Nos. 19-840, 19-841

IN THE

Supreme Court of the United States

CALIFORNIA, ., ET AL

Petitioners,

v.

TEXAS, ET AL.,

Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,

Petitioner,

v.

TEXAS, ET AL.,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* ALLIANCE OF COMMUNITY HEALTH PLANS AND ASSOCIATION FOR COMMUNITY AFFILIATED PLANS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, the Alliance of Community Health Plans ("ACHP") and the Association for Community Affiliated Plans ("ACAP"), as *amici curiae*, respectfully submit this brief in support of the petitions for writs of certiorari submitted by the States of California, *et al.* and the United States House of Representatives.

ACHP is a national leadership organization bringing together top-performing health plans and provider organizations. ACHP's members are not-for-profit, community-based, and regional health plans that provide high-quality health coverage and care to nearly 22 million Americans, including 2.6 million Medicare beneficiaries, in 34 states and the District of Columbia.

ACAP is a national trade association representing 67 not-for-profit and community-based health plans in 29 states that provide health coverage to more than 20 million people through Medicaid, Medicare, Marketplace, and other public health coverage programs. ACAP's member health plans primarily participate in the low-margin, Medicaid market and rarely participate in the higher-margin large group employer market. ACAP

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than amici curiae and their counsel. Pursuant to Rule 37.2(a), timely notice of intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

member health plans that have entered into the individual market provide streamlined coverage for low-income consumers that regularly move between Medicaid and the individual market based on income. Many enrollees to ACAP's member health plans are among the nation's poorest and sickest people who lack access to other health insurance.

Together, ACHP's and ACAP's member health plans ("Member Plans")[2] deliver affordable, high-

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[2] ACHP's Member Plans include: Aultcare (Ohio), AvMed (Fla), Capital District Physicians' Health Plan (N.Y.), CommunityCare (Okla.), Dean Health Plan (Wisc.), Fallon Health (Mass.), Geisinger Health Plan (Penn.), Group Health Cooperative of South Central Wisconsin (Wisc.), Harvard Pilgrim Health Care (Mass.), Health Alliance (Ill.), Health Alliance Plan (Mich.), HealthPartners (Minn.), Independent Health Plan (N.Y.), Kaiser Permanente (Calif.), Martin's Point Health Care (Maine), PacificSource Health Plans (Ore.), Presbyterian Health Plan (N.M.), Priority Health (Mich.), Scott & White Health Plan (Texas), Security Health Plan (Wisc.), SelectHealth (Utah), UCare (Minn.), and UPMC Health Plan (PA).

ACAP's Member Plans include: Affinity Health Plan (N.Y.), Alameda Alliance for Health (Calif.), Alliance Health (N.C.), AlohaCare (Hawaii), AmeriHealth Caritas Louisiana (La.), AmeriHealth Caritas Pennsylvania (Penn.), Amida Care (N.Y.), Banner University Health Plans (Ariz.), Boston Medical Center HealthNet Plan (Mass.), CalOptima (Calif.), Cardinal Innovations Healthcare (N.C.), CareOregon (Ore.), CareSource Ohio (Ohio), CenCal Health (Calif.), Central California Alliance For Health (Calif.), Children's Community Health Plan (Wisc.), Children's Medical Center Health Plan (Texas), Commonwealth Care Alliance (Mass.), Community Care Plan (Fla.), Community Health Choice (Texas), Community Health Group (Calif.), Community Health Network of Connecticut

(continued...)

quality coverage and care for more than 40 million Americans in 39 states and the District of Columbia. As mission-driven organizations, Member Plans have been a strong and stable presence in their communities and states.

ACHP and ACAP submit this amicus brief to highlight how prolonged uncertainty over the ACA's continued existence—uncertainty that now looms from the Fifth Circuit's ill-conceived remand

