No. 19-10011

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA, STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants

On Appeal from the United States District Court
for the Northern District Of Texas, No. 4:18-cv-167-O
Hon. Reed Charles O'Connor, U.S. District Judge

AMICI CURIAE BRIEF OF FAMILIES USA, COMMUNITY CATALYST, THE NATIONAL HEALTH LAW PROGRAM, THE CENTER ON BUDGET AND POLICY PRIORITIES, AND SERVICE EMPLOYEES INTERNATIONAL UNION SUPPORTING INTERVENOR DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit organizations. They have no parent corporations and do not issue stock.

INTEREST OF AMICI CURIAE[1]

Families USA is a national, non-partisan, non-profit organization that has represented the interests of health care consumers and promoted health care reform in the United States for more than 35 years. On behalf of health care consumers, Families USA has addressed the serious medical and financial harms inflicted on the millions of Americans without health insurance. Families USA fought for the Affordable Care Act and sponsored studies that helped shape it.[2] Families USA also worked with key stakeholders to promote cooperative support for the legislation. Given the role Families USA played in passing the Affordable Care Act, the organization has a strong interest in it remaining in effect. Further, having long represented the interests of health care consumers, Families USA offers a valuable perspective on how the statute is operating and how it has unequivocally and substantially improved access to health care in the United States.

Community Catalyst is a national, non-profit, non-partisan organization that provides leadership and support to state and local consumer organizations,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person–other than the amici, their members, or their counsel–contributed money that was intended to fund preparing or submitting the brief.

[2] *E.g.*, Families USA, *The Dangers of Defeat: The Cost of Failure to Pass Health Reform* 4, 6 (Mar. 2010), http://familiesusa.org/sites/default/files/product_documents/dangers-of-defeat.pdf.

policymakers and foundations that are working to guarantee access to high-quality, affordable health care for everyone. Critical to the organization's mission is sustaining a powerful consumer voice in state and national decisions that affect their health. As such, the organization has an interest in representing the consumers who could potentially lose critical consumer protections and access to affordable coverage and health care services should this Court uphold the district court's decision. Since 1997, in states and communities across the country, the organization has been a catalyst for collaboration, innovation, and action in health care reform.

The National Health Law Program (NHeLP) has for fifty years, engaged in legal and policy analysis on behalf of limited-income people, people with disabilities, older adults, and children. NHeLP has provided legal representation and conducted research and policy analysis on issues affecting health care coverage, including through the Affordable Care Act, as it affects these groups. NHeLP works to assist consumers and their advocates to overcome barriers to health care, including a lack of affordable services or access to health care providers.

The Center on Budget and Policy Priorities (CBPP) is a national, non-partisan, non-profit research and policy institute. CBPP's core mission is to

advance fiscally responsible federal and state policies that reduce poverty, hardship, and inequality. That includes working to ensure that Medicare, Medicaid, the Children's Health Insurance Program, and the Affordable Care Act health insurance marketplaces continue to provide coverage that meets the needs of low- and moderate-income people.

Service Employees International Union ("SEIU") is the largest health care union in the United States. More than half of SEIU's two million members work in the health care industry, in states across the country. SEIU supports the Affordable Care Act because it helps to ensure accessible, quality health care for all Americans, including SEIU members and their families. SEIU joins the other amici in submitting this brief to demonstrate how affirming a decision striking down the Affordable Care Act would cause catastrophic harm to the millions of Americans who depend on its provisions.

INTRODUCTION

In response to a lawsuit filed by twenty States, the United States District Court for the Northern District of Texas struck down the Affordable Care Act (ACA) in its entirety. Mem. Op. & Order, Dist. Ct. ECF No. 211. If upheld, this decision will have devastating consequences to millions of Americans. It will deprive as many as 20 million people of adequate health care coverage, including the more than 12 million on expanded Medicaid and the more than 8 million who

purchase insurance in the individual marketplace through subsidies. All 15 million people who purchase insurance in the individual marketplace would lose the protections that the ACA provides, including, significantly, the requirement that insurance companies not deny coverage because of pre-existing conditions and the requirement that insurance companies allow young adults to be covered by their parent's policy until age 26.[3] Consumers who buy insurance outside of the marketplace or receive it through their employers would likewise lose important protections. Invalidating the ACA also undermines the Medicare Trust Fund, which was significantly strengthened by the ACA.

