**Nos. 19-840 & 19-1019**

# In The Supreme Court of the United States

CALIFORNIA, ET AL.,
*Petitioners*,
v.
TEXAS, ET AL.,
*Respondents*.

TEXAS, ET AL.,
*Petitioners*.
v.
CALIFORNIA, ET AL.,
*Respondents*,

ON WRITS 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 IN SUPPORT OF PETITIONERS IN NO. 19-840 AND NON-EXECUTIVE BRANCH RESPONDENTS IN NO. 19-1019


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## STATEMENT OF INTERESTS OF AMICI CURIAE[1]

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).

The Center for Medicare Advocacy (the Center) is a national, nonprofit law organization that provides education, analysis, advocacy, and legal assistance to

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[1] 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. The parties have consented to the filing of this brief.

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. It provides training regarding Medicare and health care rights throughout the country. The Center 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 because the Court's decision about the constitutionality of the Affordable Care Act will dramatically affect whether older adults have access to life-sustaining health care.

## 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, safety, and financial stability. More than 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 provides millions of people with access to quality, affordable health care, guarantees coverage for people with preexisting conditions, and limits how much more insurers can charge older adults based on age. It strengthens the financial viability of Medicare, lowers out-of-pocket costs for Medicare beneficiaries, and expands Medicaid eligibility. Finally, it enhances opportunities for older adults to live in the community; prohibits health care providers from discriminating on the basis of age, disability, race, color, national origin, or sex; and helps protect nursing facility residents from fraud and abuse.

The COVID-19 pandemic highlights the ACA's critical role as a stabilizing force in the nation's health care system. For example, the law allows many newly unemployed people to obtain insurance on the ACA marketplaces and through Medicaid expansion, thereby helping the country to mitigate economic turmoil.

If this Court finds that the ACA is invalid, millions of older adults will lose life-saving health care coverage and consumer protections they have relied on for years. It will also throw the Medicare and Medicaid programs into fiscal and administrative chaos. This,

in turn, will further disrupt the nation's health care system and economy. Finally, it will destroy hard-fought gains, such as meaningful choice for older adults to age in place and protections for nursing facility residents and the lowest income seniors who rely on Medicare.

Congress did not intend this catastrophic result when it reduced the tax penalty in the Tax Cuts and Jobs Act of 2017. After refusing to repeal any provision of the ACA, Congress only amended the penalty amount. As such, the minimum coverage provision remains constitutional, and the entire ACA stands. Moreover, even if this Court determines that the minimum coverage provision is unconstitutional, all remaining parts of the ACA should remain in force. The ACA has withstood the test of time and continues to operate as Congress intended, even with a zeroed-out penalty.

With its broad reach, the ACA transformed the lives of millions of Americans. Its provisions are vital to the health and well-being of the entire country, including older adults who depend on it for life-sustaining care. Amici respectfully request that the Court reverse the lower court's decision and find that the ACA is the law of the land.

## ARGUMENT

### I. The ACA Is A Stabilizing Force That Benefits Millions of Older Adults Who Could Not Access or Afford Health Care Without It.

The enactment of the ACA was life-changing for millions of Americans, including older adults. Among other benefits, it made health insurance more accessible and affordable, provided significant consumer protections, lowered the costs of health care items and services, and strengthened the financial viability of the Medicare program. ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010). As a result, millions of older adults gained access to health care, many for the first time.

Now, after experiencing the ACA's benefits for more than a decade, older adults are at risk of losing the law's critical gains and returning to pre-ACA days when millions could not access or afford health care coverage. *See, e.g.*, Kaiser Family Found., *Potential Impact of Texas v. U.S. Decision on Key Provisions of the Affordable Care Act* (Jan. 3, 2020) [Jan. 2020 KFF Report].[2] The potential loss of insurance and thus health care would be devastating at any time, but particularly now when the country faces a pandemic where older adults – especially those with underlying

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[2] https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/.

chronic medical conditions – are at higher risk of harm. *See* Ctrs. for Disease Ctrl. and Prev., *Coronavirus Disease 2019 (COVID-19), People Who Are at Higher Risk for Severe Illness* (last visited May 11, 2020).[3]

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

Those who could buy private health insurance were often forced to pay unaffordable premiums and exorbitant out-of-pocket medical expenses. Insurers could deny coverage, charge excessive rates, or offer sparse policies to people with preexisting conditions. H.R. Rep. No. 111-443, pt. 2, at 981 (2010); Elizabeth Abbott et al., *Implementing the Affordable Care Act's Insurance Reforms: Consumer Recommendations for Regulators and Lawmakers*, Nat'l Ass'n of Ins. Commissioners, 10-11 (Aug. 2012);[4] Lynn Nonnemaker, *Beyond Age Rating: Spreading Risk in*

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[3] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

[4] https://www.naic.org/documents/committees_conliaison_1208_consumer_recs_aca.pdf.

