

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TEXAS, et al.,)
)
 Plaintiffs,)
)
 v.) Case No.: 4:18-cv-167-O
)
 UNITED STATES OF AMERICA, et al.,)
)
 Defendants.)
_____)

**BRIEF OF SMALL BUSINESS MAJORITY FOUNDATION AS *AMICUS CURIAE* IN
OPPOSITION TO A PRELIMINARY INJUNCTION**

J. Carl Cecere (Tex. Bar No. 24050397)
CECERE PC
6035 McCommas Blvd
Dallas, TX 75206-5721
Phone: (469) 600-9455
ccecere@cecerepc.com

Hyland Hunt (Tex. Bar No. 24065468)
Ruthanne M. Deutsch (*pro hac vice* pending)
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Phone: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Counsel for *Amicus Curiae* Small Business Majority Foundation

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INTEREST OF *AMICUS CURIAE*¹

The Small Business Majority Foundation, Inc. is a national, nonpartisan organization founded and run by small business owners across the United States. The organization researches policy proposals for addressing small business needs, job creation, and maximizing business opportunities and competitiveness for small businesses across the United States. It also represents the interests of small businesses before Congress and state legislatures, the Executive Branch, and the courts. In recent years, it has focused on policies that address health care costs, which limit workforce mobility and disproportionately burden small businesses. *See, e.g.*, Br. for Small Bus. Majority Found., Inc., et al., *Dep't of Health and Human Servs., et al. v. Florida*, 567 U.S. 519 (2012); Br. for Small Bus. Majority Found., Inc., *King v. Burwell*, 135 S. Ct. 2480 (2015). The Foundation's considered view is that the reforms established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA" or "the Act"), have provided substantial benefits for small businesses, their employees, and the self-employed, by providing a means of acquiring affordable health insurance. To enjoin the Act would seriously harm small businesses and their employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the United States, employment and access to affordable health insurance have historically been tightly linked. Before the enactment of ACA, this linkage pressured individuals to seek out and then stay put in jobs that provided affordable health insurance—a phenomenon known as “job lock”—because people clung to jobs with affordable health coverage even when they might have otherwise chosen to start businesses or pursue more attractive job opportunities

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

with growing small businesses. Small businesses, in turn, long faced disproportionate costs, as compared to larger employers, in obtaining health coverage for their employees.

Several of the reforms adopted within ACA have mitigated these burdens by both enabling access to affordable health insurance irrespective of employment and by providing small businesses the opportunity to obtain comprehensive health care coverage for their employees at lower costs and with greater price stability than ever before. These measures have freed individuals to make life choices about employment and entrepreneurship without forgoing affordable health care, dramatically increased the insurance rates among the self-employed, and made it easier for small businesses to provide comprehensive health care coverage to employees and their families. In particular, small businesses have benefitted from reforms to the small group market, including exchanges where small businesses can select from health plans for their employees, and a tax credit for up to 50% of the employer share of health insurance premiums for certain small businesses.

Plaintiffs here launch a broadside attack seeking to enjoin the entire Act (which spanned more than 900 pages, *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 539 (2012)), based solely on an argument that the minimum coverage provision was made unconstitutional by the enactment of the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). *Amicus* agrees with the State Defendants that these arguments fail on the merits, and that in any event the individual-market community rating and guaranteed issue provisions, as well as the rest of the Act, are severable from the minimum coverage provision. Moreover, the public interest, which Plaintiffs address in one page without any mention of ACA's benefits, *see* Pls.' Mem. in Supp. of Prelim. Inj., Dkt. No. 40, at 50 (hereafter "PI Motion"), cannot support the draconian remedy Plaintiffs seek. *Amicus* writes to inform the Court about the many important benefits that the Act's various provisions confer on small businesses and the self-employed, and the harm that the Nation's small businesses—as well as the economy as a whole—will suffer if the Act is enjoined.

