

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CITY OF CHICAGO,

*Plaintiff,*

vs.

Case No. 1:20-cv-1566

ALEX M. AZAR, II, in his official capacity  
as Secretary of the United States  
Department of Health and Human  
Services, et al.,

*Defendants.*

**DECLARATION OF DR. EMILY GEE**

I, Dr. Emily Gee, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of the City of Chicago's motion for a preliminary injunction or, in the alternative, expedited summary judgment.

2. I am the Health Economist for the Health Policy team at the Center for American Progress in Washington, DC. The Center for American Progress (CAP) is an independent nonpartisan and multi-issue policy institute dedicated to improving the lives of all Americans. CAP staff regularly advise federal, state, and local government policy makers, and CAP analyses and policy proposals are frequently cited by the news media. I have worked at CAP since February 2017. I have written dozens of publications on health policy topics for CAP, including on health care reform, hospital finance, the Affordable Care Act (ACA), and the COVID-19

pandemic.<sup>1</sup> My research and analysis has received attention in such media outlets as Politico, NPR, Vox, *The Washington Post*, CNBC, and *The Hill*. I have also been interviewed for television as an expert on health policy issues by C-SPAN, Univision, and local networks.

3. Prior to my current job, I was a career employee for the federal government. I served as an Economist in the U.S. Department of Health and Human Services (HHS) in the Office of the Assistant Secretary for Planning and Evaluation. I led the office's team for Health Insurance Marketplace enrollment analytics, participated in interagency working groups on the implementation of the Affordable Care Act, and authored issue briefs on trends in health insurance coverage and eligibility for public insurance programs. I collaborated with colleagues across the Centers for Medicare and Medicaid Services (CMS) and other offices in HHS to support the department's outreach to uninsured individuals during the initial launch of the Exchanges and the first few ACA open enrollment periods. In fall 2016, I was detailed from HHS to the staff of the Council of Economic Advisers (CEA) at the White House. As an Economist at the CEA, my duties included tracking trends in health care coverage, access, and costs and reviewing regulations related to provider payments, prescription drugs, and private insurance.

4. I hold an A.B. in government from Harvard College. I earned an M.A. in Political Economy and a Ph.D. in Economics from Boston University, where I wrote my dissertation on consumer choice in health insurance markets. I also taught a course in health economics at Boston University, and I have given talks and guest lectures on health insurance coverage at

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<sup>1</sup> See *Emily Gee*, Ctr. for Am. Progress, <https://www.americanprogress.org/about/staff/gee-emily/bio/> (last visited May 28, 2020).

other academic institutions and conferences. My research on health insurance coverage has been published in peer-reviewed economics journals.

**I. Summary of observations and opinions.**

5. The COVID-19 pandemic is expected to cause tens of millions of Americans to lose their current health insurance coverage. This is a problem because, among other things, health care providers are often not reimbursed for care provided to uninsured individuals, and because uninsured individuals often delay seeking necessary care or forgo care altogether.

6. A national special enrollment period (SEP) would rapidly provide individuals who lacked coverage before the pandemic, as well as individuals who have lost coverage as a result, with the ability to obtain ACA-compliant coverage. Based on national enrollment figures and figures released by state Exchanges that have conducted their own special enrollment periods, I conservatively estimate that a national special enrollment period on the 38 federally-facilitated or hybrid Exchanges would have resulted in 422,000 to 667,000 Americans enrolling in such coverage from mid-March to mid-May 2020. A longer SEP would likely result in far more sign-ups.

**II. Coverage losses during the pandemic and implications.**

7. Prior to the COVID-19 pandemic, over half of all nonelderly Americans, or 153 million people, had health insurance coverage through an employer.<sup>2</sup> This includes both workers and their dependents.

8. Many Americans have lost insurance as a result of the pandemic. Specifically, over 38 million people filed unemployment claims from March through May 2020,<sup>3</sup> which also means that millions have lost their source of health insurance coverage.

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<sup>2</sup> 2019 Employer Health Benefits Survey: Summary of Findings, Kaiser Fam. Found. (Sept. 25, 2019), <https://www.kff.org/report-section/ehbs-2019-summary-of-findings/>.

