Nos. 19-840 and 19-1019

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, *et al.*, *Petitioners,*

v.

STATE OF TEXAS, *et al.*, *Respondents.*

STATE OF TEXAS, *et al.*, *Petitioners,*

v.

STATE OF CALIFORNIA, *et al.*, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, BLACK WOMEN'S HEALTH IMPERATIVE, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AND 77 ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NO. 19-840

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INTEREST OF THE *AMICI CURIAE*[1]

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of legal rights and opportunities of women and all who suffer from sex discrimination.

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.

The Black Women's Health Imperative (BWHI) is a non-profit advocacy organization dedicated to promoting optimum health for Black women across the life span.

The American Medical Women's Association (AMWA) works to advance women in medicine, advocate for equity, and ensure excellence in health care.

These organizations have advocated on a range of issues important to 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); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

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

NWLC, the National Partnership, BWHI, and AMWA, together with the 77 additional *amici* listed in the Appendix, are committed to ensuring that women[2] and their families have access to affordable, comprehensive health insurance and health care. *Amici* are concerned about the potential impact of the Court's decision here—including the possibility that it will eliminate health coverage for tens of millions of women. *Amici* write to outline the serious harm to the health and economic security of women, and particularly women of color, that will result if the Court affirms the decisions below dismantling the Patient Protection and Affordable Care Act (ACA).

SUMMARY OF THE ARGUMENT

Congress enacted the ACA in the wake of growing recognition that entrenched health insurance practices systematically discriminated against women and thus left many—particularly women of color—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 maternity care and mammograms, while 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 insurers imposed lifetime coverage limits that left women and their families

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[2] This brief uses the term "women" because one critical purpose of the ACA was to ensure that women's health care needs are met. But the ACA's protections against sex discrimination in health care and health insurance apply to all, including transgender and gender non-conforming individuals.

who were battling devastating illnesses unable to obtain necessary coverage. Pre-ACA 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 kept women with employer-sponsored insurance locked in their jobs for fear of losing 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 what has widely been referred to as "gender rating" (charging women more for premiums based on their sex) and ended denials and rate increases for pre-existing conditions. The ACA 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—provisions that improve the health of women and their families. The ACA expanded access to Medicaid and provided tax credits for insurance premiums—also crucial for women. And most directly, the ACA was the first federal law to broadly prohibit sex discrimination in health care.

Although latent health disparities persist, the ACA has significantly improved the health and economic independence of women, including women of color. Among other advances, 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, which are at crisis levels for Black and Native women

and children, have begun to decline in Medicaid-expansion states.

Texas takes the extraordinary position that in reducing the tax associated with the ACA's individual-responsibility provision (26 U.S.C. § 5000A, as amended) to zero in the Tax Cuts and Jobs Act of 2017 (TCJA), Congress implicitly revoked the ACA in its entirety. But 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 the TCJA.[3] To the contrary, Congress repeatedly reassured the public that the TCJA would not affect the rest of the ACA, and even subsequently amended the ACA and appropriated billions of dollars to ACA programs—actions that would be illogical if Congress intended to revoke the ACA's protections by its passage of the TCJA. Indeed, Congress had previously rejected multiple attempts to repeal the ACA in whole or part.

For these reasons, should the Court reach the third question presented, it should sever § 5000A and uphold the rest of the ACA.[4] 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. *Nat'l*

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[3] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

[4] As for the other questions presented, *Amici* agree with California and the U.S. House of Representatives that the plaintiffs lack Article III standing to challenge § 5000A because it causes them no injury, and that § 5000A is constitutional. This brief focuses on the third question presented: whether § 5000A is severable from the rest of the ACA.

Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586–87 (2012) (*NFIB*). Here, just the opposite is evident.

ARGUMENT

I. A Central 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 Faced Discriminatory Insurance Practices.

Significant disparities in insurance coverage and access to health care affected the health and financial security of women before the ACA. Similar disparities in insurance coverage also existed for communities of color,[5] thereby magnifying the harm for women of color. Large percentages of women lacked insurance coverage or went without necessary medical treatment due to cost, and many women who accessed medical care were financially devastated by doing so. Those outcomes arose in significant part from discriminatory health insurance practices that the ACA was enacted to address.

