UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF NEW YORK, ET AL., :
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Appellees, :
:
v. : No. 19-5125
:
UNITED STATES DEPARTMENT OF :
LABOR, ET AL., :
:
Appellants. :
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Thursday, November 14, 2019

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, TATEL, AND KATSAS

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

MICHAEL SHIH (DOJ), ESQ.

ON BEHALF OF THE APPELLEES:

MATTHEW W. GRIECO, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 19-5125, State of New York, et al. v. United States Department of Labor, et al., Appellants. Mr. Shih for the Appellants; Mr. Grieco for the Appellees.

JUDGE HENDERSON: Mr. Shih, good morning.

ORAL ARGUMENT OF MICHAEL SHIH, ESQ.

ON BEHALF OF THE APPELLANTS

MR. SHIH: Good morning, Your Honors, may it please the Court, Mike Shih for the Government. And with me at Counsel table are Michael Raab and Mark Stern. Before I proceed I'd like to reserve three minutes for rebuttal.

JUDGE HENDERSON: Okay. You need to --

MR. SHIH: No problem. Can you hear me better now?

JUDGE HENDERSON: There.

MR. SHIH: Awesome.

JUDGE HENDERSON: That's great.

MR. SHIH: So, ERISA defines employer to include a group or association of employers that act in its members' interests. Congress enacted this definition to distinguish between commercial insurance entities which can't sponsor ERISA plans under this provision, and employer driven initiatives which can. The Department of Labor's previous guidance used three criteria to determine whether a group is

acting in its members' interests, which the rule challenged here is modified in some respects, and to understand the difference it's easiest to look at a few concrete examples.

So, under the guidance, for example, the American Council for Engineering Companies established a plan that gives healthcare coverage to about 90,000-plus employees of more than 1,700 employers across all 50 states, but under the old guidance it wasn't possible for a city's chamber of commerce to sponsor a similar plan. So, the rule's alternative criteria make that possible, while also retaining the guidance's requirement that the group be controlled in form and substance by its members. Now, neither the States nor the District Court can explain why groups that meet the rule's criteria are acting any less in the interest of employers than groups that meet the guidance's criteria. Both sets of criteria are designed to ensure that the group continues to act as the agent of its employer members.

JUDGE TATEL: What about the State's argument that the criteria are not adequate to prohibit commercial insurance companies from becoming bona fide?

MR. SHIH: So, I have two responses to that. First, Your Honor, Section (b)(8) of the rule already expressly prohibits commercial insurance providers from being a group or association under the rule, and so that's

already dealt with expressly. What the criteria are for are to figure out, you know, whether, you know, given the diversity of business organizations out there a particular groups looks too much like a commercial insurance provider or not, and the key to distinguish, as the Department of Labor explained, is whether the entity is acting as the agent of the employers, or is instead standing in some sort of third party bargaining relationship like an insurance company. And so, the rule accomplishes this key objective by retaining the old guidance's control requirement, and that control requirement is incredibly robust.

As the rule explains, for example, on page 28,920 under this requirement it's sufficient if an employer can nominate and elect the directors who run the group, whether they can remove the people who run the group with or even without cause, and whether they can approve or veto all decisions with respect to the healthcare coverage plan that they're getting. And so, all of that which has to be present for any group that tries to become a, you know, group under the association health plan rule is sufficient to ensure that a commercial insurance provider doesn't somehow sneak in, even notwithstanding the express prohibition on them doing so under (b)(8).

But that's not all the rule provides, the rule also has a robust non-discrimination requirement which stops

the group from discriminating on the basis of --

JUDGE TATEL: Well, what has that got to do with acting in the interest of employers?

MR. SHIH: So, it just reinforces -- so, to back up, Your Honors, the key point is control, right, and we think that had the Department --

JUDGE TATEL: Yes. I understand that. But what does a non-discrimination provision have to do with it?

MR. SHIH: The non-discrimination provision just helps the Department of Labor sort when presented with a particular group whether it is or isn't acting because, you know, it's unlikely that a commercial insurance provider, according to the Department of Labor, would want to, you know, be in some sort of engagement where they can't --

JUDGE TATEL: I see.

MR. SHIH: -- discriminate. Right. And so, that's true also for the commonality requirement that's still in the rule; that's true still for the business purpose requirement that's still in the rule. But, you know, the fact that the Department of Labor elected under the rule to go further than what ERISA might require doesn't mean that what the Department of Labor did in interpreting what it means for a group to act in the interest of its employer members was unreasonable, particularly not under the Chevron standard. So --

JUDGE KATSAS: Can I ask you about that?

MR. SHIH: Of course.

JUDGE KATSAS: So, as I understand it the dispute here centers on three issues, one is the business purpose of the group entity, one is the commonality of interest, and one with members and one is control, and your rule is criticized for watering down the first two of those.

MR. SHIH: Yes, Your Honor.

JUDGE KATSAS: Is it your position that some form of those first two requirements is required by ERISA?

MR. SHIH: So, it would be sufficient just to have control, but --

JUDGE KATSAS: Right.

MR. SHIH: -- we don't need just to have control, and the Court doesn't need to go that far because as Your Honor has pointed out the rule isn't so restricted.

