify its interpretive rules. Specifically, the Supreme Court explained that an agency has the authority to issue a new interpretation of a regulation (or statute) that deviates significantly from one the agency has previously adopted. *Perez*, *575 U.S.*___, 135 S. Ct. at 1203.

The Supreme Court has further held that an agency need not use notice-and-comment procedures under the Administrative Procedures Act ("APA") when it

[1] Explaining that Advisory Opinions apply the law to a specific set of facts, or information letters, which merely call attention to well established principles or interpretations.

wishes to issue a new interpretation that deviates from one the agency has previously adopted. *Id.* Nevertheless, the DOL *did* use the APA's notice-and-comment process when it modified its sub-regulatory guidance to allow working owners without employees to participate in an AHP, issuing proposed rules on January 5, 2018, accepting comments during a public comment period through March 6, 2018,[2] and finalizing those rules on June 21, 2018.

B. There Is a Sound Basis for the DOL to Interpret ERISA as Allowing a Working Owner to Act as an Employer and Employee

The DOL's modified interpretation that a working owner may permissibly participate in an AHP is grounded in the Department's previous sub-regulatory guidance relating to working owners. Specifically, in 1999, the DOL issued Advisory Opinion 99-04, concluding that a working owner may have dual status as an employer and an employee, and thus, permissibly be considered a "participant" in an ERISA-covered plan. *See* DOL Adv. Op. 99-04A (Feb. 4, 1999); *see also* DOL Adv. Op. 2006-04A (April 27, 2006). This conclusion was based on the DOL's opinion that ERISA section 402(a)(2) (29 U.S.C. § 1102(a)), ERISA section 403(b)(3)(A) (29 U.S.C. § 1103(b)(3)(A)), ERISA section 408 (29 U.S.C. § 1108), ERISA section 4001(b)(1) (29 U.S.C. § 1301(b)(1)), ERISA section 4021(b)(9) (29 U.S.C. § 1321(b)(9)), and ERISA section 4022(b)(5)(A) (29 U.S.C. § 1322(b)(5)(A)) all serve as an indication that working owners may be considered participants for

[2] The Department of Labor ("DOL") accepted approximately 900 comments during the public comment period.

purposes of ERISA coverage. This opinion led the DOL to state that "there is a clear Congressional design to include working owners within the definition of participant for purposes of Title I of ERISA." *Id.*

While the facts in Advisory Opinion 99-04 dealt with a working owner who had initially participated in an ERISA-covered plan as an employee of an employer, this Advisory Opinion – and the sections of ERISA cited by the DOL – are examples of the DOL's seeking to apply a more flexible standard to address a practical problem. Such a flexible interpretation illustrates that ERISA's definitions of "employer" and "participant" (29 U.S.C. §§ 1002(5), (7)) are not rigid; rather these definitions are meant to be interpreted such that practical issues can be resolved and individuals can have access to workplace benefits.

In the case of the Final Rule, it is the DOL's interpretation that a working owner with no employees has dual status as employer and employee for purposes of participating in an AHP. This interpretation is consistent with the flexible approach the DOL has taken when seeking to give individuals access to workplace benefits. Moreover, such an interpretation is consistent with the DOL's long-held position that working owners should be able to participate in an ERISA-covered plan. The Final Rule reasonably provides this flexibility in the narrow context of allowing a working owner without employees to access quality and affordable health coverage through

an AHP.[3]

1. The DOL Has the Authority to Deem Working Owners With No Employees Eligible to Participate In an ERISA-Covered AHP

DOL regulation section 2510.3-3 (29 CFR § 2510.3-3) does *not* reflect an interpretation that ERISA prohibits working owners from participating in an ERISA-covered plan. The regulation simply clarifies that working owners with no employees are not required to undertake the burdens of complying with, for example, ERISA's reporting and fiduciary requirements. The regulation, however, makes clear that where a working owner with no employees participates in an employee benefit plan alongside other employees, the working owner will be deemed an employee, and the plan *will* be governed by Title I of ERISA. This point was preceded by the DOL's long, and ultimately successful struggle to convince the courts that ERISA was not intended to exclude working owners with employees from the ERISA-covered plans the owner established for its employees. This led the Supreme Court to conclude that "a working owner can be an employee entitled to participate in a plan and, at the same time, the employer who established the plan." *See Yates v. Hendon*, 540 U.S. 1, 16 (2004).