1. Throughout their lifetimes, women have on average greater health care needs, but lower wages and higher rates of poverty, than men.[6] And while women

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[5] Samantha Artiga et al., KFF, *Changes in Health Coverage by Race and Ethnicity since the ACA, 2010-2018* 3 (2020), http://files.kff.org/attachment/Issue-Brief-Changes-in-Health-Coverage-by-Race-and-Ethnicity-since-the-ACA-2010-2018.pdf.

[6] Jessica Arons, Ctr. Am. Prog., *Women and Obamacare* 3-4 (2012), https://www.americanprogress.org/issues/women/reports/2012/05/02/11512/women-and-obamacare/; 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (Sen. Mikulski).

of every race are overrepresented in the low-wage workforce, this disproportionate representation is even more stark for women of color—especially Latina, Native, and Black women.[7] 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.[8] This is especially true for women of color, who are more likely to live in intergenerational households[9] and be primary breadwinners.[10]

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.[11]

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[7] Jasmine Tucker & Julie Vogtman, NWLC, *When Hard Work is Not Enough: Women in Low-Paid Jobs* 3-4 (2020), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.

[8] Ann Meier et al., *Mothering Experiences*, 53 Demography 649 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5497991/; Nidhi Sharma et al., *Gender Differences in Caregiving Among Family*, 6 World J. Psychiatry 7, 8 (2016), https://www.wjgnet.com/2220-3206/full/v6/i1/7.htm.

[9] D'vera Cohn & Jeffrey S. Passel, Pew Research Ctr., *A Record 64 Million Americans Live in Multigenerational Households* (Apr. 5, 2018), https://pewrsr.ch/35cZaHr.

[10] Tucker & Vogtman, *supra* at 6; Sarah Jane Glynn, Ctr. Am. Progress, *Breadwinning Mothers Continue to Be the U.S. Norm* (May 10, 2019), https://ampr.gs/2W6Rd2n.

[11] Munira Z. Gunja et al., Commonwealth Fund, *How the Affordable Care Act Has Helped Women Gain Insurance and Improved*

As a result of this and other contributing factors, 20% of women in the United States ages 15-44 were uninsured before the ACA.[12] Low-income women and women of color were hit hardest—just prior to implementation of the ACA's major coverage expansions, 40% of low-income women were uninsured,[13] and 22% of Black women and 36% of Latinas lacked insurance coverage.[14] 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.[15]

2. For many women, lack of coverage translated into lack of care. Pre-ACA studies showed that women

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Their Ability to Get Health Care (2017), https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/how-affordable-care-act-has-helped-women-gain-insurance-and.

[12] Guttmacher Inst., *Uninsured Rate Among Women of Reproductive Age Has Fallen More Than One-Third Under the Affordable Care Act* (Nov. 17, 2016), https://www.guttmacher.org/article/2016/11/uninsured-rate-among-women-reproductive-age-has-fallen-more-one-third-under.

[13] Alina Salganicoff et al., KFF, *Women and Health Care in the Early Years of the Affordable Care Act* 2 (2014), https://www.kff.org/report-section/women-and-health-care-in-the-early-years-of-the-aca-key-findings-from-the-2013-kaiser-womens-health-survey-methods/. "Low-income women" in this context means adult women between 18 and 64 with a household income below 200% of the federal poverty level. *Id.* at 7, 13. For women above that income level, the uninsured rate was 5%. *Id.* at 13.

[14] *Id.* at 2.

[15] Danielle Garrett & Stephanie Glover, NWLC, *Mind the Gap* 1-2 (2014) https://nwlc.org/resources/mind-gap-women-dire-need-health-insurance/.

without health insurance were more likely to forgo essential preventive services such as mammograms, Pap tests, and blood-pressure checks.[16] In 2010, nearly half of women ages 19-64 reported not getting needed care because of cost[17]; data from 2004-2007 show 23% of women of color being unable to visit a doctor because of cost.[18]

Inadequate health insurance has been associated with a longer interval between the onset of cancer-related symptoms and diagnosis.[19] Black women reported that they avoided non-emergency health care while uninsured—for some, this meant that gynecological cancers were not found until years later, when symptoms developed to more advanced stages.[20] 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.[21]

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[16] *See* H.R. Rep. No. 111-388, (2009) at 79-81; *see also* KFF, *Women's Health Insurance Coverage Fact Sheet* (Jan. 24, 2020), https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/#.