JUDGE KATSAS: I mean, if a group of small employers want to create an entity for the sole purpose of providing a group plan, and there are all sorts of perfectly good reasons for doing that, efficiencies of scale, you get a better deal, and they create it, and they control it, and it goes off and gets the welfare benefits for people, I would think that entity is clearly acting indirectly in the interest of the constituent employers, and as a group or association of employers acting for the employer, that's the

language of the statute, right, end of case. So, why are we even talking about the first two of these three criteria?

MR. SHIH: I agree with you completely, Your Honor. So, you know, in our view what it means to act in the interest of employers, that language is just to distinguish between people who are negotiating at, you know, arm's length from you, and people who are your agent. And the control requirement is essential to that because, you know, that --

JUDGE KATSAS: But in the explanation --

MR. SHIH: -- reflects the Agency.

JUDGE KATSAS: -- in the explanation of the rule you seem to put some stock in the fact that these first two requirements were being preserved in substance.

MR. SHIH: Yes, Your Honor. And so, I think the best place to look in the rule to, you know, figure out what the Department of Labor meant by that is, for example, on page 28,922 where they describe --

JUDGE KATSAS: I'm sorry, 922 --

MR. SHIH: Yes --

JUDGE KATSAS: -- of?

MR. SHIH: -- 28,922 of the final rule.

JUDGE KATSAS: Okay.

MR. SHIH: So, on that page the Department of Labor in discussing the non-discrimination requirements is

addressing, you know, just what all of these different criteria in the rule are meant to do, and the Department said, you know, in our view it's nice to have the commonality requirement that we've got, and it's nice to have the substantial purpose requirement that we've got, and the non-discrimination requirement because it assists in figuring out whether an entity is more like an entrepreneurial insurance venture, or an employer driven venture. But the fact that --

JUDGE KATSAS: So, those are designed as belt and suspenders provisions to screen out insurance companies --

MR. SHIH: Absolutely, Your Honor.

JUDGE KATSAS: -- is that idea?

MR. SHIH: Yes. So, you know, and the reason we know this is so is because --

JUDGE KATSAS: So, why -- sorry, this may be a simple question, but suppose an, the hypothetical everyone is worried about is that the group, the group employer is the insurance company, and that might, and they self-insure, and that gets them within ERISA regulation as opposed to state insurance regulation, and everyone worries about that, why -- even in the case of the insurer just on the narrow question at issue here, which is the meaning of the definition employer, why wouldn't they be an employer if they contract with a bunch of companies and they say we want

to act in order to provide you welfare benefits?

MR. SHIH: I understand Your Honor's question now. I'm sorry. So, I think I've got two answers, the first is that, you know, the key word I think in the definition is acts in the interest --

JUDGE KATSAS: Yes.

MR. SHIH: -- of employers.

JUDGE KATSAS: Right.

MR. SHIH: And so, it's not enough for a company to say, you know, I give some things to employers that they like, such as healthcare coverage, so that means that, you know, they're deriving some benefit from their relationship with me. How the Department of Labor has always interpreted that rule is requiring some additional safeguards in form or substance, whether or not the safeguards need to be invoked in any given case. And so, that's the reason why the control of (indiscernible) is important.

JUDGE KATSAS: To make sure that they are genuinely acting in the interest of --

MR. SHIH: Exactly, Your Honor.

JUDGE KATSAS: -- the employer.

MR. SHIH: So, look, it's possible, I guess --

JUDGE KATSAS: I see.

MR. SHIH: -- that a private insurance company, you know, even negotiating at arm's length --

JUDGE KATSAS: That concern --

MR. SHIH: Right.

JUDGE KATSAS: I mean, so that concern applies if the group employer is an insurance company or just like some random fraudster.

MR. SHIH: Yes.

JUDGE KATSAS: And you solve that problem with the control criterion --

MR. SHIH: Yes, Your Honor.

JUDGE KATSAS: -- and the rest is icing on the cake, is that --

MR. SHIH: Yes, Your Honor. Yes.

JUDGE KATSAS: Okay.

MR. SHIH: And so, the fundamental error that the District Court made in this case was to interpret acting in the interest of, which the District Court recognized as ambiguous, as somehow still requiring the stringent form of the commonality requirement, and the stringent form of the business purpose requirement that the Department had in its prior guidance.

JUDGE TATEL: I want to try a different subject on you here. I take your, I understand your argument about why the new standards survive Chevron II, and even if I agreed with you about that we still have to confront the State's argument, don't we, that small employers will stay small

employers even if they band together to form an AHP that's bona fide because they don't, quote, employ employees as required by the Affordable Care Act. So, I guess I have two questions about that, number one, what's your answer to that argument; and two, if the states are right then it doesn't seem like this change in ERISA regulations will accomplish the objective the Department set for itself, that is to allow small businesses to join associations and become major businesses, and therefore subject to the major market, insurance market?

MR. SHIH: I have two answers for that, Your Honor --

JUDGE TATEL: Yes.

MR. SHIH: -- one with your first question, and one with the second. So, you know, as I understand the State's Affordable Care Act arguments, they think that the final rule is unlawful because it contravenes two pieces of it, and only two, so the first conflict as it were is the employee counting provisions of the ACA, and the second conflict is the shared responsibility provisions of the ACA.

JUDGE TATEL: Well, just focus on the definition of large employer. It says --

MR. SHIH: Right.