The Amici endorse the arguments of the Intervenor-Appellants as to why the Affordable Care Act is constitutional after the recent amendments to the tax laws reducing tax for not obtaining minimum health insurance coverage to $0 in 2019. Amici also endorse the arguments of the Intervenor-Appellants as to why even if the amended minimum coverage requirement is unconstitutional, the rest of the ACA is severable. This brief will focus on the devastating consequences that would result if the district court's decision is permitted to stand and both Medicaid

[3] U.S. Cong. Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028* (May 2018), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53826-healthinsurancecoverage.pdf.

expansion and the availability of affordable health insurance with adequate protections are eliminated.

ARGUMENT

I. THE AFFORDABLE CARE ACT REPAIRED A HEALTH CARE SYSTEM THAT WAS MISERABLY FAILING TO PROVIDE MEANINGFUL HEALTH CARE TO A LARGE PORTION OF THE U.S. POPULATION.

In 2009, prior to enactment of the ACA, 50 million people in the United States, 17 percent of the population, did not have health insurance.[4] This was frequently because they were denied access or could not afford to buy insurance on the marketplace and did not qualify for Medicaid. Millions of others had purchased health insurance that did not provide adequate medical care.[5] The ACA dramatically changed health care in the United States in two major ways: it made Medicaid available to millions of low-income individuals and families that were previously ineligible; and it reformed the individual insurance market by establishing standards that health insurance policies were required to meet and providing subsidies for individuals who otherwise could not afford health

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[4] U.S. Dep't of Commerce, Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009* 23 tbl.8 (Sept. 2010), http://www.census.gov/prod/2010pubs/p60-238.pdf.

[5] Three quarters of people shopping on the individual market could not find an affordable plan with the benefits they needed. *See* Michelle M. Doty, et.al., *Failure to Protect: Why the Individual Insurance Market Is Not a Viable Option for Most U.S. Families* 9 (The Commonwealth Fund, July 2009), (http://www.commonwealthfund.org/~/media/files/publications/issue-brief/2009/jul/failure-to-protect/1300_doty_failure_to_protect_individual_ins_market_ib_v2.pdf).

insurance. Moreover, everyone who purchases ACA-compliant health insurance in the individual, non-group market can enjoy the benefits and protections that the ACA provides.

A. The Affordable Care Act Substantially Improved Access to Health Care by Expanding Medicaid.

When established in 1965, Medicaid was a program for a limited population, largely for very low-income children, their caretaker relatives, seniors, and people with disabilities. Over time, the program evolved so that Medicaid covered most low-income children whose parents' income was below the poverty level, and selected groups of parents with very low incomes. With limited exceptions, however, impoverished adults without disabilities who had no dependent children were excluded from Medicaid entirely.[6]

The ACA allows states to expand Medicaid to individuals who have income below 133% of poverty, with the federal government paying most of the cost of

[6] Christie Provost and Paul Hughes, *Medicaid: 35 years of Service*, 22 Medicare and Medicaid Res. Rev. 141, 142-43 (Fall 2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194689/; Kaiser Family Foundation, *Medicaid Income Eligibility Limits for Children Ages 6-18, 2002-2018 and Medicaid Income Eligibility Limits for Parents, 2002-2018*, https://www.kff.org/data-collection/trends-in-medicaid-income-eligibility-limits/ (last visited Jun. 11, 2018). In 2009, the national median eligibility level for parents of dependent children to receive Medicaid was 67 percent of poverty. Working-age, nondisabled adults without dependent children were not eligible for Medicaid coverage in 42 states, regardless of income, leaving individuals in extreme poverty to fall through the cracks in our health care system. Families USA, *Medicaid and the Children's Health Insurance Program (CHIP) Soften the Blow during Tough Economic Times* 1 (October 2009), http://familiesusa.org/sites/default/files/product_documents/medicaid-chip-soften-blow.pdf.

this expansion. 42 U.S.C §1396.[7] By September 2017, the date of the most currently available information, more than 12 million people who were newly-eligible for Medicaid had enrolled.[8] By April 2019, 35 states and the District of Columbia will have implemented Medicaid expansion.[9]

B. The Affordable Care Act Made Insurance on the Individual Market Affordable to Lower-Income Americans and Required Insurance to Meet Basic Standards.