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(continued...)
(Conn.), Community Health Plan of Washington (Wash.), Community Health Options (Maine), Common Ground Healthcare Cooperative (Wisc.) Contra Costa Health Plan (Calif.), Cook Children's Health Plan (Texas), CountyCare (Ill.), Denver Health (Colo.), Driscoll Health Plan (Texas), El Paso First Health Plan (Texas), Elderplan (N.Y.), HomeFirst (N.Y.), Gateway Health Plan (Penn.), Geisinger Health Plan (Penn.), Gold Coast Health Plan (Calif.), Hamaspik Choice (N.Y.), Health Partners Plans (Penn.), Health Plan of San Joaquin (Calif.), Health Plan of San Mateo (Calif.), Health Services for Children with Special Needs (D.C.), Hennepin Health (Minn.), Inland Empire Health Plan (Calif.), Kern Family Health Care (Calif.), L.A. Health Plan Care (Calif.), Maryland Community Health System (Md.), MDwise Montana Health CO-OP (Ind.), (Mont.), Mountain Health Co-Op (Idaho), My Choice Family Care (Wisc.), Healthcentra (N.Y.), Neighborhood Health Plan of Rhode Island (R.I.), Parkland Community Health Plan (Texas), Partnership Health Plan of California (Calif.), Partners Behavioral Health Management (N.C.), Prestige Health Choice (Fla.), Priority Partners (Md.), San Francisco Health Plan (Calif.), Santa Clara Family Health Plan (Calif.), Sendero Health Plans (Texas), Texas Children's Health Plan (Texas), University of Utah Health Plans (Utah), UPMC for You (Penn.), VillageCareMAX (N.Y.), Virginia Premier Health Plan (Va.), VNSNY CHOICE Health Plans (N.Y.), Well Sense Health Plan (N.H.).

decision—adversely affects their Member Plans and their Member Plans' enrollees.

INTRODUCTION

Before the enactment of the Affordable Care Act ("ACA")[3], approximately 47 million Americans did not have health insurance.[4] Congress sought to make comprehensive health insurance available and affordable for all Americans through the ACA.

To do this, Congress included provisions in the ACA, among others, that:

(1) ensure coverage of essential health benefits, such as maternity care and mental health and substance use disorder services, in individual and small group insurance policies[5];

(2) enable consumers to purchase and afford health insurance via advance premium

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[3] The Affordable Care Act (the "Act" or the "ACA") is comprised of two pieces of legislation: (1) the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), and (2) the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010).

[4] Kaiser Commission on Medicaid and the Uninsured, "The Uninsured: A Primer- Key Facts about Health Insurance on the Eve of Coverage Expansions," (Washington, DC: Kaiser Family Foundation), October 23, 2013, *available at* http://kff.org/uninsured/report/the-uninsured-a-primer-key-facts-about-health-insurance-on-the-eve-of-coverage-expansions/.

[5] 42 U.S.C. § 18022 (ACA Section 1302).

tax credits and reduced cost-sharing requirements[6];

(3) encourage States to expand Medicaid eligibility[7];

(4) empower State innovation[8]; and

(5) improve Medicare benefits and quality.[9]

The Fifth Circuit's decision in *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), casts doubt and uncertainty on these and all the other provisions of the ACA. *See Texas v. United States*, 945 F.3d at 416 (King, J., dissenting), State Pet. App. at 99a ("There is . . . no reason to prolong the uncertainty this litigation has caused to the future of this indubitable significant statute.") The Fifth Circuit's decision was wrong on all fronts.

- The two individual plaintiffs lack standing to challenge a now-impotent individual mandate because it causes them no cognizable injury should they opt to forgo health insurance. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.")

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[6] 26 U.S.C. § 36B (ACA Section 1401) and 42 U.S.C. §18071 (ACA Section 1402).

[7] ACA Title II, Subtitle A; 42 U.S.C. § 1396d(y)(1).

[8] 42 U.S.C. § 18052 (ACA Section 1332).

[9] ACA Title III.

- Texas and its fellow State plaintiffs lack standing because they failed to submit any empirical or concrete evidence of injury before the district court. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 420 (2013) (rejecting standing where respondents offered "no concrete evidence" of injury).

- Despite the neutering of the individual mandate by the Tax Cuts and Jobs Act of 2017[10], the mandate is still a valid exercise of congressional power; the law in its current form is a dormant tax, "do[ing] nothing" while reserving the features to operate as tax in the future. *Texas v. United States*, 945 F.3d at 405 (King, J., dissenting), State Pet. App. at 91a-92; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-566 (2012).

- And even if the mandate itself were somehow unconstitutional, it is severable from the remainder of the ACA, for Congress has given direct evidence of its intent to keep the ACA intact: it temporarily neutralized the mandate's enforceability, while retaining the rest of ACA's provisions. *See United States v. Booker*, 543 U.S. 220, 224 (2005) (severability analysis is question of Congress' "likely intent" to preserve a

[10] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

law, despite excising an unlawful portion of it).

The purpose of this brief, however, is not to delve deeper into these procedural and merits issues. State Petitioners and the House of Representatives have done that already, and there will be opportunity to go further should the Court grant review.

ACHP and ACAP instead write to support the contention that the Court should review this case *now* rather than wait. The Fifth Circuit's decision to remand the issue of severability to the district court prolongs unnecessary doubt over the ACA's continued existence, including the provisions delineated above. This uncertainty acutely affects the Member Plans of ACHP and ACAP, who rely on the ACA to deliver high-quality, affordable healthcare coverage to their enrollees.

