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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO/ OAKLAND DIVISION

THE STATE OF CALIFORNIA *et al.*,
Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,
Defendants.

Case No: 3:17-cv-05895

BRIEF OF *AMICI CURIAE* FAMILIES USA *ET AL.* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Hearing Date: October 23, 2017

Time: 2:00 p.m.

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the *amici curiae* Families USA, National Health Law Program, Asian & Pacific Islander American Health Forum, Asian Americans Advancing Justice – Los Angeles, California Pan-Ethnic Health Network, Center for Medicare Advocacy, Colorado Consumer Health Initiative, Community Catalyst, Community Health Councils, Consumers for Affordable Health Care Foundation, Disability Rights California, Health Access California, Justice in Aging, Legal Aid Society of Orange County, Maryland Citizens' Health Initiative Education Fund, Inc., Michigan League for Public Policy, Neighborhood Legal Services of Los Angeles County, National Partnership for Women & Families, North Carolina Justice Center, Northwest Health Law Advocates, South Carolina Appleseed Legal Justice Center, TakeAction Minnesota, Tennessee Justice Center, The Western Center on Law and Poverty, Universal Health Care Action Network of Ohio, Utah Health Policy Project (UHPP), Vermont Legal Aid's Office of the Health Care Advocate, West Virginians for Affordable Health Care, and Young Invincibles are not subsidiaries of any other corporation and no publicly held corporation owns 10% or more of any *amici curiae* organization's stock.

/s/ Abigail K. Coursolle
Abigail K. Coursolle

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STATEMENT OF INTEREST[1]

The *amici curiae* are Families USA, National Health Law Program (NHeLP), Asian & Pacific Islander American Health Forum, Asian Americans Advancing Justice – Los Angeles, California Pan-Ethnic Health Network, Center for Medicare Advocacy, Colorado Consumer Health Initiative, Community Catalyst, Community Health Councils, Consumers for Affordable Health Care Foundation, Disability Rights California, Health Access California, Justice in Aging, Legal Aid Society of Orange County, Maryland Citizens' Health Initiative Education Fund, Inc., Michigan League for Public Policy, National Partnership for Women & Families, Neighborhood Legal Services of Los Angeles County, North Carolina Justice Center, Northwest Health Law Advocates, South Carolina Appleseed Legal Justice Center, TakeAction Minnesota, Tennessee Justice Center, The Western Center on Law and Poverty, Universal Health Care Action Network of Ohio, Utah Health Policy Project (UHPP), Vermont Legal Aid's Office of the Health Care Advocate, West Virginians for Affordable Health Care, and Young Invincibles. While each *amicus* has particular interests, they share the mission of ensuring that American families and individuals can obtain the quality health care to which they are entitled. The *amici* submit this brief pursuant to the Court's October 19, 2017 Order Re: Briefing (ECF #26).

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund preparation or submission of this brief. No person, other than amici and amici's counsel, contributed money to fund preparation or submission of this brief.

Amici submit this brief to provide the Court with additional information about the immediate, harmful, and irreparable effects on consumers of the President's decision to terminate funding of cost-sharing reductions (CSRs). Such funding goes directly to insurers to cover their costs to provide low- and moderate-income consumers with legally required reductions to deductibles and other cost-sharing for covered health services.

For the final quarter of 2017, insurers have no way to cover their losses resulting from this sudden decision. For 2018, insurers can replace the terminated CSR payments by increasing premiums. Decisions by state insurance regulators and Marketplaces will determine whether insurers can limit 2018 premium increases to specified plans or whether they must apply to the entire individual market.

Regardless of which approach a state takes, its residents will suffer serious harm, for several reasons. (1) Some states have established policies that, if each consumer acts quickly in carefully chosen ways, could shield them from increased premium costs in 2018. Those policies require a level of sophistication and rapid engagement that is unrealistic for numerous affected consumers. (2) Regardless of state policy, insurers will experience a collective $1 billion financial loss resulting from CSR non-payment for the final quarter of 2017. As a result, some may soon go out of business or stop offering Marketplace coverage. On an irreparable and ongoing basis, insurer interest in Marketplace participation will be chilled, resulting in fewer plan options, higher premiums, and reduced insurance coverage for consumers at all income levels. (3) The President's change in policy preceded the start of open enrollment by less than a month. Considerable consumer confusion is certain to result, preventing many from receiving insurance. (4) For 2018 and beyond, plans will use across-the-board premium increase to cover the increased costs of serving low-income consumers who qualify for CSRs. Since payment will no longer be based on individual consumers' coverage generosity, insurers will lose money on each CSR-eligible consumer they enroll and make money on each CSR-ineligible member. They will avoid serving low-income, CSR-eligible consumers and focus their marketing on higher-income consumers who are ineligible for CSRs. (5) Many states are requiring insurers to cover CSR costs by raising premiums across a relatively broad range of individual-market plans. This will make it impossible for numerous consumers to avoid significant premium increases on their current insurance coverage. Some will be forced to shift to less comprehensive plans, and others will drop coverage altogether.

CSR nonpayment is the most recent and consequential step in a concerted, ongoing attempt by the Trump Administration to undermine the ACA. This troubling campaign has inflicted significant harm on consumers while flagrantly violating the President's legal duty to faithfully execute the Law.

