

Nos. 19-840, 19-841

IN THE
Supreme Court of the United States

CALIFORNIA, ET AL., *Petitioners*,

v.

TEXAS, ET AL., *Respondents*.

UNITED STATES HOUSE OF REPRESENTATIVES, *Petitioner*,

v.

TEXAS, ET AL., AND UNITED STATES OF AMERICA, ET AL.,
Respondents.

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

**AMICI CURIAE BRIEF IN SUPPORT OF
PETITIONERS AND REVERSAL BY THE
AMERICAN CANCER SOCIETY ET AL.**

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. AFFORDABLE, ACCESSIBLE
HEALTH CARE IS ESSENTIAL IN
MANAGING CHRONIC DISEASES 7

II. THE FIFTH CIRCUIT RULING
JEOPARDIZES PATIENT CERTAINTY
REGARDING COVERAGE AND
POTENTIALLY DESTABILIZES
INSURANCE MARKETS 11

III. THE ACA HAS IMPROVED ACCESS
TO AFFORDABLE HEALTH CARE,
REDUCING FINANCIAL BURDENS
AND IMPROVING MEDICAL
OUTCOMES FOR PATIENTS WITH
LIFE-THREATENING AND CHRONIC
DISEASES..... 12

A. The financial burden
accompanying necessary medical
care for uninsured Americans
fighting chronic disease is
staggering. 13

B.	Prior to enactment of the ACA, uninsured Americans often delayed treatment due to the costs of medical care.....	14
C.	Congress’s enactment and preservation of the ACA has significantly reduced Americans’ financial burden and allowed Americans who need treatment the most to receive it.	16
IV.	INVALIDATION OF THE ACA WOULD IGNORE CONGRESS’S POLICY-BASED DECISION TO PRESERVE THE ACA BECAUSE IT HAS IMPROVED ACCESS TO MUCH-NEEDED, AFFORDABLE INSURANCE.....	17
	CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015)	6, 18
<i>Nat'l Fed'n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012)	<i>passim</i>
Statutes	
42 U.S.C. § 18091(2)(E)	18
Patient Protection and Affordable Care Act	<i>passim</i>
Other Authorities	
163 CONG. REC. S4227 (daily ed. July 26, 2017).....	6, 17
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<https://www.nap.edu/catalog/10874/insuring-americas-health-principles-and-recommendations> 18
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UNINSURED POPULATION (Dec. 2019),
<http://files.kff.org/attachment/Issue-Brief-Key-Facts-about-the-Uninsured-Population> 11
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& MENTAL HEALTH INDICATORS IN
THE UNITED STATES: RESULTS FROM
THE 2017 NATIONAL SURVEY ON DRUG
USE & HEALTH (Sept. 2018), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf> 10
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PREVENTION, *National and State
Estimates of the Numbers of Adults
and Children with Active Epilepsy—
United States, 2015*, 66 MORBIDITY &
MORTALITY WKLY. REP. 821 (Aug.
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Olga Khavjou et al., AM. HEART ASS'N, PROJECTIONS OF CARDIOVASCULAR DISEASE PREVALENCE & COSTS: 2015-2035 (Nov. 2016), <https://healthmetrics.heart.org/wp-content/uploads/2017/10/Projections-of-Cardiovascular-Disease.pdf> 8

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Rules

S. Ct. Rule 37.2(a)..... 1

S. Ct. Rule 37.6 1

STATEMENT OF INTEREST¹

Amici are 20 preeminent medical, research, mental health, and other health care organizations. Collectively, *Amici* represent millions of patients and consumers across the country facing serious, acute, chronic health conditions.

American Cancer Society's mission is to save lives, celebrate lives, and lead the fight for a world without cancer.

American Cancer Society Cancer Action Network, the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem.

American Diabetes Association is a nationwide, nonprofit, voluntary health organization with a mission to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

American Heart Association is a voluntary health organization devoted to saving people from heart disease and stroke—the first and fifth leading causes of death in the United States.

¹ In accordance with S. Ct. Rule 37.2(a), *Amici* received consent to file this brief from counsel for each of the parties. Per S. Ct. Rule 37.6, *Amici* certify that this brief was authored in whole by counsel for *Amici* and that no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

American Lung Association is the nation's oldest voluntary health organization, representing the 35 million Americans with lung disease.