The Court should grant review of the Fifth Circuit's decision expeditiously to quell the uncertainty, so that the nation's healthcare system—including its health plans—may continue functioning on an even keel.

ARGUMENT

I. THE BUSINESS FUNCTIONS OF ACHP'S AND ACAP'S MEMBER PLANS AND THE LIVES OF THEIR ENROLLEES WILL BE DISRUPTED SHOULD THE COURT DECLINE TO GRANT EXPEDITED REVIEW.

The Fifth Circuit's action to remand the issue of severability to the district court should not alter this Court's "usual" course of granting certiorari over a

lower court's decision invalidating a federal statute. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019).

As the federal courts have noted, the question of severability is a legal one, subject to *de novo* review. *See, e.g. Texas v. United States*, 945 F.3d at 416 (King, J., dissenting), State Pet. App. at 98a; *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429, 435 (1st Cir. 2016) (question of severability is reviewed "de novo"); *Precision Pulsvideo Enterprises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed. Cir. 2000) (noting "the question of severability" is "reviewed *de novo*").

No new facts need to be developed for the Court to decide the severability issue. There are no good reasons why the Fifth Circuit passed on deciding it. *See* House Pet. at 14 (noting that the question of severability is "a pure question of law that can be answered on the basis of the statutory text and structure, the information Congress had before it when it amended Section 5000A…and Congress's intent in enacting the amendment"). And should this Court even have to reach the question, it may decide it without any further lower court proceedings. Indeed, this Court has decided the issue of severability in the first instance in numerous past cases. *See, e.g. Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508 (2010).

The benefits of awaiting the district court's severability "do-over" are low, but the costs are high. *Texas v. United States*, 945 F.3d at 404 (King, J., dissenting), State Pet. App. at 98a. To delay or decline review while the district court "pars[es] through the over 900 pages of the post-2017 ACA,"

Texas v. United States, 945 F.3d at 400, State Pet. App. at 65a, puts in limbo "one of the most consequential laws" in U.S. history, *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Kavanaugh, J., dissenting). The Fifth Circuit has created real doubt about the ACA's continued existence by invalidating the individual mandate and questioning the vitality of the entire ACA. *See, e.g., Texas v. United States*, 945 F.3d at 402, State Pet. App. at 69a (noting that "[i]t may still be that none of the ACA is severable from the individual mandate…")

This doubt benefits no one, most especially the Member Plans of ACHP and ACAP. In their respective petitions for writs of certiorari, both the State petitioners and the House of Representatives stress how the "uncertainty created by this litigation" threatens disruption of the healthcare markets, individuals and their families, health insurers, and state governments. *See* State Pet. At 16; House Pet. at 16 ("[T]he lengthy delay that will result from the Fifth Circuit's approach will inflict enduring concrete harms on the health insurance market, individual States, and insurers and other businesses."). No truer is this case for ACHP's and ACAP's Member Plans, who serve the health coverage needs of millions of Americans, including the sickest and most vulnerable.

Below, ACHP and ACAP submit several examples to illustrate how the uncertainty created by the Fifth Circuit's decision disrupts the business operations of their Member Plans and the people they serve.

A. Uncertainty over the continued existence of the ACA may cause Member Plans to leave certain markets or keep them from entering new ones.

ACHP's and ACAP's Member Plans began offering qualified health plans ("QHPs") in 2014 on the health exchanges that the ACA established throughout the country.

Member Plans rely on the ACA in determining whether to stay in existing service areas or enter new ones. Member Plans also rely on the ACA's provisions in setting premiums.

To participate on the marketplace exchanges for benefit year 2021, Member Plans must enter into agreements with the Centers for Medicare and Medicaid in September 2020.[11] If the Court declines to grant review, or delays review until the October 2020 term, Member Plans will be forced to make their 2021 marketplace decisions amid a path of unknowns laid down by the Fifth Circuit's decision.

Will the marketplace exchanges still exist in benefit year 2021? For that matter, will the ACA even exist? Instability and consumer confusion resulting from the current state of limbo are real risks.