For most lower-income Americans not eligible for Medicaid, the option of purchasing insurance on the individual insurance market was unaffordable or unavailable prior to the ACA. Hospitals participating in Medicare still had to treat uninsured individuals' emergency medical care, and the hospitals and other providers passed on the cost of these patients' uncompensated care by charging higher prices to other consumers; the cost of health insurance for everyone thus

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[7] As enacted, the ACA required states to expand Medicaid as a condition to continued participation in the program. In 2012, the Supreme Court held that states had the option of remaining in the program but not opting to expand Medicaid. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 587 (2012).

[8] *See* Ctrs. for Medicare and Medicaid Servs., *July-September 2017 Medicaid MBES Enrollment Report* (Nov. 2018). https://data.medicaid.gov/Enrollment/2017-3Q-Medicaid-MBES-Enrollment/rxbg-jqed. This resulted in a 9.2 percent reduction in the number of uninsured adults from 2014 to 2016, (a 49.5 percent decline in the uninsured rate) in states that expanded Medicaid. Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Medicaid Expansion Impacts on Insurance Coverage and Access to Care* 2 (Issue Brief, Jan. 18, 2017), https://aspe.hhs.gov/system/files/pdf/255516/medicaidexpansion.pdf.

[9] Families USA, *A 50-State Look at Medicaid Expansion*. https://familiesusa.org/product/50-state-look-medicaid-expansion. Additionally, Idaho and Nebraska voters approved ballot measures to expand Medicaid which have not yet implemented expansions.

increased, making it even more difficult for consumers to afford the premiums. Before the ACA was enacted in 2010, the average portion of premiums attributable to uncompensated care was $1,000 for a family with private coverage.[10] Moreover, before the ACA, approximately 42.7 percent of people who *applied for coverage* in the individual market were denied insurance due to pre-existing conditions, which ranged from a serious medical condition to a more minor condition such as high cholesterol.[11] The coverage for those who were able to purchase insurance was often inadequate since it did not include important services such as prescription drugs, maternity care and mental health.[12] More than 105

[10] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501(a)(2)(F), 124 Stat. 119, 908 (2010).

[11] Families USA calculations based on America's Health Ins. Plans Ctr. for Policy Research, *Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability, and Benefits* 10 tbl.6 (Oct. 2009), https://kaiserhealthnews.files.wordpress.com/2013/02/2009 individualmarketsurveyfinalreport.pdf. Before the ACA went into effect, 45 states and the District of Columbia allowed insurance companies to charge discriminatory premiums or to deny coverage entirely due to pre-existing conditions, and these discriminatory practices and denials and premium increases were standard practice; and only 12 states prohibited insurers from selling policies with elimination riders that permanently excluded coverage of pre-existing conditions. Additionally, in forty-four states, issued policies could be rescinded without any state review if an insurer later learned of a policyholder's pre-existing condition. *See* Families USA, *Failing Grades: State Consumer Protections in the Individual Health Insurance Market* 26-27 (June. 2008), http://familiesusa.org/sites/default/files/product_documents/failing-grades_1.pdf.