*Health Insurance Markets*, AARP Pub. Policy Inst., 3, tbl. 1 (Oct. 2009).[5]

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).[6]

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.*,* 31 (June 2001).[7] Even a healthy pre-Medicare adult with no preexisting conditions faced markedly higher rates than a younger person based solely on their age. *Id*. 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,*

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[5] https://assets.aarp.org/rgcenter/ppi/health-care/i35-age-rating.pdf.

[6] https://aspe.hhs.gov/system/files/pdf/76376/index.pdf.

[7] https://www.kff.org/wp-content/uploads/2013/01/how-accessible-is-individual-health-insurance-for-consumer-in-less-than-perfect-health-report.pdf.

*and Household Financial Burdens*, Urban Inst., 8 (Oct. 2009).[8]

Annual and lifetime caps — which were easily exceeded by treatment for a single medical condition such as cancer, heart disease, or diabetes — made it difficult for older adults to maintain coverage. These caps led many to either incur financially ruinous medical debt or go 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). [9]

Unsurprisingly, the lack of health insurance took a heavy toll on older adults' health and finances. Uninsured pre-Medicare adults were about three times less likely to be up-to-date with clinical preventive services than those who were insured. *See* Megan Multack, *Midlife Not Getting Recommended Preventative Services*, AARP Pub. Policy Inst. (Sept. 11, 2013).[10] They also had higher mortality rates because they were less likely to have been diagnosed with heart disease and its risk factors, and were more likely to have undiagnosed cancers treated

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[8] https://www.urban.org/research/publication/age-rating-under-comprehensive-health-care-reform.

[9] https://www.amjmed.com/article/S0002-9343(09)00404-5/pdf.

[10] http://blog.aarp.org/2013/09/11/midlife-adults-not-getting-recommended-preventive-services/.

at later stages. Inst. of Med. (IOM), *America's Uninsured Crisis: Consequences for Health and Health Care,* 72-83 (2009).[11]

The lack of adequate, affordable health insurance profoundly affected the financial stability of pre-Medicare adults and, in turn, the national economy. Many pre-Medicare workers who relied on employer-sponsored health insurance could not leave their jobs, reduce their hours, or retire for fear that they would lose and be unable to regain health benefits. Richard W. Johnson et al., *Older Workers on the Move: Recareering in Later Life,* AARP Pub. Policy Inst., 10, 18 (Apr. 2009);[12] *see also* Sara R. Collins et al., *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief,* The Commonwealth Fund, 3 (March 16, 2011) [*Help on the Horizon*] (57% of adults ages 18 to 64 who lost a job with health benefits in 2010 could not regain insurance).

People with inadequate or no health insurance had financially debilitating health care costs when they did get care. Their medical costs depleted retirement savings and contributed to debt and bankruptcy. One 2010 study estimated that 29 million people had used all their savings on medical expenses. *Help on the Horizon*, *supra,* at 12, ex. 12. Another 22

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[11] https://www.ncbi.nlm.nih.gov/books/NBK214966/.

[12] https://assets.aarp.org/rgcenter/econ/2009_08_recareering.pdf.

million were unable to pay for basic necessities like rent, food, and utilities due to medical bills. *Id.* Before the ACA, a pre-Medicare adult who had a newly ill and uninsured household member lost, on average, between 30 and 50% of their assets. Keziah Cook et al., *Does Major Illness Cause Financial Catastrophe?,* 45 Health Servs. Res. 418, 418 (Apr. 2010).

Even Medicare beneficiaries who had insurance through the federal program were not immune from the strain of health care costs. 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).[13] 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 resorted to dangerous but economically unavoidable strategies to make ends meet, 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).[14] These strategies led to worse health outcomes. Ramin Mojtabai and Mark

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[13] https://www.aarp.org/health/medicare-insurance/info-2018/part-d-donut-hole-closes-fd.html.

[14] https://www.healthaffairs.org/doi/full/10.1377/hlthaff.28.2.w317.

Olfson, *Medication Costs, Adherence, and Health Outcomes Among Medicare Beneficiaries*, Health Affairs (July/Aug. 2003).[15] This all changed with the passage of the ACA.

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

Consistent with its primary purpose, the ACA improved the lives of older adults by making health insurance, and, thus, health care, more accessible and affordable. 42 U.S.C. § 18091(2)(D)-(H); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Since 2010, millions of Americans have gained health insurance, including adults ages 50 to 64. *See, e.g.*, Jan. 2020 KFF Report.

The ACA continues to help pre-Medicare adults access much-needed health care services without experiencing financial ruin. To that end, it expands access to coverage with strong consumer protections, including prohibiting discrimination against people based on their health or preexisting health conditions and establishing limits on age rating. 42 U.S.C. § 300gg to gg-4. It also provides financial assistance in the form of income-based subsidies and tax credits to help people pay for individual coverage offered in the ACA marketplaces, and financial incentives for states

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[15] https://www.healthaffairs.org/doi/10.1377/hlthaff.22.4.220.

to expand Medicaid coverage. 42 U.S.C. § 18031(b); 26 U.S.C. § 36B(b)(3)(A); 42 U.S.C. § 18071(c)(2).