In the context of an AHP formed in accordance with the Final Rule, a working owner with no employees will typically participate in the AHP alongside other

[3] The Final Rule only permits AHP participation by working owners without employees in the new compliance option created in the Rule, and not for AHPs that choose to use the traditional DOL interpretation. The new option in the Rule balances this expanded participation with additional protective measures such as requiring AHPs using this option to charge level premiums. *See* 29 CFR § 2510.3-5(d).

employees. The types of member-based organizations that qualify as a "bona fide group or association of employers" as now permitted under the new option in the Final Rule typically include *both* employer members *and* working owner members with no employees because these member-based organizations are typically *not* exclusively comprised of working owners. For these "bona fide groups" sponsoring an AHP, their working owner members with no employees *will* be participating in the AHP alongside other employees employed by the group's employer members.

There may be rare instances where the only members of a "bona fide group" – and thus the only participants in an AHP sponsored by this "bona fide group" – are working owners with no employees. But, the tail should not wag the dog; rare instances should not transform a reasonable statutory interpretation to an unreasonable one as the district court concludes.

The Final Rule also provides an option to resolve one area of uncertainty for working owners *with* employees who are participants of an ERISA-covered plan because it addresses the question of what would happen when there are fluctuations in the number of employees employed by a working owner and whether ERISA coverage would suddenly cease when the working owner's employees cease their employment, leaving only the working owner and his or her spouse. For any AHP that provides coverage to small employers and working owners with employees, such fluctuations are bound to occur, and now, the Final Rule provides a clear path to

remaining in ERISA compliance for AHPs formed under the new option in the Final Rule. Again, the DOL has adopted a flexible standard to address a practical problem.

2. The Ability of a Working Owner With No Employees to Participate In an ERISA-Covered AHP Does Not Produce an Absurd Result Under the ACA

To be clear, under the option provided under the Final Rule, the "bona fide association" – and *not* the working owner – is the "employer of two or more employees" as required under the ACA. The district court states that the "DOL contends that an ERISA bona fide association comprised solely of two working owners without employees would qualify as both an employer and an employee *under the ACA*." Mem. Op. 40. This is *not* what that the DOL contends. A working owner without employees is *not* considered both an employer and an employee under the ACA. Rather, a working owner without employees is considered both an employer and an employee *under ERISA*. *See* 29 C.F.R. § 2510.3-5(e); *see also* DOL Br. at 21.

Pursuant to the option provided by the Final Rule, a working owner with no employees is considered an employer member of the "bona fide association." And, it is the "bona fide association" that stands as the "employer" *under the ACA*. A working owner with no employees is *never* incorporated into the ACA as an employer, because a working owner with no employees is *not* considered an employer under ERISA section 3(5). An "ERISA bona fide association," on the

other hand, *is* considered an employer under ERISA section 3(5) because the "bona fide association" qualifies as "a group or association of employers [that acts] indirectly in the interest of an employer." As an ERISA section 3(5) employer, the "ERISA bona fide association" is incorporated into the ACA by reference under Public Health Service Act ("PHSA") section 2791(d)(6) (42 U.S.C. § 300gg-91(d)(6)).

We note that the previous Administration interpreted ERISA and the PHSA as working hand-in-hand from a definitional perspective. *See* CMS Insurance Standards Bulletin, September 1, 2011. And, according to that Administration, in cases where an "ERISA bona fide association" is sponsoring a group health plan, like an AHP, the number of employees employed by all of the employers members of the "ERISA bona fide association" determines whether the coverage is subject to the small group market or the large group market rules. *Id*. In other words, the Administration explained where an "ERISA bona fide association" stands as an employer under ERISA section 3(5), employees employed by *all* of the employer members of the "ERISA bona fide association" are aggregated for purposes of determining whether the AHP sponsored by the "bona fide association" is a small group market or large group market plan.

As an "employee" of the "bona fide association," as called for under the Final Rule (and consistent with the DOL's long-held recognition that a working owner

may be considered an employer and employee for ERISA purposes), a working owner under the Final Rule will be aggregated with *all* of the other employees of the employer members of the "bona fide association." *Id*. That means that the "ERISA bona fide association" – and *not* the working owner – stands as an "employer of two or more employees" as required under the ACA.

