

Nos. 19-840, 19-841

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IN THE  
**Supreme Court of the United States**

CALIFORNIA, et al.,

*Petitioners,*

v.

TEXAS, et al.,

*Respondents.*

and

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 AARP, AARP  
FOUNDATION, CENTER FOR MEDICARE  
ADVOCACY, AND JUSTICE IN AGING  
SUPPORTING PETITIONERS**

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**STATEMENT OF INTERESTS  
OF AMICI CURIAE<sup>1</sup>**

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation advocate for access to quality health care across the country and frequently appear as friends of the court on issues affecting older Americans, including challenges to the Patient Protection and Affordable Care Act (Affordable Care Act or ACA). *See, e.g.,* Brief of AARP, et al., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, Nos. 11-393 & 11-400 (U.S. Jan. 27, 2012).

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<sup>1</sup> In accordance with Supreme Court Rule 37.6, Amici state that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than Amici, their members, and their counsel have made a monetary contribution to the preparation or submission of this brief. All parties were given timely notice of and have consented to the filing of this brief.



The Center for Medicare Advocacy (the Center) is a national, nonprofit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to help older adults and people with disabilities access Medicare and necessary health care. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care, and provides training regarding Medicare and health care rights throughout the country. It advocates on behalf of beneficiaries in administrative and legislative forums, and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage.

Justice in Aging is a national, nonprofit organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Justice in Aging focuses its advocacy on those who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency. Justice in Aging conducts training and advocacy regarding Medicare and Medicaid, and provides technical assistance to attorneys across the country on how to address problems arising under these programs. Justice in Aging frequently appears as friend of the court on cases involving health care access for older adults.

Amici are organizations that represent the interests of older adults. We file this brief to urge this Court to accept this case for review and end the prolonged uncertainty that millions of older adults are

experiencing wondering if they will lose their health insurance at a time when they need it most.

### **SUMMARY OF ARGUMENT**

The Affordable Care Act (ACA) is a lifeline for millions of Americans, including older adults who rely on it for their health and financial stability. Nearly ten years after its enactment, the ACA has become an integral part of the nation's health care system and economy. Among other things, it expands access to quality affordable care, guarantees coverage for people with preexisting conditions, and limits how much more insurers can charge older adults. It strengthens the financial viability of Medicare, lowers out-of-pocket costs for Medicare beneficiaries, and expands Medicaid eligibility. Finally, the ACA helps protect nursing facility residents from fraud and abuse, and enhances opportunities for older adults to live independently.

The Fifth Circuit's decision wrongly places millions of people who depend on the ACA at risk of losing life-changing health care coverage and puts the national economy and health care system at risk of a catastrophic disruption. Most immediately, the decision plunges millions of Americans into an abyss of prolonged uncertainty because they do not know if they will lose access to life-sustaining health care coverage and consumer protections. This prolonged uncertainty is especially grueling for older adults because they have a higher incidence of chronic illnesses and depend heavily on access to health care services.

Health insurance is an essential part of people's lives, especially for those who have chronic illnesses. As a result, they cannot make informed life decisions while the legal viability of the ACA hangs in the balance. Instead, they are stuck waiting for the case to go through potentially years of legal proceedings while constantly fearing they will lose their access to affordable health care.

They worry that they will return to life before the ACA when they paid a dire human and financial toll for not having access to affordable health care. Will their insurance be cancelled because of a preexisting condition? Will their coverage for services like chemotherapy abruptly end? Will prescription drugs and preventive services become even more expensive? Will they be unable to change jobs for fear of losing health insurance? Will they have to move to another state to obtain needed care?

Exacerbating their concerns is the reality that health care stakeholders, including insurance companies and state and local governments, may decide that the prolonged uncertainty impairs their ability to participate in the ACA Marketplaces or other ACA programs.

The Court can end this uncertainty and confusion by granting review of this case. The issues here (standing, the constitutionality of the mandate, and severability) are questions of law that are ripe for this Court's immediate review. Moreover, because the district court already reasoned that it would invalidate the entire ACA under a provision-by-

provision review, requesting this analysis again on remand is superfluous and will lead to unnecessary delay. Given the importance of this case to the public, health care stakeholders, and state and local governments, Amici respectfully request that the Court grant the petition for a writ of certiorari and expedite its review of this case.

## ARGUMENT

### **I. Prolonged Uncertainty About The Legal Status Of The ACA Harms Older Adults And Is Unnecessary Because The Legal Issues Are Ripe For This Court's Immediate Review.**

The Court should grant Petitioners' writ of certiorari. First, the Fifth Circuit's decision is wrong and warrants immediate review to avoid an unjust result. Second, the prolonged uncertainty resulting from the Circuit's decision harms all Americans and the economy, but particularly older adults as they depend heavily on access to health care services to sustain their lives.