The result is that millions of previously uninsured or underinsured older adults now have access to vital health care. Invalidating the law will plunge their health, safety, and economic stability into uncertainty and likely chaos.

### 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 health insurance in the individual market. Indeed, the Act's consumer protection provisions transformed the health care landscape for older adults. *See* 42 U.S.C. § 300gg to gg-4.

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 particularly crucial to older adults because they have a higher incidence of preexisting conditions that increase as they age. Without this protection, four out of ten pre-Medicare adults – or about 25 million people in this age group – could be denied health coverage because of a preexisting condition. Claire Noel-Miller & Jane Sung, *In Health Reform, Stakes are High for Older Americans with Preexisting Health Conditions*,

AARP Pub. Policy Inst. (March 2017).[16] This provision protects over 100 million Americans. ASPE, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 2017).[17]

The ACA also bans insurers' previous practice of cancelling the policies of people who became ill. 42 U.S.C. § 300gg-12. Thus, it protects consumers by ensuring that they cannot be terminated from coverage when they most need it. Further, it decreases the likelihood that people will face financial ruin if they or a family member becomes ill.

Moreover, the Act prohibits setting insurance premiums based on an insurance company's perception of health status-related factors such as disability, claims experience, receipt of health care, and medical history. 42 U.S.C. § 300gg-4. The law also protects consumers, including people with job-based coverage, from medical bankruptcy by requiring insurers to limit enrollees' annual out-of-pocket spending (such as deductibles, coinsurance, and copays). 42 U.S.C. § 300gg-11. Along with that, it prohibits insurers from setting annual and lifetime coverage limits. *Id.*

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[16] https://www.aarp.org/content/dam/aarp/ppi/2017-01/ACA-Protects-Millions-of-Older-Adults-with-Preexisting-Health-Conditions-PPI-AARP.pdf.

[17] https://aspe.hhs.gov/pdf-report/health-insurance-coverage-americans-pre-existing-conditions-impact-affordable-care-act.

The ACA also increased access and affordability for older people by limiting the ratio that insurers can use to consider age when setting premiums. The law prohibits insurers from charging older adults premiums that are more than three times what they charge younger adults (known as the 3:1 limit on age rating). 42 U.S.C. § 300gg(a)(1)(A)(iii). This limit ensures pre-Medicare adults have access to affordable health insurance coverage, while fairly considering 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).[18]

Invalidating the ACA would allow insurers to increase the age rating ratio. This could financially devastate pre-Medicare adults and again place health coverage out of their reach. For example, the median personal income among adults ages 60 to 64 with individual market insurance or no insurance is about $20,000. *See* AARP Pub. Policy Inst., *Weakening Age Rating Protections Will Make Health Care Unaffordable For Older Adults* (Jan. 2017).[19] Even increasing the age rating limit from 3:1 to 5:1 would increase premiums by 22% for an adult age 60 and over or $3,192 per year on average. *See* Jane Sung & Olivia Dean, *Impact of Changing the Age Rating Limit for Health Insurance Premiums*, AARP Pub. Policy

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[18] https://www.aarp.org/ppi/info-2016/protecting-affordable-health-insurance-for-older-adults.html.

[19] https://www.aarp.org/content/dam/aarp/ppi/2017-01/Age%20Rating%20Infographic.pdf.

Inst. (Feb. 2017).[20] Without the ACA subsidies, adults ages 60 to 64 could have an annual premium of $18,000 if the age-rating ratio became 5:1. *Id.* That rating would make coverage too expensive for many, as premiums alone would consume 90% of the median income. *Id.*

Finally, the ACA ensures that the health insurance coverage consumers buy will cover the care they need by requiring plans to include coverage for essential health benefits (EHB). 42 U.S.C. 300gg-6. These benefits include doctors' services, inpatient and outpatient hospital care, prescription drug coverage, mental health services, and more. 42 U.S.C. § 18022. Without the EHB protections, consumers could assume they had coverage for needed surgery or hospitalization only to learn that their policy did not include those key benefits. It also ensures that consumers have access to EHBs, regardless of their age or health status.

Discrimination based on age and health status, such as a preexisting condition, damages older adults' health, financial security, and well-being. It also puts public insurance programs at risk of having higher expenditures for older adults who are sicker when they enroll because they could not previously afford insurance. The ACA's consumer protection provisions end these harmful practices.

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[20] https://www.aarp.org/ppi/info-2016/Impact-of-Changing-the-Age-Rating-Limit-for-Health-Insurance-Premiums.html.

Amicus Center for Medicare Advocacy has a website where it has collected stories about the ACA.[21] 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 would probably be sitting here with stage 4 cancer.

The barriers that Mary and others faced getting insurance could return if the Court invalidates the ACA.

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[21] https://www.esurveyspro.com/s/390566/Share-Your-Healthcare-Story.

### B. The ACA increases older adults' access to health insurance in the individual market through the ACA marketplaces, tax credits, and subsidies.