Crohn's & Colitis Foundation is the leading non-profit organization dedicated to finding the cures for Crohn's disease and ulcerative colitis and to improving the quality of life for individuals affected by these diseases.

Cystic Fibrosis Foundation's mission is to cure cystic fibrosis and to provide all people with CF the opportunity to lead long, fulfilling lives by funding research and drug development, partnering with the CF community, and advancing high-quality, specialized care.

Epilepsy Foundation is the leading national voluntary health organization that speaks on behalf of more than 3.4 million Americans with epilepsy and seizures.

Global Healthy Living Foundation, and its arthritis community CreakyJoints®, is a non-profit foundation representing people with chronic disease, including arthritis, migraine, cardiovascular disease, psoriasis, inflammatory bowel disease and osteoporosis.

Hemophilia Federation of America is a community-based, grassroots advocacy organization that educates on behalf of and advocates for people with hemophilia, von Willebrand disease, and other rare bleeding disorders.

Leukemia & Lymphoma Society is the world's largest voluntary health agency dedicated to fighting blood cancer and ensuring that the more than 1.3

million blood cancer patients and survivors in the United States can access the care they need.

March of Dimes is a nonprofit organization that leads the fight for the health of all mothers and babies by educating medical professionals and the public about best practices, lifesaving research, and by advocating for mothers and babies.

Muscular Dystrophy Association has been committed to transforming the lives of people affected by muscular dystrophy, ALS, and related neuromuscular diseases for 70 years through innovations in science and innovations in care.

National Alliance on Mental Illness is the nation's largest grassroots organization dedicated to building better lives for the millions of Americans affected by mental illness through advocacy, support, and awareness.

National Coalition for Cancer Survivorship is a national organization that advocates for access to quality care for survivors of all forms of cancer.

National Hemophilia Foundation is the nation's leading advocacy organization working to ensure that individuals affected by hemophilia and related bleeding disorders have timely access to high quality medical care and services.

National Multiple Sclerosis Society mobilizes people and resources so that everyone affected by MS can live their best lives while the Society works to stop MS in its tracks, restore what has been lost and end MS forever.

National Organization for Rare Disorders is a patient advocacy organization dedicated to

individuals with rare diseases and the organizations that serve them.

Kennedy Forum is a non-profit organization focused on promoting mental health coverage and educating consumers, providers, and regulators on the implementation of efficient practice models for integrated service, coverage, and communication.

United Way improves lives by mobilizing the caring power of communities around the world to advance the common good.

As organizations that fight to prevent, treat, and cure some of the most debilitating and deadly diseases, *Amici* and the millions of Americans they represent would be among those hit hardest if the lower court's invalidation of the Patient Protection and Affordable Care Act ("ACA" or the "Act") is allowed to stand. *Amici* are uniquely able to assist the Court in understanding why the Act is crucial to millions of patients, survivors, and their families and why further delay in determining the Act's validity would be detrimental.

SUMMARY OF ARGUMENT

All Americans use or will use health-care services, and the lifetime risk that individual Americans will acquire one of the diseases or conditions that *Amici* represent is high. The question is not *whether* individual Americans will incur health care expenses but *how* those expenses will be financed. Without the health insurance provided by the ACA, access to vital health-care services and the quality of health outcomes diminishes, making it more difficult to manage the myriad of chronic

diseases that *Amici* help Americans fight every day. Few Americans have the means to pay for adequate treatment of these diseases without insurance coverage—for most Americans, insurance is a not a luxury, but a prerequisite to obtaining treatment.

Congress is aware of this reality—it reviewed the scientific data when it passed the ACA in 2010. During 2017, amidst public outcry to protect the Act and data tying lack of affordable health insurance to more costly and longer-term treatment, Congress chose not to repeal the ACA despite lengthy consideration and debate on numerous proposed measures to do so.² Congress also expressly chose to preserve the remainder of the ACA even as it eliminated the penalty for noncompliance with the individual mandate.

Congress’s choice to preserve the ACA was a decision that has proven critical to preserving insurance coverage for many Americans, including those living with chronic diseases: repeal of the ACA would have resulted in 17 million Americans losing their insurance in 2018, with that total reaching 27 million by 2020. CONG. BUDGET OFF., COST ESTIMATE OF H.R. 1628, OBAMACARE REPEAL RECONCILIATION ACT OF 2017 (July 19, 2017),

² For example, the Better Care Reconciliation Act, H.R. 1628, 115th Cong. (2017), which would have repealed ACA mandates and cost sharing subsidies and allowed providers to sell non-compliant plans outside marketplaces, failed 43-57 in the Senate. The Fifth Circuit chose to reference a closer vote on a different measure. *See* Petition for a Writ of Certiorari, No. 19-840, App. 8a n.6. The legislature rejected all repeal efforts; none have advanced in the current Congress.