[12] Before the ACA, individually purchased coverage lacked federal benefit standards. For instance, almost 1 in 10 people enrolled in the individual market did not have coverage for prescription drugs, more than 3 in 5 enrollees were in plans that did not provide maternity coverage, and plans were only required to include mental health coverage in 17 states. *See* Dania Palanker, et al., *Eliminating Essential Health Benefits Will Shift Financial Risk Back to Consumers* (The Commonwealth Fund, Mar. 24, 2017),

million Americans had health insurance that capped their lifetime and annual benefits.[13] Prior to the Affordable Care Act, ten percent of all cancer patients reported that they reached a benefit limit in their insurance policy and were forced to seek alternative insurance coverage or pay the remainder of their treatment out-of-pocket.[14]

The lack of coverage, inadequate coverage and capped benefits caused deaths that otherwise would not have occurred. A Families USA study showed that before the ACA went into effect many uninsured went without needed medical care because of cost, resulting in 26,100 premature deaths in 2010 alone.[15] In addition, by 2007, more than 60 percent of all personal bankruptcies were related to medical costs. [16]

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http://www.commonwealthfund.org/publications/blog/2017/mar/eliminating-essential-health-benefits-financial-risk-consumers.

[13] *See* Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Under the Affordable Care Act, 105 Million Americans No Longer Face Lifetime Limits on Health Benefits* 1-2 (Issue Brief, Mar. 5, 2012), https://aspe.hhs.gov/basic-report/under-affordable-care-act-105-million-americans-no-longer-face-lifetime-limits-health-benefits.

[14] USA Today/Kaiser Family Foundation/Harvard School of Public Health, *National Survey of Households Affected by Cancer* 17-18 (Nov. 2006), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7590.pdf.

[15] Families USA, *Dying for Coverage: The Deadly Consequences of Being Uninsured*, 2 tbl.1 (June 2012), http://familiesusa.org/product/dying-coverage-deadly-consequences-being-uninsured.

[16] From 2001 to 2007, the share of personal bankruptcies that was related to medical expenses rose by almost 50 percent. David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, American Journal of Medicine, 122 Am. J. of Med. 741 (2009), http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf. Findings are

The ACA helped populations with income between 100 and 400 percent of the federal poverty line by providing premium tax credits that allowed them to afford the cost of individual coverage. The ACA also improved individual coverage, providing for guaranteed availability and assuring that it covered essential benefits, such as maternity and newborn care, prescription drugs, mental health services and preventive care services. As a result of the ACA, the drop in the uninsured rate in 2014 was the largest since Medicare was enacted and Medicaid first ramped up in the early 1970s.[17] By 2016, the ACA helped lower the number of people without health insurance by more than 20.0 million people.[18] By 2017, the latest year for which data is available, the uninsured rate among the non-

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based on a survey of a random national sample of 2,314 bankruptcy filings and interviews with 1,032 filers.

[17] Jason Furman & Matt Fiedler, *2014 Has Seen Largest Coverage Gains in Four Decades, Putting the Uninsured Rate at or Near Historic Lows*, Executive Office of the President Council of Economic Advisors (Dec. 18, 2014, 11:00Am), https://obamawhitehouse.archives.gov/blog/2014/12/18/2014-has-seen-largest-coverage-gains-four-decades-putting-uninsured-rate-or-near-his.

[18] This increase in coverage included 3 million African-Americans, 4 million people of Hispanic origin, and 8.9 million white non-elderly adults. An estimated 6.1 million young adults and 1.2 million children gained coverage between 2010 and early 2016. Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Health Insurance Coverage and the Affordable Care Act, 2010–2016*, (Issue Brief, Mar. 3, 2016), https://aspe.hhs.gov/system/files/pdf/187551/ACA2010-2016.pdf; Executive Office of the President Council of Economic Advisors, *2017 Economic Report of the President* 196 (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/chapter_4-reforming_health_care_system_2017.pdf.

elderly population was 27.4 million, as compared to 46.5 million in 2010.[19] Even after the Tax Cut and Jobs Act of 2017, which eliminated the penalty for failure to meet the ACA requirement that individuals purchase insurance, the gains remain. For 2019, enrollment in federal marketplace plans is only slightly below 2018 levels.[20] The Medicaid expansion and the various private market protections enacted in the ACA continue to enable millions of people to obtain health insurance, notwithstanding the Tax Cut and Jobs Act of 2017. If permitted to stand, the district court's decision would completely undo all of these gains.

II. UPHOLDING THE DISTRICT COURT OPINION STRIKING DOWN THE ACA WOULD HAVE A DEVASTATING IMPACT ON THE NATION'S HEALTH CARE SYSTEM WITH A DISPROPORTIONATE IMPACT ON THE NATION'S LOW-INCOME POPULATION.