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

[18] H.R. Rep. No. 111-388, (2009) at 81.

[19] 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).

[20] Human Rights Watch, *It Should Not Happen* (2018), https://www.hrw.org/report/2018/11/29/it-should-not-happen/alabamas-failure-prevent-cervical-cancer-death-black-belt.

[21] 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), https://acsjournals.onlinelibrary.wiley.com/doi/pdf/10.1002/cncr.30507.

The same is true of breast cancers. Mammogram screenings have saved as many as 600,000 lives in the U.S. since 1989.[22] But with a later average stage of diagnosis and a higher rate of aggressive cancers, Black women in the United States were about 40% more likely to die from breast cancer than white women between 1999 and 2013.[23]

Verta Wells provides a heartwrenching account of the tragic consequences of this access gap. When Verta's youngest son was 17, she found a lump in her breast; because she was covered under Illinois' Children's Health Insurance Program (CHIP), she promptly sought treatment and became a survivor. But years later, when her children were grown and she was no longer eligible for CHIP, she felt another lump. Without insurance and no financial ability to consult with an oncologist as a free community clinic advised her to do, Verta did not seek medical care until she was so ill she had to visit the emergency room. She was diagnosed with metastatic cancer and died within a few months—an entirely preventable outcome shared by all-too-many women of color before the ACA.[24]

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[22] Robert Preidt, *Mammograms Helped Save Up to 600,000 U.S. Lives Since 1989*, U.S. News & World Rep. (Feb. 11, 2019), https://www.usnews.com/news/health-news/articles/2019-02-11/mammograms-helped-save-up-to-600-000-us-lives-since-1989-study.

[23] CDC, *Breast Cancer Rates Among Black Women and White Women* (2016), https://www.cdc.gov/cancer/dcpc/research/articles/breast_cancer_rates_women.htm.

[24] 155 Cong. Rec. S9631-S9632 (daily ed. Sept. 22, 2009).

3. The systemic sex discrimination in the health insurance market before the ACA also 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 preexisting 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]

Women were also more vulnerable to catastrophic medical costs. Women across all racial and ethnic groups were more likely than men to live in poverty, with Black and Latina women at least twice as likely as white women to be living in poverty.[27] Before the ACA, 37% of women, versus 29% of men, reported

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[25] Editorial, *Some reminders of life before Obamacare*, The Charlotte Observer (January 22, 2017 1:45 PM), https://www.charlotteobserver.com/opinion/editorials/article127783904.html.

[26] Bowen Garrett et al., The Urban Inst., *Recent Evidence on the ACA and Employment* 12 (2017), https://urbn.is/2FvSF7i; Austin Frakt, *If Obamacare Exits, Some May Need to Rethink Early Retirement*, N.Y. Times (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/upshot/if-obamacare-exits-some-may-need-to-rethink-early-retirement.html.

[27] NWLC, *Turning to Fairness* 11 (2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf; Amanda Fins, NWLC, *National Snapshot: Poverty Among Women & Families, 2019* 1-2 (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/10/PovertySnapshot2019-1.pdf.

problems paying medical bills.[28] More than one-third of women filing for bankruptcy identified medical debt or health problems as a reason for filing,[29] and women were more than twice as likely as men to identify a medical reason for their bankruptcies.[30]

In addition, the pre-ACA market kept women dependent on spousal health insurance. Because women are more likely to be covered by a spouse's health insurance, they are at a greater risk of coverage loss if their spouse dies, becomes unemployed, or if they divorce.[31]

Thus, while the pre-ACA health insurance market was insufficient to ensure positive health outcomes for individuals in the United States generally, it had a particularly pernicious impact on women and communities of color. This began to change when Congress enacted the ACA.

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

When crafting health care legislation, Congress knew about the disparities in health insurance. Thus,

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[28] H.R. Rep. No. 111-388, (2009) at 83.

[29] Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 Harv. Women's L.J. 19, 26 n.36 (2002).

[30] Elizabeth Warren et al., *Medical Problems and Bankruptcy Filings* 10, Norton's Bankruptcy Adviser (May 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=224581.