<https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/52939-hr1628-amendment.pdf>. Indeed, members of Congress on both sides of the aisle were emphatic that critical protections not be repealed without a replacement that would ensure patients had access to care. *See* 163 CONG. REC. S4227–96 (daily ed. July 26, 2017). And with good reason—as the data illustrates, the ACA has resulted in greatly improved access to affordable medical care for Americans dealing with chronic illnesses.

The district court’s ruling did precisely what Congress chose not to do. Congress expressly rejected a “repeal-without-replace” scenario that would have left millions of Americans without adequate coverage—a policy decision properly in the province of the legislature, not the court. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (stating that the power to make the laws rests with Congress, and because Congress passed the ACA to improve the health-insurance market, courts must interpret the Act consistent with that goal). Invalidating the ACA over Congress’s clear intent to the contrary—as the district court did and as the court of appeals’ ruling leaves open—has life-altering implications for patients with chronic diseases.

The Fifth Circuit’s decision to remand the severability determination rather than acknowledge Congress’s clear intent to leave the ACA in place causes further delay, resulting in uncertainty for the health and finances of patients, survivors, and their families across this country, as well as possibly creating market instability. In order to protect the wellbeing of patients and survivors as well as the

economic health of the insurance marketplace, this Court should grant an expedited review of these petitions to resolve the matter.

ARGUMENT

I. AFFORDABLE, ACCESSIBLE HEALTH CARE IS ESSENTIAL IN MANAGING CHRONIC DISEASES

“Everyone will eventually need health care at a time and to an extent they cannot predict.” *Nat’l Fed’n of Indep. Bus. v. Sebelius* (“*NFIB*”), 567 U.S. 519, 547 (2012). There is also a pervasive need for health care in connection with the most serious diseases—diseases that are the focus of *Amici*’s efforts:

- An estimated 1.8 million Americans will be diagnosed with cancer in 2020, and more than 16.9 million Americans with a history of cancer were alive on January 1, 2019. Rebecca L. Siegel et al., AM. CANCER SOC’Y, *Cancer Statistics, 2020* (2020), <https://acsjournals.online.library.wiley.com/doi/epdf/10.3322/caac.21590>.
- An estimated 30.3 million Americans have diabetes and 84 million American adults (about one third) have prediabetes. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L DIABETES STATISTICS REPORT, 2017: ESTIMATES OF DIABETES & ITS BURDEN IN THE UNITED STATES 2 (2017),

<https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf>.

- In 2019, a projected 108.8 million Americans had cardiovascular disease. Olga Khavjou et al., AM. HEART ASS'N, PROJECTIONS OF CARDIOVASCULAR DISEASE & COSTS: 2015-2035, at 20 (Nov. 2016), <https://healthmetrics.heart.org/wp-content/uploads/2017/10/Projections-of-Cardiovascular-Disease.pdf>.
- In 2017, it was estimated that 15.3 million adults had chronic obstructive pulmonary disease and 25.2 million Americans currently had asthma, including 6.2 million children. This equates to 35.7 million Americans with chronic lung disease. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L HEALTH INTERVIEW SURVEY, 2017 DATA RELEASE, https://www.cdc.gov/nchs/nhis/nhis_2017_data_release.htm (last reviewed Aug. 8, 2018) (data analysis by ALA's Epidemiology and Statistics department).
- In 2015, 3.4 million Americans reported active epilepsy. Matthew M. Zack & Rosemarie Kobau, CTRS. FOR DISEASE CONTROL & PREVENTION, *National and State Estimates of the Numbers of Adults and Children with Active*

Epilepsy–United States, 2015, 66
MORBIDITY & MORTALITY WKLY. REP.
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[https://www.cdc.gov/mmwr/volumes/66/
wr/mm6631a1.htm](https://www.cdc.gov/mmwr/volumes/66/wr/mm6631a1.htm).