If this Court were to uphold the district court's ruling that the ACA is unconstitutional and inseverable it would, among other things, deprive as many as 20 million people of health insurance. Such a ruling also would eliminate the minimum standards that the ACA requires of all insurance sold on the individual

[19] Kaiser Family Foundation, *Key Facts About the Uninsured Population* (Dec. 7, 2018), https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/.

[20] 8.7 million people had selected plans on healthcare.gov by the close of the 2018 enrollment period, and 8.4 million people by the close of the 2019 open enrollment period. Ctrs. for Medicare and Medicaid Services, "Final Weekly Enrollment Snapshot for 2018 Open Enrollment Period," December 28, 2017, https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2018-open-enrollment-period and "Final Weekly Enrollment Snapshot for 2019 Open Enrollment Period," January 3, 2019, https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2019-enrollment-period.

market, as well as standards applying to coverage provided by small and large employers.

A. More than 12 Million Low-Income Citizens Could Lose Health Care if Medicaid Expansion Were Eliminated.

Medicaid expansion was a major contributor to the coverage gains attributable to the ACA. As a result of the ACA, low-income citizens in 35 states and the District of Columbia have access to health coverage. Nearly 12.2 million people who were newly-eligible for Medicaid were enrolled as of fiscal year 2017.[21] Eliminating Medicaid expansion will adversely impact the Medicaid population in many ways.

First, many of our most vulnerable citizens are covered by Medicaid and eliminating the expansion would leave them without health care. Among those whose coverage rates increased due to Medicaid expansion are young adults, people with HIV, veterans, rural residents, and racial and ethnic minorities.[22] About 340,000 Veterans who receive coverage through the ACA's Medicaid expansion would likely lose coverage if this Court were to affirm the decision of

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[21] Medicaid and CHIP Payment and Access Comm'n, MACStats: Medicaid and CHIP Data Book, Exhibit 23, December 2018, https://www.macpac.gov/wp-content/uploads/2018/12/December-2018-MACStats-Data-Book.pdf.

[22] Larisa Antonisse, et al., *The Effects of Medicaid Expansion Under the ACA: Updated Findings From a Literature Review* 3 (Henry J Kaiser Family Found., Issue Brief, March 2018), https://www.kff.org/medicaid/issue-brief/the-effects-of-medicaid-expansion-under-the-aca-updated-findings-from-a-literature-review-march-2018/.

the district court.[23] Likewise, over 25 percent of rural residents rely on Medicaid for their health coverage in states that have expanded Medicaid.[24] Many of them would also likely lose coverage.

Second, since Medicaid expansion increased access to primary care and prescription medications, and it increased the rates of diagnosis of chronic conditions, such as diabetes, its elimination would lead to an increase in illness and deaths in the United States.[25] Medicaid expansion also significantly improved access to preventive care for low-income, childless adults.[26] One analysis found a

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[23] Families USA, *Cutting Medicaid Would Hurt Veterans* 1 (May 2017), http://familiesusa.org/product/cutting-medicaid-would-hurt-veterans (analysis of 2013 and 2015 American Community Survey data).

[24] Families USA, *Cutting Medicaid Would Hurt Rural America* 1 (March 2017), http://familiesusa.org/product/cutting-medicaid-would-hurt-rural-america. Rural hospitals in these states experienced increases in Medicaid revenue and decreases in uncompensated care attributable to the ACA. Brystana G. Kaufman, et al., *Medicaid Expansion Affects Rural and Urban Hospitals Differently*, 35 Health Affairs 1665 (Sept. 2016), https://www.healthaffairs.org/doi/10.1377/hlthaff.2016.0357.