#### **A. The Fifth Circuit's decision is incorrect and warrants this Court's immediate review.**

As a threshold matter, the Fifth Circuit incorrectly held that the individual mandate is unconstitutional and remanded the case to the district court for further review. Pet. App. 47a-72a. As Petitioners state, the Court should accept this case

now because the key issues of the case (standing, constitutionality, and severability) are questions of law ripe for this Court's review. State Pet. Br. 26.

For example, analyzing severability includes reviewing whether the 2017 Congress determined that the entire ACA could survive with a zeroed-out individual mandate. This Court can answer this question without remand to the district court because the plain text of the Tax Cuts and Jobs Act of 2017 (TCJA) and its legislative history show that Congress found that the rest of the ACA should survive. TCJA, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

When a statute's text is plain and unambiguous, it must be enforced according to its terms. *See generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Here, a plain language reading of the TCJA shows that Congress intended to reduce the tax penalty but leave the rest of the ACA intact. TCJA, *supra*. To that end, they did not repeal the mandate or any other provision of the ACA as part of the TCJA. *Id.*

The legislative history also confirms that Congress intended every other provision of the ACA to remain operational after the penalty reduction. As Senator Orrin Hatch explained:

[L]et us be clear, repealing the tax does not take anyone's health insurance away. No one would lose access to coverage or subsidies that help them pay for coverage

unless they choose not to enroll in health coverage once the penalty for doing so is no longer in effect.

No one would be kicked off of Medicare. No one would lose insurance they are currently getting from insurance carriers. Nothing—nothing—in the modified mark impacts Obamacare policies like coverage for preexisting conditions or restrictions against lifetime limits on coverage.

*See Continuation of the Open Executive Session to Consider an Original Bill Entitled the “Tax Cuts and Jobs Act” Before the S. Comm. On Fin., at 106 (Nov. 15, 2017) (statement of Orrin Hatch, Chairman of Committee).*<sup>2</sup>

Moreover, even a cursory review of the ACA reveals several provisions that are wholly unrelated to the individual mandate and should remain intact, regardless of the mandate’s constitutionality. For instance, the ACA provides significant cost savings on prescription drugs and preventive health services for Medicare beneficiaries, thus improving access to care and reducing the financial burden on older adults. *See infra* Section III.C. Nothing in the TCJA suggests that Congress intended to rip this or any other important benefit away from vulnerable adults by reducing the tax penalty. TCJA, *supra*.

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<sup>2</sup> <https://www.finance.senate.gov/imo/media/doc/11-15-17%20-%20The%20Tax%20Cuts%20and%20Jobs%20Act%20--%20Day%203.pdf>.

Finally, remanding the case to the district court is also unnecessary, as the district court already stated that its decision would be the same if it conducted a provision-by-provision review of the ACA. Pet. App. 222a.

**B. The Fifth Circuit’s Decision Will Lead To A Prolonged Period Of Uncertainty That Will Harm All Americans, Including Older Adults, And The National Economy.**

Most immediately, though, the Fifth Circuit’s decision prolongs the uncertainty about the viability of the ACA for millions of Americans and the national economy. It forces them to wait for the case to wind through a remand and at least two other appeals to learn whether the ACA will remain intact. This uncertainty affects all Americans, but particularly older adults. According to the Centers for Disease Control and Prevention, 78% of older adults have at least one chronic disease, and 47% have at least two. Ctrs. for Disease Control & Prevention, *Percent of U.S. Adults 55 and Over with Chronic Conditions, National Center for Health Statistics* (Nov. 6, 2015).<sup>3</sup> It is crucial for them to have health insurance and access to health care services.

The enactment of the ACA was life-changing for many older adults. It made health insurance more accessible and affordable, provided significant

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<sup>3</sup> [https://www.cdc.gov/nchs/health\\_policy/adult\\_chronic\\_conditions.htm](https://www.cdc.gov/nchs/health_policy/adult_chronic_conditions.htm).

consumer protections, provided cost savings to Medicare beneficiaries, increased the financial viability of Medicare, saved lives through Medicaid expansion, and protected older adults living in nursing facilities and in the community. ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010).

After experiencing its benefits for nearly a decade, many older adults now live with constant worry that they will lose the ACA's critical gains and return to the days when they could not access or afford health care. *See, e.g.,* Ashley Kizinger et al., *6 Charts About Public Opinion On The Affordable Care Act*, Kaiser Family Found., (Nov. 27, 2019) (showing that 56% of people worry that someone in their family will lose health insurance if the Supreme Court overturns the ACA);<sup>4</sup> Kris B. Mamula, *What's Next: Patients insured through Obamacare worry after court ruling*, *Pittsburgh Gazette* (Dec. 19, 2019)<sup>5</sup>.

