No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants,

STATE OF CALIFORNIA, et al.,
Intervenor Defendants-Appellants,

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:18-cv-167

BRIEF FOR THE NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, BLACK WOMEN'S HEALTH IMPERATIVE, AND AMERICAN MEDICAL WOMEN'S ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR DEFENDANTS-APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES AND RULE 26.1 DISCLOSURE

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. *Amici Curiae* on this brief:

National Women's Law Center
National Partnership for Women & Families
Black Women's Health Imperative
American Medical Women's Association

2. Counsel for *Amici Curiae* on this brief:

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* also certifies as follows:

- National Women's Law Center has no parent corporation, and no company holds 10 percent or more of its stock.
- National Partnership for Women & Families has no parent corporation, and no company holds 10 percent or more of its stock.
- Black Women's Health Imperative has no parent corporation, and no company holds 10 percent or more of its stock.
- American Medical Women's Association has no parent corporation, and no company holds 10 percent or more of its stock.

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INTERESTS OF *AMICI*

The National Women's Law Center (NWLC), National Partnership for Women & Families, Black Women's Health Imperative, and American Medical Women's Association are non-profit, non-partisan organizations committed to protecting and advancing the rights and health of women, with a particular interest in preserving the benefits of access to health care ensured by the Affordable Care Act for women and their families.[1] Individual statements of interest for each *amicus* are provided in the Appendix.

Amici have advocated on a broad range of legal issues of importance to women and women's health, frequently filing *amicus curiae* briefs in the U.S. Supreme Court and the courts of appeals. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

Together, *amici* are committed to ensuring that women and their families have access to affordable, comprehensive health insurance and health care. *Amici* are deeply concerned about the impact that the Court's decision may have and therefore respectfully offer their views to aid the Court in this case.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress enacted the Patient Protection and Affordable Care Act (ACA) in the wake of growing recognition that entrenched practices in the health insurance market systematically discriminated against women and left many women without access to necessary care and treatment. Before the ACA, insurers in the individual market excluded coverage, or required substantial out-of-pocket payments, for essential women's health services such as prenatal care and mammograms, while nonetheless charging women higher premiums based solely on their sex. Insurers also denied coverage to many women based on common medical conditions and procedures, such as pregnancy or prior caesarean delivery, and imposed lifetime limits on coverage that left women and their families battling devastating illnesses and unable to obtain coverage for their future medical needs.

Lack of adequate coverage, among other systemic barriers to care, led women—particularly women of color—to forgo doctor visits and prescription medicines, contributing to otherwise-preventable deaths from childbirth, cervical cancer, and other conditions. The pre-ACA system also left women and families without protection against catastrophic medical expenses, and kept women with employer-sponsored insurance locked in their jobs for fear of losing insurance coverage.

Congress enacted specific provisions of the ACA to tackle those problems.

For example, through the guaranteed-issue and community-rating provisions, the ACA ended "gender rating" (charging women more for premiums based on their sex) and ended denials and rate increases for pre-existing conditions. The Act eliminated lifetime caps on coverage, established a baseline of essential health benefits for individual and small group insurance plans, and required most plans to cover preventive health services without cost-sharing. The Act expanded access to Medicaid and provided tax credits for insurance premiums. And it became the first federal law to broadly prohibit sex discrimination in health care.

Women and their families have benefited significantly from those changes. Among other improvements, more women and children are insured, women's use of preventive services has increased as fewer women report cost as a barrier to obtaining care, and maternal and infant mortality rates have begun to decline in Medicaid expansion states.

There is no need to undertake a severability analysis for the reasons described in the appellants' briefs—because the plaintiffs lack standing and because 26 U.S.C. § 5000A is constitutional. But even if the Court disagrees with appellants on those issues, it should sever that provision and uphold the rest of the ACA. Congress was well aware of the advancements in health coverage and health outcomes attributable to the ACA and demonstrably did not intend to revoke them in 2017 when it reduced the tax associated with the individual-responsibility

provision in the Tax Cuts and Jobs Act of 2017 (TCJA).[2] To the contrary, Congress repeatedly reassured the public that the TCJA would not affect the rest of the ACA. Under the Supreme Court's severability jurisprudence, courts may only use their remedial powers to nullify a statute where it is "evident" that Congress intended that nullification. *NFIB*, 567 U.S. at 586–87. Here, just the opposite is evident.

ARGUMENT

I. A Key Purpose of the ACA Was To Eliminate Discriminatory Insurance Practices that Undermined the Health and Economic Security of Women and Their Families.

A. Before the ACA, Women Suffered From Discriminatory Insurance Practices.

Significant disparities in insurance coverage and access to health care affected the health and financial security of women and families before the ACA. Significant percentages of women lacked insurance coverage or went without necessary medical treatment due to cost, and many women who accessed medical care were financially crippled by doing so. Those disparities largely arose from discriminatory health insurance practices that the ACA was enacted to address.

1. Women Lacked Coverage for Essential Health Care Due to Discriminatory Insurance Practices.

Throughout their lifetimes, women have on average greater health care

[2] Pub. L. 115-97, 131 Stat. 2054.

needs, but lower wages and higher rates of poverty, than men.[3] Women are also substantially more likely than men to have sole responsibility for children, aging relatives, or relatives with chronic medical conditions, further increasing the burden of health care on women.[4] But insurance practices before the ACA made accessing health care comparatively more difficult for women. At the time of the ACA's enactment, one-third of women who had a health plan or had tried to purchase an individual plan had either been turned down by an insurance company, charged higher premiums because of their health, or had a health problem excluded from coverage.[5]

As a result of this and other contributing factors, 20 percent of women in the United States ages 15-44 were uninsured before the ACA.[6] Low-income women were hit hardest—4 in 10 were uninsured[7]—and 22 percent of black women and

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[3] Jessica Arons, Center for American Progress, *Women and Obamacare* 2 (2012), https://bit.ly/2ToiR7H.