ARGUMENT

THE ACT'S REFORMS PLAY AN ESSENTIAL ROLE IN LOWERING HEALTH CARE COSTS FOR SMALL BUSINESSES AND THEIR EMPLOYEES, THEREBY MITIGATING JOB LOCK

A. Before ACA, Small Businesses And The Self-Employed Faced Disproportionately Large Health Care Costs, Creating Economically Inefficient Job Lock

Employer-sponsored health insurance has been an economic fixture in the United States since World War II. *See* David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 25-26 (2001) (describing the rise of employment-based coverage “fueled by federal labor and tax policy” and labor unions). Not only do “[a] majority of Americans rely on private insurance for health coverage,” U.S. Gov't. Accountability Off., GAO-12-166R, *Health Care Coverage: Job Lock and the Potential Impact of the Patient Protection and Affordable Care Act* 3 (2011) (hereinafter “GAO Report”), but “[t]he majority of privately insured Americans obtain their health insurance through their own or a family member's employment,” Brigitte C. Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q.J. ECON. 27, 27 (1994).

When employees “stay[] in jobs they might otherwise leave for fear of losing access to affordable health coverage”—whether because insurance is more expensive at the prospective job, does not cover a pre-existing condition, or is not offered at all—economists refer to that phenomenon as “job lock.” GAO Report at 3. And health care-induced job lock has disproportionately hindered the development of small businesses. Why? Absent effective measures to spread risk that are non-employment based, both the self-employed and small businesses with few employees lack the ability to spread risk among large numbers of people. Before ACA, these sectors faced challenges in procuring affordable health coverage, which deterred individuals from moving freely to small business jobs or starting their own businesses.

Before many of ACA's reforms took effect in 2014, small businesses employees and the self-employed comprised a disproportionate share of the working uninsured. In 2011 more than six in ten of the nation's uninsured workers were self-employed or working at a company with fewer than 100 employees. Paul Frostin, Emp. Benefit Research Inst., *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey* 15 (2012).² Small businesses were "less likely to offer their employees health coverage, citing the cost of coverage as a key reason." GAO Report at 3. And when small businesses did offer insurance, it was more expensive. Small business employees typically paid "nearly 30 percent" of "the average share of ... policy premiums," as compared to employees of larger firms who pay "about 7 percent." Congressional Budget Office, Economic and Budget Issue Brief, *Effects of Changes to the Health Insurance System on Labor Markets* 1 (2009).

As a result, for the 24 million self-employed Americans and many employees of the country's 5.8 million small businesses with employees, coverage options were both limited and undesirable before ACA's reforms.³ These individuals could either: (i) purchase health insurance in the individual market, paying a full-freight premium lacking both the employer subsidy of "more than 70 percent on average," GAO Report at 3-4, and the favorable tax treatment long granted employer-sponsored coverage; or (ii) forgo health-insurance coverage altogether, *see* William Craig, *Four Reasons the Affordable Care Act is a Boon to Entrepreneurs*, FORBES, June 17, 2014 (citing Gallup study showing that "one in four entrepreneurs went without health insurance in 2012").⁴ And those options applied only to workers who were able to obtain coverage; others could

² Available at goo.gl/pNrjQ2.

³ See U.S. Census Bureau, Nonemployer Statistics, NES Tables 2015, available at <https://goo.gl/TtG3xE>; U.S. Census Bureau, 2015 SUSB Tables, Data by Enterprise Employment Size, available at <https://goo.gl/18gjNf>.