In the days before the ACA, access to affordable health care was especially challenging for people ages 50 to 64 ("pre-Medicare adults"). Many could not get adequate and affordable health insurance in the private and employer-based markets, and also did not qualify for Medicaid. *See* Kaiser Comm'n on Medicaid & the Uninsured, *Key Facts about the Uninsured Population*, 2 (Sept. 2013).

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<sup>4</sup> <https://www.kff.org/health-reform/poll-finding/6-charts-about-public-opinion-on-the-affordable-care-act/>.

<sup>5</sup> <https://www.post-gazette.com/business/healthcare-business/2019/12/19/obamacare-affordable-care-act-unconstitutional-appellate-court-ruling/stories/201912190184>.



Those who could get private health insurance often paid high premiums and exorbitant out-of-pocket medical expenses. Insurers could deny coverage or offer sparse policies to people with preexisting conditions, charge higher premiums based on age alone, or offer policies with high cost-sharing. Elizabeth Abbott et al., *Implementing the Affordable Care Act's Insurance Reforms: Consumer Recommendations for Regulators and Lawmakers*, Nat'l Ass'n of Insur. Commissioners, 10-11 (Aug. 2012)<sup>6</sup>; Lynn Nonnemaker, *Beyond Age Rating: Spreading Risk in Health Insurance Markets*, AARP Pub. Policy Inst., 3, tbl. 1 (Oct. 2009).<sup>7</sup>

These practices disproportionately harmed older adults because 48% to 86% of people ages 55 to 64 had preexisting conditions. U.S. Dep't of Health & Human Servs., *At Risk: Pre-Existing Health Conditions Could Affect 1 in 2 Americans: 129 Million People Could Be Denied Affordable Coverage Without Health Reform*, 4, fig. 1 (2011).<sup>8</sup> Insurers who did not outright deny coverage to pre-Medicare adults would often limit benefits or charge excessive premiums. H.R. Rep. No. 111-443, pt. 2, at 981 (2010).

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<sup>6</sup> [https://www.naic.org/documents/committees\\_conliaison\\_1208\\_consumer\\_recs\\_aca.pdf](https://www.naic.org/documents/committees_conliaison_1208_consumer_recs_aca.pdf).

<sup>7</sup> <https://assets.aarp.org/rgcenter/ppi/health-care/i35-age-rating.pdf>.

<sup>8</sup> <https://aspe.hhs.gov/system/files/pdf/76376/index.pdf>.

On top of that, insurers often charged pre-Medicare adults exorbitant rates – even as much as six times more than younger adults – based on their age alone (a practice known as “age rating”). See Karen Pollitz, et al., *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?* Kaiser Family Found., iv, 25 (June 2001).<sup>9</sup> Even a healthy pre-Medicare adult with no preexisting conditions faced markedly higher rates than a younger person based solely on their age. *Id.* at 25. This put the cost of health insurance out of reach for many. See Linda J. Blumberg et al., *Age Rating Under Comprehensive Health Care Reform: Implications for Coverage, Costs, and Household Financial Burdens*, Urban Inst., 8 (Oct. 2009).<sup>10</sup>

Annual and lifetime caps—which were easily exceeded by treatment for a single medical condition such as cancer, heart disease, or diabetes—meant that many older adults either incurred financially ruinous medical debt or went without treatment until they became eligible for Medicare. See David Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741, 744 (2009).<sup>11</sup>

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<sup>9</sup> <https://www.kff.org/wp-content/uploads/2013/01/how-accessible-is-individual-health-insurance-for-consumer-in-less-than-perfect-health-report.pdf>.

<sup>10</sup> <https://www.urban.org/sites/default/files/publication/30701/411970-Age-Rating-Under-Comprehensive-Health-Care-Reform-.PDF>.

<sup>11</sup> [https://www.amjmed.com/article/S0002-9343\(09\)00404-5/pdf](https://www.amjmed.com/article/S0002-9343(09)00404-5/pdf).

Indeed, Medicare beneficiaries also felt the strain of health costs even though they had insurance. Before the ACA, Medicare Part D required enrollees to pay the full cost of their drugs in the benefit's coverage gap, commonly known as the "donut hole." Dena Bunis, *Medicare "Doughnut Hole" Will Close in 2019*, AARP (Feb. 2018).<sup>12</sup> After reaching an initial coverage limit, enrollees had to pay 100% of their prescription drug costs until they spent enough to qualify for catastrophic coverage. *Id.*

Beneficiaries who entered the coverage gap often had to resort to strategies used before Medicare even had a prescription drug benefit, including skipping doses or not filling prescriptions. Yuting Zhang et al., *The Effects of the Coverage Gap on Drug Spending: A Closer Look at Medicare Part D*, *Health Affairs* 317, 322 (Feb. 3, 2009);<sup>13</sup> Patricia Barry, *Doing Away with the Doughnut Hole—the Gap in Part D Prescription Drug Coverage*, AARP (May 19, 2009).<sup>14</sup> This all changed with the passage of the ACA.