[4] Ann Meier et al., *Mothering Experiences*, 53 Demography 649 (2016); Nidhi Sharma et al., *Gender differences in caregiving among family*, 6 World J. of Psychiatry 7 (2016), https://bit.ly/2FMg1Wz.

[5] Munira Z. Gunja et al., Commonwealth Fund, *How the Affordable Care Act Has Helped Women Gain Insurance and Improved Their Ability to Get Health Care* (2017), https://bit.ly/2JoA8Or.

[6] Guttmacher Institute, *Uninsured Rate Among Women of Reproductive Age Has Fallen More Than One-Third Under the Affordable Care Act* (2016), https://bit.ly/2fZueiS.

[7] Alina Salganicoff et al., Kaiser Family Found. (KFF), *Women and Health Care in the Early Years of the Affordable Care Act* 2 (2014), http://goo.gl/ptNsk8. "Low-income women" in this context means adult women between 18 and 64 with a

36 percent of Latinas lacked insurance coverage.[8] Although Medicaid was an important source of health coverage for some of the poorest women, its strict eligibility requirements before the ACA left many low-income women—especially those without children—unable to obtain the coverage they needed.[9]

Lack of adequate health coverage affected children before the ACA as well. Though the United States had made some progress in providing insurance coverage for children, many children who were eligible for coverage through the Children's Health Insurance Program (CHIP) were not enrolled if they lived in households with uninsured adults.[10] Thus, the uninsured rate for children was still nearly 10% before the ACA.[11]

2. Women Went Without Essential Medical Care Due to Cost.

For many women, lack of coverage translated into lack of care. Pre-ACA studies showed that women without health insurance were more likely to forgo

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household income below 200% of the federal poverty level. *Id.* at 7. For women above that income level, the uninsured rate was 5%. *Id.* at 13.

[8] *Id*. at 13; Melissa Majerol et al., KFF, *The Uninsured* 5 (2014), http://goo.gl/618gwn.

[9] Danielle Garrett & Stephanie Glover, NWLC, *Mind the Gap* 1-2 (2014), https://bit.ly/2utKdiM.

[10] Julie L. Hudson & Asako S. Moriya, Health Affairs, *Medicaid Expansion For Adults Had Measurable 'Welcome Mat' Effects On Their Children* (2017), https://bit.ly/2HGTTy2.

[11] Genevieve M. Kenney et al., *Improving Coverage for Children Under Health Reform Will Require Maintaining Current Eligibility Standards for Medicaid and CHIP*, 30 Health Affairs 2371, 2371 (Dec. 2011), https://bit.ly/2TZdiAQ.

essential preventive services such as mammograms, Pap tests, and blood-pressure checks.[12] In 2010, nearly half of women ages 19-64 reported not getting needed care because of cost.[13] The rates were particularly high among women of color: 23 percent reported being unable to visit a doctor because of cost.[14]

The latent consequences of this access gap have been devastating for women, as illustrated by the high rates of death from pregnancy and childbirth in the United States. The maternal mortality rate in the United States has been "the worst among high-income countries,"[15] increasing from 17 deaths per 100,000 live births in 1990 to 26 deaths per 100,000 live births in 2015.[16] Black women were much more likely than white women to die during pregnancy and childbirth, as were Native American women and women in rural areas.[17] The rate of maternal mortality in each state has been correlated with both lack of prenatal care in the

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[12] *See* H.R. Rep. No. 111-388, at 79-81; *see also* KFF, *Women's Health Insurance Coverage Fact Sheet* 3 (2018), https://bit.ly/2HtTr76.

[13] Gunja et al., *supra*; *see also* Salganicoff, *supra*, at 14, fig. 10 (2014).

[14] H.R. Rep. No. 111-388, at 81.

[15] Shelley-Ann Hope et al., *The Impact of the Affordable Care Act on U.S. Maternal Mortality*, 129 Obstetrics & Gynecology 108S (2017), https://bit.ly/2FlVbNg.

[16] Maternal Health Task Force, Harvard Chan School, *Maternal Health in the United States*, https://bit.ly/2IhsGPQ.

[17] Judette Louis et al., *Racial and Ethnic Disparities in Maternal Morbidity and Mortality*, 125 Obstetrics & Gynecology 690, 690-91 (2015), https://bit.ly/2HFOHvc; Virginia Tangel et al., *Racial and Ethnic Disparities in Maternal Outcomes and the Disadvantage of Peripartum Black Women*, Am. J. Perinatology (2018), https://bit.ly/2DOJaQ9.

first trimester and the overall percentage of uninsured patients.[18] As discussed *infra*, Medicaid expansion since the ACA has been correlated with lower maternal mortality rates.[19]

Inadequate health insurance has also been associated with a longer interval between the onset of cancer-related symptoms and diagnosis.[20] Black women reported that they avoided non-emergency health care while uninsured, which, for some, meant that gynecological cancers were not found until years later, when symptoms developed to more advanced stages.[21] As a latent consequence of delayed diagnosis, as of 2017, deaths of black women in the United States from cervical cancer—a disease that is both preventable and treatable in its early stages—was comparable to rates in sub-Saharan Africa.[22] The same is true of breast cancers. Mammogram screenings have saved as many as 600,000 lives in

[18] Hope et al., *supra*.