JUDGE TATEL: -- means an employer who employed an average of at least 50 employees. And their argument is

that can't possibly be an association.

MR. SHIH: So, just again, two things here, Your Honor. The first is that ERISA defines employer in the way that, you know, we've been discussing.

JUDGE TATEL: Correct, but in order -- no, no --

MR. SHIH: And the ACA incorporates the ERISA definition.

JUDGE TATEL: -- I understand that. I'm sorry to interrupt, but --

MR. SHIH: Yes. No.

JUDGE TATEL: -- they're arguing that -- I'm saying even if this, even if you're totally right that the final rule survives under Chevron II under ERISA, does it accomplish its goal because of the Affordable Healthcare Act's definition of large employer? In other words, these associations can't be, can't qualify because they don't employ anyone, they don't employ employees, that's their argument.

MR. SHIH: I understand Your Honor's point, and I think the fundamental response is that nothing in the Department of Labor's rule affects how association health plans whether created under the old guidance or the new rule are treated. So, the provision that you're referring to is implemented by CMS, and CMS --

JUDGE TATEL: So, in other words --

MR. SHIH: -- as read.

JUDGE TATEL: I see. So, in other words we don't know whether -- so, there's a two-step process here, right? Number one, you have to convince the Court that the ERISA final rule is okay; and then number two, we're going to have to see how HHS defines employee to see whether or not these newly created bona fide associations will in fact be able to qualify as major employers, correct?

MR. SHIH: We disagree, Your Honor. So --

JUDGE TATEL: I thought that's what you said.

MR. SHIH: No.

JUDGE KATSAS: You --

MR. SHIH: No, no, so --

JUDGE KATSAS: Sorry, you disagree?

MR. SHIH: No. So, the only basis that the --

JUDGE TATEL: Wait did you say --

MR. SHIH: -- District --

JUDGE TATEL: -- you agree or disagree?

MR. SHIH: We disagree --

JUDGE TATEL: Okay.

MR. SHIH: -- with the two-part, like, you know, the fact that the Government needs to prove two to prevail.

JUDGE TATEL: No, no, no, not here. Maybe I asked the question wrong. Your position is that in order to prevail here you just need to defend, we just need to accept

your Chevron II argument about the definition, about the ERISA definition of employer, right?

MR. SHIH: That's right.

JUDGE TATEL: And then what happens under the Affordable Care Act is for another day, correct?

MR. SHIH: Yes.

JUDGE TATEL: Okay. Now -- but I'm not sure it's quite that simple, because the reason the Department gave for changing these standards, the criteria was to make it possible for small employers, right? Small employers to be able to join together in associations and function in the major market, right?

MR. SHIH: Yes.

JUDGE TATEL: That's the purpose of it?

MR. SHIH: Yes.

JUDGE TATEL: Okay.

MR. SHIH: That's one of the several purposes --

JUDGE TATEL: Well, okay.

MR. SHIH: -- but that's one of the --

JUDGE TATEL: Let's hold that.

MR. SHIH: -- ones, yes.

JUDGE TATEL: Let's hold that for a second.

MR. SHIH: Of course.

JUDGE TATEL: That's, you just mentioned my second question. Let's just talk about that purpose. Suppose I

think that the word employ in the healthcare (indiscernible) is just plain old unambiguous, I mean, it seems like it is, it says employ employees, and associations don't employ employees. Now, if I think that then (indiscernible) the new -- how can the final order survive under Chevron II if its reason for making the change, for amending the standards is to accomplish something that can't be legally accomplished, doesn't that make it arbitrary and capricious?

MR. SHIH: So, you know, first, as to the methodology, second, as the merits. As for the methodology, whether it's arbitrary, capricious, or not is separate from whether the Department's interpretation is reasonable under ERISA.

JUDGE TATEL: I -- no.

MR. SHIH: But then as to --

JUDGE TATEL: This whole hypothetical assumes that.

MR. SHIH: Right.

JUDGE TATEL: Stick with my question. My question is assuming -- you know the way Chevron II works, Chevron II, the way this Court interprets Chevron II is that the Agency's interpretation of the statute has to be reasonable, and it has to give a rational explanation for it, right? So, even a rational, even a reasonable interpretation of a regulation can fail if the agencies fail to give a rational

explanation for why it's done it, we have lots of cases that say that. I'm asking you about the second part of that.

MR. SHIH: So, as to the second part of that --

JUDGE TATEL: Do you see my point now?

MR. SHIH: I do.

JUDGE TATEL: Okay.

MR. SHIH: Right.

JUDGE TATEL: So --

MR. SHIH: And so --

JUDGE TATEL: So, if I think the word employ is unambiguous doesn't that mean that the regulation in fact does fail, the final rule?

MR. SHIH: There's a couple of reasons why you shouldn't think that, Your Honor.

JUDGE TATEL: Okay.

MR. SHIH: The first is that as CMS has repeatedly explained since as far back as I think --

JUDGE TATEL: Yes.

MR. SHIH: -- 1997, and then 2002, the relevant definitional provisions of the ACA --

JUDGE TATEL: Yes.

MR. SHIH: -- which comes from the PHS Act, are not limited in the manner that Your Honor is suggesting at the State's --

JUDGE TATEL: Is that the bulletin you're talking

about?