Thus, the ACA is vital to older adults' health and financial stability. Prolonged uncertainty about its status harms many older adults, especially those who do not yet qualify for Medicare, because they

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<sup>12</sup> <https://www.aarp.org/health/medicare-insurance/info-2018/part-d-donut-hole-closes-fd.html>.

<sup>13</sup> <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.28.2.w317>.

<sup>14</sup> [https://www.aarp.org/health/medicare-insurance/info-05-2009/doing\\_away\\_with\\_the\\_doughnut\\_hole\\_.html](https://www.aarp.org/health/medicare-insurance/info-05-2009/doing_away_with_the_doughnut_hole_.html).

cannot make informed decisions about their future. They live with the risk that they will lose their health care. *See* Mamula, *supra*. Compounding their precarious situation is the significant risk that health care stakeholders, including businesses, insurance companies, and state and local governments, will not participate in the ACA Marketplaces, Medicaid expansion, or other ACA programs because of an uncertain business environment. *See* Christen Linke Young, *Remanding Texas v. US to the lower court prolongs harms to consumers and the health care industry*, USC-Brookings Schaeffer Initiative on Health Policy (Jan. 3, 2020).<sup>15</sup>

In sum, older adults and the entire nation need this case to be promptly resolved to restore stability to the economy and Americans' lives. Dragging this case out for months or even years is unnecessary as the case is ready for review. The Fifth Circuit's decision is wrong, and this Court's immediate review can avert an unjust result.

## **II. Invalidating The ACA Will Cause Millions Of Older Adults To Lose The Health Insurance And Consumer Protections That They Have Relied On For Years.**

Consistent with its primary purpose, the ACA improved the lives of older adults by making health

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<sup>15</sup> <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/01/03/remanding-texas-v-u-s-to-the-lower-court-prolongs-harms-to-consumers-and-the-health-care-industry/>.

insurance, and thus health care, more accessible and affordable. 42 U.S.C. §§ 18091(2)(D)-(H). Since 2010, millions of Americans have gained health insurance, including pre-Medicare adults ages 50 to 64. *See, e.g.,* Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, Kaiser Family Found. (Dec. 13, 2019).<sup>16</sup>

The ACA allows millions of older adults to access much-needed health care services without experiencing financial ruin. The ACA also expands their access to coverage by providing strong consumer protections, including prohibiting discrimination against people with pre-existing health conditions and establishing limits on age rating. In addition, it helps older adults afford health insurance by providing income-based subsidies and tax credits for individual coverage offered in the Marketplaces, as well as financial incentives for states to expand Medicaid coverage.

Because of the Act, millions of older adults now have access to health care. The Fifth Circuit's decision threatens to take away their health care at a time when they need it most.

**A. The ACA protects older adults against insurance discrimination based on age or health status.**

The ACA addresses the barriers that many pre-Medicare adults once faced in accessing affordable

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<sup>16</sup> <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

health insurance in the individual market. Indeed, the Act’s consumer protection provisions transformed the health care landscape for older adults.

One of the Act’s most important provisions requires insurers to “accept every employer and individual in the State that applies for such coverage,” regardless of preexisting conditions. 42 U.S.C. § 300gg-1(a). This protection is vital to all Americans, but is especially crucial for older adults because they have a high incidence of preexisting conditions that increases with age. Without this protection, four out of ten adults ages 50 to 64 – or about 25 million people – could be denied health coverage because of a preexisting condition. Claire Noel-Miller and Jane Sung, *In Health Reform, Stakes are High for Older Americans with Preexisting Health Conditions*, AARP Pub. Policy Inst. (March 2017).<sup>17</sup> Overall, this provision protects over 100 million Americans. U.S. Dep’t of Health & Human Servs., Office of the Assistant Secretary for Planning and Evaluation, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act*, ASPE ISSUE BRIEF 1 (Jan. 5, 2017).<sup>18</sup>

The Act prohibits setting insurance premiums based on health-status related factors such as disability, claims experience, receipt of health care,

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<sup>17</sup> <https://www.aarp.org/content/dam/aarp/ppi/2017-01/ACA-Protects-Millions-of-Older-Adults-with-Preexisting-Health-Conditions-PPI-AARP.pdf>.

<sup>18</sup> <https://aspe.hhs.gov/pdf-report/health-insurance-coverage-americans-pre-existing-conditions-impact-affordable-care-act>.

and medical history. 42 U.S.C. § 300gg-4. It eliminates annual and lifetime coverage limits. 42 U.S.C. § 300gg-11. The ACA also bans insurers' previous practice of cancelling the policies of people who became ill. 42 U.S.C. § 300gg-12.