[25] Harvey W. Kaufman, et al., *Surge in Newly Identified Diabetes Among Medicaid Patients in 2014 Within Medicaid Expansion States Under the Affordable Care Act*, 41 Diabetes Care (Mar. 2015), http://care.diabetesjournals.org/content/early/2015/03/19/dc14-2334; Laura R. Wherry & Sarah Miller, *Early Coverage, Access, Utilization, and Health Effects Associated With the Affordable Care Act Medicaid Expansions: A Quasi-Experimental Study*, Annals of Internal Medicine, 164 Annals of Internal Med. 795 (June 21, 2016), http://annals.org/aim/article-abstract/2513980/early-coverage-access-utilization-health-effects-associated-affordable-care-act; Rebecca Myerson, et al., *Medicaid Eligibility Expansions May Address Gaps in Access to Diabetes Medications*, 37 Health Affairs 8 (August 2018), https://doi.org/10.1377/hlthaff.2018.0154.

[26] Kosali Simon, et al., *The Impact of Health Insurance on Preventive Care and Health Behaviors: Evidence from the 2014 ACA Medicaid Expansions* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22265, May 2016 (revised Sept. 2016)), http://www.nber.org/papers/w22265.

6.1 percent relative reduction in adjusted all-cause mortality in states that had expanded Medicaid before the ACA.[27] In addition, studies have documented improved outcomes for such services as cardiac surgery associated with the ACA's Medicaid policies.[28]

Third, eliminating Medicaid expansion would undercut the treatment of substance abuse disorders during a national opioid crisis. Medicaid expansion has played a significant role in financing substance use disorder treatment. Though both expanding and non-expanding states have experienced approximately the same increase in overall admissions for substance use disorders, Medicaid has played an important role in paying for treatment in expanding states; and it is a significant payer of outpatient, medication-assisted treatment.[29] It would be devastating to the efforts to address the national opioid crisis, which kills, on average, 130 Americans per day, to lose these gains to treat substance abuse.[30]

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[27] Benjamin D. Sommers, et al., *Mortality and Access to Care Among Adults After State Medicaid Expansions*, 367 New Eng. J. of Med. 1025, 1028 (Sept. 13, 2012), http://www.nejm.org/doi/full/10.1056/nejmsa1202099.

[28] Eric J. Charles, et al., *Impact of Medicaid Expansion on Cardiac Surgery Volume and Outcomes*, 104 Annals of Thoracic Surgery 1251-1258 (June 2017), http://www.annalsthoracicsurgery.org/article/S0003-4975(17)30552-0/pdf.

[29] Johanna Catherine Maclean & Brendan Saloner, *The Effect of Public Insurance Expansions on Substance Use Disorder Treatment: Evidence from the Affordable Care Act* (Nat'l Bureau of Econ. Research, Working Paper No. 23342, Sept. 2017), http://www.nber.org/papers/w23342.

[30] Ctrs. for Disease Control and Prevention, *Opioid Overdose: Understanding the Epidemic*, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited March 1, 2019).

Fourth, eliminating Medicaid expansion would increase institutionalization of the disabled population since Medicaid is an important source of coverage for people with disabilities. About 10 million people qualify for Medicaid based on their disability.[31] For many Medicaid recipients with disabilities, the ACA extended home and community based care, which allows them to receive service in their own home or community rather than in institutions or other isolated settings. For example, the newly created Community First Choice Option program gives states increased matching funds to provide personal attendant services to people who would otherwise have needed institutional care. States, including Texas, have used this option to reduce their waiting lists for home care services and to provide care to new populations, such as people with intellectual and developmental disabilities.[32] People with disabilities will lose these important benefits if the district court's decision stands.

Finally, the loss of Medicaid expansion will cause medical debt to increase. Medicaid expansion has resulted in a significant reduction in unpaid medical

[31] Medicaid and CHIP Payment Access Comm'n, *People with Disabilities* (Feb. 2017), available at https://www.macpac.gov/subtopic/people-with-disabilities/.