MR. SHIH: -- suggestion. Yes, that's the bulletin --

JUDGE TATEL: Well, but is there any --

MR. SHIH: -- in 2011.

JUDGE TATEL: -- indication in that bulletin that they were actually interpreting the phrase employ?

MR. SHIH: Yes, Your Honor. So, that's --

JUDGE TATEL: Does it say that?

MR. SHIH: Yes, Your Honor. So, if you look at the 2011 --

JUDGE TATEL: Yes.

MR. SHIH: -- bulletin --

JUDGE TATEL: Yes.

MR. SHIH: -- the idea is, you know, who is the relevant employer under the employee counting provisions --

JUDGE TATEL: Yes.

MR. SHIH: -- and the bulletin says the relevant employer is in this case the association health plan. And that's not an oddity because as we pointed out in the reply brief, and you can see this, it's, the statute is 42 U.S.C. 18,024(b)(4), recognizes that there are a number of different groups of employers that are nonetheless treated as a single employer under the statute, and so, that just underscores the fact that the term employer as used in the

ACA --

JUDGE TATEL: Yes.

MR. SHIH: -- which came from the PHS Act, doesn't have to mean, and indeed has been interpreted by CMS not to mean what your question posits. But the reason I've kind of been, you know, resisting going down this road is because at no point has anybody challenged the validity of the CMS interpretation of the Affordable Care Act, and association health plans have been around for quite a while under the old guidance, and, you know, the same CMS interpretation that was in the 2011 bulletin was applied to association health plans created under the previous guidance.

JUDGE TATEL: Yes. I see.

MR. SHIH: Right.

JUDGE TATEL: So --

MR. SHIH: And so --

JUDGE TATEL: Yes. I'm sorry. I didn't -- finish your point.

MR. SHIH: And so, you know, the upshot is not only has nobody challenged the CMS interpretation in this case, but also, no one appears to have had a problem with CMS's interpretation of the ACA as applied to other association health plans.

JUDGE TATEL: So, what about -- just two more questions. Number one, now it's going to the other issue

you raised. You said there are other reasons for the Department to have made these changes other than facilitating the ability of small employers to get out from under the more onerous provisions of the small market, what are those?

MR. SHIH: So, a couple of reasons, Your Honor, include the fact that if you're a small employer it's difficult to get the benefit of, you know, bargaining power if you don't have that many employees.

JUDGE TATEL: But isn't that the same as being able to participate in the major?

MR. SHIH: I think it's slightly different --

JUDGE TATEL: What's the difference?

MR. SHIH: -- because it doesn't really touch on, you know, whether you have to comply with the ACA's essential benefits requirements, or so on, it's, you know, as the Department explained --

JUDGE TATEL: Okay. What is another reason?

MR. SHIH: Sorry. Other than that?

JUDGE TATEL: You said there were several.

MR. SHIH: Yes. So, one is you can get the benefits of negotiating from a position of --

JUDGE TATEL: Yes.

MR. SHIH: -- you know, relative strength, and another is you can get the benefits of, you know, being able

to more precisely tailor your coverage to the needs of --

JUDGE TATEL: I see.

MR. SHIH: -- the members in your group. And so, you know, on the very first page of the final rule the Department walks through a lot of different policy reasons for why the alteration to the criteria were made, and, you know, very few of those have anything to do with how association health plans are treated --

JUDGE TATEL: I see.

MR. SHIH: -- under the Affordable Care Act.

JUDGE TATEL: All right. So, just to go back to where we were at the beginning. So, would the Government be satisfied, I know this is an odd question to ask a litigant about an opinion, but we do it sometimes, would the Government be satisfied with an opinion that says yes, this final order, this final rule survives under Chevron II, but the Court expresses no opinion whatsoever about its impact on the Affordable Care Act?

MR. SHIH: Yes, Your Honor. So --

JUDGE TATEL: Yes. Okay. All right.

MR. SHIH: -- you know, the reason we're here is because the --

JUDGE TATEL: Right.

MR. SHIH: -- District Court held that under --

JUDGE TATEL: Okay.

MR. SHIH: -- ERISA --

JUDGE TATEL: Yes. All right.

MR. SHIH: -- the Department of Labor lacked authority to --

JUDGE TATEL: Okay.

MR. SHIH: -- do what it did.

JUDGE TATEL: Okay.

MR. SHIH: Unless the Court has any further questions, I'll reserve the remainder of my time. Thank you.

JUDGE HENDERSON: Okay. We'll give you a couple of minutes in reply. Mr. Grieco.

ORAL ARGUMENT OF MATTHEW W. GRIECO, ESQ.

ON BEHALF OF THE APPELLEES

MR. GRIECO: Good morning, may it please the Court, Matthew Grieco on behalf of the Appellees. There are two reasons why this Court should affirm, and it may affirm on either of them, first, the final rule unreasonably interprets ERISA to rework the operation of the ACA, a much more recent enactment; the second, the final rule violates separate language in the ACA that classifies a plan a small group or large group coverage based on the number of employees who work directly for each individual employer.

I'd like to begin with the ACA because Judge Tatel has correctly identified the simplest way to resolve this

case, which is that even if the Court were to conclude that the Department's interpretation of employer were reasonable, which it is not, nevertheless, the aggregation principle stated in the final rule at page 225 of the Joint Appendix, which as the Department states is the only purpose for which the word employer is being re-interpreted, is an illegal aggregation principle because it violates the ACA. And the fatal flaw --

JUDGE TATEL: Because --

JUDGE KATSAS: Sorry, what page?