In addition, the Act increased affordability for older people by requiring that if insurers use a formula that considers age when determining premiums, they may not charge older adults premiums that are more than three times the premiums charged to younger adults (3:1 limit on age rating). 42 U.S.C. § 300gg(a)(1)(A)(iii). This limit ensures adults ages 50 to 64 have access to affordable health insurance coverage, while taking into account predictions of increased health care consumption. *See Jane Sung, Protecting Affordable Health Insurance for Older Adults: The Affordable Care Act's Limit on Age Rating*, AARP Pub. Policy Inst. (Jan. 2017).<sup>19</sup>

If the ACA is invalidated in part or in whole, there would be no prohibition against insurance companies returning to unlimited age rating in setting rates, and older adults would again face that insurmountable barrier to health care. It would also put the Medicare program at risk of having higher expenditures for older adults who are sicker when they enroll because they could not previously afford insurance.

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<sup>19</sup> <https://www.aarp.org/ppi/info-2016/protecting-affordable-health-insurance-for-older-adults.html>.

Amicus the Center for Medicare Advocacy has collected stories about the ACA.<sup>20</sup> On January 9, 2017, Maryland resident Mary, age 64, explained how she finally got insurance on the ACA marketplace after being precluded from getting insurance because of a preexisting condition. Mary said:

In June of 2011, I lost my job due to budget cuts. I had health insurance for 18 months. I tried to get health insurance on my own, but was declined because I had sleep apnea. So for over a year, I had no health insurance. During that year, I paid \$3,000 to doctors. That's all well and good, but just have a car accident, cancer, or a heart attack and you will be bankrupt in a heartbeat.

So when the Affordable Care Act kicked in in 2014, I signed up in March and was covered on April 1st. What's the first thing a woman would do? Get a pap smear and mammogram. I was diagnosed with breast cancer - early stages, but an aggressive strain. I had a lumpectomy, chemo, and radiation, and am now cancer free. But without the Affordable Care Act, I

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<sup>20</sup> See <https://www.esurveyspro.com/s/390566/Share-Your-Healthcare-Story>.



would probably be sitting here with stage 4 cancer.

The barriers that Mary and others faced getting insurance will likely return if the ACA is invalidated.

**B. The ACA increases older adults' access to health insurance on the individual market through the ACA Marketplaces, Tax Credits, and Subsidies.**

The ACA has improved pre-Medicare adults' access to health insurance in the individual market by establishing the ACA Marketplaces and providing consumers with tax credits and subsidies to make the insurance more affordable. 42 U.S.C. § 18031(b); 26 U.S.C. § 36B(b)(3)(A); 42 U.S.C. § 18071(c)(2). In 2019, 11.4 million people secured health coverage by enrolling in the federal and state health insurance exchanges. *Ctrs. for Medicare & Medicaid Servs., Health Insurance Exchanges 2019 Open Enrollment Report* (Mar. 25, 2019).<sup>21</sup>

The tax credits reduce the cost of premiums for people with incomes between 100% and 400% of the federal poverty level, 26 U.S.C. §36B(b)(3)(A). Subsidies reduce out-of-pocket expenses for people with incomes under 250% of the federal poverty level, 42 U.S.C. §18071(c)(2). In 2017, over 3 million low and moderate-income adults ages 50 to 64 relied on ACA tax credits to purchase health insurance coverage in

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<sup>21</sup> <https://www.cms.gov/newsroom/fact-sheets/health-insurance-exchanges-2019-open-enrollment-report>.

the individual health insurance market. See Jane Sung et al., *Adequate Premium Tax Credits are Vital to Maintain Access to Affordable Health Coverage for Older Adults*, AARP Pub. Policy Inst. (March 2017).<sup>22</sup> Without these subsidies and tax credits, many older adults could not afford insurance.

The legislative history of Congress's 2017 debate on repealing the ACA includes this statement from Kentucky resident Kevin S., age 62, describing how purchasing insurance on the ACA Marketplace helped his family financially:

I am 62 years old and I'm a lifelong resident of Louisville, Kentucky. I worked hard, took risks and built a successful small business that I sold at age 59. My wife and I were excited about our prospects as we headed into early retirement. As a retiree too young for Medicare, I purchased health insurance on the open market. Less than a year later, I was diagnosed with lymphoma. I have undergone multiple scans and 2 cycles of chemo. I am winning the battle so far, but since this disease is in my blood I will be fighting it for the rest of my life.

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<sup>22</sup> <https://www.aarp.org/content/dam/aarp/ppi/2017-01/adequate-premium-tax-credits-are-vital-to-maintain-access-to-affordable-health-coverage-for-older-adult.pdf>.