[19] Jaime Rosenberg, AJMC, *Medicaid Expansion Linked to Lower Maternal Mortality Rates* (Feb. 6, 2019), https://bit.ly/2CrmvYB.

[20] Anna Jo Bodurtha Smith & Amanda N. Fader, *Effects of the Affordable Care Act on Young Women with Gynecologic Cancers*, 131 Obstetrics & Gynecology 966, 974 (2018).

[21] Human Rights Watch, *It Should Not Happen* (Nov. 29, 2018), https://bit.ly/2FD1kpG.

[22] Anna Beavis et al., *Hysterectomy-Corrected Cervical Cancer Mortality Rates Reveal a Larger Racial Disparity in the United States*, 123 Cancer 1044, 1047-48 (2017).

the U.S. since 1989.[23] But with a later average stage of diagnosis and a higher rate of aggressive triple-negative cancers, black women in the United States were about 40% more likely to die from breast cancer than white women between 1999 and 2013.[24]

3. Lack of Access to Affordable Care Undermined the Economic Security of Women and Their Families.

The systemic sex discrimination in the health insurance market before the ACA substantially curtailed women's economic mobility and security.

Discriminatory insurance policies prevented women from leaving their employers to seek other opportunities—a phenomenon known as "job lock."[25] Because the individual insurance market charged women more for health plans, or denied coverage based on pre-existing conditions, many women were disincentivized from seeking better job opportunities because the alternative was no health insurance coverage, or inadequate coverage that failed to meet basic health needs like pregnancy care.[26]

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[23] Robert Preidt, *Mammograms Helped Save Up to 600,000 U.S. Lives Since 1989*, U.S. News & World Rep. (Feb. 11, 2019), https://bit.ly/2URtmBt.

[24] CDC, *Breast Cancer Rates Among Black Women and White Women*, https://bit.ly/2k96XhX.

[25] Editorial, *Some reminders of life before Obamacare*, The Charlotte Observer (January 22, 2017 12:16 PM), https://bit.ly/2TQsG3d.

[26] Bowen Garrett et al., The Urban Institute, *Recent Evidence on the ACA and Employment* 12 (2017), https://urbn.is/2FvSF7i; Austin Frakt, *If Obamacare Exits,*

Women were also more vulnerable to catastrophic medical costs. Before the ACA, 37 percent of women, versus 29 percent of men, reported problems paying medical bills.[27] More than one-third of women filing for bankruptcy identified medical debt or health problems as a reason for filing,[28] and women were more than twice as likely as men to identify a medical reason for their bankruptcies.[29]

B. Key Provisions of the ACA Addressed Practices and Disparities That Harmed Women and Their Families.

When crafting health care legislation, Congress knew about the disparities in health insurance affecting women and families. As Senator Mikulski said during Senate debates, "[W]hen it comes to health insurance, we women pay more and get less," all while earning lower salaries on average than men.[30] Thus, many of the ACA's provisions addressed the specific discriminatory practices detailed above. And because severability seeks to effectuate Congress's intent, this history provides critical context to the issues before the Court.

Some May Need to Rethink Early Retirement, N.Y. Times (Feb. 27. 2017), https://nyti.ms/2lrHZKD.

[27] H.R. Rep. No. 111-388, at 83.

[28] Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 Harvard Women's L.J. 19, 27 n.36 (2002), https://bit.ly/2HQ7QtO.

[29] *Id.*; Elizabeth Warren et al., *Medical Problems and Bankruptcy Filings* 10, Norton's Bankruptcy Adviser (2000), https://bit.ly/2Fg61U0.

[30] 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009).

1. The ACA Ended Gender Rating.

> *Is a woman worth as much as a man? One would think so, unless, of course, one was considering our current health care system, a system where women pay higher health care costs than men.*
>
> *—Representative Jackie Speier*[31]

Before the ACA, "gender rating"—the practice of charging women more for insurance coverage based solely on their sex—was "rampant in the individual health insurance market and among best-selling health plans."[32] In 2009, a nationwide survey of the best-selling plans in state capitals found that *95 percent* practiced gender rating.[33] Indeed, most of those individual plans charged *non-smoking* women more than men of the same age group who smoked.[34] In Texas, for example, 100 percent of the best-selling plans practiced gender rating, and a 40-year-old woman who did not smoke was charged up to *40 percent more* than a 40-year-old man who smoked.[35]

Gender rating also extended to group coverage. Before the ACA, insurance companies in most states charged higher premiums to businesses of all sizes based on the number of women they employed. This disproportionately impacted

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[31] 156 Cong. Rec. H1637 (daily ed. Mar. 18, 2010); *see also* 156 Cong. Rec. H1894, H1898, H1909 (daily ed. Mar. 21, 2010) (Reps. DeLauro, Sanchez, and Velazquez); 155 Cong. Rec. S13596 (daily ed. Dec. 21, 2009) (Sen. Harkin).

[32] NWLC, *Still Nowhere to Turn* 3 (2009), https://bit.ly/2ucIaiX.

[33] *Id.*

[34] *Id*.