The ACA also improved pre-Medicare adults' access to health insurance in the individual market by establishing the ACA health insurance marketplaces (also known as exchanges) and providing eligible consumers with premium tax credits and cost-sharing reduction subsidies to make the insurance more affordable. *See* 42 U.S.C. §§ 18031(b), 18071(c)(2); 26 U.S.C. § 36B(b)(3)(A).

In 2020, 11.4 million people secured health care coverage by enrolling in the federal and state health insurance exchanges. Ctrs. for Medicare & Medicaid Servs. (CMS), *Health Insurance Exchanges 2020 Open Enrollment Report* (April 1, 2020).[22] What is more, enrollment has remained stable even after Congress dropped the penalty to zero for those that do not secure ACA-compliant coverage. *Id.* at 1 (showing enrollment for 2019 was also 11.4 million); Rachel Fehr & Cynthia Cox, *Individual Insurance Market Performance in Late 2019*, Kaiser Family Foundation (Jan. 6, 2020).[23] This steady enrollment underscores that people want

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[22] https://www.cms.gov/files/document/4120-health-insurance-exchanges-2020-open-enrollment-report-final.pdf.

[23] https://www.kff.org/private-insurance/issue-brief/individual-insurance-market-performance-in-late-2019/.

health insurance and that the ACA can function with a zeroed-out penalty.

These provisions do more than give older adults access to an additional source of non-employer based health insurance. They give them freedom to explore other economic opportunities. For example, the availability of non-employer-based insurance substantially reduced the problem of job lock. Harris Meyer, *Self-Employed fear Obamacare-repeal means 'job lock'*, Modern Healthcare (Dec. 28, 2016).[24] Workers know they can change jobs or explore opening their own businesses because they no longer feel tied to a specific job to get health insurance. *Id.* Thus, these provisions allow them economic mobility. They also help them avoid financial ruin when they have a personal or public crisis.

Indeed, the ACA marketplaces have been a crucial source of stability during the COVID-19 pandemic. To begin with, because of the ACA, 20 million more people had health insurance when the pandemic hit. Anuj Gangopadhyaya & Bowen Garrett, *Unemployment, Health Insurance, and the COVID-19 Recession*, Urban Inst. 6 (Apr. 2020).[25] In addition, because of the ACA, many people who lost their jobs and employer-based health insurance became eligible

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[24] http://www.modernhealthcare.com/article/20161228/NEWS/161229966.

[25] https://www.urban.org/sites/default/files/publication/101946/unemployment-health-insurance-and-the-covid-19-recession_1.pdf.

to gain insurance on the marketplaces. Karen Schwartz, *Coronavirus Response and the Affordable Care Act*, Kaiser Family Found. (March 23, 2020).[26] Under the ACA, losing job-based health insurance coverage is a qualifying life event that allows unemployed individuals up to 60 days to enroll in a marketplace health plan before the close of a special enrollment period. 45 C.F.R. § 155.420(d). As discussed in Section II.C below, many may also qualify for Medicaid, for which the ACA expanded eligibility. Schwartz, *supra*.

At least 11 states that run their own ACA insurance markets and the District of Columbia also opened a special enrollment period during the pandemic. Kaiser Family Found., *State Data and Policy Actions to Address Coronavirus* (May 5, 2020).[27]

New Jersey resident Ann G., age 60, is an example of a person who recently obtained insurance on the ACA marketplace after being laid-off from her job due to the pandemic. Jon Hurdle, *Laid-Off Employees Scramble for New Health Coverage in COVID-19 Pandemic*, My Verona NJ: NJ Spotlight (Apr. 9, 2020).[28] She enrolled in a marketplace plan

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[26] https://www.kff.org/health-reform/issue-brief/coronavirus-response-and-the-affordable-care-act/.

[27] https://www.kff.org/report-section/state-data-and-policy-actions-to-address-coronavirus-maps-and-data/.

[28] https://www.myveronanj.com/2020/04/09/laid-off-employees-scramble-for-new-health-coverage-in-covid-19-pandemic/.

because she did not want to be without insurance. This was her second time relying on the ACA marketplace for coverage. She signed up for a marketplace plan five years ago after losing her long-term job at a grocery store. *Id.*

Ms. G. explained that she quickly signed up for a marketplace plan after her employer laid her off:

> I was hoping that it was still available, so I took action pretty fast. If Obamacare hadn't been available to me, I probably would have been dead when I lost my insurance with the grocery store. Cholesterol and blood pressure were very high and if I hadn't had Obamacare, I wouldn't have been able to get that taken care of.[29]
>
> *Id.*

One reason people turn to the marketplaces is because the ACA's tax credits and subsidies make that insurance more affordable. 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 pre-Medicare adults relied on ACA tax credits to purchase health insurance coverage in the

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[29] https://www.myveronanj.com/2020/04/09/laid-off-employees-scramble-for-new-health-coverage-in-covid-19-pandemic/.

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);[30] Laura Skopec et al., *Fewer Americans Ages 50-64 Have Difficulty Paying Family Medical Bills after Early ACA Marketplace Implementation,* Urban Inst. & AARP Pub. Policy Inst. (Jan. 2016).[31] Without the ACA's subsidies and tax credits, many older adults could not afford insurance.[32]

The legislative history of the American Health Care Act of 2017 includes the following 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

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[30] 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.