⁴ Available at <https://goo.gl/xQU8Ts>.

be excluded entirely, or be denied the coverage they most needed, based on pre-existing condition exclusions. See Elana Gordon, *Pre-Obamacare, Preexisting Conditions Long Vexed States And Insurers*, KAISER HEALTH NEWS, Apr. 26, 2017.⁵ Reflecting these limited options, in 2010 small business employees were almost twice as likely to be uninsured as large business employees, and 30% of the self-employed were uninsured. See U.S. Small Bus. Admin., *Small Business Facts* (June 2012).⁶

This dearth of self-employed and small business coverage had undesirable effects both for individuals and the national economy as a whole. Nearly one-third of individuals responding to a research survey conducted before ACA had been harmed by job lock, which caused a 25% reduction in job mobility and in individuals' freedom to choose among employment options, including starting a new business. See Madrian, *supra*, at 28-29, 52 (citing poll and conducting statistical analysis). As one pre-ACA commentator put it:

There's no shortage of sad stories about health insurance. But for pure frustration, nothing beats job lock: being frozen in a job you hate because leaving it means losing key health benefits. You're stuck because you have a bad knee, your daughter has diabetes or your wife has emphysema. No new insurer wants your family unless it can draw a big red circle around your maladies and refuse to cover everything inside.

Ellyn E. Spragins, *How to Beat Job Lock*, NEWSWEEK, Dec. 14, 1998, at 98.

Taken in the aggregate, job lock also creates inefficiencies that ripple through the entire economy. “[I]f individuals who would like to move to more productive jobs are constrained to keep their current positions simply to maintain their health insurance,” that causes “[t]he productivity of the economy as a whole [to] suffer.” Madrian, *supra*, at 28. Concomitantly, “[e]conomic theory generally suggests that worker mobility ... in turn promotes efficiencies in the labor market and provides benefits to the overall economy.” GAO Report at 3.

⁵ Available at <https://goo.gl/wjTCxP>.

⁶ Available at <https://goo.gl/rXsPVn>.

B. The Act's Reforms In The Individual And Small Group Markets Have Provided Critically Important Benefits To Small Businesses

Consistent with decades of congressional attention to mitigating job lock, *see, e.g., Geissal v. Moore Med. Corp.*, 524 U.S. 74, 79-80 (1998) (describing congressional efforts beginning in 1985 to give certain employees the ability to continue group coverage when they “might otherwise lose coverage upon ... the termination of ... employment”), several different ACA reforms have made it easier for individuals to obtain health coverage regardless of the size of their employer or any pre-existing conditions, freeing them to start new businesses or join smaller businesses. At the same time, other ACA programs operating in the distinct market for “small group” coverage have made it easier for small businesses to provide health coverage for their employees.⁷ The combined upshot is that small business owners, their employees, and self-employed individuals have all benefitted significantly from the Act.

1. ACA Individual-Market Reforms, Along with Tax Credits, Have Mitigated Job Lock and Enabled Greater Choice in Employment and Entrepreneurship

A constellation of separate and independent ACA reforms spurred a dramatic increase in health insurance coverage for small business employees and self-employed workers, delivering peace of mind and economic freedom to millions of Americans who are critical to the national economy. These reforms, like the formation of ACA's exchanges and the associated premium tax credits, as well as the expansion of Medicaid in the States that have opted in, have meaningfully increased individual choice, job mobility, and flexibility. Some of them—like the extension of parental coverage to young adults—are never mentioned in Plaintiffs' motion, *see* PI Motion 4–8,

⁷ The group market involves employer-sponsored health insurance. *See* Kaiser Family Foundation, Health Reform Glossary, *available at* <https://goo.gl/n3J7AR> (entry for “Group Health Insurance”). The small group market is generally for employers with 2-50 employees, although the precise numbers can differ by State. *See id.* (entry for “Small Group Market”).

but will nonetheless be swept into the vast injunction they seek, with resulting harm to countless Americans. The considerable economic benefits of the reforms should be considered in any equitable calculus.