ARGUMENT

II. In every state, consumers will experience serious and irreparable harm from CSR non-payment

A. Even optimal state policies for 2018 will fail to help many consumers, resulting in significantly higher premiums that cause losses of health insurance.

Even though the federal government is no longer paying CSR reductions, insurers are still required to provide more generous coverage to eligible, low-income consumers. To cover the resulting costs in 2018, they have no choice but to raise premiums. Several states have developed procedures to insulate their residents from the effects of the President's decision to terminate CSR payments for 2018. Unfortunately, to ensure that consumers obtain insulation for premium hikes, these procedures require a level of sophistication and engagement that is unrealistic for many people. Inevitably, numerous consumers will fail to take effective action and experience sharp, surprising premium increases, followed by coverage losses.

California's policy exemplifies the best of what states can do. In 2018, carriers will replace CSR payments by raising premiums on silver-level plans sold both within and outside of the Covered California Marketplace. Because of state laws requiring the same premiums to be charged for the identical coverage offered on and off the Marketplace, insurers will create a new kind of silver-plan outside the Marketplace that is slightly different from existing plans. To avoid major premium increases in 2018, silver-plan members with incomes too high for premium tax credits must enroll *during the upcoming open enrollment period* (Nov.1, 2017 – Jan. 31, 2018) in one of the new silver-plans now offered outside of the Marketplace. Covered California is implementing a coordinated communications campaign, with mailings and follow-up calls, to educate consumers about the steps they must take to avoid substantially higher premium bills when their silver-level plans begin the new coverage year in January 2018. Those who do not take such steps will experience unexpectedly high charges for continuing their past insurance, frequently leaving them no choice but to drop coverage.[2] This relationship between higher premiums and reduced coverage was evident even before recent decision to end CSR payments, as rising premiums led to a 22% drop in unsubsidized individual-market enrollment during the first half of 2017.[3]

For many affected consumers, it is not realistic to expect them to learn about their options and make the appropriate change of plan within the brief window allowed by the enrollment period for 2018 coverage. Considerable behavioral economics research shows that adding even minor steps to enrollment procedures can greatly reduce participation levels. The classic study involves 401(k) retirement-savings accounts. When firms ask new employees to complete a simple form to establish such accounts, only 33% do so within six months. In companies where accounts are established unless new employees complete forms opting out, 90% join within six months.[4]

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[2] Different complications will obstruct enrollment in some of the other states that, like California, leave room for unsubsidized consumers to maintain silver-level coverage by moving to non-Marketplace plans exempt from higher premiums. For example, the Washington State Marketplace has continued the open enrollment period for Marketplace plans one month beyond the December 15 end-date that applies to non-Marketplace coverage. As a result, consumers who delay their Marketplace renewals until the final month of open enrollment will find themselves unable to switch from silver-level Marketplace plans to non-Marketplace options. This is likely to affect numerous unsubsidized consumers, since many people delay enrollment decisions until the final days of open enrollment. Many consumers will be forced to drop coverage, rather than pay significantly higher premiums.

[3] Kurt Giesa, *Rising Premiums Hinder ACA Enrollment*, OLIVER WYMAN HEALTH BLOG (Oct. 19, 2017), http://health.oliverwyman.com/transform-care/2017/10/rising_premiums_hind.html.

[4] David Laibson, Impatience and Savings, NAT'L BUR. ECON. RES. REP. (2005), http://www.nber.org/reporter/fall05/laibson.html.

Louisiana provides a similar example involving health coverage. From 2010 through 2012, the State implemented a federal option to qualify children for Medicaid based on their families' participation in the Supplemental Nutrition Assistance Program (SNAP), which serves poor- and near-poor households. At first, the State sent Medicaid cards to the families of each qualifying child, activating the card upon use. Louisiana then changed enrollment procedures and required families to check a simple, clear, prominently displayed box on the SNAP application form. Adding that apparently minor procedural requirement caused the average number of children enrolled through monthly SNAP applications to drop by 62%.[5]

Even with middle-income consumers enrolled in employer-sponsored insurance, many remain in the same health plan year after year, ignoring new options that reduce their health care costs. A study of one firm found average financial losses of $1,570 for each individual remaining in their previous plan, despite the availability of new plans offering more favorable coverage.[6] Medicare Part D shows similar patterns of beneficiaries remaining in the same plan, despite changed circumstances that make other alternatives much less costly.[7]

Intensive communications efforts, like those planned by Covered California, have not prevented significant coverage losses, as illustrated by retirement savings

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[5] Stan Dorn *et al.*, *CHIPRA Express Lane Eligibility Evaluation: Case Study of Louisiana's Express Lane Eligibility Final Report,* URBAN INST. (Jan. 2012).

[6] Benjamin R. Handel, *Adverse Selection and Inertia in Health Insurance Markets: When Nudging Hurts*, 103 AM. ECON. REV. 2643-82. (2013).