[31] https://www.aarp.org/content/dam/aarp/ppi/2015/fewer-americans-ages-50-64-have%20-difficulty-paying-family-medical-bills-after-early-aca-marketplace%20Implementation.PDF.

[32] 163 CONG. REC. H2406-7 (daily ed. March 24, 2017) (statement of Cong. Yarmuth).

> 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 …
>
> 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.

### C. The ACA provides life-saving health coverage to low-income older adults 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). Medicaid is a cooperative federal-state program that provides medical assistance to people in certain low-income populations, such as children and people who are aged, blind, or have a disability. *See* 42 U.S.C. § 1396-1.

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); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2607 (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 Expansion Decision* (April 27, 2020).[33] As a result, over 13 million Americans in expansion states have gained Medicaid coverage. Medicaid & CHIP Payment & Access Comm'n, *Medicaid enrollment changes following the ACA*.[34] This expansion helped address the COVID-19 outbreak, as millions more people had immediate access to coverage during the pandemic. Jan. 2020 KFF Report; Adis Robeznieks, Am. Med. Ass'n., *As COVID-19 Job Losses Mount, Share These Keys to Get Patients Covered* (Apr. 30, 2020).[35] It also served as another potential source of insurance for people who lost their jobs or income. Schwartz, *supra*, at 21.

Most importantly, Medicaid expansion has saved lives. Because new enrollees have received diagnoses and consistent treatment for serious conditions such as cancer, mental illness, and diabetes, Medicaid expansion saved the lives of 19,200 older adults ages 55 to 64. Sarah Miller et al.,

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[33] https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/.

[34] www.macpac.gov/subtopic/medicaid-enrollment-changes-following-the-aca/#ftn1.

[35] https://www.ama-assn.org/delivering-care/patient-support-advocacy/covid-19-job-losses-mount-share-these-keys-get-patients.

*Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data*, Nat'l Bureau of Econ. Research: Working Paper Series 16 (July 2019);[36] *see also* Madeline Guth et al., Kaiser Family Found., *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review* (March 2020).[37]

Further, a JAMA Network study found that Medicaid expansion was associated with 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.*, Am. Med. Ass'n.: JAMA Network Open (2020).[38]

Kaiser Family Foundation published a journal profiling people who obtained Medicaid coverage through the expansion. Kaiser Comm'n on Medicaid and the Uninsured, Kaiser Family Found., *Faces of The Medicaid Expansion: How Obtaining Medicaid Coverage Impacts Low-Income Adults* (Jan. 2013).[39] A Minnesota resident, John L., age 50, explained how obtaining Medicaid coverage gave him access to a comprehensive team of health care professionals to

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[36] https://www.nber.org/papers/w26081.

[37] http://files.kff.org/attachment/Report-The-Effects-of-Medicaid-Expansion-under-the-ACA-Updated-Findings-from-a-Literature-Review.pdf.

[38] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6991255/.

[39] https://www.kff.org/wp-content/uploads/2013/02/8404.pdf.

help him recover from heart surgery and manage diabetes:

> If I didn't have [Medicaid], I wouldn't be able to go to the cardiac rehab program. I wouldn't be able to have my diabetes under control.... Having the medical insurance is absolutely key to my physical recovery and my eventual return to my desired career.
>
> *Id.* at 20.

In sum, the ACA improved access to health care for millions of older adults by removing barriers to health insurance. Invalidating the law would place them at risk of losing access to needed care.

## III. Invalidating The ACA Will Upend The Financial Stability Of The Medicare Program And Eliminate Many Protections for Medicare Beneficiaries.

Invalidating the ACA, including its Medicare provisions, would directly harm older adults and people with disabilities by throwing the Medicare program into fiscal and administrative chaos and eliminating cost savings for beneficiaries. Because the program is so large, this disruption would upend the financial markets and the entire health care system. It would also force millions of older adults to either pay more for their care or forgo important services such as preventive screenings.

Medicare is a bedrock of security for millions and represents a significant portion of the national economy. It currently provides health care coverage for 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) ("Facts on Medicare").[40] In 2018, Medicare spending accounted for 15% of total federal spending, and it represented 20% of total national health spending in 2017. *Id.*

The ACA significantly altered, and is now woven into, the Medicare program. It contains at least 165 provisions that affect Medicare. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *2018 Annual Report* 3 (June 2018).[41] 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 Medicare, goals that Congress has long sought to attain. Even attempts to

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[40] https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/.

[41] https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf.

directly repeal and replace the ACA maintained virtually all of the ACA's Medicare fiscal savings. *See, e.g.,* Juliette Cubanski & Tricia Neuman, *What Are the Implications for Medicare of the American Health Care Act and the Better Care Reconciliation Act?*, Kaiser Family Found. (Jul. 6, 2017).[42] When Congress zeroed out the ACA's penalty for lacking minimum coverage, it did not intend to strike down provisions that would result in a dramatic undermining of the Medicare program.