JUDGE TATEL: -- it violates the -- you mean because --

MR. GRIECO: It's page 225 of the Joint Appendix.

JUDGE TATEL: Is that because --

MR. GRIECO: It's the last paragraph of the --

JUDGE KATSAS: Is that in the rule or the preamble?

MR. GRIECO: That is the final paragraph of the first section of the preamble.

JUDGE KATSAS: Right. Where is it --

JUDGE TATEL: Wait, is --

JUDGE KATSAS: -- in the rule?

MR. GRIECO: So, this Court has recognized a number of times that if the preamble to a rule assumes an interpretative principle to be true for purposes of the

rule's future application, and does not substantiate that interpretation, and furthermore, there is no record in the past to reach that interpretation, then that is also part of what is before the Court on the challenge.

JUDGE KATSAS: Well, that is clearly right with regard to Judge Tatel's line of questioning about arbitrary and capricious review, whether you think of that as part of Chevron II or otherwise. If their explanation depends on that proposition we can look at whether it makes sense.

MR. GRIECO: And it does --

JUDGE KATSAS: But in terms of what's before us, what's before us is a District Court order setting aside specific provisions of a regulation with the force and effect of law, and I don't see this issue addressed in any of those provisions.

MR. GRIECO: So, a couple of things, Judge Katsas. First of all, in the arguments below all of these arguments were raised as an independent basis for challenging the rule, and of course, the District Court didn't need to reach them because it concluded that the rule was unreasonable under ERISA. Secondly, because DOL takes pains throughout the final rule to repeatedly state that this is the only purpose for which the word employer is being reinterpreted, and that it does not apply, for example, under the employer mandate, and does not apply anywhere else that borrows the

definition of employer from ERISA, it is a necessary part of the reasoning of the rule, and they are relying on the assumption that this aggregation principle will work, even though there is no rule-making record to say that it would. And the fatal flaw in the final rule is that ERISA, the Affordable Care Act does not only import ERISA's definition of employer, it also imports ERISA's definition of employee, and nowhere does the final rule grapple with the fact that both the Supreme Court in Nationwide Mutual Insurance Company v. Darden, and DOL itself in its MEWA, Multi-Employer Welfare Arrangement, MEWA manual from 2013, which remains on the books, and which it has never challenged or withdrawn, both say that the word employee always means the direct employee of an individual employer. As you look to the direct common law employers. With Darden, that's what Nationwide Insurance Company v. Darden says, what the MEWA manual says.

And another way to understand this is that when Congress enacted ERISA it made the word employer to a limited extent a term of art, it says that in addition to having its common law meaning, employer can also in some cases mean someone who acts in the interest of an employer. However, Congress did not when it enacted the definition of employee in ERISA Section 3(6) make the word employee a term of art, that word has only its original common law meaning.

And so, for example, in the MEWA manual what DOL says is that even if a group or association qualifies as an employer for purposes of ERISA it does not become, the employees are still counted only as employees of each individual employer. So, that means that even if DOL's interpretation of ERISA were reasonable, all that would mean is that they qualify as an employer, it does not qualify them as a large employer. There is an incorrect intuitive leap in the final rule that if you qualify as an employer then it's simply a matter of counting employees and being a large employer, and then intuitively is incorrect.

JUDGE TATEL: Okay. I got that. But could you just focus on this one question that I asked your Counsel for the Government there, which is do we actually, does this Court have to go beyond deciding the straightforward ERISA question? That is, does the final rule survive Chevron II? That's all. Do we have to go beyond that? Do we have to say anything about the Affordable Care Act in this case?

MR. GRIECO: If the Court agrees with the Court below that the --

JUDGE TATEL: No, forget the Court below.

MR. GRIECO: Okay.

JUDGE TATEL: Just talk about this Court.

MR. GRIECO: Sure, if --

JUDGE TATEL: Do we have to decide that question?

Is the question -- let's assume that we, obviously, if we struck down the definition of, the final order, then that would end the case. But let's assume that we agreed with the Government that this does survive Chevron II, this is just a hypothetical, okay? Let's just assume we do.

MR. GRIECO: Sure.

JUDGE TATEL: And that's all we decide. Then the question of what effect this has on the Affordable Care Act, and the ability of small employers who are now able to join bona fide associations, their ability to qualify in the major market, that's a different question for another case, you have to wait and see what, how HHS interprets the statute, right?

MR. GRIECO: So, I would disagree with the very last part of that. It is a question that is presented in this particular case, and --

JUDGE TATEL: It is. Tell me why?

MR. GRIECO: So, as this Court has recognized in a number of cases, when there is an interpretation, even if it's in the preamble to the rule, if there is one interpretation that is central to the rule, the rule cannot evade --

JUDGE TATEL: I see.

MR. GRIECO: -- cannot escape --

JUDGE TATEL: Okay. Right.

MR. GRIECO: -- the, cannot escape review of that interpretative principle based on the fact that --

JUDGE TATEL: Okay.

MR. GRIECO: -- it doesn't happen to mention that in the portion that's actually going into the C.F.R. For example --

JUDGE TATEL: So --

JUDGE KATSAS: Well, that's true if legally operative text in a rule rests on an interpretation that's expressed in the preamble.