[7] *E.g.*, Kate Ho *et al.*, *The Impact of Consumer Inattention on Insurer Pricing in the Medicare Part D Program* (Nat'l Bureau of Econ. Research, Working Paper No. 21028, 2015) (Revised in March 2017); Keith Ericson, *Consumer Inertia and Firm Pricing in the Medicare Part D Prescription Drug Insurance Exchange* (Nat'l Bureau of Econ. Research, Working Paper No. 18359, 2012).

research. One study of companies that offered employer matches to workers' 401(k) contributions found that, at the median company, 31% of workers over 59½ years of age failed to claim employer matching payments that were essentially free. Because of their age, these workers could immediately withdraw their employee contributions, without penalty. On average, they left unclaimed an amount equal to 2% of annual income. An intensive educational intervention increased participation rates by just one-tenth of one percentage point.[8]

With health coverage, several states expanding Medicaid under the ACA automatically qualified consumers based on their receipt of SNAP. Oregon and Illinois mailed information to all residents who received SNAP but not Medicaid, explaining that they could obtain Medicaid by calling a toll-free number, going on line, or mailing in a simple form to request coverage. Just 27% and 33% responded in Oregon and Illinois, respectively. Arkansas and West Virginia achieved slightly higher participation rates of 41% and 46%, respectively, by supplementing their mailings with follow-up phone calls. A second round of follow-up calls in the latter state raised participation to 60% – leaving fully 40% of targeted consumers uninsured, despite repeated and targeted outreach efforts.[9]

In a final example, researchers examined the impact of intensive information interventions on enrollees in the Colorado Marketplace who could have saved money at renewal by changing plans, with average savings exceeding $700. An

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[8] James Choi *et al.*, *$100 Bills on the Sidewalk: Suboptimal Investment in 401(K) Plans* (Nat'l Bureau of Econ. Research, Working Paper No. 11554, 2005).

[9] Fredric Blavin *et al.*, *Using Behavioral Economics to Inform the Integration of Human Services and Health Programs under the Affordable Care Act*, URBAN INST. (2014).

experimental intervention that sent consumers two letters and two emails describing potential savings from changing plans, including a personalized savings estimate tailored to each individual consumer, did not have a statistically significant impact on consumers' decisions.[10]

States like California have designed exemplary procedures to help consumers retain coverage at current levels of affordability and comprehensiveness. To benefit from these procedures, however, consumers must quickly understand their complicated situation and take a precisely calibrated series of steps to retain affordable coverage. Long experience teaches that, despite the best efforts of state policymakers, many consumers will be unable to make the necessary coverage changes in time. As a result, they will be charged much higher premiums, and many will have no choice but to drop coverage.

B. Insurers' losses for 2017 will create serious, long-term consumer harm.

In California and many other states, insurers will be able to cover their 2018 CSR-payment losses by raising premiums. That step will not shield insurers from losses resulting from CSR non-payment for 2017 coverage. The resulting harm will be experienced by consumers in every state, including both those eligible and those ineligible for CSRs and premium tax credits.

Consumers have already experienced serious harm due to similar payment shortfalls in the past. Due to a 2015 appropriations rider, the U.S. Department of Health and Human Services (HHS) was unable to make promised risk-corridor

[10] The intervention increased Marketplace shopping, without changing coverage decisions. Keith Ericson *et al.*, *Nudging Leads Consumers In Colorado To Shop But Not Switch ACA Marketplace Plans,* 36 HEALTH AFFAIRS 311,-19 (2017).

payments to health plans in the individual market. The resulting unexpected losses in an industry where companies often have narrow margins contributed to many new and small health insurers going out of business. Those that remained increased premiums.[11]

Premium increases also resulted when fewer insurers participated in health insurance marketplaces. One study found that, in the average rating area nationally, the benchmark premium charged by the second-lowest cost silver plan would have been 5.4% lower if a particular, large commercial carrier had offered coverage and 11.1% lower if all carriers that previously participated in the individual market had offered Marketplace plans.[12]

Similar harm will recur as plans experience serious financial setbacks due to CSR non-payment for the final quarter of 2017. The National Association of Insurance Commissioners estimates the resulting plan losses at $1 billion.[13] Some insurers will take advantage of federal contractual language allowing them to

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[11] *See, e.g.*, Shelby Livingston, *The State of the ACA's Risk Corridors*, MODERN HEALTHCARE*,* Dec. 5, 2016; David Smith, *Charlie Brown, Lucy, and Risk Corridor Payments*, LEAVITT PARTNERS BLOG (Feb. 17, 2017), https://leavittpartners.com/2017/02/charlie-brown-lucy-and-risk-corridor-payments; Thom Hartmann, *How Republicans Quietly Sabotaged Obamacare Long Before Trump Came into Office*, SALON (Mar. 22, 2017), https://www.salon.com/2017/03/22/how-republicans-quietly-sabotaged-obamacare-long-before-trump-came-into-office_partner.

[12] Leemore Dafny *et al.*, *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, 1 AM. J. HEALTH ECON. 53-81 (2015).