- Estimates indicate approximately 1 million individuals in the U.S. have Multiple Sclerosis (“MS”). Mitchell T. Wallin et al., *The Prevalence of MS in the United States: A Population-Based Estimate Using Health Claims Data*, 92 NEUROLOGY 1029, 1035 (Feb. 2019), <https://n.neurology.org/content/neurology/92/10/e1029.full.pdf>.
- 60 percent of adult Americans have a chronic disease, and 40 percent have two or more. Rahul Gupta, Senior V.P. & Chief Med. & Health Officer, March of Dimes, Examining Threats to Workers With Preexisting Conditions, Testimony Before the H. Educ. & Labor Comm. (Feb. 6, 2019), https://edlabor.house.gov/imo/media/doc/Testimony_Gupta020619.pdf (citing *Chronic Diseases in America*, CTRS. FOR DISEASE CONTROL & PREVENTION: NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, <https://www.cdc.gov/chronicdisease/pdf/infographics/chronic-disease-H.pdf> (last updated Mar. 18, 2019)).

- In 2017, there were an estimated 46.6 million adults aged 18 or older in the United States with mental illness, representing 18.9% of all adults. Jonaki Bose et al., DEP'T OF HEALTH & HUMAN SERVS., KEY SUBSTANCE USE & MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2017 NATIONAL SURVEY ON DRUG USE & HEALTH 2 (Sept. 2018), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf>.

These statistics confirm the virtual certainty that all Americans will need health care at some point in their lives to combat either these serious chronic diseases or a myriad of other health conditions. Without affordable, accessible health insurance, patients, survivors, and their families must bear the burden of substantial health-care costs and later-stage diagnoses, as well as risk being denied the life-saving care they need.

Congress passed the ACA to improve Americans' access to health care. As nonpartisan organizations dedicated to studying and preventing the devastating impact of these diseases, *Amici* know firsthand that access to affordable, basic, preventive health care and life-saving treatments are fundamental to successful health outcomes.

II. THE FIFTH CIRCUIT RULING JEOPARDIZES PATIENT CERTAINTY REGARDING COVERAGE AND POTENTIALLY DESTABILIZES INSURANCE MARKETS

While the Fifth Circuit ruling did not immediately enjoin any provision of the ACA, the decision to remand to the district court creates uncertainty for patients surrounding the continued ability to access meaningful coverage without facing discrimination for health history, including prior diagnoses.

According to the Kaiser Family Foundation—a health policy-focused, non-profit organization—the number of uninsured Americans decreased from 46.5 million to 27 million between 2010 and 2017. However, by the end of 2018, the number of uninsured Americans increased by almost 1 million people. Jennifer Tolbert et al., KAISER FAM. FOUND., KEY FACTS ABOUT THE UNINSURED POPULATION 2 (Dec. 2019), <http://files.kff.org/attachment/Issue-Brief-Key-Facts-about-the-Uninsured-Population>.

Entering 2019, in the midst of administrative and litigation uncertainties surrounding the Act, premiums increased by nearly 5 percentage points from the previous year. Rachel Fehr & Cynthia Cox, KAISER FAM. FOUND., *Individual Insurance Market Performance in Late 2019* (Jan. 2020), <https://www.kff.org/private-insurance/issue-brief/individual-insurance-market-performance-in-late-2019/>. Premiums largely stabilized through 2019, yet the insurance market remains fragile. For example, consumers in rural areas with fewer

insurers and higher premiums are susceptible to market insecurities. *Id.*

Ongoing litigation threatens not only the operation of ACA exchanges, but the entire ACA, and exposes millions of Americans to uncertainty about their access to insurance, their ability to pay, and ultimately their ability to obtain vital health services and medications. These lingering uncertainties are detrimental—particularly for the patients and survivors represented by *Amici*. Therefore, the most logical process for ensuring certainty for patients, continued stability in the marketplace, and for carrying out the intent of Congress in enacting the ACA is an expedited review by this Court.

III. THE ACA HAS IMPROVED ACCESS TO AFFORDABLE HEALTH CARE, REDUCING FINANCIAL BURDENS AND IMPROVING MEDICAL OUTCOMES FOR PATIENTS WITH LIFE-THREATENING AND CHRONIC DISEASES

Since its enactment, the ACA has successfully reduced: (i) the financial burden of necessary medical expenses; (ii) the uninsured rates among adults; and (iii) the demonstrable gap between household income and insurance coverage. Improving access to health care by making coverage more affordable was a primary reason Congress passed the ACA. *NFIB*, 567 U.S. at 538 (“The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care.”). And the ACA has proven to be up to the challenge: the Act has made significant progress in reducing the problems faced by Americans dealing with chronic diseases.