In particular, the individual exchanges have allowed millions more self-employed workers and small business employees to obtain health coverage than before the ACA's passage. In total, over 5.7 million small business employees and self-employed workers are enrolled in the ACA individual marketplaces, and more than half of all ACA marketplace enrollees are small business owners, self-employed individuals or small business employees. Small Bus. Majority, *Number of Small Business Owners, Self-Employed People and Small Business Employees in the ACA Marketplaces*.⁸ According to one analysis, this represents an increase of 3.1 million small business workers covered through the individual marketplaces from 2013 to 2015. Sarah Lueck, *Health Coverage Gains for Small-Business Workers at Risk*, Center on Budget and Policy Priorities: Blog (Jan. 9, 2017).⁹ Small business owners and the self-employed alone (excluding small business employees) made up one-fifth of the individual marketplace consumers and were almost three times more likely to purchase marketplace coverage as other consumers. Adam Looney and Kathryn Martin, *One in Five 2014 Marketplace Consumers was a Small Business Owner or Self-Employed*, U.S. Dept. of the Treasury: Treasury Notes Blog (Jan. 12, 2017).¹⁰

Separate and apart from the exchanges, the Act's Medicaid expansion has also made coverage available to millions more small business employees, in those States that have chosen to participate. See Lueck, *supra* (estimating that 1.7 million small business employees gained coverage through the expansion of Medicaid); see also Lucas Puente, *Analysis: Small Business*

⁸ Available at <https://goo.gl/d7Bzjk>.

⁹ Available at <https://goo.gl/MYExdS>.

¹⁰ Available at <https://goo.gl/2ef563>.

Professionals Insured at Higher Rate in Medicaid Expansion States, Thumbtack: Journal (Mar. 27, 2017) (reporting that the uninsured rate for small business owners in Medicaid expansion states was 21%, compared to 34% in states that did not expand Medicaid).¹¹

Collectively, these reforms reduced the uninsured rate for the tens of millions of people who own or work for small businesses. Of the 36.2 million employees people working at a business with fewer than 50 employees in 2015, 20% were uninsured—down from 31% in 2012. Kaiser Family Foundation, *The Uninsured: A Primer - Key Facts About Health Insurance And The Uninsured In The Era Of Health Reform*, Supplemental Tables 8 (2016).¹² That represents a 35% decline in uninsured small business employees. These numbers alone suggest that ACA has greatly reduced “job lock,” given the strong reliance of self-employed individuals on different coverage options made available by the Act. Workers are thus now freer to make employment choices without the burden of forgoing affordable health coverage, rather than being hamstrung based on pre-existing conditions or lack of affordable health coverage options.

Many anecdotes, as well, illustrate how ACA reforms have proved decisive for individuals looking to leave a job to create small businesses or to become self-employed. Autumn Theodore, for example, was able to leave a “corporate job that offered health benefits” to start a photography business due to the ability to access coverage under Ohio's expansion of Medicaid. *See* Autumn Theodore, *Letter: AHCA would not be good for small business*, COLUMBUS DISPATCH, June 29, 2017.¹³ For some young adults, the chance to stay on their parents’ insurance for a few additional years has made all the difference. For example, Lauren Braun, because she was able to stay on her parents’ insurance under ACA, left her job after receiving a \$100,000 Bill and Melinda Gates

¹¹ Available at <https://goo.gl/TUziwj>.

¹² Available at <https://goo.gl/65jjMH>.

¹³ Available at <https://goo.gl/k9msKf>.

Foundation grant to make and distribute silicone bracelets that remind mothers of upcoming vaccinations in Peru. Shaila Dewan, *How Obamacare Could Unlock Job Opportunities*, N.Y. TIMES, Feb. 20, 2014.¹⁴

For other entrepreneurs, the Act's provisions regarding pre-existing conditions have proved crucial. Karen McKie, a small business owner in Chicago, reported that she has "endured several serious health issues, which now qualify as pre-existing conditions," and that without the Act, she "would have had huge financial strain, been forced to abandon [her] business to find employer-sponsored coverage and, in a worst-case scenario, declared bankruptcy." Karen McKie, *Letters: Obamacare a lifesaver for the self-employed*, CHICAGO SUN-TIMES, July 23, 2017.¹⁵