[13] Mike Consedine, *Statement from NAIC CEO Mike Consedine, CSR Funding Ceased, NAIC Response*, NAT'L ASS. INS. COMM'RS (Oct. 2017), http://www.naic.org/newsroom_statement_171013_csr_funding.htm.

terminate their Marketplace participation, ending their members' eligibility for premium tax credits and causing many to become uninsured.[14]

Before the Administration's recent announcement, the mere threat of CSR non-payment caused many insurers to withdraw from the Marketplace. Even more will stop offering Marketplace coverage now that CSR non-payment has changed from a threat to official policy.[15]

If the federal government refuses to make promised payments for a second time, following its prior failure to furnish full risk-corridor payments, the results will again include fewer health plan choices. Consumers will be forced to change plans and experience disruptions in care, premiums will rise, and more consumers will lose health coverage.

C. Financing CSRs for low-income consumers by raising premiums on consumers at all income levels will lead insurers to avoid serving low-income consumers.

Under the Administration's policy, the cost of increasing the generosity of individual-market coverage for the lowest-income enrollees will no longer be covered by CSR payments that vary based on the generosity of coverage. Instead, consumers both with and without CSRs will be charged a premium increase that is identical across all income levels. Put differently, insurers will receive the same total compensation for members with more generous coverage (hence higher covered

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[14] Timothy Jost, *Administration's Ending Of Cost-Sharing Reduction Payments Likely To Roil Individual Markets*, HEALTH AFFAIRS BLOG (Oct. 13, 2017), http://healthaffairs.org/blog/2017/10/13/administrations-ending-of-cost-sharing-reduction-payments-likely-to-roil-individual-markets.

[15] Louise Norris, *10 Reasons Cost-Sharing Reductions are YUGE News*, HEALTHINSURANCE.ORG BLOG (Oct. 13, 2017), https://www.healthinsurance.org/obamacare/10-reasons-cost-sharing-reductions-are-yuge-news.

claims) and less generous coverage (hence lower covered claims). Plans will be underpaid for each CSR-eligible, low-income consumer and overpaid for each enrollee with incomes too high for CSRs. Carriers will have a powerful incentive to avoid serving low-income consumers and instead increase their margins by marketing exclusively to higher-income people.

The ACA was carefully designed to minimize these insurer incentives to compete based on avoiding unprofitable members. Risk-adjustment payments accordingly raise or lower each insurer's revenue based on the risk profile of its individual-market members. Nevertheless, imperfections in HHS's risk-adjustment methodology leave room for insurers to increase profits by avoiding consumers with certain risk profiles, some of which are signaled by the use of particular prescription drugs. To deter such consumers' enrollment, Marketplace plans have deliberately limited the generosity of their coverage of drugs in those specific categories.[16]

In Medicare, health plans similarly exploited weaknesses in early risk-adjustment systems by structuring advertising campaigns to attract relatively healthy seniors. For example, they used active seniors in television advertising, touted their coverage of health plan memberships, used small typeface in written advertising, and conducted in-person marketing at events that were accessible only to seniors who were physically active.[17]

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[16] Michael Geruso *et al.*, *Screening in Contract Design,* SSRN (Oct. 10, 2017), https://ssrn.com/abstract=2867542.

[17] *E.g.*, Ateev Mehrotra *et al.*, *The Relationship Between Health Plan Advertising And Market Incentives*, 25 HEALTH AFFAIRS 759-65 (2006); Patricia Neuman *et al.*, *Marketing HMOs to Medicare Beneficiaries*, 17 HEALTH AFFAIRS 132,-39 (1998).

If CSR payments tailored to the increased generosity of low-income coverage are replaced by premium increases that apply equally to those with more and less generous coverage, there is no doubt that insurers will expend similar energy to limit their enrollment to higher-income members as much as possible. To illustrate carriers' available strategies, they could use advertising language that cannot be understood without a high literacy level, stop all advertisements on media outlets that target non-English speakers and communities of color, limit in-person marketing to events sited outside low-income communities, etc. As a result, the consumers most in need of assistance will be least able to access health coverage.

D. Consumer confusion will cause many to become uninsured.

Even before the Administration announced its decision to stop funding CSRs, many consumers who rely on Marketplace coverage were confused and worried about their options for 2018. A survey fielded by the Kaiser Family Foundation from September 13 through October 10, 2017, illustrates both the confusion and anxiety reported by Marketplace enrollees, purchasers of individual insurance outside the Marketplace, and the uninsured who qualify for Marketplace coverage.[18]

Despite the imminent start of open enrollment for all individual coverage on November 1, only one-third of those in the individual market and 15% of the uninsured knew when open enrollment was scheduled to begin. Even more—80% of individual-market enrollees and 95% of the uninsured—were unaware of the

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[18] Ashley Kirzinger *et al.*, *Kaiser Health Tracking Poll – October 2017: Experiences of the Non-Group Marketplace Enrollees*, KAISER FAMILY FOUND. (Oct. 18, 2017), https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-october-2017-experiences-of-the-non-group-Marketplace-enrollees.

critically important December 15 end date for open enrollment, after which most people will be unable to sign-up for insurance or change plans.

Financial anxieties were widespread. Six in ten Marketplace enrollees were "very" or "somewhat" worried that deductibles and co-payments would increase so much that the enrollees could no longer afford essential health care. Almost as many (55%) were "very" or "somewhat" worried that premiums would rise so much that consumers could no longer afford continued coverage through the same plan. More than a third of Marketplace enrollees – fully 36% – reported being "very" or "somewhat" worried that their current insurer would stop offering coverage and that there would be no plans left in the consumer's area of residence.