[31] Elizabeth M. Patchias & Judy Waxman, NWLC, *Women and Health Coverage: The Affordability Gap* 3 (The Commonwealth Fund) (April 2007), https://nwlc.org/sites/default/files/pdfs/NWLCCommonwealthHealthInsuranceIssueBrief2007.pdf.

many of the ACA's provisions addressed specific discriminatory practices. And because severability seeks to effectuate Congress's intent, this history provides critical context to the issues before the Court.

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*[32]

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."[33] In 2009, a nationwide survey of the best-selling plans in state capitals found that *95%* practiced gender rating.[34] Indeed, most of those individual plans charged *non-smoking* women more than men of the same age group who smoked.[35] In Texas, for example, 100% of the best-selling plans practiced gender rating, and a 40-year-old woman who did not smoke was charged up to *40% more* than a 40-year-old man who smoked.[36]

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[32] 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).

[33] NWLC, *Still Nowhere to Turn* 3 (2009), https://nwlc.org/wp-content/uploads/2015/08/stillnowheretoturn.pdf.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 14.

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 businesses with women-majority workforces, which include child care, home health care, pharmacies, florists, and community-service organizations.[37] In these and other industries, gender rating left many small businesses struggling to find affordable coverage.[38]

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.[39]

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[37] U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 68-78 (2019), https://www.bls.gov/opub/reports/womens-databook/2019/pdf/home.pdf.

[38] *See, e.g.*, Jenny Gold, *Fight Erupts over Health Insurance Rates for Businesses with More Women,* Kaiser Health News (Oct. 25, 2009), https://khn.org/news/gender-discrimination-health-insurance/.

[39] 42 U.S.C. § 300gg(a)(1).

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

> *Today, women are turned away from buying insurance due to so-called preexisting conditions such as domestic violence, pregnancy, and C-sections. But this bill makes it illegal to deny coverage due to any preexisting condition, including breast cancer.*
>
> *—Rep. Judy Chu*[40]

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.[41] The ACA ended this practice, which disproportionately impacted women and communities of color given higher prevalence of chronic health conditions among both groups.[42]

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

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[40] 155 Cong. Rec. H12209-H12210 (daily ed. Nov. 3, 2009).

[41] Nat'l Partnership for Women & Families, *Moving Backward* 1 (2018), https://www.nationalpartnership.org/our-work/resources/health-care/aca-pre-ex-protections-women-girls.pdf.

[42] H.R. Rep. No. 111-388, at 70; Kenneth E. Thorpe et al., *The United States Can Reduce Socioeconomic Disparities By Focusing On Chronic Diseases*, Health Affairs Blog (Aug. 17, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170817.061561/full/.

over 70,900 medical claims… due to pre-existing conditions."[43]

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."[44] These conditions included pregnancy, eating disorders, diabetes, lupus, heart disease, stroke, and obesity, among others[45]—many of which disproportionately impact people of color due to multiple systemic barriers to care.[46] Some insurers would deny coverage to women who had previously had a cesarean delivery[47]—a particularly pernicious practice given that nearly three in ten births in the United States now occur by cesarean

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[43] Memorandum from Henry A. Waxman and Bart Stupak to Members of the Committee on Energy and Commerce 4, 6 (Oct. 12, 2010), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Memo-Coverage-Denials-Individual-Market-2010-10-12.pdf.

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

[45] Gary Claxton et al., KFF, *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA* 4 (2016), https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/.

[46] Lupus Found. Am., *Lupus Facts and Statistics*, https://www.lupus.org/resources/lupus-facts-and-statistics (last visited May 8, 2020) (women of color two to three times more likely to suffer from lupus); *see also* Thorpe et al., *supra* (discussing diabetes, heart disease, stroke, and obesity rates in communities of color). Moreover, Black women have over 18 times the AIDS rate as their white counterparts. U.S. Dep't of Health and Human Servs. Office of Minority Health, *HIV/AIDS and African Americans*, https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=21 (last visited May 8, 2020).