### A. The ACA strengthens the long-term financial stability of the Medicare program.

The ACA benefits Medicare's budget to such an extent that the Medicare Hospital Insurance Trust Fund will be solvent for eight years longer than before the ACA was enacted. Paul N. Van de Water, *Medicare Is Not "Bankrupt,"* Ctr. on Budget & Policy Priorities (May 1, 2019). It has done so in part by slowing the growth of payments to providers and by reducing payments to privately-administered Medicare Advantage plans, where 34% of Medicare beneficiaries receive their coverage. Facts on Medicare. The ACA also included certain tax increases and delivery system reforms aimed at both improving health care quality and reducing federal costs. *See generally*, Jan. 2020 KFF Report.

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[42] https://www.kff.org/medicare/issue-brief/what-are-the-implications-for-medicare-of-the-american-health-care-act-and-the-better-care-reconciliation-act/.

Invalidating the ACA would cause massive confusion, cost overruns, and disruption to Medicare reimbursement. 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* 10 (June 2015).[43]

Likewise, reversing the ACA's payment reductions in the traditional fee-for-service sector of Medicare would increase spending by an additional $350 billion over ten years. *Id.*; *see also* Jan. 2020 KFF Report. This result is precisely the opposite of Congress's longstanding aim to *improve* Medicare's sustainability. *Id.*

**1. The ACA provides greater continuity of coverage, resulting in saving Medicare money because people are healthier by the time they enroll in the program.**

The ACA brings a healthier population into the Medicare program, thereby reducing program costs. 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.

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[43] http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50252-effectsofacarepeal.pdf.

Gov't Accountability Off., *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).[44]

The ACA also 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, yet they 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 waiting period faced enormous problems obtaining or affording health insurance coverage, which often led 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).[45] The ACA provides them with options for health insurance through expanded Medicaid or marketplace plans before Medicare eligibility begins. If the ACA is struck down, this particularly vulnerable population will lose a vital lifeline to coverage. They will enter Medicare far sicker, requiring more costly care.

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[44] https://www.gao.gov/assets/660/659753.pdf.

[45] https://www.kff.org/medicare/issue-brief/medicares-role-for-people-under-age-65-with-disabilities/.

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

Largely due to the ACA, the Medicare program "has taken a lead in testing a variety of new models that include financial incentives for providers, such as doctors and hospitals, to work together to lower spending and improve care for patients in traditional Medicare." Kaiser Family Found., *An Overview of Medicare* (Feb. 13, 2019).[46] 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).[47] 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*. All of these investments and savings risk being forfeited without the ACA.

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[46] https://www.kff.org/medicare/issue-brief/an-overview-of-medicare/.

[47] https://www.kff.org/medicare/fact-sheet/what-is-cmmi-and-11-other-faqs-about-the-cms-innovation-center/.

The ACA authorizes other Medicare innovations, including accountable care organizations (ACOs), bundled payments, and medical homes. *Id.* These innovations focus on aligning financial incentives with improved quality of care – in other words – linking payment with value. *Id*. As of 2019, ACOs alone affected almost 11 million Medicare beneficiaries due to numerous providers participating in the program. CMS, *2019 Shared Savings Program Fast Facts – As of July 1, 2019*.[48]

Invalidating the ACA would likewise end other reforms aimed at enhancing health, quality, and efficiency. For example, changes to the payment system that reward higher quality Medicare Advantage plans would be eliminated. Jan. 2020 KFF Report. The ACA also requires Medicare Advantage and Medicare prescription drug plans to maintain a "medical loss ratio" of at least 85% (meaning plans must spend at least 85% of premium dollars on providing care, rather than on profits or overhead). *Id*. Without the law, Medicare would lose these value-and quality-enhancing reforms.

Finally, the ACA established many measures to combat waste, fraud, and abuse across government health care programs. These include enhanced funding, screening, oversight, data sharing, and investigation to prevent and identify fraud and abuse, and imposing harsher fines and penalties for offenses.

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[48] https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/ssp-2019-fast-facts.pdf.

These powerful tools have already enabled CMS to better protect and recover billions in taxpayer dollars. CMS Fact Sheet, *The Health Care Fraud and Abuse Control Program Protects Consumers and Taxpayers by Combating Health Care Fraud* (Jan. 18, 2017).[49]

### B. The ACA includes critical coverage improvements for Medicare beneficiaries, enhancing access to care and affordability.

The ACA improved Medicare coverage by improving access to specific medical services and products. First, the ACA decreased the amount that beneficiaries enrolled in Medicare Part D pay for prescription drugs. The ACA helped reduce Part D enrollees' out-of-pocket expenses by effectively 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. CMS, *Nearly 12 million people with Medicare have saved over $26 billion on prescription drugs since 2010* (Jan. 13, 2017)[50] ("CMS Jan. 2017 Press Release").

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[49] https://www.cms.gov/newsroom/fact-sheets/health-care-fraud-and-abuse-control-program-protects-consumers-and-taxpayers-combating-health-care-0.