More than half of Marketplace consumers (52%) believed that the Trump Administration's actions to date were hurting the Marketplace, and less than one in four (24%) were "very" or "somewhat" confident that President Trump and Congress could work together to make improvements.

All these doubts were layered on top of a system that many consumers already found hard to understand. Just before the start of the first open enrollment period in 2013, many in the income range qualifying for premium tax credits reported not understanding such basic health insurance terms as "deductible" and "copayment." Among whites in this income range, slightly more than half (50.4%) failed to understand one or more terms. For people of color, more than 80% reported such lack of understanding.[19] It is thus not surprising that by June 2014, nearly half (48.7%) of insured consumers with incomes low enough to qualify for premium tax credits who had limited literacy or numeracy skills reported difficulty finding essential information about factors needed to support enrollment into health coverage.[20]

Both confusion and worry are likely to deepen, if CSRs are cut, leading to a complex situation that many will find hard to understand. Consumer confusion is further worsened by the remarkably precise timing of the Administration's decision that all of its previous CSR payments since January 2017 were illegal and that it must immediately stop further payments. Announced just weeks before the start of open enrollment, this policy change is already "sowing widespread confusion among consumers, according to leaders of insurance exchanges and -enrollment-assistance organizations around the country…[T]hey predict this latest move is almost certain to suppress the number of Americans insured under the law… 'The timing couldn't be worse, said [the chief executive officer of the Minnesota Marketplace].' "[21]

This decision was announced just weeks after insurers in most of the country settled on their final rates for 2018. As a result, many plans need to change their publicly announced premiums, which will force consumers to rethink their coverage

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[19] Sharon Long & Dana Goin, *Large Racial and Ethnic Differences in Health Insurance Literacy Signal Need for Targeted Education and Outreach*, URBAN INST. (Feb. 6, 2014).

[20] Sharon Long *et al.*, *Low Levels of Self-Reported Literacy and Numeracy Create Barriers to Obtaining and Using Health Insurance Coverage*, URBAN INST. (Oct. 2014).

[21] Amy Goldstein, *Timing of White House Actions Unrolling Parts of ACA 'Couldn't Be Worse,' States Say*, WASH. POST, Oct. 14, 2017.

choices. Already confused and anxious consumers must now learn about the end of CSR payments, understand the implications for their own health insurance, and decide how to respond—just weeks before the start of a short open enrollment.

Considerable research shows that such confusion and cognitive overload can paralyze decision-making and prevent participation. A classic study involves the purchase of exotic jams at an upscale supermarket. When free samples of six products were offered, 30% of consumers trying the jams made a purchase. When 26 different products were offered, only 3% bought jam.[22] Research involving retirement savings likewise found, after controlling for other factors, that each additional 10 mutual fund options were associated with an approximate 1.5 to 2% drop in participation rates.[23]

In terms of health coverage, one study of low-income Medicare beneficiaries eligible for subsidized Part D drug coverage found that those with fewer cognitive or numerical skills were significantly less likely to apply for subsidies or to enroll in any Part D coverage.[24] And California researchers found that in counties where Medi-Cal beneficiaries must choose between two or more health plans, 20.8% remained unenrolled and uninsured one month after qualifying for the program. By contrast, in counties where no choice of plan was required, just 4.8% were not enrolled after a month. Fully 10 months after qualifying for coverage, 5.8% of

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[22] Sheena Iyengar & Mark Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?,* 79 J. PERSONALITY & SOC. PSYCHOL. 995-1006 (2000).
[23] Sheena Iyengar *et al.*, *How Much Choice is Too Much? Contributions to 401(k) retirement plans* (Wharton School, Pension Research Council Working Paper, 2004).
[24] Ifedayo Kuye *et al.*, *Cognition and Take-Up of Subsidized Drug Benefits by Medicare Beneficiaries*,173 J. AM. MED. ASS. INTERNAL MED. 1100-07 (2013).

qualifying consumers were uninsured in counties where plan choice was required, compared to 0.4% in counties without plan choices.[25] Cognitive challenges and confusion depress enrollment–a result certain to follow on the heels of the Administration's last-minute change in CSR-payment policy.

II. In the states that are not attempting to protect all of their residents, consumers will experience additional harm

An analysis released on October 13, 2017, found that 13 states were implementing policies like California's, with insurers compensating for 2018's missing CSR payments by raising silver premiums for Marketplace plans and leaving silver options outside the Marketplace exempt from higher premiums. However, in 22 states insurers were increasing 2018 silver premiums, without any limitation to Marketplace plans; in five states insurers were increasing 2018 premiums across the board, at all metal levels, throughout the individual market; four states were not yet letting carriers recoup 2018 CSR losses by increasing premiums at all; and six used a combination of approaches.[26] In almost all of these scenarios, many consumers who retain their current coverage in 2018 will be unable to escape significant premium increases.