A cancer diagnosis is a life-changing event that not only attacks the body, but the mental stress is just as tough to deal with. Thanks to ObamaCare, I've been able to rest easier knowing that my illness wouldn't bankrupt my family and that I'll be able to provide for my wife even after I'm gone.<sup>23</sup>

**C. The ACA increases low-income older adults' access to health coverage by expanding eligibility for Medicaid.**

The ACA increases access to health insurance for lower-income older adults by encouraging states to expand their Medicaid programs. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Before the ACA, in most states, low-income adults under age 65 without dependent children could not qualify for Medicaid, unless they had a disability. The ACA makes it possible for adults with incomes at or below 138% of the federal poverty level to qualify for Medicaid if their state elects to expand the program. 42 U.S.C. § 1396d(y); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541-542, 588 (2012) (making Medicaid expansion optional for the states).

Currently, 36 states and the District of Columbia have expanded Medicaid. Kaiser Family Found., *Status of State Action on the Medicaid*

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<sup>23</sup> 163 CONG. REC. H2406-7 (daily ed. March 24, 2017) (statement of Cong. Yarmuth).

*Expansion Decision* (Jan. 10, 2019).<sup>24</sup> As a result, 13.1 million Americans in expansion states have gained Medicaid coverage. Medicaid & CHIP Payment & Access Comm'n, *Medicaid enrollment changes following the ACA* (last visited Jan. 13, 2020).<sup>25</sup>

Most importantly, Medicaid expansion has saved lives. A JAMA Network study linked Medicaid expansion to a six percent lower rate of total opioid overdose deaths compared with the rate in non-expansion states. Nicole Craffitz-Wortz et al., *Association of Medicaid Expansion with Opioid Overdose Mortality in the U.S.*, JAMA Network (2020).<sup>26</sup> Further, because new enrollees were diagnosed with and received consistent treatment for serious conditions such as cancer, mental illness, and diabetes, Medicaid expansion saved the lives of at least 19,200 adults ages 55-64. See Matt Broaddus and Aviva Aron-Dine, *Medicaid Expansion Has Saved at Least 19,000 Lives, New Research Finds*, Ctr. On Budget & Policy Priorities (Nov. 6, 2019).<sup>27</sup>

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<sup>24</sup> <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/>.

<sup>25</sup> [www.macpac.gov/subtopic/medicaid-enrollment-changes-following-the-aca/#ftn1](http://www.macpac.gov/subtopic/medicaid-enrollment-changes-following-the-aca/#ftn1).

<sup>26</sup> <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2758476>.

<sup>27</sup> <https://www.cbpp.org/research/health/medicaid-expansion-has-saved-at-least-19000-lives-new-research-finds>.

### **III. Invalidating The ACA Will Harm The Financial Health And Efficiency Of The Medicare Program And End Many Cost Savings For Medicare Beneficiaries.**

Invalidating the ACA, including its Medicare provisions, would throw the Medicare program into fiscal and administrative chaos, and directly harm older adults and people with disabilities. Because the program is so large, this sort of chaos would upend the financial markets and the entire health care system.

Medicare is a bedrock of security for millions and represents a significant portion of the national economy. It currently provides health care coverage for over 60 million people who are either at least 65 years old or disabled. Juliette Cubanski et al., *The Facts on Medicare Spending and Financing*, Kaiser Family Found. (Aug. 20, 2019).<sup>28</sup> In 2018, Medicare spending accounted for 15% of total federal spending and represented 20% of total national health spending in 2017. *Id.*

The ACA significantly altered, and is now woven into, the Medicare program. The statute contains about 165 provisions that impact Medicare. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medicare Insurance

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<sup>28</sup> <https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/>.

Trust Funds, *2018 Annual Report 3* (June 2018).<sup>29</sup> Among other things, these provisions focus on “reducing costs, increasing revenues, improving benefits, combating fraud and abuse,...[and identifying] alternative provider payment mechanisms, health care delivery systems, and other changes intended to improve the quality of health care and reduce costs.” *Id.* In short, the ACA vastly improved the financial health, efficiency, and quality of the Medicare program – goals that Congress has long sought to attain.

**A. The ACA strengthens the financial health of the Medicare program.**

Critical to the national economy, the ACA benefits Medicare’s budget. It slowed the growth of payments to providers and reduced payments to Medicare Advantage plans. Juliette Cubanksi et al., *The Facts on Medicare Spending and Financing*, Kaiser Family Found. (Aug. 20, 2019).<sup>30</sup> The ACA included certain tax increases and delivery system reforms aimed at improving health care quality and reducing federal costs. *See generally*, Kaiser Family Found., *Potential Impact of Texas v. U.S. Decision on Key Provisions of the Affordable Care Act* (Jan. 3, 2020)

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<sup>29</sup> <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf>.

<sup>30</sup> About one-third (34 percent) of beneficiaries receive their Medicare coverage through privately-sponsored “Medicare Advantage” plans, such as HMOs.