[35] *Id*. at 14.

businesses with women-majority workforces, which include child care, home health care, pharmacies, florists, and community-service organizations.[36] In these and other industries, gender rating left many small businesses struggling to find affordable coverage.[37]

The ACA ended gender rating in the individual and small group markets, which means that plans can no longer charge women—or their small employer—higher premiums.[38]

2. The ACA Prohibited Denials, Exclusions, and Increased Premiums Based on Pre-existing Conditions.

> *In nine States and the District of Columbia, … domestic abuse can be considered a preexisting condition. So they get abused and then they can't even get the health care coverage to help them. Maternity, being pregnant—these things can all be preexisting conditions, and that is something we need to stop.*
>
> —*Senator Amy Klobuchar*[39]

More than half of all women and girls in the United States have pre-existing conditions for which they could have been denied or excluded coverage, or charged a higher premium, before the ACA.[40] The ACA ended this practice,

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[36] U.S. Bureau of Labor Statistics, *Women in the Labor Force* 49-55 (2014), http://goo.gl/nJxR7L.

[37] *See, e.g.*, Jenny Gold, Kaiser Health News, *Fight Erupts over Health Insurance Rates for Businesses with More Women* (2009), https://bit.ly/2TMYwhp.

[38] 42 U.S.C. § 300gg(a)(1).

[39] 155 Cong. Rec. S10262 (daily ed. Oct. 8, 2009).

[40] Nat'l Partnership for Women & Families, *Moving Backward* 1 (2018),

which disproportionately impacted women and posed particularly draconian penalties on families with children born with chronic diseases.

Denying coverage based on pre-existing conditions was commonplace before the ACA. For example, in 2009, the nation's four largest for-profit insurers denied coverage to "one out of every seven applicants based on a pre-existing condition" and "refused to pay over 70,900 medical claims due to pre-existing conditions."[41]

Pre-existing conditions were so broadly defined—and so disproportionately targeted at women—that the Speaker of the House remarked that "being a woman" was itself a "preexisting condition."[42] These conditions included pregnancy, lupus, diabetes, and eating disorders.[43] Some insurers would deny coverage to women who had previously had a cesarean delivery[44]—a particularly pernicious practice given that nearly one-third of births in the United States now occur by cesarean

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https://bit.ly/2TZz3l5.

[41] Memorandum from Henry A. Waxman and Bart Stupak to Members of the Committee on Energy and Commerce 4, 6 (Oct. 12, 2010), https://bit.ly/2UHbedS.

[42] *See* 156 Cong. Rec. H1896 (daily ed. Mar. 21, 2010).

[43] Gary Claxton et al., KFF, *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA* 4 (2016), https://bit.ly/2EqvFGL.

[44] 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (Sen. Murray); 155 Cong. Rec. S11135 (daily ed. Nov. 5, 2009) (Sen. Bennet).

delivery,[45] and the rate is even higher for black women.[46]

Domestic violence was also considered a pre-existing condition in nine states, where insurers could deny coverage to survivors.[47] Insurers also denied coverage for those who sought treatment after a sexual assault, including Christina Turner, who was required to go without health coverage for three years after she received precautionary anti-HIV medication because she was drugged and sexually assaulted.[48]

Parents of children with cancer, birth defects, asthma, and other conditions were often unable to get coverage for their children. For example, not one major insurance company would cover five-year-old Zade Hirsch because he had suffered from febrile seizures as an infant.[49] His parents said they "spent many sleepless nights terrified about what would happen if the seizures returned or he had an accident or any health issue. Being unable to provide for and protect your

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[45] Scott Hensley, *About A Third of Births, Even for First-Time Moms, Are Now By Cesarean*, Nat'l Pub. Radio (Aug. 31, 2010), https://n.pr/2WtAAwv; *see generally* Joyce Martin & Brady Hamilton et al., *Births: Final Data for 2012*, 62 Nat'l Vital Statistics Reports (2013), http://goo.gl/KoBPXI.

[46] Louise Marie Roth & Megan M. Henley, *Unequal Motherhood*, 59 Social Problems 207, 208 (May 2012), https://bit.ly/2TkqyeU.

[47] NWLC, *Nowhere to Turn* 8 (2008), http://goo.gl/QodK0s; *see also* 155 Cong. Rec. S12462 (daily ed. Dec. 5, 2009) (Sen. Harkin).

[48] Danielle Ivory, *Rape Victim's Choice*, Huffington Post (Mar. 18, 2010), https://bit.ly/2WgyUq7.

[49] Doug Hirsch, *A bygone pre-existing condition shouldn't keep my son from getting health insurance*, Stat (June 25, 2018), https://bit.ly/2tDcnXI.

children is one of the worst feelings a parent can endure."[50]

Today, under the ACA's guaranteed-issue and community-rating provisions, insurers can no longer "cherry pick healthy people and … weed out those who are not healthy" through denials for pre-existing conditions.[51] They must provide coverage to all who apply, and cannot charge higher premiums based on one's health status.[52]

3. The ACA Improved Coverage for Women's Health Needs.

> *This bill is about women and children—the millions of women who have no health care and the millions of children who are born frail and weak because their mothers have no access to prenatal care and their fathers have no insurance…. [E]very year, more than half a million American children are born underweight, one out of every eight children born premature, malnourished, and so many with disability. That should not happen in America.*
>
> *—Representative Marcy Kaptur*[53]

Pre-ACA health insurance not only charged women more for health coverage based on their sex, coverage was *less comprehensive* for women's health needs. Indeed, in debating health care reform, Congress "recognize[d] that historically, insurers have not covered medical services addressing a range of

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[50] *Id.*

[51] H.R. Rep. No. 111-299, pt. III, at 92 (2009).

[52] 42 U.S.C. §§ 300gg(a); 300gg-1(a).