[32] U.S. Dep't of Health & Human Servs., *Community First Choice: Final Report to Congress* 48 (Dec. 2015), https://www.medicaid.gov/medicaid/hcbs/downloads/cfc-final-report-to-congress.pdf.

bills.[33] One study found that the amount of debt sent to collection was reduced by over $1,000 per person residing in ZIP Codes with the highest share of low-income, uninsured individuals in states that expanded Medicaid compared to those that did not expand the program.[34] Another study found that Medicaid expansion was associated with an average $200 decline in credit card debt and in decreases in third-party collection.[35] If this Court does not overturn the district court opinion, the United States would be at risk of going back to the pre-ACA conditions when 62 percent of all personal bankruptcies were related to medical costs.[36]

B. Upholding the District Court Opinion Striking Down the ACA in its Entirety Could Deprive More Than 8 Million Americans in the Non-group Market of the Health Insurance Coverage They Gained Under the ACA.

An estimated 15 million people have non-group coverage purchased in the individual insurance market, as of the most recent Congressional Budget Office

[33] Luojia Hu, et al., *The Effect of the Patient Protection and Affordable Care Act Medicaid Expansions on Financial Wellbeing* 5-6 (Nat'l Bureau of Econ. Research, Working Paper No. 22170, Apr. 2016), http://nber.org/papers/w22170.

[34] *Id.*

[35] Nicole Dussault, et al., *Is Health Insurance Good for Your Financial Health?*, Liberty Street Economics (June 6, 2016), http://libertystreeteconomics.newyorkfed.org/2016/06/is-health-insurance-good-for-your-financial-health.html#.V2fhz_krLct.

[36] *See supra* note 16. In January 2019, the CBO estimated a drop in average non-group enrollment over the next ten years of about 2 million people as a result of new administrative rules, but still projects that about 7 million people will receive premium tax credits. CBO, *How CBO and JCT Analyzed Coverage Effects of New Rules for Association Health Plans and Short term Plans* (January 2019), https://www.cbo.gov/system/files?file=2019-01/54915-New_Rules_for_AHPs_STPs.pdf.

estimate in 2018. If the ACA is struck down, 8 million of those people would lose the subsidies that they now receive and all 15 million would lose the protections that the ACA provides.[37] For example, the ACA's guarantee that health insurance is available regardless of health status offers critical health security to 133 million Americans who have a pre-existing health condition. Without these protections, individuals with pre-existing conditions could be denied coverage entirely, denied coverage of specific services and treatments, or charged higher and often unaffordable premiums due to their pre-existing conditions. The number of people with pre-existing conditions covered by health insurance in the individual market rose by 64 percent between 2010, when the ACA provision barring the denial of insurance because of pre-existing conditions went into effect, and 2014.[38]

Out-of-pocket maximums for cost-sharing cap the amount an insured consumer could face in medical expenses. These maximums are lowered for low- to middle-income people eligible for cost-sharing reductions in certain health insurance marketplace plans. For example, in 2019, the maximum an individual with income under 200 percent of poverty could be charged for covered services in

[37] *See supra* note 3.

[38] Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* 15 App. tbl.5 (Issue Brief, Jan. 5, 2017), https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf.

a year is $2600,[39] significantly less than a person with a hospitalization or high drug costs might have faced prior to the ACA. Before the ACA, in most states, a person with an expensive health condition could only buy coverage through a high risk pool. In Missouri in 2009, for example, high risk pool enrollees could be charged up to $10,000 per year for covered services in addition to their premiums; if they exceeded lifetime maximum benefits, their coverage would end.[40] Absent ACA protections, there would be no federal limit to patient cost sharing.

Prior to the ACA, certain essential health benefits, including such services as maternity care and mental health/substance use services were frequently excluded from health insurance.[41] The ACA bars benefit carve-outs and requires all individual and small group market plans to cover essential health benefits, including maternity care. It requires coverage of screening and treatment for substance use disorders, has expanded mental health parity to all health insurance

[39] HHS Notice of Benefit and Payment Parameters for 2019, 83 Fed. Reg. 16,930, 17,023 (Apr. 17, 2018) (to be codified at 45 C.F.R. pt. 156), https://www.federalregister.gov/documents/2018/04/17/2018-07355/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2019.

[40] Nat'l Ass'n of State Comprehensive Health Insurance Plans, *Comprehensive Health Insurance for High Risk Individuals: A State-by-State Analysis, 2009-2010* (2009).