[47] 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (Sen. Murray); 155 Cong. Rec. S11135 (daily ed. Nov. 5, 2009) (Sen. Bennet).

delivery,[48] and the rate is even higher for Black women.[49]

Domestic violence was considered a pre-existing condition in nine states, where insurers could deny coverage to survivors.[50] Insurers also denied coverage for those who sought treatment after a sexual assault, such as Christina Turner, who was required to go without health coverage for three years after she was drugged and sexually assaulted and had to receive precautionary anti-HIV medication.[51]

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.[52] They must provide coverage to all who apply, and cannot charge higher premiums based on one's health status.[53]

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[48] Scott Hensley, *About A Third of Births, Even for First-Time Moms, Are Now By Cesarean*, NPR (Aug. 31, 2010), https://www.npr.org/sections/health-shots/2010/08/31/129552505/cesarean-sections-stay-popular; *see generally* Joyce A. Martin et al., *Births: Final Data for 2012,* 62 Nat'l Vital Stats. Reports 9 (2013), https://www.ncbi.nlm.nih.gov/pubmed/25671704.

[49] Joyce A. Martin et al., *Births: Final Data for 2018*, 68 Nat'l Vital Stats. Reports 13, 6 (2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

[50] NWLC, *Nowhere to Turn* 8 (2008), https://www.nwlc.org/sites/default/files/pdfs/NWLCReport-NowhereToTurn-81309w.pdf; *see also* 155 Cong. Rec. S12463 (daily ed. Dec. 5, 2009) (Sen. Harkin).

[51] Danielle Ivory, *Rape Victim's Choice,* Huffington Post (Mar. 18, 2010), https://www.huffpost.com/entry/insurance-companies-rape-_n_328708.

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

[53] 42 U.S.C. §§ 300gg(a); 300gg-1(a).

The COVID-19 global health pandemic only underscores the importance of the ACA's preexisting condition protections for women and communities of color. For example, domestic violence, which disproportionally affects women of color,[54] is spiking globally as women are forced to quarantine at home with their abusers.[55] And given that communities of color are more likely to suffer from chronic conditions that raise the risk of developing severe COVID-19 symptoms, such as asthma, cardiovascular disease, and diabetes, loss of coverage due to pre-existing conditions in this time of crisis would be catastrophic.[56]

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[54] CDC, *The National Intimate Partner and Sexual Violence Survey* 120 (2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.

[55] *UN Chief Calls for Domestic Violence "Ceasefire" Amid "Horrifying Global Surge"*, UN News, (April 6, 2020), https://news.un. org/en/story/2020/04/1061052; Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. Times (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html.

[56] Christine Ro, *Coronavirus: Why Some Racial Groups Are More Vulnerable*, BBC (April 20, 2020), https://www.bbc.com/future/article/20200420-coronavirus-why-some-racial-groups-are-more-vulnerable; CDC, *People Who Are at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited May 8, 2020).

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. . . . That should not happen in America.*
>
> *—Representative Marcy Kaptur*[57]

Pre-ACA health insurance not only charged women more for health coverage based on their sex, but coverage was also *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 women's health needs, resulting in high out-of-pocket costs for medical services, such as maternity care and preventive screenings."[58]

Before the ACA it was nearly impossible, and extraordinarily expensive, to find maternity coverage outside of employer-provided insurance, yet maternity coverage is critical to ensuring access to pre- and postnatal health services and reducing the astronomical rate of maternal deaths in the U.S. that exists particularly among Black and Native women.[59] A 2009

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[57] 156 Cong. Rec. H1893 (daily ed. Mar. 21, 2010).
[58] H.R. Rep. No. 111-299, pt. III, at 104 (2009).
[59] Jamila Taylor et al., Ctr. Am. Progress, *Eliminating Racial Disparities in Maternal and Infant Mortality* (May 2019), https://cdn.americanprogress.org/content/uploads/2019/04/30133000/Maternal-Infant-Mortality-report.pdf. The rate of maternal mortality has been correlated with both lack of prenatal care in the first

study found that only 13% of individual health insurance policies available for 30-year-old women living in capital cities nationwide included maternity coverage.[60] In certain states, there were no plans offering maternity coverage; 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 (an average of $7,488 for an *uncomplicated* vaginal birth in 2006).[61] The few private plans that offered maternity coverage before the ACA often made it cost-prohibitive, with deductibles as high as $10,000, coupled with high premiums.[62]

This "shocking" reality was at the forefront of Congress's mind in enacting the ACA.[63] Thus, new health plans in the individual and small-group markets must now cover "maternity and newborn care" as "essential health benefits."[64] And almost all new private plans are now required to cover a range of preventive services for women and children without cost-sharing.[65]

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trimester and the overall percentage of uninsured patients. Shelley-Ann Hope et al., *The Impact of the Affordable Care Act on U.S. Maternal Mortality*, 129 Obstetrics & Gynecology 108S (2017), https://journals.lww.com/greenjournal/Abstract/2017/05001/The_Impact_of_the_Affordable_Care_Act_on_U_S_.386.aspx.