[53] 156 Cong. Rec. H1893 (daily ed. Mar. 21, 2010).

women's health needs, resulting in high out-of-pocket costs for medical services, such as maternity care and preventive screenings."[54]

Before the ACA, it was nearly impossible, and extraordinarily expensive, to find maternity coverage outside of employer-provided insurance. A 2009 study found that only 13 percent of individual health insurance policies available for 30-year-old women living in capital cities nationwide included maternity coverage.[55] In certain states, there were no plans offering maternity coverage, and in others, the only option was a limited maternity rider that covered just $2,000 of a woman's maternity expenses, which came nowhere near the actual cost of maternity care in the United States (in 2006, an average of $7,488 for an *uncomplicated* vaginal birth).[56] For cesarean, multiple, and premature births, the costs of delivery and postnatal care (not to mention high-risk prenatal care) dwarf that amount. The few private plans that offered maternity coverage before the ACA often made it cost-prohibitive, with deductibles as high as $10,000 and high premiums.[57]

This "shocking" reality was at the forefront of Congress's mind in enacting

[54] H.R. Rep. No. 111-299, pt. III, at 104 (2009).
[55] NWLC, *Nowhere to Turn*, *supra*, at 7.
[56] *Id.* at 4, 11.
[57] NWLC, *Turning to Fairness* 11 (2012), https://bit.ly/2WgkqGJ.

the ACA.[58] Thus, new health plans in the individual and small-group markets must now cover "maternity and newborn care" as "essential health benefits."[59] And almost all new private plans are now required to cover a range of preventive services for women and children without cost-sharing.[60] Those who are newly eligible for Medicaid because of the ACA must also receive coverage of preventive services without cost-sharing.[61]

For women, the services include breast and cervical cancer screenings; screening for gestational diabetes; screening and counseling for interpersonal and domestic violence; the full range of FDA-approved methods of contraception for women and related education and counseling; comprehensive breastfeeding support services (including counseling, education, and supplies);[62] and genetic

[58] 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (Sen. Mikulski); *see also* 155 Cong. Rec. S12027 (daily ed. Dec. 1, 2009) (Sen. Gillibrand); H.R. Rep. No. 111-299, pt. III, at 104 (2009).

[59] 42 U.S.C. § 18022(b)(1); 45 C.F.R. § 156.110(a)(4).

[60] KFF, *Preventive Services Covered by Private Health Plans under the Affordable Care Act* (Aug. 4, 2015), https://bit.ly/2Fms5NQ.

[61] 42 C.F.R. § 440.347.

[62] 42 U.S.C. § 300gg-13(a)(4); *see also* 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2014); Health Res. and Servs. Admin., *Women's Preventive Services Guidelines* (2018), http://goo.gl/MkccR1; 155 Cong. Rec. S12274 (daily ed. Dec. 3, 2009) (Sen. Murray).

counseling and testing for women at high risk of carrying the BRCA1 and BRCA2 mutations (which increase risk of cancer)—all without cost sharing.[63]

Moreover, when the ACA became law, mental health coverage became an essential benefit,[64] which is particularly important for women, who are twice as likely as men to be diagnosed with depression.[65] Most health plans will also be required to cover mental health counseling for pregnancy-related and post-partum depression without cost-sharing beginning in 2020.[66]

4. The ACA Ended Lifetime and Annual Caps.

> *A wife's diagnosis of cancer or a child's serious accident shouldn't be the cause for a family losing health insurance just when it is needed most.*
>
> —*Representative Lois Capps*[67]

Before the ACA, insurance companies commonly imposed lifetime limits—often one or two million dollars—and annual coverage limits.[68] Those limits were particularly devastating for families with children who faced serious medical

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[63] 42 U.S.C. § 300gg-13(a)(1); U.S. Preventive Services Task Force, *Final Recommendation Statement, BRCA-Related Cancer*, https://bit.ly/2dng8u8.

[64] 42 U.S.C. § 18022(b)(1)(E); 45 C.F.R. § 156.110(a)(5).

[65] Mayo Clinic, *Depression in women* (Jan. 29, 2019), https://mayocl.in/2zgzj1M.

[66] *See* U.S. Preventive Servs. Task Force, *Interventions to Prevent Perinatal Depression*, 321 J. Am. Med. Assoc. 580 (2019), https://bit.ly/2I6bNMu.

[67] 156 Cong. Rec. H1902 (daily ed. Mar. 21, 2010).

[68] 156 Cong. Rec. H1900, H1902, H1908, H1910 (daily ed. Mar. 21, 2010) (Reps. Kajorski, Capps, Sutton, Price, Costello); Associated Press, *Health insurance caps leave patients stranded*, NBCNews (July 13, 2008), https://nbcnews.to/2TWVp6s.

conditions. For example, Michelle Morrison's son, Timmy, was born with a rare genetic disease called Opitz G/BBB Syndrome.[69] Within three months of his birth, Timmy's NICU bills had eclipsed the $1 million lifetime limit that would have applied under his parents' plan had the ACA not banned that limit six days before he was born.[70]

5. The ACA Expanded Medicaid and Offset the Cost of Insurance Through Premium Tax Credits.

One way Congress sought to address systematic disparities in health insurance coverage was by expanding eligibility to participate in the Medicaid program to anyone meeting the income threshold—including adults without children—and by raising that threshold for single adults to 138 percent of the federal poverty level.[71]

For low-income individuals not eligible for Medicaid, Congress provided tax credits to offset the cost of insurance premiums.[72] As the Congressional Budget Office (CBO) explained, "[t]he substantial premium subsidies available in the exchanges would encourage the enrollment of a broad range of people."[73] The

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[69] Sarah Kliff, *The Obamacare Provision that Saved Thousands from Bankruptcy*, Vox (Mar. 2, 2017), https://bit.ly/2qPOIB4.