Once the Court obtains updated and verified information from the defendants, it will become clear how many states are not providing silver options

[25] Christopher Millett *et al.*, *Unhealthy Competition: Consequences of Health Plan Choice in California Medicaid*, 100 AM. J. PUB. HEALTH 2235,-40 (2010).

[26] David Anderson, *State Choices for CSR Ramifications*, BALLOON JUICE BLOG (Oct. 13, 2017), https://www.balloon-juice.com/2017/10/13/state-choices-for-csr-ramifications/ (data shown at https://docs.google.com/spreadsheets/d/1W2EQhCXowRDDuqJhy6PUJtIGHjoND9f_K7oALyDAbLg/edit?usp=sharing).

outside the Marketplace that avoid premium increases. In states where insurers recoup CSR-payment losses by increasing premiums on all individual-market plans, those who buy individual coverage without premium tax credits will be charged more for the same level of coverage they purchased in the past, regardless of metal level. Some will experience financial hardship, and many will become uninsured.

In states where insurers impose premium increases on all silver plans, those who previously paid full price for silver coverage will be charged more if they stay at the same level, even if they move off Marketplace. To keep premiums at prior levels, they must enroll in lower value coverage, with higher deductibles. The combination of complexity involved in shifting between plans and the inability to retain coverage of comparable value for the same price is likely to result in many consumers becoming uninsured, given the behavioral economics research described earlier.

III. Individual consumer experiences illustrate the damage caused by CSR nonpayment

For more than 20 years, *Amicus* Families USA has provided individual consumers with forums for sharing their health coverage experiences with a broader audience.[27] Immediately after the President's announcement ending CSR payments, Lynn from Illinois expressed concerns about what that would mean for her family:

> Last year we found a policy for a little over $300 a month with subsidies. It is costly, but it fits all of our needs, especially since we have pre-existing conditions and take several expensive medications. We could finally see our doctors, take care of our medical needs, and get healthy. And now….with a stroke of a pen….we are going to lose it thanks to Trump. My husband and I have pre-existing conditions and without the subsidies, the premiums will be too high and we won't be able to afford insurance. Our premiums would be

[27] *Share Your Story*, FAMILIES USA, http://familiesusa.org/share-your-story (last visited Oct. 20, 2017; 10:33AM).

> over $2,000 a month. The medications we need are necessary to LIVE…but I don't know how we will afford them. My heart hurts this morning.

A few days later, Jo from Oregon expressed similar worries:

> My partner and I are organic farmers. Once ACA passed we were able to have actual health care coverage that we could actually use and afford. Partially because of these advances and feeling secure in our future, we decided to have a baby. Our son was born in February of 2016 and has been covered… from day one. Since his birth our premiums have gone up significantly even with the assistance we receive through ACA provided federal subsidies. Now everything is up in the air and unknown and far from secure or stable. We currently do not know how any of us will be covered in 2018 or what the cost will be. The flip-flopping and inconsistent policies being promoted by this current president and his administration is detrimental to our security, our sanity, and our health as a family. The sheer amount of anxiety and stress we are feeling around this matter and having no idea where it's all going to land, is exhausting and soul-crushing…. We need a functioning ACA that isn't being undermined. Our lives depend on it. And I know we aren't alone.

For nearly 50 years, *Amicus* National Health Law Program has provided technical assistance and support to low-income individuals and their advocates nationwide. One such person is Parker, a 59-year-old man with stage 4 cancer (which has spread throughout his body) who lives in Monterey County, California and works part-time. He cannot get insurance through his employer. He earns just under $23,000 a year. He is currently enrolled in a Covered California Marketplace silver plan, but the issuer of his plan decided to leave the Marketplace in 2018 due to the Trump Administrations' refusal to commit to paying the CSRs. Parker must take daily cancer medication which costs $1800/month without health insurance coverage, and he requires regular monthly follow-up treatment, including blood work, a monthly shot for his bones, CT scans, and Cat scans. He is extremely worried and anxious about how he will get the services and medications he needs if he has to find a new plan or his premiums or out of pocket costs increase.

For 50 years, *Amicus* the Western Center on Law & Poverty has provided technical assistance and support to low-income Californians and their advocates. Through this work, the Western Center on Law & Poverty met Rosalia, a certified enrollment counselor with a health agency in California's Central Valley. Since the Administration's CSR announcement, she has spoken to enrollees living in Kern County who are confused and fearful. One woman thought that the announcement would mean she has to cancel her coverage, leaving her husband with no way to cover his needed medication. Another believed the government's recent action meant an end to the ACA so that he shouldn't renew coverage that he could already barely afford. Without Rosalia's advice, the confusion these individuals were experiencing would have persisted and they might well have lost coverage. Rosalia knows that for every person she is able to educate, there is another confused and scared person in her community who is likely to lose coverage.

IV. The decision to stop CSR funding is the final and most destructive act in an ongoing refusal to faithfully execute the Law

Even before taking office, Donald Trump tweeted that "The 'Unaffordable' Care Act will soon be history."[28] As is his absolute right, President Trump has regularly urged Congress to repeal the ACA, ending Marketplace coverage and other policies crafted by President Obama. Despite multiple attempts, President Trump has been unable to achieve his legislative goals.