Considering the uncertainty, some insurers, Member Plans included, may opt to leave certain

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[11] Centers for Medicare and Medicaid, "Qualified Health Plan Certification Information and Guidance – Timeline," accessed January 2020, *available at* https://www.qhpcertification.cms.gov/s/Timeline.

service areas for fear the ACA will crumble leaving them bound to perform on insurance contracts at serious financial risk without the benefit of the ACA's help. This could result in "significant disruption" for consumers since they are "automatically disenrolled" from discontinued plans.[12]

Other Member Plans may decide not to enter new service areas, limiting consumer choice in certain regions of the country. To enter a new service area, an insurer generally must establish or modify hundreds of contracts with hospitals and other healthcare providers, develop expertise to price insurance products in that region, and invest in customer-facing infrastructure. Health plans are unlikely to make the necessary investments amid significant uncertainty regarding the application of the ACA's reforms and financial assistance.

The Court should weigh in now to keep the healthcare markets stable and ensure that the ongoing health needs of some of the nation's most vulnerable patients are not compromised. If the Court grants review and resolves the case by June 2020, Member Plans will be able to make decisions regarding participation in the marketplaces for benefit year 2021 based on renewed certainty of the

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[12] BMC Health Services Research, "Three years in – changing plan features in the U.S. health insurance marketplace," published on June 15, 2019, p. 9, accessed on January 2020, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6002983/pdf/12913_2018_Article_3198.pdf.

ACA provisions in effect. Respondents do not have a meaningful, countervailing reason for delay.

B. Uncertainty over the ACA's premium tax credits and cost-sharing reductions disrupts the lives of Member Plans' enrollees.

ACHP's and ACAP's Member Plans serve low-income populations. Many of their enrollees previously were uninsured, have pre-existing conditions, and cannot afford large deductibles. Before the ACA, these enrollees lacked access to health insurance and, by extension, much-needed medical care. Consider that the Kaiser Family Foundation estimates that 27 percent of non-elderly people have pre-existing conditions that would have kept them from purchasing health insurance on the individual market prior to the ACA.[13]

Today, many of Member Plans' enrollees rely on the ACA's advance premium tax credit and/or cost-sharing reductions to afford coverage. See, e.g., 26 U.S.C. § 36B (ACA Section 1401) and 42 U.S.C. §18071 (ACA Section 1402). Some enrollees since enactment of the ACA have always needed these support provisions to afford coverage. Others have relied on the availability of these provisions in

[13] Kaiser Family Foundation Health Reform, "Pre-Existing Condition Prevalence for Individuals and Families," accessed January 2020, https://www.kff.org/health-reform/issue-brief/pre-existing-condition-prevalence-for-individuals-and-families/.

making life-altering decisions, such as to retire, work part-time, or pursue self-employment.[14]

The Fifth Circuit's decision casts doubt on the availability of these support provisions going forward. As that doubt looms—potentially for years while the district court employs a "finer-toothed comb" to the severability question, State Pet. App. at 68a—enrollees may be forced to make new life-altering decisions for fear of losing their health insurance. The retired may return to work; those hoping to retire may continue working; and the self-employed may abandon their small-business or entrepreneurial venture in favor of corporate employment—all to ensure coverage security for themselves and their families due to the doubt that permeates from the Fifth Circuit's decision.

This disruption is unnecessary because the severability question presented by this case, should the Court even need to consider it, is simple: "After all, '[o]ne determines what Congress would have done by examining what it did,' and Congress declawed the coverage requirement without repealing any other part of the ACA." *Texas*

[14] The U.S. Department of the Treasury found that 20% of people who bought coverage on the Marketplace exchanges in the ACA's first year were self-employed or small business owners, and the self-employed bought coverage at almost three times the rate of traditional wage earners. *See* U.S. Department of the Treasury, "One in Five 2014 Marketplace Consumers was a Small Business Owner or Self-Employed," accessed January 2020, *available at* https://www.treasury.gov/connect/blog/Pages/One-in-Five-2014-Marketplace-Consumers-was-a-Small-Business-Owner-or-Self-Employed.aspx.

United States, 945 F.3d at 416 (King, J., dissenting) (citations omitted), State Pet. App. at 98a. The Court can nip the unnecessary disruption in the bud by expeditiously reviewing and deciding this case now. It need not await the district court's resolution of a purely legal issue that this Court may resolve, and has resolved in previous cases, in the first instance.

C. Uncertainty over the continuation of Medicaid expansion threatens its effectiveness.

The ACA's optional Medicaid expansion has enabled millions of previously uninsured individuals at or below 138% of the federal poverty level in 37 states and the District of Columbia (as-of January 2020) to access Medicaid benefits and obtain health care.[15] Medicaid expansion eliminates the "coverag gap" between traditional Medicaid eligibility (limited to low-income families, qualified pregnant women and children, and the aged, blind, or disabled) and qualifications for federal subsidies to purchase coverage through the marketplace exchanges.