MR. GRIECO: So, the --

JUDGE KATSAS: But here the interpretation expressed in the preamble doesn't seem to bear on any question about what the rule means, it's just a statement about the downstream effectiveness or not when someone starts to figure out what are the consequences of this ERISA rule for purposes of the Affordable Care Act.

MR. GRIECO: So --

JUDGE TATEL: Right. And just to add to, if I might just add to Judge Katsas' question, actually, the Labor Department has no authority to interpret the provisions of the Affordable Care Act, so whatever it says in the preamble is not something we would defer to anyway.

MR. GRIECO: So --

JUDGE TATEL: Isn't that right?

MR. GRIECO: -- the last part that they don't have power to interpret the Affordable Care Act, that is certainly true.

JUDGE TATEL: Yes.

MR. GRIECO: But it is not, it is something that works against them here, not for them, because there are, as we lay out in our brief, there are provisions that require the term employer to be interpreted with the same effect throughout, everywhere that it is use. They have done more than merely say oh, here's how we think it's going to affect the aggregation principle, they have also said oh, it does not apply for purposes of the employer mandate, or in fact, for any purpose other than the aggregation principle. So, by attempting to so-limit the effect of the rule it is also a basis on which this Court could conclude that the rationale for the rule is arbitrary and capricious. The reason they have given for re-interpreting ERISA is based entirely on the Affordable Care Act, and not based on ERISA itself. They don't give any reasons relative to the purposes or policies underlying ERISA to sustain the rule, they merely say this will be helpful in avoiding the requirements of the ACA.

JUDGE TATEL: Okay. But that means for us to accept your argument, the one I was teasing out with Government Counsel about this is that we have to, in order

to accept that argument we have to agree with you that the word employee in the definition is in fact unambiguous, and that the Department of Labor's interpretation is inaccurate, right?

MR. GRIECO: You said the word employee?

JUDGE TATEL: Yes, I'm sorry, employee.

MR. GRIECO: Yes. So, yes --

JUDGE TATEL: No, employ. Employ.

MR. GRIECO: Yes, employee. So, well, first of all --

JUDGE TATEL: Well, no, but -- yes.

MR. GRIECO: -- the word, the Supreme Court in Nationwide Mutual Insurance Company v. Darden did say that the word employee always has a specific common law meaning, and DOL itself has never disputed that. So, the fact that the final rule attempts to interpret the rule employer in isolation, and in fact, it attempts to interpret the words in the interest of in isolation, not removed from the broader statutory context of ERISA, shows that they are trying to drive a truck through a very small hole to attempt to rework how the ACA works by changing a definition in a much older statute, and changing it for only one purpose, which again, is why it is before the Court in this case. I would say also that --

JUDGE KATSAS: But on, just on ERISA your

position, if I'm following it, is that employer and employee are not mirror images of one another.

MR. GRIECO: That is exactly right, Judge Katsas, they are not mirror images, and that is exactly right.

JUDGE KATSAS: And the ERISA piece of this goes to the non-intuitive, non-common law statutory definition of employer.

MR. GRIECO: Right. Which is also unreasonable.

JUDGE KATSAS: And your ACA argument focuses on the employee piece of it.

MR. GRIECO: Right. But the aggregation --

JUDGE KATSAS: So --

MR. GRIECO: -- principle that's stated in the final, that is stated in the final rule depends on an assumption, an interpretative assumption that is incorrect. But, I mean, if you're background rule is right, which is that the way this scheme works, rules governing who is an employer don't necessarily govern who is an employee, it seems like that's further ground for the minimalist disposition that Judge Tatel suggests, which is we deal with the employer concept under ERISA, and we leave open the employee questions under the ACA.

MR. GRIECO: The Court should go ahead and confront the gap in the rule because of the Agency's failure to grapple with the separate definition of employee, which

would be a, which is a necessary step to get to the aggregation principle that the rule actually states. No agency has ever actually looked at the text of the ACA, and looked at the employer who employed language, the language that says a large employer is an employer who employed an average of at least 51 employees, 42 U.S.C. 18024(b)(1), no agency has looked at that language and concluded it is reasonable to conclude from that language that an association --

JUDGE TATEL: I thought Government --

MR. GRIECO: -- can count its employees --

JUDGE TATEL: -- Counsel, Counsel told me that the CMS bulletin does do that.

MR. GRIECO: It does not. The CMS rule, the main thrust of the CMS bulletin is to say that you look to the size of the individual employer, it then says, quote, it speculates that there may be, quote, rare instances in which you look to the size of the employer, but there is no textual, size of the association, but there is no textual analysis associated with that rare instance of suggestion, it is just a throwaway line by another agency. There was a case a couple of --

JUDGE TATEL: Okay. But you agree that it's HHS that has the authority to interpret this language, not the Labor Department?

MR. GRIECO: Yes. So --

JUDGE TATEL: But -- well, let me just finish my question.

MR. GRIECO: Sure.

JUDGE TATEL: So, if the -- I hear your point that, because I asked Government Counsel the same question, if the reason DOL has modified the criteria for bona fide associations is to accomplish a purpose that is unlawful, namely under the Affordable Care Act, I understand your point that that would make, you could argue that would make the rule arbitrary and capricious, even if it was on its face a reasonable interpretation of ERISA. But how can we make that judgment since HHS has not yet interpreted these provisions?