[70] *Id.*; 42 U.S.C. § 300gg-11.

[71] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[72] 26 U.S.C. § 36B(a).

[73] CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 19-20 (Nov. 30, 2009), https://bit.ly/2HUdRp8.

CBO estimated that 78% of enrollees would be entitled to premium tax credits, covering, on average, nearly two-thirds of an individual's premium.[74]

As enacted, the ACA extended health coverage to 14 million uninsured women, with about half gaining health coverage through the Medicaid expansion and the other half through tax credits to purchase private insurance.[75]

6. The ACA Prohibited Sex Discrimination in Health Care and Health Insurance.

> *[I]t is shocking to think that in today's America, over half of this country could be discriminated against in one of their most basic life needs. Women must shoulder the worst of the health care crisis, including outrageous discriminatory practices in care and coverage.*
>
> —*Senator Kirsten Gillibrand*[76]

The ACA included a direct and express prohibition against sex discrimination in health care and health insurance, and became the first comprehensive federal legislation to offer such protection. Notably, this non-discrimination provision, § 1557, was effective immediately upon enactment, years before the individual-responsibility provision.[77]

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[74] *Id.* at 24.

[75] Garrett & Glover, *supra*, at 2. Medicaid expansion under the ACA is optional, *NFIB*, 567 U.S. at 585, but, as of March 2019, only 14 states have chosen not to expand their Medicaid coverage, Rachel Garfield et al., KFF, *The Coverage Gap* (Mar. 21, 2019), https://bit.ly/2OPsrDe.

[76] 155 Cong. Rec. S10264 (daily ed. Oct. 8, 2009).

[77] Letter from Bill Kadereit, President, National Retiree Legislative Network, to NRLN Grassroots Network Members (July 3, 2010), https://bit.ly/2ueRbYL.

Section 1557 prohibits discrimination on the basis of sex (including pregnancy, gender identity, and sex stereotyping),[78] race, national origin, disability, or age in health programs or activities receiving federal financial assistance, as well as the health insurance marketplaces.[79] It also provides a private right of action, as in other federal civil rights statutes. In enacting this provision, Congress sought to "remedy the shameful history of invidious discrimination and the stark disparities in outcomes in our health care system based on traditionally protected factors such as race and gender."[80]

II. Congress Recognized the Benefits of the ACA's Protections, and Did Not Intend to Repeal Those Protections When Enacting the TCJA.

The ACA has improved access to health care for women and their families, and there are already measurable improvements in health outcomes for these populations just as Congress had hoped. Congress knew about these improvements and, in amending the ACA to reduce the tax for failing to obtain health coverage, did not intend to undo this progress and place the health and economic security of women at risk.

A. The ACA Improved Health Outcomes and Economic Security for Women and Their Families.

1. More Women and Families Obtained Health Insurance.

[78] 45 C.F.R. §§ 92.101, 92.4.

[79] *See* 42 U.S.C. § 18116.

[80] 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (Sen. Leahy).

As a result of the Medicaid expansion and increased enrollment in private plans, the number of uninsured women ages 19 to 64 has decreased significantly, from 19 percent (18.1 million) in 2010 to 11 percent (10.6 million) in 2017.[81] Low-income women have made particularly large gains: uninsured rates for low-income women with incomes below 200 percent of the federal poverty level fell from 34 percent in 2010 to 18 percent in 2016.[82] The findings are similar for low-income women of all races and ethnicities.[83] Thirty-six states plus D.C. have expanded Medicaid eligibility, and 27 percent of Latinas and 31 percent of black women ages 15-44 are now enrolled in Medicaid.[84]

Children have benefitted as well. Medicaid expansion for adults led to a "welcome mat effect," increasing enrollment of children in health insurance.[85] The uninsured rate for all U.S. children reached an all-time low of 4.7% in 2016.[86]

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[81] KFF, *Uninsured Rates for Nonelderly Adults by Gender*, https://bit.ly/2HDDCe9.

[82] Gunja et al., *supra*.

[83] *Id*.; *see also* KFF, *Changes in Health Coverage by Race and Ethnicity Since Implementation of the ACA, 2013-2017*, https://bit.ly/2U0z7Rw.

[84] Garfield et al., *supra*; Hannah Katch,et al., Ctr. on Budget & Priority Policies, *Medicaid Works for Women–But Proposed Cuts Would Have Harsh, Disproportionate Impact* (2017), https://bit.ly/2npSK25.

[85] Hudson & Moriya, *supra.*

[86] Olivia Pham, Georgetown Univ. Health Policy Ins., *U.S. Continues Progress in Children's Health* (Sept. 12, 2017), https://bit.ly/2JxLqA2; David Murphey, *Health Insurance Coverage Improves Child Well-Being*, Child Trends (2017), https://bit.ly/2CrJq69.

Between 2013 and 2016, racial disparities in rates of uninsured children also improved, with Latina and Latino children, who historically have much higher uninsurance rates, experiencing the greatest improvement.[87]

2. Expanded Insurance Coverage Has Increased Women's Use of Preventive Services and Improved Health Outcomes.

As described above, *supra* pp. 18-21, the ACA has expanded access to routine and potentially life-saving cancer screenings, preventive care, mental health services, maternity care, and other services that are now covered as either preventive health services without cost-sharing or as essential health benefits.