[60] NWLC, *Still Nowhere to Turn*, *supra*, at 7.

[61] NWLC, *Nowhere to Turn, supra,* at 4, 11.

[62] NWLC, *Turning to Fairness*, *supra*.

[63] 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).

[64] 42 U.S.C. § 18022(b)(1); 45 C.F.R. § 156.110(a)(4).

[65] KFF, *Preventive Services Covered by Private Health Plans under the Affordable Care Act* (Aug. 4, 2015), https://www.kff.org/he

Those who are newly eligible for Medicaid because of the ACA must also receive coverage of preventive services without cost-sharing.[66]

For women, these 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 and supplies;[67] and genetic counseling and testing for women at high risk of carrying the BRCA1 and BRCA2 mutations (which increase the risk of cancer)—all without cost-sharing.[68]

Additionally, when the ACA became law, mental health coverage became an essential benefit.[69] This change is particularly important for women, who are twice as likely as men to be diagnosed with depression.[70] Most health plans are also required to cover

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alth-reform/fact-sheet/preventive-services-covered-by-private-health-plans/.

[66] 42 C.F.R. § 440.347.

[67] 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), https://www.hrsa.gov/womens-guidelines/index.html; 155 Cong. Rec. S12274 (daily ed. Dec. 3, 2009) (Sen. Murray).

[68] 42 U.S.C. § 300gg-13(a)(1); U.S. Preventive Services Task Force, *Final Recommendation Statement, BRCA-Related Cancer* (Aug. 20, 2019), https://www.uspreventiveservicestaskforce.org/uspstf/document/RecommendationStatementFinal/brca-related-cancer-risk-assessment-genetic-counseling-and-genetic-testing.

[69] 42 U.S.C. § 18022(b)(1)(E); 45 C.F.R. § 156.110(a)(5).

[70] Mayo Clinic, *Depression In Women* (Jan. 29, 2019), https://www.mayoclinic.org/diseases-conditions/depression/in-depth/depression/art-20047725.

mental health counseling for pregnancy-related and post-partum depression without cost-sharing beginning in 2020.[71]

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

One way Congress sought to address systemic 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% of the federal poverty level.[72]

For low-income individuals not eligible for Medicaid, Congress provided tax credits to offset the cost of insurance premiums.[73] 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."[74] The CBO estimated that 57% of people with nongroup coverage would be entitled to subsidies, covering, on average, nearly two-thirds of an individual's premium.[75]

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[71] KFF, *Preventative Services Tracker* (Mar. 10, 2020), https://www.kff.org/report-section/preventive-service-tracker-pregnancy-related/.

[72] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[73] 26 U.S.C. § 36B(a).

[74] CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 6 (2009), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/11-30-premiums.pdf.

[75] *Id.* at 24.

5. The ACA Prohibited Sex Discrimination in Heath 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 nondiscrimination provision, § 1557, was effective immediately upon enactment, years before compliance with the individual-responsibility provision was required.[77]

Section 1557 prohibits discrimination on the basis of sex, race, national origin, disability, or age in health programs or activities receiving federal financial assistance, as well as the health insurance marketplaces.[78] It also provides a private right of action, as in other federal civil rights statutes.[79] In enacting this provision, Congress sought to "remedy the shameful history of invidious discrimination and the stark disparities in

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

[77] Letter from Bill Kadereit, President, Nat'l Retiree Legislative Network, to Nat'l Retiree Legislative Network Grassroots Network Members (July 3, 2010), https://www.nrln.org/documents/Kaiser%20Health%20Reform%20Timeline%20%20070310.pdf.

[78] *See* 42 U.S.C. § 18116.

[79] *Id.* § 18116(a); *e.g.*, *Flack v. Wis. Dep't of Health Servs.,* 328 F. Supp. 3d 931, 947–51 (W.D. Wis. 2018).

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 and their families at risk.

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

Passage of the ACA has caused a measurable improvement in women's health and economic security in at least three ways.