Medicaid expansion is vitally important to the mission of the ACHP's and ACAP's Member Plans. Its stabilizing effect on hospitals and other providers—particularly in rural areas—resulted in improved access to healthcare services. A Health

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[15] ACA Title II, Subtitle A; See Kaiser Family Foundation State Health Facts, "Status of State Action on the Medicaid Expansion Decision," accessed January 2020, *available at* http://kff.org/health-reform/state-indicator/state-activity-around- expanding-medicaid-under-the-affordable-care-act/.

Affairs study determined that Medicaid expansion prevents hospital closures because it reduces hospitals' exposure to uncompensated care for uninsured individuals, "especially in rural markets and counties with large numbers of uninsured adults before Medicaid expansion."[16]

ACHP's and ACAP's Member Plans rely on and partner with rural hospitals and other providers to ensure adequate networks to deliver healthcare services for Medicaid. Medicaid expansion allows Member Plans to provide much-needed care to critical populations before health status deteriorates and, in so doing, saves Medicaid money and, more importantly, lives.

But continued uncertainty about the future of Medicaid expansion caused by this litigation stands to disrupt its many successes. Doubts about the federal funding attendant to Medicaid expansion may dissuade providers from partnering with Member Plans to construct necessary Medicaid provider networks and programs. And the loss or uncertainty of provider participation may push some Member Plans out of certain Medicaid markets.

Moreover, states still considering whether to implement Medicaid expansion may decline making the necessary investments to do so amid the uncertainty of the expansion's continued existence.

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[16] Richard C. Lindrooth, Marcelo C. Perraillon, Rose Y. Hardy, and Gregory J. Tung, Understanding the Relationship Between Medicaid Expansions and Hospital Closures, Health Affairs Vol 37, No. 1 (January 2018), *available at* https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0976.

Delay in resolving this case will only disserve and potentially stifle the Medicaid expansion program.

D. Uncertainty over the ACA's Medicare programs may undermine their progress.

The ACA enabled ACHP's and ACAP's Member Plans to provide more Medicare benefits with lower costs to enrollees. The ACA reduced costs for the more than 57 million Medicare beneficiaries by requiring free coverage of certain preventive screenings and eliminating the Part D prescription drug coverage gap.[17] These changes empowered Medicare beneficiaries to access services and potentially catch dangerous and costly medical conditions earlier, permitting ACHP and ACAP Member Plans to more effectively manage care, mitigate risks, and improve the lives of their Medicare beneficiary members.

The success of these changes have been made possible due to provider participation in the alternative provider-reimbursement models that the ACA created for Medicare, such as the Medicare Shared Savings Program and bundled payments models. *See* 42 U.S.C. § 1395jjj and 1395cc-4.

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[17] Juliette Cubanski, Tricia Neuman, Gretchen Jacobson, Cristina Boccuti, "What are the Implications of Repealing the Affordable Care Act for Medicare Spending and Beneficiaries," Kaiser Family Foundation (Dec. 13, 2016), *available at* https://www.kff.org/health-reform/issue-brief/what-are-the-implications-of-repealing-the-affordable-care-act-for-medicare-spending-and-beneficiaries/.

Indeed, in July 2019, about one-sixth of all Medicare beneficiaries—10.9 million people—were receiving care from a provider participating in the Medicare Shared Savings Program.[18] Many others receive care from providers participating in alternative payment models operating under the Center for Medicare and Medicaid Innovation, a federal office established by the ACA.[19]

But provider participation in these alternative payment models is only likely to make sense for providers who are willing to invest in redesigning how they deliver care. Some providers are unlikely to make these investments if a cloud of doubt, stemming from this litigation, persists over the payment models' continued existence. Provider unease about the future of these payment models may disrupt the Medicare programs that the Member Plans help administer and the lives of their Medicare beneficiaries.

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There is little to gain by waiting for the lower courts to resolve the severability issue, which based on the merits, this Court may not have to resolve, and even if it did, it has resolved in the first instance

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[18] Centers for Medicare and Medicaid Services, "Shared Savings Program Fast Facts – As of July 1, 2019," accessed January 2020, *available at* https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/ssp-2019-fast-facts.pdf.

[19] Centers for Medicare and Medicaid Services, "About the CMS Innovation Center," accessed January 2020, *available at* https://innovation.cms.gov/About/.

in past cases anyway. But there is potentially much to lose in further delay. The stability of the healthcare markets, the effectiveness of Medicaid expansion, the progress of Medicare, and most notably, the well-being of Americans hang in the balance.

CONCLUSION

The Court should grant the petitions for writs of certiorari and expeditiously review and resolve this case.

Respectfully submitted,

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