Studies of the ACA's impact on health outcomes demonstrate a significant improvement in self-reported health, regular care for chronic conditions, blood-pressure control, and medication adherence, among other things.[88] Fewer low-income women now report cost to be a barrier to care, postpone preventive services, decline to fill prescriptions, skip pills, go without mental health care, or delay care due to cost.[89]

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[87] Olivia Pham, Georgetown Univ. Health Policy Inst., *New Data Shows Child Health Coverage Rate Racial Disparities are Narrowing* (Oct. 16, 2017), https://bit.ly/2YGyZ8j.

[88] Benjamin D. Sommers et al., *Three-Year Impacts of the Affordable Care Act*, 36 Health Affairs 1119-1128 (June 2017), https://bit.ly/2JkEeH1.

[89] KFF, *Women's Coverage, Access, and Affordability: Key Findings from the 2017 Kaiser Women's Health Survey* 5, 10 (2018), https://bit.ly/2FOdb3b.

More women are being screened for cancers—an early intervention that is part of the standard of care and saves lives. Among low income adults, Medicaid expansion under the ACA was associated with increased screening for cervical and colorectal cancer.[90] Increases in screening have been accompanied by increases in cancer diagnoses—but crucially in earlier disease stages.[91] Authors of one study analyzing the effects of the ACA concluded that increased coverage rates due to the ACA were likely the "driving factor behind the significant improvement in early-stage diagnosis of young women with gynecologic cancer."[92]

Coverage of the full range of FDA-approved contraceptives without cost-sharing has also increased with the passage of the ACA, allowing women to better control when they have families and, in turn, their own economic futures. Nearly 62.8 million women now have coverage of contraception without out-of-pocket costs.[93] Women saved an estimated $1.4 billion in 2013 on oral contraception alone,[94] and as a result of decreased out-of-pocket costs, use of contraception—

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[90] Michael Hendryx & Juhua Luo, *Increased Cancer Screening for Low-income Adults Under the Affordable Care Act Medicaid Expansion*, 56 Medical Care 944, 944 (2018).

[91] Hendryx & Luo, *supra*, at 944-45.

[92] Bodurtha Smith & Fader, *supra*, at 966, 974.

[93] NWLC, *New Data Estimates 62.8 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs* (Nov. 2018), https://bit.ly/2FqspKm.

[94] Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease In Out-Of-Pocket Spending For Contraceptives After ACA Mandate Removed Cost Sharing*, 34 Health Affairs 1204, 1208-09 (2015), https://bit.ly/2Fn7MQo.

especially highly effective long-acting reversible contraceptives such as intrauterine devices and contraceptive implants—has increased.[95]

Investments in prenatal maternal care are generating long-term benefits for mothers and children.[96] Mean infant mortality declined in Medicaid expansion states, and the infant mortality rate decline in black infants in Medicaid expansion states was more than twice the decline in non-Medicaid-expansion states.[97] Maternal deaths, particularly for Latinas, also fell in Medicaid-expansion states.[98]

3. Improved Coverage Has Provided Greater Economic Security for Women and Their Families.

By improving health coverage not tied to employment, the ACA has allowed women to seek positions that may offer higher wages or better opportunities, alleviating job lock.[99] Since the ACA health insurance marketplaces became available in 2014, more unmarried women have pursued full-time self-employment, coinciding with their relatively higher uptake of private health

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[95] Ashley H. Snyder et al., *The Impact of the Affordable Care Act on Contraceptive Use and Costs among Privately Insured Women*, 28 Women's Health Issues 219, 222 (2018), https://bit.ly/2WBky3o.

[96] Murphey, *supra*.

[97] Chintan B. Bhatt & Consuelo M. Beck-Sague, *Medicaid Expansion and Infant Mortality in the United States*, 108 Am. J. Public Health 565, 565-567 (2018), https://bit.ly/2HuXX5c.

[98] Rosenberg, *supra*.

[99] See also Sabrina Corlette, Georgetown University Health Policy Inst., *The Affordable Care Act and the End of Job Lock*, (2014), https://bit.ly/2FAWZlS.

insurance purchased on the marketplaces.[100]

In addition, research has shown a significant relationship between Medicaid coverage and reduction of medical debt, reducing both the average size of debt and the probability of a new bankruptcy filing.[101] Researchers have also found that "the effect of the Medicaid expansion closes about a quarter of the gap in financial satisfaction between low-income and median-income individuals."[102] Other analyses find that Medicaid coverage "nearly eliminate[s]" catastrophic medical expenditures for low-income families and significantly reduces medical debt.[103] The ACA has therefore allowed women, who are much more likely to be the heads of single-parent families, to better chart their own economic futures.

B. Congress Did Not Intend to Eliminate These Key ACA Protections By Enacting the TCJA.

Should this Court find the need to undertake a severability analysis, it should sever the individual-responsibility provision and uphold the rest of the ACA. Legislative intent is the "touchstone" of the severability inquiry. *NFIB*, 567 U.S. at 567. And every possible indicator here demonstrates that Congress did *not* intend

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[100] Meg Blume-Kohout, *The Affordable Care Act and Women's Self-Employment*, ASHEcon (June 11, 2018), https://bit.ly/2Y9sA5d.

[101] Larissa Antonissa et al., *The Effects of Medicaid Expansion under the ACA* (Mar. 28, 2018), https://bit.ly/2RcHDXF.

[102] Aaron Sojourner & Ezra Golberstein, *Medicaid Expansion Reduced Unpaid Medical Debt And Increased Financial Satisfaction*, Health Affairs (July 24, 2017), https://bit.ly/2LyTfRE.