A. The financial burden accompanying necessary medical care for uninsured Americans fighting chronic disease is staggering.

Prior to enactment of the ACA, uninsured Americans with chronic diseases were often unable to receive necessary treatment or went into crushing debt to obtain medical care.

For example, the high cost of treating cardiovascular disease has been a leading cause of medical bankruptcy. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 745 (2009). Prior to the ACA, approximately 7.3 million (or 15 percent of) adults who reported suffering from the disease lacked insurance, and nearly one of four cardiovascular disease patients and one of three stroke patients went without coverage at some point following their diagnosis—more than half cited cost as the reason they lacked coverage. See AM. HEART ASS'N, BREAKING DOWN THE BARRIERS: THE UNINSURED WITH HEART DISEASE & STROKE 1 (2013), http://www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm_304486.pdf (citing GEO. WASH. UNIV. CTR. FOR HEALTH POL'Y RESEARCH for the AM. HEART ASS'N, ANALYSIS OF 2006-10 NHIS DATA (Aug. 2011) (on file with the American Heart Association)); AM. HEART ASS'N, AFFORDABLE ACCESS TO HEALTH CARE: TOP PRIORITIES OF HEART DISEASE & STROKE PATIENTS: RESULTS FROM AN AM. HEART ASS'N PATIENT SURVEY 2 (2010), https://www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm_432322.pdf.

Likewise, diabetes poses a substantial financial burden on the 30 million people who live with the disease. For millions of people with diabetes, including all people with type 1 diabetes, access to insulin is a matter of life and death. Yet, the cost of insulin nearly tripled between 2002 and 2013. William T. Cefalu et al., *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, 41 DIABETES CARE 1299, 1301 (2018), <https://care.diabetesjournals.org/content/diacare/41/6/1299.full.pdf>.

Similarly, treatment for blood-cancer patients averages \$156,000 in the year following diagnosis, with the cost of treatment for certain blood-cancer subtypes averaging as high as \$800,000 in the first year. Gabriela Dieguez et al., MILLIMAN RESEARCH REP., THE COST BURDEN OF BLOOD CANCER CARE 2 (Oct. 2018) <https://www.lls.org/sites/default/files/Milliman%20study%20cost%20burden%20of%20blood%20cancer%20care.pdf>.

The data above represents a microcosm of the financial burden that uninsured Americans seeking treatment for chronic conditions often face. Potentially more worrisome is the fact that without insurance, many patients are unwilling to incur these costs, putting their well-being—and often, their lives—at risk.

B. Prior to enactment of the ACA, uninsured Americans often delayed treatment due to the costs of medical care.

Prior to the ACA taking effect, uninsured Americans often chose to delay or forgo treatment

altogether—shortening their own lives or worsening their conditions—rather than incur the financial strain associated with receiving care. Even without the obvious, negative medical consequences of forgoing treatment, uninsured Americans fighting chronic conditions without financial reserves were often at risk of exacerbating their poor-health outcomes due to their financial condition alone.³ Lack of preventive care and delayed treatment result in uninsured patients with poorer health outcomes who require more costly, long-term, and invasive treatment than individuals with insurance. *See, e.g., NFIB*, 567 U.S. at 594 (Ginsburg, J., concurring) (“When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention.”).

A 2009 Harvard Medical School study found approximately 45,000 deaths annually could be attributed to lack of health insurance among working-age Americans: those uninsured had a 40 percent higher risk of death than their privately insured counterparts. Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 AM. J. PUB. HEALTH 2289, 2292 (2009). Not having access

³ In interviews with lung and colorectal cancer patients, 33 to 40 percent of those patients reported having limited financial reserves and also reported significantly increased pain, greater symptom burden, and poorer quality of life. Christopher S. Lathan et al., *Association of Financial Strain with Symptom Burden and Quality of Life for Patients with Lung or Colorectal Cancer*, 34 J. CLINICAL ONCOLOGY 1732, 1736 (2016), <http://ascopubs.org/doi/abs/10.1200/JCO.2015.63.2232?sid=8a09e15b-fc58-45b6-9b35-b94c65d78437>.

to insurance is associated with mortality despite advances in medical therapeutics. *See id.* at 2294.