9. Two recent studies highlight the tremendous volume of potential coverage losses that the Exchanges may face this year. Based on unemployment claims filed as of early May, the Kaiser Family Foundation estimates 26.8 million people across the country would become uninsured due to loss of job-based health coverage if they don't sign up for other coverage. Of those, 12.7 million would be Medicaid eligible, 8.4 million would be eligible for tax credits through the Exchanges, and yet others would be eligible for unsubsidized Exchange coverage.<sup>4</sup>

10. The Urban Institute projects a shift in insurance coverage of a similar magnitude. It estimates that if the COVID-19 crisis generates a 20% increase in unemployment, 25 million people would lose their job-based coverage.<sup>5</sup> While 12 million could be expected to obtain coverage through Medicaid and 6 million through the Exchanges or other private coverage, about 7 million of those who lost employer-sponsored coverage would remain uninsured. The Urban report also notes that some people who lose job-based coverage may not realize they are eligible for Exchange coverage and that "creating a national special open enrollment period, regardless of whether a person had prior insurance coverage" could help minimize the number who end up uninsured.

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<sup>3</sup> "Jaw-Dropping" Fraud Reported as Jobless Claims Reach 38.6 Million, N.Y. Times, (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/coronavirus-news-tracker.html>.

<sup>4</sup> Rachel Garfield et al., *Eligibility for ACA Health Coverage Following Job Loss*, Kaiser Fam. Found. (May 13, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/>.

<sup>5</sup> Bowen Garrett & Anuj Gangopadhyaya, *How the COVID-19 Recession Could Affect Health Insurance Coverage*, Urban Inst. 3 (May 2020), [https://www.urban.org/sites/default/files/publication/102157/how-the-covid-19-recession-could-affect-health-insurance-coverage\\_0.pdf](https://www.urban.org/sites/default/files/publication/102157/how-the-covid-19-recession-could-affect-health-insurance-coverage_0.pdf).

11. Surveys show that the uninsured are more than twice as likely to delay or forgo care due to cost compared to those with Medicaid.<sup>6</sup> Historically, people who are uninsured are less likely to have a usual source of care,<sup>7</sup> and are more likely to report that when they do seek out care, they rely on the emergency department.<sup>8</sup>

12. When uninsured and underinsured people seek care they cannot afford, hospitals and other providers, including clinics and emergency departments, sometimes provide uncompensated care. This can take the form of care provided free upfront as a form of charity or as written-off medical debt. In other cases, however, hospitals and other providers have historically resorted to aggressive measures to collect payment such as selling debt to collection, garnishing wages, or suing patients. Increasing comprehensive health insurance coverage, including through Exchange enrollment, would protect patients from medical debt and help ensure that health care providers are paid for services they provide. For example, studies show that uncompensated care declined as a share of hospitals' operating costs in the wake of the ACA's Medicaid expansion.<sup>9</sup>

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<sup>6</sup> See, e.g., Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, Kaiser Fam. Found. (Dec. 13, 2019), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

<sup>7</sup> Rachel Garfield et al., *The Uninsured and the ACA: A Primer—Key Facts about Health Insurance and the Uninsured Amidst Changes to the Affordable Care Act*, Kaiser Fam. Found. (Jan. 25, 2019), <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-does-lack-of-insurance-affect-access-to-care/>.

<sup>8</sup> Rachel Garfield et al., *The Uninsured at the Starting Line: Findings from the 2013 Kaiser Survey of Low-Income Americans and the ACA*, Kaiser Fam. Found. (Feb. 6, 2014), <https://www.kff.org/report-section/the-uninsured-at-the-starting-line-findings-from-the-2013-kaiser-survey-of-low-income-americans-and-the-aca-iii-gaining-coverage-getting-care/>.

<sup>9</sup> See, e.g., David Dranove et al., *Uncompensated Care Decreased at Hospitals in Medicaid Expansion States but Not at Hospitals in Nonexpansion States*, 35 *Health Affairs* 1471 (Aug. 1, 2016), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2015.1344>.