[103] NWLC, *Medicaid at 50* (2015), https://bit.ly/2CpQ6Si.

to do away with the ACA's key protections when passing the TCJA.

In the seven years between the ACA and the TCJA, there were many attempts to repeal the ACA in its entirety, or rescind major portions of it, all of which failed.[104] And for good reason: the protections afforded by the ACA are widely popular. A survey conducted by the Kaiser Family Foundation in August 2017, two months before the enactment of the TCJA, found that 78 percent of Americans, including more than half of Republicans, wanted the Administration to do what it could to make the current health care law work.[105]

When Congress passed the TCJA, legislators emphasized that doing so would have no impact on the ACA's protections:

> In honesty, as we all know, what we have done is—we are zeroing out the penalty, the tax imposed on people who cannot afford or do not wish to purchase an ObamaCare plan. That is all we are doing here. Not a single person is disqualified. Not a single person loses the benefit. There is no reduction in reimbursements to any healthcare providers.[106]

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[104] C. Stephen Redhead & Janet Kinzer, Cong. Research Serv., *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* (Feb. 7, 2017), https://bit.ly/2meIrNr; Chris Riotta, *GOP Aims To Kill Obamacare Yet Again After Failing 70 Times*, Newsweek (July 29, 2017, 6:53 PM), https://bit.ly/2uPeGqX.

[105] Rakesh Singh & Chris Lee, KFF, *Poll: The ACA's Pre-Existing Condition Protections Remain Popular with the Public, including Republicans, As Legal Challenge Looms This Week* (2018), https://bit.ly/2Fn8JrW; Ashley Kirzinger et al., KFF, *August 2017: The Politics of Repeal and Replace* (Aug. 11, 2017), https://bit.ly/2WpskgM.

[106] 163 Cong. Rec. S7542 (Nov. 30, 2017) (Sen. Toomey).

…

> "[The TCJA] doesn't cut a single dime out of Medicaid, it doesn't cut a single dime out of insurance subsidies for people on the exchanges, and it doesn't change a single regulation of Obamacare. All it says is that the IRS cannot fine you …."[107]

Moreover, Congress has *continued* to amend the ACA even *after* the TCJA.[108] In these amendments, Congress has appropriated billions of dollars to ACA programs, including $400 million for the Maternal, Infant, and Early Childhood Home Visiting program—a clear indicator of Congress's consistent understanding that passing the TCJA would have no adverse impact on the health of women and their families.[109]

Congress's intention is plain: it enacted landmark legislation in part to end health insurance practices that discriminated against women and undermined the health and economic security of women. And the success of the ACA in accomplishing exactly what Congress set out to do is widely documented and was well known by Congress when it repeatedly reassured the public that the TCJA would not impact any part of the ACA except for the individual responsibility provision. This Court should not repeal the ACA by judicial fiat when Congress has repeatedly declined to do so legislatively.

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[107] 163 Cong. Rec. S7229 (daily ed. Nov. 15, 2017) (Sen. Cotton).

[108] Annie L. Mach & Janet Kinzer, Cong. Research Serv., *Legislative Actions to Modify the Affordable Care Act in the 111th-115th Congresses* 5-6 (June 27, 2018), https://fas.org/sgp/crs/misc/R45244.pdf.

[109] *Id.*

CONCLUSION

Congress did not intend to return to the pre-ACA world in which children with cancer were subjected to lifetime coverage limits, and women were unable to obtain coverage for prenatal visits and childbirth. Nor is there any evidence that Congress, in lowering the penalty associated with the individual-responsibility provision, intended to force more women to forgo screenings for cervical cancer, leading to their premature death. But that's just what the district court's decision did, and what this Court must reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 29(b)(4) because it contains 6,498 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: April 1, 2019

/s/ Jaime A. Santos
Jaime A. Santos

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jaime A. Santos
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APPENDIX

Amici Curiae Individual Statements of Interest

National Women's Law Center

The National Women's Law Center (Center) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has advocated specifically on issues affecting women's health care—from discrimination in health care to pregnancy and reproductive health care to Medicare and Medicaid. The ACA was critical to combating harmful and discriminatory health insurance industry practices that prevented women from obtaining comprehensive, affordable health coverage. NWLC has participated as amicus in numerous cases explaining the importance of the ACA to women, including briefs on behalf of itself and dozens of additional organizations before the U.S. Supreme Court in *King v. Burwell*, 135 S. Ct. 2480 (2015), and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

National Partnership for Women & Families

The National Partnership for Women & Families (National Partnership) is a nonprofit, nonpartisan organization that uses public education and advocacy to promote equal rights and quality health care for all. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership advocated for the critical reforms established by the Patient Protection and Affordable Care Act, which address discriminatory practices in the insurance industry and stand to make affordable, quality health care a reality for women and their families.

Black Women's Health Imperative

The Black Women's Health Imperative (Imperative) is a non-profit advocacy organization with a history of more than 35 years of dedication to promoting optimum health for black women across the life span. Women have long faced great difficulty obtaining comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. The Imperative is profoundly concerned about the impact that the Court's decision may have on women's access to health insurance.

American Medical Women's Association

The American Medical Women's Association (AMWA) is an organization that works to advance women in medicine, advocate for equity, and ensure excellence in healthcare. AMWA has long been a proponent for the improvement of women's health and the right for women to have equal access to healthcare. Key provisions of the ACA helped end discrimination against women on the basis of gender, leading to improved coverage and access to care. AMWA is concerned that a reversal of the ACA would again allow gender discrimination, resulting in healthcare disparity.