Prior to the enactment of the ACA, uninsured Americans were left with an impossible choice—place themselves and their families in financial peril or forgo getting the treatment they needed. Congress passed the ACA to eliminate this untenable choice, and the ACA has largely risen to the occasion.

C. Congress’s enactment and preservation of the ACA has significantly reduced Americans’ financial burden and allowed Americans who need treatment the most to receive it.

Since enactment of the ACA, the Act has significantly improved circumstances for individuals with chronic diseases. Uninsured rates among nonelderly adults decreased by 6.3 percent between the fourth quarter of 2013 and the fourth quarter of 2016. Benjamin D. Sommers et al., *Early Changes in Health Insurance Coverage Under the Trump Administration*, 378 NEW ENG. J. MED. 1061 (2018), <https://www.ncbi.nlm.nih.gov/pubmed/29539288>.

The ACA has had a direct benefit on Americans living with chronic conditions including arthritis, migraine, cardiovascular disease, psoriasis, inflammatory bowel disease, and osteoporosis. Over 606,277 adults aged 18 to 64 suffering from these chronic conditions received increased coverage and medical access due to the ACA. Hugo Torres et al., *Coverage and Access for Americans With Chronic Disease Under the Affordable Care Act: A Quasi-Experimental Study*, 166 ANNALS INTERNAL MED. 472,

472-79 (2017), <https://annals.org/aim/article-abstract/2599147/coverage-access-americans-chronic-disease-under-affordable-care-act-quasi?doi=10.7326%2fM16-1256>. Increased coverage tangibly affects health outcomes.

Congress's policy-based decision to pass and preserve the ACA resulted in both the reduction of financial burdens on Americans and the improvement of medical outcomes for patients with chronic diseases.

IV. INVALIDATION OF THE ACA WOULD IGNORE CONGRESS'S POLICY-BASED DECISION TO PRESERVE THE ACA BECAUSE IT HAS IMPROVED ACCESS TO MUCH-NEEDED, AFFORDABLE INSURANCE

Congress was clearly unwilling to leave millions without coverage in a “repeal-without-replace” scenario. *See* 163 CONG. REC. S4227–96 (daily ed. July 26, 2017). By invalidating the ACA in its entirety, the district court substituted its own judgment for Congress's policy-based decision, threatening the significant progress the ACA has made in getting patients the medical care they need. The Fifth Circuit's decision to remand the severability analysis rather than promptly giving effect to Congress's express intent continues that threat by maintaining substantial uncertainty around the law.

In enacting the ACA, Congress was aware of—and relied on—data establishing that people have poorer health outcomes and require more costly, long-

term treatment without affordable health insurance. 42 U.S.C. § 18091(2)(E) (“The economy loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.”).

This Court recognized that the broad policy goals of the Act were “to increase the number of Americans covered by health insurance and decrease the cost of health care.” *NFIB*, 567 U.S. at 519. In *King v. Burwell*, the Court emphasized that such policy goals are the province of the legislature, not the courts. 135 S. Ct. at 2496. And, as discussed above and recognized by a Justice of this Court, individuals without health insurance are less likely to receive preventive treatment or early detection screenings and are more likely to delay treatment. *See, e.g., NFIB*, 567 U.S. at 594 (Ginsburg, J., concurring) (“Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on.”) (citing INST. OF MED., INSURING AMERICA’S HEALTH, PRINCIPLES & RECOMMENDATIONS 43 (2004), <https://www.nap.edu/catalog/10874/insuring-americas-health-principles-and-recommendations>).

Congress passed the ACA to address the known failures of the health-insurance market and the tragic consequences those failures have on patients and their families. By making health insurance available to all eligible individuals

regardless of financial status, the ACA helps protect patients from the negative financial and medical outcomes of being uninsured or underinsured. Congress decided that preserving the ACA was the best way to continue improving access to much-needed, affordable insurance—a worthy policy goal that falls squarely on Congress.

CONCLUSION

Congress, in altering only one, discrete provision of the ACA, expressly chose not to repeal the whole Act and its important provisions designed to provide access to health care. The ACA operates to help patients and survivors of chronic disease—exactly as Congress intended. Delay in resolving this question of law harms patients and survivors across this country who rely on the ACA and exposes the insurance market to potential instability. For the foregoing reasons, *Amici* respectfully request that the Court grant these petitions for certiorari and proceed quickly to resolve the matter by giving effect to Congress’s clearly expressed intent to leave the Act in place without an enforceable individual mandate.

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