(“KFF Report”).<sup>31</sup> As a result, the Medicare Hospital Insurance Trust Fund will be solvent for eight years longer. Paul N. Van de Water, *Medicare Is Not “Bankrupt,”* Ctr. on Budget & Policy Priorities (May 1, 2019).<sup>32</sup>

Invalidating the ACA would disrupt Medicare reimbursement by wiping out statutory payment provisions and reversing cost savings. Pet. App. 16a. (Fifth Circuit noting that Medicare reimbursement schedules would be unlawful, requiring an increase in payments). The Congressional Budget Office (CBO) estimated that eliminating the changes to Medicare Advantage payments *alone* would increase Medicare spending by approximately \$350 billion over ten years, accelerating the insolvency of the Medicare Trust Fund. CBO, *Budgetary and Economic Effects of Repealing the Affordable Care Act*, 2, 12 (June 2015).<sup>33</sup>

Reversing the ACA’s payment reductions to providers would also increase Medicare spending by another \$350 billion over ten years. *Id.*; *see also* KFF Report. This result would undermine Congress’s longstanding aim to *improve* Medicare’s sustainability. *Id.*

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<sup>31</sup> <https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/>.

<sup>32</sup> <https://www.cbpp.org/research/health/medicare-is-not-bankrupt>.

<sup>33</sup> <https://www.cbo.gov/publication/50252>.

## **B. The ACA improves value, quality, and efficiency in Medicare.**

The ACA has resulted in cost-savings for the Medicare program and quality improvements for Medicare beneficiaries. Kaiser Family Found., *An Overview of Medicare* (Feb. 13, 2019).<sup>34</sup> For example, the ACA established the Center for Medicare and Medicaid Innovation (CMMI) to design, implement, and test new approaches for payment and delivery systems to reduce spending and improve quality of care. 42 U.S.C. § 1315a.

As of early 2018, CMMI had started over 40 new payment models in Medicare, Medicaid, and the Children’s Health Insurance Program (CHIP). Kaiser Family Found., “*What is CMMI?*” and *11 other FAQs about the CMS Innovation Center* (Feb. 27, 2018).<sup>35</sup> These models affect 18 million individuals and 200,000 health care providers in all 50 states and the District of Columbia. *Id.* CBO estimates CMMI “will save the federal government an estimated \$34 billion, on net, from 2017-2026.” *Id.* These investments and savings could be forfeited without the ACA.

Finally, the ACA also established many measures to combat waste, fraud, and abuse across government health care programs. These include

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<sup>34</sup> <https://www.kff.org/medicare/issue-brief/an-overview-of-medicare/>.

<sup>35</sup> <https://www.kff.org/medicare/fact-sheet/what-is-cmmi-and-11-other-faqs-about-the-cms-innovation-center/>.



enhanced funding, screening, oversight, data sharing, and investigation to prevent and identify fraud and abuse, and harsher fines and penalties for offenses. These powerful tools have already enabled the Centers for Medicare and Medicaid Services to recover billions in taxpayer dollars. Ctrs. for Medicare & Medicaid Servs., *The Health Care Fraud and Abuse Control Program Protects Consumers and Taxpayers by Combating Health Care Fraud* (Jan. 18, 2017).<sup>36</sup>

**C. The ACA created critical coverage improvements for Medicare beneficiaries, enhancing cost-savings and access to care.**

The ACA improved Medicare coverage by enhancing access to specific medical services and products. First, the ACA decreased the amount that beneficiaries enrolled in Medicare Part D pay for prescription drugs by closing the doughnut hole through a series of escalating contributions from drug manufacturers and Part D plans. 42 U.S.C. § 1395w-102. As a result, more than 11.8 million Medicare beneficiaries have saved over \$26.8 billion on prescription drugs under the ACA. Ctrs. for Medicare & Medicaid Servs., *Nearly 12 million people with Medicare have saved over \$26 billion on prescription*

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<sup>36</sup> <https://www.cms.gov/newsroom/fact-sheets/health-care-fraud-and-abuse-control-program-protects-consumers-and-taxpayers-combating-health-care-0>.

*drugs since 2010* (Jan. 13, 2017)<sup>37</sup> (“CMS Jan. 2017 Press Release”).

Second, the ACA eliminated beneficiary cost-sharing (*e.g.*, copayments or coinsurance amounts) for many life-saving screening services. 42 U.S.C. §1395l(a)(1)(T); *see also* Nat’l Council on Aging, *Nat’l Ctr. for Benefits Outreach & Enrollment, Quick Reference Chart: Medicare’s Preventive Benefits, 1-7* (Aug. 2015).<sup>38</sup> Examples of these services are mammograms, pap smears, bone mass measurement for those with osteoporosis, depression screening, diabetes screening, HIV screening, obesity screening and counseling, and free annual wellness visits. In 2016, an estimated 40.1 million Medicare beneficiaries received at least one preventive service and 10.3 million had an annual wellness visit with no copay or deductible. CMS Jan. 2017 Press Release, *supra*.