13. Without insurance, people run the risk of large and unexpected medical costs. Although the legislative packages passed by Congress during the pandemic have helped to make COVID-19 testing free and COVID-related care affordable, people in the United States remain vulnerable to high medical bills for care related to the diagnosis of and treatment related to COVID-19 symptoms. This includes patients who ultimately do not receive a COVID-19 test or are tested and treated for conditions other than COVID-19.<sup>10</sup> To stop the spread of the novel coronavirus, it is crucial that people with COVID-like illness be willing to step forward for testing and treatment, regardless of whether their illness is confirmed to be COVID-19.

### **III. The need for a broad, nationwide SEP.**

14. In general, people who have lost job-based coverage qualify for a special enrollment period for individual market plans through the Affordable Care Act's Health Insurance Exchanges, allowing them to enroll outside the annual open enrollment period. As it is, the Exchanges will likely attract an unusually high number of enrollment applications during the pandemic, in addition to the typical SEP activity among people who qualify based on job changes, moving, marriage, and other qualifying events.

15. Opening a nationwide special enrollment period, without eligibility restrictions, in response to the pandemic would immediately provide an opportunity for many of the uninsured

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<sup>10</sup> See Kao-Ping Chua & Rena Conti, *Congress Must Do More to Lower Out-Of-Pocket Costs for Coronavirus Detection*, Detroit Free Press (Apr. 26, 2020), <https://www.freep.com/story/opinion/contributors/2020/04/25/coronavirus-testing-isnt-always-free-congress-should-fix-that/3016162001/>; Phil Galewitz, *COVID-Like Cough Sent Him To ER—Where He Got A \$3,278 Bill*, Kaiser Health News (May 25, 2020), <https://khn.org/news/covid-like-cough-covid19-symptoms-emergency-room-billing-code-surprise-medical-bill/>.

to obtain coverage. A dozen state-based exchanges, in states that operate their own enrollment platforms, have already offered SEPs to the uninsured due to the pandemic.<sup>11</sup>

16. However, CMS has not declared a similar SEP for the 38 states using the federally-facilitated Exchange (FFE) platform, including the state-based Exchanges that use the federal HealthCare.gov website as an enrollment portal. These states account for the vast majority of Exchange enrollment: during the open enrollment period for 2020 coverage, 11.4 million people enrolled in Exchange coverage nationwide; of these, 8.3 million people were enrolled in FFE states.<sup>12</sup>

17. Without a nationwide SEP with broad eligibility, newly jobless Americans face hurdles to obtaining Exchange coverage. If a person qualifies for an SEP based on the loss of job-based coverage, they generally need to file documents proving their eligibility and receive verification prior to enrollment. This process may be overly burdensome at a time when millions of Americans who have lost their jobs are simultaneously experiencing other disruptions to their lives, such as complying with stay-at-home orders and being unable to access websites for filing for unemployment.

18. Reportedly, CMS has waived the requirements to file documentation to qualify for an SEP for loss of job-related coverage during the pandemic, allowing an attestation instead.<sup>13</sup> Yet as of May 27, the federal HealthCare.gov enrollment portal still tells consumers

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<sup>11</sup> *State Data and Policy Actions to Address Coronavirus*, Kaiser Fam. Found. (June 11, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/>.

<sup>12</sup> *Marketplace Enrollment, 2014–2020*, Kaiser Fam. Found. (2020), <https://www.kff.org/health-reform/state-indicator/marketplace-enrollment/>.

<sup>13</sup> Amy Lotven, *CMS Won't Do SEP Outreach, But Will Grant Flexibility*, InsideHealthPolicy, Apr. 20, 2020, <https://insidehealthpolicy.com/daily-news/cms-wont-do-sep-outreach-will-grant-flexibility>.

who say they have lost coverage that “you may be required to submit documents showing the coverage you lost and the date it ended” and that they can “select a plan now and submit the documents later,” along with a link to “acceptable documents.”<sup>14</sup> The appearance of these requirements may discourage some people from seeking coverage or completing applications.