Thus, throughout the Trump Administration, the ACA has been the law of the land. The President has a constitutional duty, under Article II, Section 3, to

[28] @realDonaldTrump, Twitter (Jan. 13, 2017, 3:33 AM), https://twitter.com/realdonaldtrump/status/819869953692155904.

"take Care that the Laws be faithfully executed." Instead, the President has led a systematic campaign to end the ACA's operation, working to rewrite the law even as the legislative branch leaves the ACA intact.

The Administration's precisely timed decision to reverse course and stop CSR payments—announced just days after the final release of insurance premium rates and a few weeks before the start of open enrollment—has already disrupted individual health insurance markets, with consumers facing the prospect of deepening harm, as we show above. This represents the most consequential stage of a shockingly transparent attempt to destroy rather than faithfully execute the law:

- January 20, 2017: The President signs his first Executive Order, calling on federal agencies to undo the ACA "to the maximum extent permitted by law."[29]

- January 26, 2017: The Administration announces it will halt planned advertisements during the last week of the open enrollment period (typically the highest volume week of enrollment).[30]

- February 14 2017: The Internal Revenue Service reverses an earlier decision to reject 2016 tax returns that do not indicate compliance with the ACA's individual mandate, thus lowering incentives for healthy consumers to enroll.[31]

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[29] *Presidential Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal* (Jan. 20, 2017), https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and.

[30] Paul Demko, *Trump White House Abruptly Halts Obamacare Ads*, POLITICO (Jan. 26, 2017), http://www.politico.com/story/2017/01/trump-white-house-obamacare-ads-234245.

[31] Kathleen Pender, *Quiet IRS Change Could Undermine Obamacare, Supporters Say*, S.F. CHRONICLE (Feb. 14, 2017), http://www.sfchronicle.com/business/networth/article/Quiet-IRS-change-could-undermine-Obamacare-10932798.php.

- February 17, 2017: HHS further undermines the ACA by publishing a proposed rule that lets health plans impose higher deductibles and out-of-pocket costs on consumers and lowers standards for health coverage of silver plans in the marketplace.[32]

- March 24, 2017: When it becomes clear that House Republicans cannot agree on terms for an ACA repeal, the President states, "Obamacare unfortunately will explode…It's going to have a very bad year."[33]

- April 12, 2017: The President threatens to withhold CSR payments.[34]

- April 18, 2017: The Administration issues a final rule that reduces the length of the 2018 open enrollment period from three months (November 1, 2017–January 31, 2018) to just 45 days (November 1, 2017–December 15, 2017). The shrunken period overlaps with holiday shopping, when consumer credit balances are most overextended, and fewer brokers and agents are available to help with Marketplace coverage due to open-enrollment for Medicare plans.[35] The rule also increases out-of-pocket costs for consumers.[36]

- April 26, 2017: Office of Management and Budget Director Mulvaney tells House Minority Leader Pelosi that the President will let the government shut down rather than sign a bill that includes CSR payments.[37]

- May 11, 2017: The President says that, even if Congress passes a bill authorizing CSR payments, it "only gives them one month"; "[T]here is no Obamacare, it's dead. Plus we're subsidizing [sic] it and we don't have to

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[32] *Patient Protection and Affordable Care Act; Market Stabilization*, 82 F.R. 10980 (Feb. 17, 2017), https://www.federalregister.gov/documents/2017/02/17/2017-03027/patient-protection-and-affordable-care-act-market-stabilization.
[33] Robert Pear *et al.*, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html.
[34] Dan Diamond & Josh Dawsey, *Trump Dangles Obamacare Payments to Force Dems to the Table,* POLITICO (Apr. 12, 2017), http://www.politico.com/story/2017/04/donald-trump-obamacare-subsidies-negotiate-237174.
[35] Stan Dorn, *Enrollment Periods in 2015 and Beyond*, URBAN INST. (Feb. 2015).
[36] 45 C.F.R. pts. 147,155,156 (2017), https://www.federalregister.gov/documents/2017/04/18/2017-07712/patient-protection-and-affordable-care-act-market-stabilization.
[37] Burgess Everett *et al.*, *White House to continue Obamacare payments, removing shutdown threat,* POLITICO (Apr. 26, 2017), http://www.politico.com/story/2017/04/26/ nancy-pelosi-mick-mulvaney-clash-budget-237630.

subsidise [sic] it. You know if I ever stop wanting to pay the subsidies, which I will."[38]

- May 16, 2017: The President tells aides in an Oval Office meeting that he wants to end the CSR payments.[39]

- May 23, 2017: The President releases his 2018 budget, requesting 21% less funding for administration of the ACA, with the cuts focused on "consumer information and outreach" and "eligibility and enrollment."[40]

- June 8, 2017: HHS Secretary Price refuses to tell a Senate Budget Committee whether the Administration will continue to fund CSRs.[41]

- July 20, 2107: HHS eliminates from its website information about how consumers can enroll into coverage, including through the Marketplace. Links to enrollment portals are replaced by links to claims that the ACA "has done damage to this market and created great burdens for many Americans."[42] Concurrently, the Administration withdraws from contracts with private firms that help individuals enroll in marketplace coverage,[43]