II. The DOL Final Rule is Good Public Policy That Does Not Conflict With Existing Law and Provides Flexibility for an Evolving Workforce

A. An Employment Relationship Remains Even for Working Owners With No Employees

The district court suggests that working owners with no employees fall "outside *any* employment relationship." Mem. Op. at 19 - 20. The district court further states that "[a]s a practical matter, one does not have an employment relationship with oneself." Mem. Op. at 35. A working owner with no employees provides services to the working owner's own trade or business, which in turn provides services to a third-party entity, which itself is traditionally a trade or business or a third-party consumer. This working owner generates revenue for his or her own trade or business through the provision of these services for these third-parties, and the Internal Revenue Code treats this revenue generated as "income," which is taxed for both income and employment tax purposes, similar to "wages." *See* 26 U.S.C. § 1402.

Over the past three decades, the nation's economy has evolved into a competitive, global economy. Our nation's workforce has similarly evolved from a traditional employment-based setting where "employees are employed by an employer," to a nontraditional employment-based setting where a growing number of workers are self-employed individuals, or working owners, with no employees . *See* *Key Trends at Sole Proprietorships Over the Past 30 Years*, Small Business Trends, Dec. 4, 2015.[4] It does *not* follow, however, that this evolution extinguishes *any* employment relationship, as the district court suggests.

More specifically, while these working owners with no employees do not act in the capacity of employees of an employer in the traditional sense, these working owners continue to provide services just like an employee, and these working owners generate income that is taxed in a manner similar to wages. A failure to recognize that these revenue-generating, taxpaying working owners operate in an employment setting is a failure to recognize that we now live in a competitive, global economy that no longer relies on a workforce made up largely of the traditional employee employed by a traditional employer.

Recognizing these changing market dynamics, the DOL has sought to develop a flexible rule to promote sound public policy that would permit a working owner to access workplace benefits. Again, such an interpretation is consistent with the

[4] Reporting that the Internal Revenue Service found that sole proprietorships nearly doubled from 1980, when there were 39.2 for every thousand Americans to 76.7 sole proprietors for every thousand Americans in 2007.

DOL's long-held position that working owners should be able to participate in an ERISA-covered plan. And, the Final Rule is reasonable because it limits this interpretation to the narrow context of health coverage offered through an AHP.

B. Deeming a Working Owner With No Employees Eligible to Participate In an ERISA-Covered AHP is Reasonable In Light of Changing Market Dynamics and an Enhanced Regulatory Environment

The DOL properly exercised its broad authority to interpret the provisions of ERISA, in light of changing times and circumstances, which is permissible according to the Supreme Court. Specifically, the Supreme Court explained that a Federal agency can supersede a prior interpretation to address marketplace developments and new policy and regulatory issues. *Perez, 575 U.S.*___,135 S. Ct. at 1203.

The primary factors that the DOL has always used in the context of AHPs – "bona fide," "commonality," "control," "substantial business purpose," and "genuine organizational relationship" – are themselves sub-regulatory, and are substantially retained in the Final Rule, but updated to reflect changing industry patterns and a wholly different enforcement landscape. For example, the "substantial business" test was utilized during a time of perceived need to curb abuses involving putative multiple employer welfare arrangements ("MEWAs"). At that time, there was no indication that Congress intended such a test when it included employer groups and associations in the definition of "employer." Even if it was appropriate years ago, one might even suggest that there is currently no compelling need to require any

"other" purpose at all. That is, the employer's interest in providing benefits to its employees is compelling enough, and the new emphasis on the "control test" clarifies that the obligation placed on each employer participant in an AHP is a serious commitment, providing alternative indicia of legitimate purpose.

When the above-stated terms were first articulated, the States were just starting to curb abuses in the area of MEWAs by commercial insurance-type arrangements as permitted by ERISA's MEWA provision, which gives States broad authority to regulate self-insured MEWAs and to regulate the contribution and reserve levels of fully-insured MEWAs. *See* 29 U.S.C. § 1144(b)(6). The DOL itself, through sub-regulatory guidance and new enforcement regulations and programs, built and maintains robust enforcement activities, aided by Congress's specifically requiring AHPs to file annually with the DOL a public form that includes specific plan-related information. *See* DOL Form M-1. Congress further augmented the DOL's enforcement authority through the ACA by allowing the DOL to impose civil and new criminal penalties, and the ACA now allows the DOL to stop an AHP's operations or seize its assets in certain circumstances without a court order. *See* 29 U.S.C. §§ 1149 and 1151.