Third, the ACA created the Federal Health Care Coordination Office (also known as the Medicare-Medicaid Coordination Office or MMCO) to focus on the 12 million older Americans and people with disabilities who are enrolled in both Medicare and Medicaid. 42 U.S.C. § 1315b(a); CMS Medicare-Medicaid Coordination Office, *People Dually Eligible*

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<sup>37</sup> <https://www.cms.gov/newsroom/press-releases/nearly-12-million-people-medicare-have-saved-over-26-billion-prescription-drugs-2010>.

<sup>38</sup> <http://www.ct.gov/agingservices/lib/agingservices/choices/medicare-preventive-benefits-chartncoa.pdf>.

*for Medicare and Medicaid*, (Mar. 2019).<sup>39</sup> Together with improving care coordination for this high-need, high-cost population, the MMCO has also implemented mechanisms to ensure that providers do not illegally bill the lowest-income beneficiaries for Medicare cost-sharing.

The ACA has also brought a healthier population into the Medicare program, thereby reducing program costs over time. People who were uninsured before enrolling in Medicare cost the program far more than people who consistently had insurance before age 65. See U.S. Gov't Accountability Off., GAO-14-53, *Medicare: Continuous Insurance Before Enrollment Associated With Better Health and Lower Program Spending* 9 (Dec. 2013) (finding that the previously uninsured had 35% more program spending in the first year of Medicare enrollment than those who continuously had insurance for six years).<sup>40</sup>

Finally, the ACA addressed eligibility gaps for people under age 65 who qualify for Medicare based on disability. These individuals have often lost their health, jobs, income, and health insurance, and must wait 24 months after entitlement to Social Security disability benefits before they can receive Medicare coverage. 42 U.S.C. § 1395c. Before the ACA, people in this two-year gap faced enormous problems

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<sup>39</sup> [https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO\\_Factsheet.pdf](https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO_Factsheet.pdf).

<sup>40</sup> <https://www.gao.gov/assets/660/659753.pdf>.

obtaining or affording health insurance coverage, which could lead to severe financial and medical hardships. Juliette Cubanski et al., *Medicare's Role for People Under Age 65 with Disabilities*, Kaiser Family Found. (Aug. 12, 2016).<sup>41</sup>

#### **IV. Invalidating The ACA Will Harm Nursing Facility Residents By Ending Quality And Safety Improvements And Harm Older Adults Who Want To Age In The Community.**

The ACA improves accountability and enhances access to long-term services and supports, which are critical to older adults and people with disabilities. The ACA's Nursing Home Transparency and Improvement Act expands access to nursing facility information to improve accountability and ensure resident safety. It requires nursing facilities to: (1) disclose their ownership and management so they are accountable to residents; (2) establish compliance and ethics programs, and quality assurance and performance improvement programs; and (3) report their actual nursing facility staffing through payroll-based information. 42 U.S.C. §§ 1320a-7j.

The ACA also codifies the Elder Justice Act, the first comprehensive federal law fighting elder abuse, neglect, and exploitation. 42 U.S.C. §§ 1397j-1397m-5. Its sweeping provisions:

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<sup>41</sup> <https://www.kff.org/medicare/issue-brief/medicares-role-for-people-under-age-65-with-disabilities/>.

- fund adult protective services;
- establish forensic centers focused on elder abuse, neglect, and exploitation;
- provide grants for Long-Term Care Ombudsman Programs;
- provide grants to enhance long-term care; and
- require reporting of crimes committed in federally funded long-term care facilities and state demonstration grants to monitor elder abuse detection and prevention methods.

The ACA also provides incentives to states to shift Medicaid long-term care spending from institutions to the community. Nearly 90% of adults age 65 and older say they want to stay in their homes and communities as they age, rather than moving to a nursing facility. Joanne Binette et al., *2018 Home and Community Preferences Survey: A National Survey of Adults Age 18-Plus*, AARP (August 2018).<sup>42</sup>

By providing these financial incentives, Congress sought to improve the quality of life for older adults receiving Medicaid-funded long-term care services and help states comply with their obligations under the Americans with Disabilities Act. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999) (holding that unjustified segregation of people with disabilities in an institutional setting is discrimination).

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<sup>42</sup> <https://www.aarp.org/research/topics/community/info-2018/2018-home-community-preference.html>.

The ACA has additional landmark protections for older adults, such as Section 1557, which prohibits discrimination on the basis of age, disability, race, color, national origin, or sex in certain health programs or activities. 42 U.S.C. § 18116.

### CONCLUSION

Amici respectfully urge this Court to grant the petition for a writ of certiorari. As the Fifth Circuit's decision is incorrect, further remand and appeal of this case will result in an unjust, indefinite period of uncertainty that harms the American people, the health care industry, and the economy. Review of the decision below will avert this untenable result.

Respectfully submitted,

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