[50] https://www.cms.gov/newsroom/press-releases/nearly-12-million-people-medicare-have-saved-over-26-billion-prescription-drugs-2010.

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* Medicare Rights Ctr. & National Council on Aging, *Medicare-covered Preventive Services* (2019).[51] 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.

The elimination of out-of-pocket costs for preventive services removed a barrier to securing care for many. *See, e.g.*, Sukyung Chung et al., *Medicare Annual Preventive Care Visits: Use Increased Among Fee-For-Service Patients, But Many Do Not Participate*, Health Affairs (Jan. 2015) (finding significant increases in use of preventive exams among Medicare patients after ACA took effect). [52] In 2016, an estimated 40.1 million Medicare beneficiaries used at least one preventive service and 10.3 million had an annual wellness visit with no copay or deductible. CMS Jan. 2017 Press Release.

Third, the ACA created an important consumer protection for the over 20 million individuals enrolled in Medicare Advantage plans. Specifically, cost-

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[51] https://d2mkcg26uvg1cz.cloudfront.net/wp-content/uploads/Medicare-covered-preventive-services.pdf.

[52] https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2014.0483.

sharing under these plans cannot exceed cost-sharing in traditional Medicare for chemotherapy, renal dialysis, skilled nursing care, and other services at the discretion of the Secretary of HHS. 42 U.S.C. § 1395w-22(a)(1)(B)(iv). Starting in 2021, individuals with end-stage renal disease will be allowed to enroll in Medicare Advantage plans. 21st Century Cures Act, Pub. L. 114-255, § 17006(a), 130 Stat. 1033, 1334 (2016). The ACA's cost-sharing protection guarantees that these beneficiaries will *not* face higher costs for dialysis in those plans, ensuring essential care will be available.

Finally, the ACA created the Federal Health Care Coordination Office (also known as the Medicare-Medicaid Coordination Office or MMCO) to focus on the 12.2 million older Americans and people with disabilities who are enrolled in both Medicare and Medicaid and thus referred to as people who are "dually eligible." 42 U.S.C. § 1315b(a); CMS Medicare-Medicaid Coordination Office, *People Dually Eligible for Medicare and Medicaid*, (Mar. 2020).[53] Many people who are dually eligible face complex health and long-term care needs. They also have more social risk factors than the general Medicare population and account for a third of Medicare and Medicaid spending. *Id.*

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[53] https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO_Factsheet.pdf.

For nearly a decade, the MMCO has improved the quality of health care for people who are dually eligible. Among other things, the MMCO administers demonstration projects that have improved coordination of care. CMS, *Enrollee Experiences in the Medicare-Medicaid Financial Alignment Initiative: Results through the 2017 CAHPS Surveys* (Dec. 2017).[54] The MMCO has also implemented mechanisms to ensure that providers do not illegally bill the lowest-income dually eligible patients for Medicare cost-sharing. Losing this oversight would harm the older adults and people with disabilities who have the highest health care needs and the least resources.

## IV. Invalidating The ACA Will Harm Older Adults Who Want To Age In The Community.

The ACA enhanced older adults and people with disabilities' access to home and community-based long-term services and supports. 42 U.S.C. § 1396n(k); 42 U.S.C. § 1396n. The COVID-19 pandemic has had a devastating impact on older adults living in nursing facilities. *See* Kaiser Family Found., *State Reporting of Cases and Deaths Due to COVID-19 in Long-Term Care Facilities* (April 2020). It has put a fine point on why it is essential that older adults have access to

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[54] https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/FinancialAlignmentInitiative/Downloads/FAICAHPSResultsDec2017.pdf.

home and community-based services as an alternative to more institutionalized nursing facility care.

Nearly 90% of adults aged 65 and older say they want to stay in their homes and communities as they age, rather than moving to a nursing facility. Rodney Harrell, et al., *What is Livable? Community Preferences of Older Adults*, AARP Public Pol'y Inst. (April 2014).

The ACA includes provisions that incentivize states to shift Medicaid long-term care spending from institutions to the community. Through these provisions, 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 (ADA). *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).

For example, the ACA created the Community First Choice Option that provides states increased federal funds to provide personal care services that keep older adults and persons with disabilities in their homes and communities. 42 U.S.C. § 1396n(k). That program also allows Medicaid coverage for the one-time costs of transitioning from an institution to the community, including first month's rent and utilities, bedding, basic kitchen supplies, and other necessities.

The ACA also lifted some of the original restrictions of Section 1915(i) of the Medicaid Act, so

now states can provide home and community-based services to people who do not meet an institutional level of care. 42 U.S.C. § 1396n. States can tailor services to specific populations, including individuals with up to 300% of the Federal Supplemental Security Income benefit rate, and incorporate additional services.

These ACA initiatives have been successful. On average, states now spend 57% of their Medicaid long-term care dollars on home and community based services, compared to 48% before the ACA. Steve Eiken, et al., *Medicaid Expenditures for Long-Term Services and Supports in FY 2016* (May 2018).[55]

## V. Invalidating the ACA Would Put Older Adults At Greater Risk of Discrimination, Abuse, and Neglect And Make It Harder To Enforce Their Civil Rights.