III. Real Estate Professionals Deserve Access to Quality and Affordable Health Care Coverage Through AHPs

Most real estate professionals are working owners that provide services to their own trade or business, which in turn provides services to third parties such as

individuals families, or businesses desiring to buy or sell property). Through the time and energy devoted to the property transaction, real estate professionals generate revenue for their own trade or business, which is taxed for both income and employment tax purposes, similar to wages. Real estate professionals can transition between roles as a working owner with no employees, a working owner with employees, and a traditional employee of a traditional employer. It is this flexibility and associated benefits that attracts many individuals to the real estate profession, and it should not result in reduced or less attractive health insurance options.

Real estate professionals with or without employees struggle to find quality and affordable health coverage for themselves and their families. For example, according to the Kaiser Family Foundation, the average increase in the lowest-cost premium in the individual market ranged between 17 and 32 percent for 2018. *See* *How Premiums Are Changing In 2018*, Kaiser Family Foundation, Nov. 29, 2017.[5] While individual market premiums moderated in many states in 2019, the nonpartisan Congressional Budget Office estimated that roughly 3.1 million people exited the "unsubsidized" individual market, due in large part to the sizeable premium increases between 2015 and 2018. *See* *Health Insurance Coverage for People Under Age 65: Definitions and Estimates for 2015 to 2018*, April 2019, Table 1. This is especially relevant in the context of REALTORS®, as 70 percent of

the 364,000 National Association REALTORS® members who were recently surveyed indicated that they did not qualify for a premium tax credit under the ACA. *See* *2018 Health Insurance Survey*, National Association of Realtors, July 20, 2018, slide 10. Premiums in the small group market also remain high and unpredictable for real estate professionals with employees or those who are employees of a small brokerage firm. For example, the cost of small group market plans are eight to 18 percent higher than they are for large employer plans, depending on the State insurance market. *See* *Small and Large Business Health Insurance: State & Federal Roles*, National Conference of State Legislatures, September 12, 2018.

Real estate professionals, like other working owners with and without employees, are the types of workers that the DOL has sought to provide access to affordable and quality workplace benefits. And, many real estate professionals are members of a member-based local, state, and national REALTORS® association that also includes employers with employees in addition to working owners with no employees. Thus, in the case of an AHP sponsored by the National Association of REALTORS® or a state-based REALTOR® Association, the AHP would likely provide health coverage to working owners with no employees as well as employers with at least one employee, which is the type of AHP that the DOL envisioned when developing the Final Rule provision permitting working owners without employees to participate in an ERISA-covered AHP.

A. The State and Local-Based REALTOR® AHPs Formed In Accordance With the Final Rule

1. Comprehensive Coverage

As set forth in the Interest of Amici section above, five (5) REALTOR® associations currently provide a fully-insured AHP for their members created under the new option provided for under the Final Rule (after January 1, 2019).

The Baldwin REALTORS® AHP covers all ten (10) of the ACA's "essential health benefits" ("EHBs"), while The Greater Las Vegas Association, Kansas City Regional Association, Nevada, and Tennessee REALTORS® AHPs cover all ten EHBs, except pediatric dental and vision (which is a component of pediatric services, which is the tenth EHB)[6] because it is more cost-effective to provide coverage for these services through a more comprehensive stand-alone product. Participants in the Kansas City Regional Association of REALTORS® AHP averaged savings between 5 percent and 50 percent, while participants in the Tennessee REALTORS® AHP experienced 25 to 50 percent savings. The Nevada REALTORS® AHP participants saw savings from 2 percent up to 32.5 percent, while participants in the Baldwin REALTORS® AHP realized savings ranging from $150 to $15,000 per year.

[6] The ACA's "essential health benefits" include ambulatory patient services; emergency services; hospitalization; pregnancy, maternity, and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; pediatric services, including oral and vision care. *See* 42 U.S.C. § 18022(b).

Importantly, the Baldwin, Greater Las Vegas, Kansas City Regional, and Tennessee REALTORS® cover working owners without employees and traditional employers with employees under their AHPs.

2. AHPs Transform Peoples' Lives

For purposes of developing this Brief, we asked the current participants of the State and Local-based REALTORS® AHPs the following questions: (1) If the AHP health coverage goes away on account of the district court ruling, how would it affect you? and (2) Please share a short story about how your AHP has helped you and your family?