Many more have found ACA's exchanges, together with the tax credits, to be essential to enable them to start now-thriving small businesses. For example, Rebecca Murray found herself unable to leave her job at a dialysis company because she risked losing coverage for her husband's chronic spinal arthritis. Through the Exchange, however, she was able to purchase health insurance for her family at a subsidized cost of \$535 per month, freeing her to start a company that helps other women care for their sick relatives. See Stephanie O'Neill, *Some Obamacare Enrollees Emboldened to Leave Jobs, Start Businesses*, KAISER HEALTH NEWS, Apr. 29, 2014.¹⁶ Similarly, Joshua Lapp—who has a congenital heart condition—was able to leave a full-time job with health benefits to start a three-partner urban planning firm due to the ability to obtain affordable coverage on ACA's exchanges. See Harris Meyer, *Self-employed fear ACA repeal means 'job lock'*, MODERN HEALTHCARE, Dec. 28, 2016.¹⁷

¹⁴ Available at <http://goog.gl/LQosGU>.

¹⁵ Available at <https://goo.gl/xViDqB>.

¹⁶ Available at <https://goo.gl/pL9wdn>.

¹⁷ Available at <https://goo.gl/SWvMTf>.

Whichever ACA program has enabled them to obtain individual coverage, many entrepreneurs have been able to use such coverage to bridge the gap until they have grown enough to purchase small group coverage for their own employees. *See Meyer, supra* (describing a young entrepreneur who was able to stay on her parents' coverage for two years, enabling her to grow her business, which "now employs eight people and provides them with group health insurance").

And the reforms have played an especially critical role in supporting the growth of microbusinesses, which include the self-employed and businesses with four or fewer employees. Taken together, these small businesses play a powerful role in the U.S. economy; the 22 million self-employed small business owners generate almost \$1 trillion in economic activity each year. *See Corporation for Enterprise Development, Microbusinesses: America's Unsung Entrepreneurs* 1 (May 2013).¹⁸ In a survey, 74% of microbusiness owners reported that their businesses were their sole source of income, and more than half reported hiring an independent contractor in the past year. *See Association for Enterprise Opportunity, et al., Opinion Poll: The Role of Micro Businesses in Our Economy* 4 (2012).¹⁹ The ability of millions of Americans to leave their current employment and start new businesses, work as independent contractors, or pursue other endeavors on account of one or more of ACA's reforms is thus not only a victory for individual choice and productivity. It also results in increased productivity for the entire national economy.

2. *The Act's Small Group Reforms Have Helped Small Businesses Provide Affordable Health Benefits to Employees, Fostering Growth and Economic Opportunity*

In addition to reforming the individual market, ACA made several important reforms to the small group market. Although these changes stand apart from the individual market reforms (the individual market and small group risk pools are generally distinct, *see* 45 C.F.R. § 156.80),

¹⁸ Available at <https://goo.gl/uC8ZBn>.

¹⁹ Available at <https://goo.gl/XhUPPF>.

they have also significantly benefitted small businesses and their employees. Relevant here, the Act has stabilized health care costs for small businesses that provide group coverage, reducing the disparity between large employers and small employers with respect to those costs.

Before the Act was implemented, small businesses paid 18% more on average for health coverage than larger companies, usually for less comprehensive plans. Sean Lowry & Jane G. Gravelle, Cong. Research Serv., R43181, *The Affordable Care Act and Small Business: Economic Issues* 4 (2015).²⁰ The financial strain could be significant. In a survey of small business owners in a large U.S. market undertaken as ACA's reforms were first being implemented in 2014, nearly 37% of small businesses reported that they were "directing between 5 and 10 percent of their [annual] budgets to employee health benefits," and approximately 16% noted that they were spending "more than 15% of annual budgets on health insurance." Health and Disability Advocates, *Chicago Area Small Businesses and the Affordable Care Act* 2 (2014).²¹ And small business owners employing skilled labor or operating in tight labor markets often had no choice but to bear these costs. Because health care benefits are significant to employees, ensuring employee access to health care is a significant factor in determining a small business's ability to attract top talent and succeed. *See id.* at 3 (noting 71.8% of small business respondents reported that "providing health insurance benefits helps them recruit new employees"); Adela Luque et al., *The Effect of Employer Health Insurance Offering on the Growth and Survival of Small Business* 91, Upjohn Institute Technical Report No. 13-030 (2013) ("[H]ealth insurance offering firms ... are ... more likely to survive....").