The ACA protects older adults and people with disabilities from discrimination, abuse, or neglect when receiving health and long-term care services. The law's provisions affecting people with disabilities are relevant to older adults because 41% of adults ages 65 to 79 have at least one disability. Joint Center for Housing Studies, *Projections and Implications for Housing A Growing Population: Older Households*

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[55] https://www.medicaid.gov/medicaid/long-term-services-supports/reports-evaluations/index.html.

*2015-2035*, Chap. 3, 38 (Dec. 2016).[56] That number jumps to nearly 71% for those ages 80 and over. *Id*.

### A. The ACA empowers older adults to challenge discrimination in health care.

The ACA's Section 1557 is a landmark civil rights law that 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. If invalidated, older adults would lose an avenue to enforce their rights and valuable protections unique to the ACA.

These protections have been key to prohibiting discrimination against older adults and people with disabilities during the pandemic as states and providers developed crisis care rationing standards and plans. The U.S. Department of Health Human Services Office for Civil Rights (HHS OCR) responded by issuing guidance to covered entities on compliance with Section 1557. HHS OCR, *Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019* (March 2020).[57] It reminded them that Section 1557 prohibits denying medical care "on the basis of stereotypes, assessments of quality of life, or judgments about a

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[56] https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_housing_growing_population_2016_chapter_3.pdf.

[57] https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf.

person's relative 'worth' based on the presence or absence of disabilities or age." *Id*.

To date, HHS OCR recently resolved complaints filed under Section 1557 and other civil rights laws against two states for their discriminatory crisis rationing standards and guidelines. Press Release, HHS OCR, *OCR Reaches Early Case Resolution With Alabama After It Removes Discriminatory Ventilator Triaging Guidelines* (April 8, 2020); Press Release, HHS OCR, *OCR Resolves Civil Rights Complaint Against Pennsylvania After it Revises its Pandemic Health Care Triaging Policies to Protect Against Disability Discrimination* (April 16, 2020).[58] Because of these complaints brought under the law, Alabama and Pennsylvania changed policies that discriminated against older adults and people with disabilities.

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[58] https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html; https://www.hhs.gov/about/news/2020/04/16/ocr-resolves-civil-rights-complaint-against-pennsylvania-after-it-revises-its-pandemic-health-care.html.

### B. The ACA provides quality and safety improvements for nursing facility residents and protects all older adults from abuse and neglect.

The ACA increased nursing facility accountability through quality and safety improvement requirements. The pandemic has brought into laser focus why nursing facility residents need robust protections and why nursing facilities must be held accountable. These are the exact aims of the ACA's Nursing Home Transparency and Improvement Act, which expands access to nursing facility information and helps ensure resident safety. 42 U.S.C. §§ 1320a-7j(c), (g).

The Act requires nursing facilities to establish quality assurance and performance improvement programs and other accountability measures, including disclosing their ownership and management and reporting on nursing facility staffing through payroll-based information. *Id*. Holding facilities accountable for daily staffing levels through accurate and reliable data affects quality of care and outcomes and provides valuable information to consumers. CMS, *"Transition to Payroll-Based Journal (PBJ) Staffing Measures on the Nursing Home Compare tool on Medicare.gov and the Five Star Quality Rating System,"* QSO-18-17-NH, at 1 (Apr. 6, 2018).[59]

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[59] https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions-Items/QSO18-17-NH.html.

Finally, the ACA also codifies the Elder Justice Act, the first comprehensive federal law fighting elder abuse, neglect, and exploitation. 42 U.S.C. §§ 1305, *et seq*. Its sweeping provisions:

- 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.

If the ACA is invalidated, these initiatives and protections will be lost, putting older adults at increased risk of institutionalization, abuse, neglect, and exploitation at the time when their need for safe living environments has never been greater.

## CONCLUSION

The ACA is a landmark law that has transformed the lives of millions of Americans. Among its many benefits, the ACA increases access to health care for tens of millions of people, protects consumers against discrimination based on preexisting conditions and age, increases the financial stability of the Medicare program, and protects older adults from abuse and neglect. And, as the pandemic has shown, the law is a stabilizing force that helps steady the country in times of crisis.

Ten years in, the ACA is woven into the fabric of our economy and our lives. A decision invalidating the law would be a nationwide catastrophe for the health and financial stability of all Americans, but especially for older adults. It would also be unjust, as the minimum coverage provision is constitutional. Even if the Court finds that the minimum coverage provision is unconstitutional, the rest of the ACA should stand. Many provisions, such as those providing cost-savings to Medicare beneficiaries, are wholly unrelated to the mandate. Most importantly, Congress did, in fact, leave the rest of the law standing, and the ACA continues to operate as Congress intended.

Simply put, the ACA is benefitting millions of people, the health care system, and the national economy and should remain in force.

For the reasons above, Amici respectfully request that this Court reverse the lower court's decision.

Respectfully submitted,

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