A respondent from Baldwin REALTORS® AHP explained, "If our AHP coverage goes away, it would cost more money for health insurance and I would be less likely to use it due to higher deductibles and co-pays. What I have through the AHP is better coverage at a better price." Another Baldwin AHP participant stated, "I would have to pay $450 more for a 'silver' plan instead of the 'gold' plan I have now." In response to the second question, a Baldwin AHP participant also explained, "I've been struggling with some chronic health issues, but have been unable to afford to go to a specialist and pay for the tests. I work two jobs, and I am a caregiver to a 94-year-old woman. Even with two jobs, I could not afford useful insurance on my own without this AHP. With this insurance, I've made some appointments and look

forward to seeing what I can do to slow down the progression of the health issues I struggle with (Fibromyalgia and inflammatory arthritis)."

The Greater Las Vegas Association of REALTORS® reported that real estate professionals between ages 55 to 64 experienced lower overall premiums, richer overall benefits, and access to a broader network. The savings in premiums for this age cohort averaged 11 percent, and out-pocket savings average 12 percent. Additionally, thanks to increased education on health savings accounts tied to the AHP options, enrollees in those plans will save $3,600 annually.

A REALTOR® in the Kansas City AHP reported that as a newly self-employed individual, with a wife who recently retired, "[f]inding a long term plan had been more difficult than I imagined. . . . We have been making do with short term plans, but not comfortable with the limited coverage. . . . The KCRAR Blue Cross plan has solved our health insurance problem." Another AHP participant discussed the limited marketplace options available in Kansas City and how the AHP offered by KCRAR enables the freedom to continue being a real estate professional. "This policy through KCRAR gives me the ability to step away from the uncertainty of the Marketplace. The phenomenal work you have done to add major medical insurance for agents allows me to continue . . . without a worry . . . my incredible career."

The Tennessee REALTORS® also explained that a number of their real estate professional members were previously enrolled in a non-ACA-compliant plan that

did not cover pre-existing conditions. But, because the Tennessee REALTORS® AHP provides coverage for pre-existing conditions, these real estate agents gained access to the medical care that they needed. One real estate broker was especially thankful for being able to provide ACA compliant and affordable coverage to their employed staff, which was much more attractive when compared to what was available in the small group market. As health care costs in the state continued to rise, Tennessee REALTORS® searched for affordable health polices, which were sometimes only short-term plans, not designed for long-term coverage. Such coverage failed to ensure diseases or illnesses that happened outside of effective dates were paid for, prompting many individuals to seek more permanent, comprehensive solutions in the AHP.

Lastly, a participant from the Nevada REALTORS® AHP relayed,

> *"My wife and I are currently on the Nevada REALTORS®AHP health care plan and have saved about $500 per month from our previous Obamacare plan. My wife paid the penalty for 4 years and had no coverage until we got Obamacare last year. I am diabetic so going without health coverage is not an option for me as I have many doctor visits and high prescription costs. When we got on the AHP this year, we upgraded our coverage and now have a deductible which is much lower and the overall coverage is much better. In other words, we went from the worst plan under Obamacare to the best plan under Hometown Health for Northern Nevada and still saved money on the monthly costs. In addition, we are also able to go to the best hospital in Northern Nevada as well as have a network of local providers that were not covered under our previous plan. As we live in a remote area at Lake Tahoe, we would normally have to drive an hour or more to go to preferred providers under the previous Obamacare plan and now we can use local providers."*

These are just a few of the countless examples of real estate professionals' appreciation for the new health insurance options afforded to them through an AHP. Such success stories have encouraged many other state and local REALTOR® associations to also explore implementation of AHPs in their areas but have been put on hold due to the uncertainty of the ongoing litigation, leaving working owners in real estate across the country with limited and unaffordable insurance options.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(g). This brief contains 4,895 words.

/s/ Israel Goldowitz
ISRAEL GOLDOWITZ

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellant CM/ECF system. Two participants who are not registered CM/ECF users were served by other electronic means, Taylor Payne of the Office of the Kentucky Attorney General, taylor,payne@doj.state.ky.us, and Scott J. Kaplan, of the Office of the Oregon Attorney General, scott.kaplan@doj.state.or.us.

/s/ Israel Goldowitz

ISRAEL GOLDOWITZ