The Act's small group reforms, including the small group exchanges (known as "SHOP,"

²⁰ Available at <https://goo.gl/CcXgN4>.

²¹ Available at <https://goo.gl/ZxjYbh>.

for “Small Business Health Options Program”), have significantly improved health care costs for small businesses (and their employees). Many small businesses offering health insurance coverage have seen their premium increases stabilize under the ACA, with premium increases dropping to their lowest level in years. Between 2008 and 2010, the average yearly premium increase in the small group market was 10.4%. U.S. Dept. of Health and Human Services, *Fiscal Year 2017 Budget in Brief* 115 (Feb. 2016).²² But after ACA, that rate has dropped by half or more. *See id.* (reporting average yearly premium increase in small group market of 5.2% between 2011 and 2015); Sabrina Corlette et al., Urban Institute and the Robert Wood Johnson Foundation, *Small Business Health Insurance and the ACA: Views from the Market 2017* 5 (2017) (reporting 3.1% annual increase for businesses with fewer than 50 employees).²³

Beyond this stabilization in the small group market, another ACA program designed for newer, smaller businesses provides a tax credit to small businesses with fewer than 25 employees. This credit, up to 50% of the employer’s share of health insurance premiums purchased on the ACA exchanges for small group policies, is available for up to two consecutive years. *See* 26 U.S.C. § 45R. As one business owner reported, in addition to the “peace of mind” from “minimal” annual premium increases, he has received about \$2,200 per year for offering group health coverage to his employees, which “goes a long way toward reducing ... costs.” Ron Nelson, *One View: Obamacare helped me to provide insurance for employees, family*, RENO GAZETTE J., Jan. 23, 2017.²⁴ Programs like this (unmentioned in Plaintiffs’ motion), alongside other ACA reforms, not only increase the freedom for individuals to start or join small businesses, but also increase the opportunity for those individuals and businesses to thrive.

²² Available at <https://goo.gl/kZ2RJw>.

²³ Available at <https://goo.gl/UTLVjN>.

²⁴ Available at <https://goo.gl/7YW9u7>.

* * * * *

Small business owners, their employees, and self-employed individuals have benefitted significantly from the many different reforms enacted as part of the Affordable Care Act, especially the creation of the individual marketplaces with tax credits, the optional expansion of Medicaid, and small group market reforms. Millions more working Americans, who are self-employed or employees of the Nation's small businesses, now have health insurance that they would not have had without the Act. The harm they will suffer if the Act is enjoined is just one of many reasons why the public interest is not served by Plaintiffs' sweeping requested injunction. A preliminary nationwide injunction is an extreme remedy by any account. *Amicus* respectfully requests that the Court's public interest analysis consider the consequences of Plaintiffs' draconian request on the health of America's small businesses and the self-employed.

CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: June 14, 2018

Respectfully Submitted,

J. Carl Cecere (Tex. Bar No. 24050397)
CECERE PC
6035 McCommas Blvd
Dallas, TX 75206-5721
Phone: (469) 600-9455
ccecere@cecerepc.com

/s/Hyland Hunt

Hyland Hunt (Tex. Bar No. 24065468)
Ruthanne M. Deutsch (*pro hac vice* pending)
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Phone: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Counsel for *Amicus Curiae* Small Business Majority Foundation

CERTIFICATE OF SERVICE

On June 14, 2018, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served counsel for all parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/Hyland Hunt

Hyland Hunt