MR. GRIECO: Well, that flips it around --

JUDGE TATEL: You just told me --

MR. GRIECO: -- because if one agency is relying -- sorry, go ahead.

JUDGE TATEL: You just told me that HHS hasn't ever interpreted this language.

MR. GRIECO: Right, but the --

JUDGE TATEL: And since it's entitled to Chevron deference, unless we're prepared to say the language is unambiguous, then how can we say in this case that the Department of Labor's rationale is arbitrary and capricious

if the Agency, if HHS hasn't interpreted that language yet?

MR. GRIECO: Because when a statutory interpretation question comes first to a court before --

JUDGE TATEL: Yes.

MR. GRIECO: -- an agency, then the Court should arrive at the correct interpretation of the rule. There was a case a couple of years ago --

JUDGE TATEL: Yes, but not if -- I mean, why would we interpret that statute, if HHS interpreted it we would defer to it if it was reasonable, correct?

MR. GRIECO: If it was reasonable, and -- yes. So, but --

JUDGE TATEL: Yes.

MR. GRIECO: -- HHS has not --

JUDGE TATEL: So, why wouldn't we say in this case okay, we're going to decide the ERISA question just like the District Judge did, and we're going to leave its impact on the Affordable Care Act to be worked out later, and litigated once we have the Agency's interpretation of that language, which is under the statute responsible for interpreting it?

MR. GRIECO: Because that's not what this Court has historically done when it's confronted with a regulation --

JUDGE TATEL: Really?

MR. GRIECO: -- that has, when this Court has been confronted with a regulation that assumes the correctness of another interpretation that has never actually been aired, this Court has gone ahead and concluded that --

JUDGE TATEL: Can you give me a case that says that?

MR. GRIECO: Sorry?

JUDGE TATEL: What case would you cite?

MR. GRIECO: Well, you know, I'm blanking on the name of the case, but there was a --

JUDGE TATEL: Okay.

MR. GRIECO: -- case a couple of years ago in which Judge Henderson referred to the cross your fingers and hope it goes away principle of statutory interpretation, that is what we have here.

JUDGE TATEL: Well, you might think about this whole --

MR. GRIECO: DOL --

JUDGE TATEL: -- case that way.

MR. GRIECO: Sorry?

JUDGE TATEL: I said one might use that for this whole case. I thought your answer, by the way, would have been well, look, it's unambiguous, you don't have to wait for HHS.

MR. GRIECO: That is also true. As I said before,

the Supreme Court has unambiguously interpreted the word employee under Nationwide Insurance Company, so you wouldn't get to Chevron II in an interpretation of employee. But what we have here is a circumstance where DOL has --

JUDGE KATSAS: But that's, I mean, that's a harder lift for you, right? If we think your interpretation of the ACA is the more plausible one, but it's a 5545 case --

MR. GRIECO: But of course DOL is not the agency --

JUDGE KATSAS: -- that's not the same as saying that this issue is so clear that you can win at Chevron I.

MR. GRIECO: Well, what's clear at a minimum about the word employee from Nationwide and from the MEWA manual is that the employee only connects back to the direct common law employer. There's no ambiguity about that. But even if that we're true the problem here is that what DOL is relying on, DOL is attempting to base an aggregation principle that will fundamentally change how the market size definitions that are central to the ACA, how they will work by relying on an assumption that the aggregation principle works, even though neither DOL nor HHS has done the work of reaching that interpretation, nor could they because it would violate the plain text of the Affordable Care Act. And there are a couple of additional problems --

JUDGE TATEL: Can I, wait, can I just interrupt

and ask you something? I'm sorry, I just don't want to lose my thought. Do you care about the interpretation of ERISA beyond its impact on the Affordable Care Act?

MR. GRIECO: For purposes of this case what we're concerned about is that the final rule states an aggregation principle --

JUDGE TATEL: Yes. I got that.

MR. GRIECO: Yes.

JUDGE TATEL: But setting aside the aggregation principle for purposes of the Affordable Care Act, you don't really care about this interpretation of ERISA, do you?

MR. GRIECO: It is an unreasonable interpretation of ERISA, but at the end of the day --

JUDGE TATEL: I know that's what you think, but --

MR. GRIECO: -- what we care about --

JUDGE TATEL: -- that's not why you're here, right?

MR. GRIECO: We are here because --

JUDGE TATEL: Yes.

MR. GRIECO: -- they are attempting to change the way the --

JUDGE TATEL: Right.

MR. GRIECO: -- Affordable Care Act works.

JUDGE TATEL: Okay. I got you. Right. Okay. Right.

MR. GRIECO: And they have said in the rule that the only reason that they are adopting this rule is to change how the Affordable Care Act works.

And there are a couple of final points I'd like to make about this, first of all, DOL has no delegation of authority to change how the ACA works. As in cases such as King v. Burwell, or Brown & Williamson, the Court should apply a measure of common sense as to whether Congress intended this Agency to have the authority to change the operation of a statute that is fundamentally delegated to a different agency. They are also affirmatively violating a provision in 26 U.S.C. 4980H(c)(6), which says any term in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act. But that section I just quoted, that's the employer mandate, and they are affirmatively saying that their re-interpretation of employer does not apply to that provision. So, setting aside whether you think the definition of large employer is unambiguous, or would ever receive Chevron deference, they have a separate problem in that they have made an affirmative, they have affirmatively said this word is not going to apply the same in the employer mandate, even though there is a provision in the employer mandate saying that they have to give it the same interpretation. That is an independent basis on which this

Court can declare the final rule to violate the Affordable Care Act.