[41] In 2011, before the essential health benefit rules went into effect, 62 percent of individual market enrollees lacked maternity coverage, 34 percent lacked coverage for substance use disorders, 18 percent lacked coverage for mental health care, and 9 percent lacked prescription drug coverage. Office of the Assistant Sec'y for Planning and Evaluation, *Essential Health Benefits: Individual Market Coverage, Issue Brief* 1 (Issue Brief, Dec. 16, 2011), https://aspe.hhs.gov/basic-report/essential-health-benefits-individual-market-coverage.

plans, and supports integrating prevention and treatment with mental health, primary care, and other related services.[42] A cross-state study showed that before the ACA's mental health parity requirements went into effect, about 20 percent of individual and small group plans sampled did not cover mental health and substance use treatment; these plans all subsequently added this coverage in compliance with the Affordable Care Act's requirements.[43] This comprehensive focus is particularly important in combating the opioid crisis as well as other behavioral health disorders. Affirming the district court's opinion would not only eliminate coverage for as many as 8 million people in the non-group, individual market, it would also eliminate all of the important lifesaving consumer protections that the ACA created.

Many lower- and middle-income people, whose income is above the level that qualifies for Medicaid under the ACA, receive tax credits that make comprehensive insurance affordable. Premium subsidies produced 40 percent of

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[42] Amanda J. Abraham, et al., *The Affordable Care Act Transformation of Substance Use Disorder Treatment*, American Journal of Public Health, 107 Am. J. of Public Health 31-32 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5308192/.

[43] Alexander J. Cowell, et al., *Behavioral Health Coverage in the Individual Market Increased After ACA Parity Requirements*, 37 Health Affairs No. 7 (July 2018), https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.1517.

the coverage gains attributable to the ACA from 2012-2015.[44] If the district court's opinion stands and the ACA is struck down, an estimated 8 million people would lose those subsidies.[45]

Under the ACA, not only are individuals eligible for premium tax credits able to afford insurance, they are also shielded from increasing insurance premiums, which are a serious problem in some states. These tax credits are calculated on a sliding fee scale based on incomes in comparison to the cost of coverage in a "benchmark" plan in their community. In 2018, the net average annual premiums paid by subsidized enrollees actually decreased. In 2017, the average gross premium for subsidized enrollees was about $5,850 but the average net paid after subsidies was $1,240. In 2018, gross premiums grew to an average of $7,650 for subsidized individuals but the net premium paid fell to an average of $1,050 because tax credits also rose.[46]

Eliminating these subsidies in combination with invalidating Medicaid expansion would eliminate all of the progress the U.S. has made since 2010 and

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[44] Molly Frean, et al., *Premium Subsidies, the Mandate, and Medicaid Expansion: Coverage Effects of the Affordable Care Act* 29 (Nat'l Bureau of Econ. Research, Working Paper No. 22213, Apr. 2016 (revised Dec. 2016)), http://www.nber.org/papers/w22213.

[45] *See supra* note 3, at 4, 22.

[46] *See supra* note 3, at 12.

take us back to the time when many middle and low-income adults and children were uninsured and went without needed medical care because of cost.

CONCLUSION

The Affordable Care Act allows states to expand Medicaid so that it is available to individuals who have incomes below 133% of poverty. It also has helped individuals with incomes between 100 and 400 percent of the federal poverty level, who generally qualify for premium tax credits, afford the cost of individual coverage. As a result of the ACA, the drop in the uninsured rate in 2014 was the largest since Medicare was passed and Medicaid first ramped up in the early 1970s. By 2016, the ACA had lowered the number of people without health insurance by more than 20 million people. Affirming the district court's opinion would reverse these gains with devastating health consequences to millions of adults and children in the United States. The district court's decision should be reversed.

Dated: April 1, 2019

Respectfully submitted,

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CERTIFICIATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,077 words, according to the count of Microsoft Word. I further certify that this brief complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: April 1, 2019

/s Margaret M. Dotzel
Margaret M. Dotzel

CERTIFICATE OF SERVICE

This is to certify that on this this first day of April 2019, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/Margaret M. Dotzel
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