19. In addition, no SEP is available for uninsured people who have lost their job or are working reduced hours but did not lose job-based coverage, or for people who were uninsured or underinsured to begin with. As of 2018, approximately 28 million Americans were uninsured, according to the U.S. Census Bureau.<sup>15</sup> A categorical special enrollment period without eligibility restrictions would allow these individuals to enroll as well.

#### **IV. Estimates for how many would seek to enroll.**

20. National enrollment figures and figures from the state exchanges that offered their own special enrollment period are the best measure for estimating how many Americans might seek to enroll through a national SEP. For example, Covered California, the Exchange for the state of California, was among those that opened enrollment to “any eligible uninsured individuals” due to the pandemic. It made enrollment eligibility criteria “similar to those in place during the annual open-enrollment period.” Covered California reported that 123,810 people had signed up via an SEP between March 20 and May 16, “nearly 2.5 times higher than the level

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<sup>14</sup> *It Looks Like You May Qualify for A 2020 Special Enrollment Period*, HealthCare.gov, <https://www.healthcare.gov/screener/loss-of-coverage.html> (last visited May 27, 2020).

<sup>15</sup> Edward R. Berchick et al., *Health Insurance Coverage in the United States: 2018*, No. P60-267 (RV), U.S. Census Bureau (Nov. 8, 2019), <https://www.census.gov/library/publications/2019/demo/p60-267.html>.

Covered California saw during the same time period in 2019.”<sup>16</sup> Covered California’s SEP is scheduled to close on June 30.<sup>17</sup>

21. Based on those figures, and as explained more fully below, I conservatively estimate that about 422,000 to 667,000 people would have enrolled in coverage if CMS had allowed a similar SEP during that roughly 60-day March–May period. More would enroll if the SEP were to last beyond that.

22. The 422,000 figure uses historical SEP enrollment as a starting point. CMS had reported that “[f]or states using the Federal platform for plan year 2017, 1.1 million individuals applied for coverage after OEP [the Open Enrollment Period] and made a plan selection through a SEP, while approximately 9.2 million individuals had an active plan selection at the close of the 2017 OEP.”<sup>18</sup> In other words, SEP activity in a typical year is about 12% of total open enrollment plan selections. If 2020 SEP enrollment were similar to that in 2017, in the absence of the pandemic and its associated economic disruption, one would expect total SEP enrollment for 2020 to be 12% of total open enrollment, or 1.0 million enrollments. This would mean approximately 169,000 expected enrollments over a given 60-day period if SEP enrollment were spread out evenly over the 12 months of the year. If CMS had declared an SEP open to all eligible uninsured Americans and the FFE states had SEP enrollment also roughly 2.5 times the typical level (akin to Covered California), we would have expected 422,000 people to have

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<sup>16</sup> Press Release, *Covered California Sees More Than 123,000 Consumers Sign Up for Coverage During the COVID-19 Pandemic*, Covered Cal. (May 20, 2020), <https://www.coveredca.com/uploads/05-20-20-coveredca-sep-data.pdf>.

<sup>17</sup> Press Release, *California Responds to COVID-19 Emergency by Providing Path to Coverage for Millions of Californians*, Covered Cal. (Mar. 20, 2020), <https://www.coveredca.com/newsroom/news-releases/2020/03/20/california-responds-to-covid-19-emergency-by-providing-path-to-coverage-for-millions-of-californians/>.

<sup>18</sup> *The Exchanges Trend Report*, CMS (July 2, 2018), <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/2018-07-02-Trends-Report-3.pdf>.

enrolled in Exchange coverage in the FFM states, which is 253,000 more people compared to expected normal levels.

23. For the second, 667,000 estimate, note that Covered California's total SEP enrollment during the 60-day COVID SEP was equal to about 8% of that state's 1.5 million sign-ups during the open enrollment period for plan year 2020 coverage and the state says that SEP activity was 2.5 times higher than typical than last year over the same 60-day period. If CMS had designated a similar SEP and enrollment was equivalent to 8% of the 8.3 million open enrollment period sign-ups, then the 38 FFE states would have enrolled a total of 667,000 people via that SEP. If, like in California, that FFE SEP enrollment had been 2.5 times greater than typical, then that total FFE SEP sign-ups would have been 396,000 greater than would be expected in the absence of the pandemic over the period.