- August 31, 2017: The Administration announces marketplace outreach budget cuts of at least 90%,[44] and HHS ends key community partnerships that have been assisting individuals with ACA enrollment.[45]

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[38] *Transcript: Interview with Donald Trump*, ECONOMIST (May 11. 2017), http://www.economist.com/Trumptranscript.
[39] Josh Dawsey *et al.*, *Trump tells Advisors He Wants to End Key Obamacare Subsidies*, POLITICO (May 19, 2017), http://www.politico.com/story/2017/05/19/donald-trump-end-payments-obamacare-subsidies-238616.
[40] Budget of U.S. Government, A New Foundation for American Greatness, OFFICE MGMT & BUDGET (May 23, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf.
[41] Robert King, *Price dodges on committing to Obamacare insurer payments*, WASH. EXAM'R (June 8, 2017), http://www.washingtonexaminer.com/price-dodges-on-committing-to-obamacare-insurer-payments/article/2625333.
[42] Sam Stein, *Team Trump Used Obamacare Money to Run PR Effort Against It*, DAILY BEAST (Jul. 20, 2017), https://www.thedailybeast.com/team-trump-used-obamacare-money-to-run-ads-against-it.
[43] Carla Johnson, *Trump Administration Pulls Health Law Help in 18 Cities* , AP NEWS (Jul. 20, 2017), https://apnews.com/3d3f7034713e4c1b904e003bf1ac6eb1.
[44] Randy Pate, *Policies Related to the Navigator Program and Enrollment Education for the Upcoming Enrollment Period*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 31, 2017), https://www.cms.gov/CCIIO/Programs-and-

- September 14, 2017: The Administration issues a budget significantly cutting funding for "navigator" groups, which ACA §1311(i) [42 U.S.C. 13031(i)] requires to help with Marketplace enrollment. The navigator programs that enrolled the most consumers receive some of the largest cuts.[46] Navigator programs are required to file revised budget proposals within 30 days and informed that they will receive no funding until final approval is granted.[47]

- September 22, 2017: HHS announces that computer "maintenance" will shut down access to on-line application and enrollment portals for 12-hour periods on all but one Sunday and the first night of open enrollment, thus limiting enrollment opportunities for working families who often use weekends for activities like researching options and signing up for benefits.[48]

- September 27, 2017: HHS forbids regional office staff from participating in marketplace enrollment events.[49] HHS's press secretary says this was done because Obamacare "continues to collapse."[50]

Initiatives/Health-Insurance-Marketplaces/Downloads/Policies-Related-Navigator-Program-Enrollment-Education-8-31-2017pdf.pdf.

[45] Alice Ollstein, *Trump HHS Severs Key Partnerships For Obamacare Outreach*, TALKING POINTS MEMO (Aug.14, 2017), http://talkingpointsmemo.com/dc/trump-hhs-obamacare-partnerships-promotion-sabotage.

[46] Juliet Eilperin & Amy Goldstein, *HHS Slashes Funding to Groups Helping ACA Consumers Enroll by up to 92 Percent*, WASH. POST (Sept. 14, 2017), https://www.washingtonpost.com/national/health-science/hhs-slashes-funding-to-some-aca-navigator-groups-by-more-than-60-percent/2017/09/14/729c394c-9957-11e7-b569-3360011663b4_story.html.

[47] Shelby Gonzales, *Trump Administration Slashing Funding for Marketplace Enrollment Assistance and Outreach*, CTR. BUDGET & POL'Y. PRIORITIES (Sept. 1, 2017), https://www.cbpp.org/blog/trump-administration-slashing-funding-for-marketplace-enrollment-assistance-and-outreach.

[48] Shelby Livingston, *HealthCare.gov to Go Dark for 12 Hours Nearly Every Sunday of Open Enrollment*, MODERN HEALTHCARE (Sept. 22, 2017), http://www.modernhealthcare.com/article/20170922/NEWS/170929945.

[49] *Sabotage Watch: Tracking Efforts to Undermine the ACA*, CTR. BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/sabotage-watch-tracking-efforts-to-undermine-the-aca (last visited Oct. 20, 2017).

[50] Dan Mangan, *Trump Administration Health Reps Told Not to Participate in Obamacare Outreach Nationwide, as Advocates Claim 'Sabotage',* CNBC (Sept. 27, 2017), https://www.cnbc.com/2017/09/27/federal-health-reps-told-not-to-participate-in-obamacare-outreach.html.

The Administration's systematic disregard of both its legal duties under the Constitution and the health care needs of millions of Marketplace consumers culminated in President Trump's October 12 decision to stop CSR payments. At 2:36 in the morning of October 13, he tweeted, "The Democrats ObamaCare is imploding. Massive subsidy payments to their pet insurance companies has stopped. Dems should call me to fix!"[51]

This final step will yield grim and irreparable consequences for millions of American consumers, unless this Court takes action.

CONCLUSION

The *amici* urge this Court to grant the requested Temporary Restraining Order.

DATED: October 21, 2017

Respectfully submitted,

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[51] @realDonaldTrump, Twitter (Oct. 13, 2017, 2:36 AM), https://twitter.com/realDonaldTrump/status/918772522983874561.