And finally, I would say that the paradox of what they have done is that under the final rule employees of small employers who join an association that if the final rule were upheld will get to count as a single large employer will have the least protection from the Affordable Care Act of any employees in the country because Congress intended employees of small employers to have the greatest protection, and then employees of large employers would have at least the protection that comes from the employer mandate, which requires the payment of the mandate if the large employer does not provide 60 percent of essential health benefits. But under the final rule directly contrary to Congress' intent the employees of small employers would now have no, effectively no statutory protections that applied to either the small group or large group markets, which is contrary to Congress' intent, and suggests that the Department has gone beyond the delegation of authority Congress intended it to have.

JUDGE HENDERSON: All right.

MR. GRIECO: Thank you.

JUDGE HENDERSON: Thank you. Does Mr. Shih have any time left?

THE CLERK: Mr. Shih did not have any time left.

JUDGE HENDERSON: Okay. Why don't you take two minutes?

ORAL REBUTTAL OF MICHAEL SHIH, ESQ.

ON BEHALF OF THE APPELLANTS

MR. SHIH: Thank you, Your Honor.

JUDGE KATSAS: Can I just ask you, if, assume for the sake of argument that we agreed with New York about the meaning of the Affordable Care Act, would you still want this rule on the ERISA side?

MR. SHIH: Yes.

JUDGE KATSAS: Okay. Why?

MR. SHIH: So, as we explain on the very first page of the rule, and you can find it on page 222 of the Joint Appendix, third column on the top, that paragraph I think is probably the most succinct explanation for why the Department of Labor wants the rule.

JUDGE KATSAS: I'm sorry, which column?

MR. SHIH: The third column --

JUDGE KATSAS: Okay.

MR. SHIH: -- first full paragraph, it says this is an innovative option for expanding access to employer sponsored coverage, working owners, you know, here's where it talks about things such as the ACA, the regulatory complexity and burden that currently characterizes the market for individual and small group health coverage. But

then the entire rest of that paragraph has nothing whatsoever to do with the ACA. So, it explains, for example, that association health plans can help reduce the cost of health coverage by giving groups increased bargaining power vis-à-vis hospitals, doctors, and pharmacy benefit providers. Then it says --

JUDGE KATSAS: Because --

JUDGE TATEL: But they can't --

MR. SHIH: -- more economies of scale --

JUDGE TATEL: I see. I see.

JUDGE KATSAS: Does that work if, again, assume for the sake of argument that your opponents are right about the Affordable Care Act, can this work, can a group plan work if you have all the different constituent employers, and some are individual employers, and some are small employers, and some are large employers, and that triggers three entirely different regulatory schemes under the ACA, and all of that is subsumed in one plan?

MR. SHIH: We think --

JUDGE KATSAS: I mean, is that --

MR. SHIH: -- it would certainly be harder.

JUDGE KATSAS: -- workable?

MR. SHIH: Right. And I think that's why, you know, CMS and IRS have interpreted the Affordable Care Act with respect to not only, you know, plans created under the

rule, but, you know, way back in the day plans created under the old guidance to not be subject to that sort of regulatory complexity that you're --

JUDGE KATSAS: Yes, but you're --

MR. SHIH: -- positing.

JUDGE KATSAS: -- fighting, now you're fighting the hypo.

MR. SHIH: Right.

JUDGE KATSAS: I'm saying assume New York is right on the Affordable Care Act --

MR. SHIH: And so, the --

JUDGE KATSAS: -- could plans work with underlying employees subject, in the same group plan subject to the three different tiers of ACA regulation?

MR. SHIH: I don't want to get out too far in front of the Agency because, you know, the Agency didn't have to address that because --

JUDGE KATSAS: Okay.

MR. SHIH: -- it just relied on what the other agencies have said about how the ACA applies to these plans. But what I would say is like yes, Your Honor, it would make it harder, and that would be a consideration for the Agency to take into account if you disagreed with what those agencies have done with respect to all association health plans. But, you know, whatever the Court thinks about that

question it is emphatically not before it because that would be more of an arbitrary capricious challenge to what the Department of Labor has done, and, you know, as page 48 --

JUDGE KATSAS: And you think --

MR. SHIH: -- of the brief explains.

JUDGE KATSAS: -- the paragraph that you cited to me would support the proposition that there are independent benefits, so, like, even if my instinct is right that that three-tiered scheme would collapse you could at least have group plans where ever employer is given a small market or something?

MR. SHIH: Yes. Absolutely, Your Honor.

JUDGE KATSAS: Okay.

MR. SHIH: Right. Unless the Court has further questions --

JUDGE HENDERSON: All right.

MR. SHIH: -- we ask that the judgment be reversed. Thank you.

JUDGE HENDERSON: Thank you.

(Whereupon, at 10:21 a.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood — November 22, 2019

Paula Underwood — Date

DEPOSITION SERVICES, INC.