24. Again, I believe these estimates of SEP enrollment are conservative. If an SEP for the FFE commenced sometime after today, enrollment for a given 60-day period might be even greater. Given that the pandemic and the economic hardship it has caused are expected to last months, an SEP of a longer duration would likely result in even more enrollment in the Exchanges. Moreover, Covered California's SEP began relatively early in the pandemic, and the mounting job losses and the crisis's financial strain on families may have heightened the salience of health insurance coverage among potential enrollees.

25. In comparison, an analysis by health care analyst Charles Gaba estimates that, based on recent jobless claims numbers, as many as 1.8 million to 2.4 million people would enroll in Exchange coverage if there were an SEP for the pandemic in all states.<sup>19</sup> In addition, the

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<sup>19</sup> Charles Gaba, *UPDATE: 1.8 - 2.4 Million more Americans would likely #GetCovered if HealthCare.Gov launched #COVID19 SEP*, ACASignups.net (Apr. 14, 2020),

projections by the Kaiser Family Foundation and the Urban Institute also suggest that the economic effects of the pandemic will make millions newly eligible for subsidized and unsubsidized coverage. The extent to which those people enroll in coverage—and avoid becoming uninsured—will depend on awareness of the Exchanges and the ease of enrollment.

26. A national SEP with broad eligibility could reduce uninsurance beyond the Exchanges. An SEP is likely to have spillover effects that boost enrollment in other public programs, including among those eligible for Medicaid and the Children’s Health Insurance Program (CHIP). The “welcome mat” effect of the ACA’s coverage expansion is well-documented: the expansion of Medicaid in some states and the opening of the Exchanges led to increases in the rate of insurance coverage among people who were already eligible for Medicaid/CHIP.<sup>20</sup> Amid the ongoing financial strain of the economic crisis on American families, Medicaid/CHIP coverage is also more important for protecting them from additional, unexpected costs from health care.

27. Some may argue that introducing an SEP during a pandemic increases the risk of adverse selection in the Exchanges, making it more likely that people who are or expect to be sicker than average enroll in coverage, which could raise insurers’ costs and increase premiums in the future. Concern about adverse selection is why health insurance enrollment is typically only available during certain annual periods. In my opinion, the value of expanding coverage amid the novel threat posed by the pandemic outweighs the risk of some adverse selection in

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<http://acassignups.net/20/04/16/update-18-24-million-more-americans-would-likely-getcovered-if-healthcaregov-launched>.

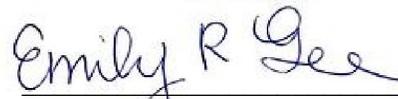
<sup>20</sup> Molly Frean et al., *Understanding ACA’s Coverage Gains: Welcome Mat Effect & State Marketplaces Keys to Success*, Geo. Univ. Health Pol’y Inst.: Say Ahhh! Blog, (May 18, 2016), <https://ccf.georgetown.edu/2016/05/18/understanding-acas-coverage-gains-welcome-mat-effect-state-marketplaces-keys-successful-expansion/>.

enrollment under a broad SEP. In fact, enrollees at the margin may be younger and healthier than average. An SEP for the uninsured could attract enrollees among the so-called young invincibles who previously believed that their good health made insurance not worth the cost. Some of the states that have created a COVID-19 SEP for their own Exchanges have seen just such an increase in younger customers. Maryland and Rhode Island report that more than half of those enrolling through the COVID-19 SEP are below the age of 35.<sup>21</sup> By contrast, just 35% of enrollees in the FFE during open enrollment were under age 35.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 12, 2020

Washington, DC

  
Dr. Emily Gee

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<sup>21</sup> Rachel Schwab et al., *During the COVID-19 Crisis, State Health Insurance Marketplaces Are Working to Enroll the Uninsured*, The Commonwealth Fund: To The Point, (May 19, 2020), <https://www.commonwealthfund.org/blog/2020/during-covid-19-crisis-state-health-insurance-marketplaces-are-working-enroll-uninsured>.