1. More Women and Families Have Obtained Insurance.

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% (18.1 million) in 2010 to 11% (10.8

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

million) in 2018.[81] Low-income women have made particularly large gains: uninsured rates for low-income women with incomes below 200% of the federal poverty level fell from 34% in 2010 to 18% in 2016.[82] The findings are similar for low-income women of all races and ethnicities.[83] Indeed, coverage increased for all racial and ethnic groups during this period, with most racial and ethnic minorities seeing particularly significant drops in uninsured rates.[84]

Children have benefitted as well. Medicaid expansion for adults led to an increase in 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] States that have not implemented Medicaid expansion have not experienced as many gains—children in non-expansion states are now nearly twice as likely to be uninsured as children in states that have expanded Medicaid.[87] Between 2013 and 2016, racial

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[81] KFF, *Uninsured Rates for Nonelderly Adults by Gender*, https://www.kff.org/703444e/ (last visited May 8, 2020).
[82] Gunja et al., *supra*, at 3.
[83] *Id.*; *see also* KFF, *Changes in Health Coverage by Race and Ethnicity Since Implementation of the ACA, 2013-2017* (Mar. 5, 2020), https://www.kff.org/disparities-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-the-aca-2010-2018/.
[84] Artiga et al., *supra* note 5.
[85] David Murphey, *Child Trends, Health Insurance Coverage Improves Child Well-Being* 4 (2017), https://www.childtrends.org/publications/health-insurance-coverage-improves-child-well.
[86] Olivia Pham, Georgetown Univ. Health Policy Inst., *U.S. Continues Progress in Children's Health* (Sept. 12, 2017), https://ccf.georgetown.edu/2017/09/12/u-s-continues-to-make-progress-in-childrens-health-over-95-of-u-s-children-have-health-insurance/; Murphey, *supra*, at 7.
[87] Joan Alker & Lauren Roygardner, Georgetown Univ. Health Policy Inst., *The Number of Uninsured Children is On the Rise*

disparities in rates of uninsured children also improved, with Latina and Latino children, who historically have much higher uninsured rates, experiencing the greatest improvement.[88]

However, efforts by the executive branch in recent years to restrict and chip away at the ACA have led to a reversal of some of these improvements, especially for women, young adults, and those living in households making less than $48,000 per year.[89] The uninsured rate for women is among the fastest rising.[90] And the uninsured rate for children increased in 2017 for the first time in ten years, with the greatest increase among poor children,[91] and it rose yet again in 2018.[92] The increases were particularly pronounced for Hispanic children.[93] And while these increases have thus far been relatively modest, it is estimated

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10-11 (2019), https://ccf.georgetown.edu/wp-content/uploads/2019/10/Uninsured-Kids-Report.pdf.

[88] Olivia Pham, Georgetown Univ. Health Policy Inst., *New Data Shows Child Health Coverage Rate Racial Disparities are Narrowing* (Oct. 16, 2017), https://ccf.georgetown.edu/2017/10/16/new-data-shows-narrowing-racial-disparity-among-uninsured-children/ .

[89] Dan Witters, *U.S. Uninsured Rate Rises to Four-Year High*¸ Gallup (Jan. 23, 2019), https://news.gallup.com/poll/246134/uninsured-rate-rises-four-year-high.aspx.

[90] *Id.*

[91] Jesse Cross-Call, CBPP, *Children's Uninsured Rate Rises for First Time in a Decade* (Nov. 30, 2018), https://www.cbpp.org/blog/childrens-uninsured-rate-rises-for-first-time-in-a-decade.

[92] Alker & Roygardner, *supra,* at 1. Data is not yet available for 2019, but this disturbing trend is expected to continue. *Id.* at 12.

[93] *Id.* at 6.

that a full repeal would more than double children's uninsured rate.[94]

2. Women's Increased Use of Health Care Services Has Improved Their Health Outcomes.

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.[95] 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.[96]

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 has been associated with increased screening for cervical, breast, and colorectal

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[94] Tara Straw, CBPP, *Repealing ACA Would More Than Double Children's Uninsured Rate* (Dec. 22, 2016), https://www.cbpp.org/blog/repealing-aca-would-more-than-double-childrens-uninsured-rate.

[95] Benjamin D. Sommers et al., *Three-Year Impacts of the Affordable Care Act*, 36 Health Affairs 1119-1128 (May 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:33330546.

[96] KFF, *Women's Coverage, Access, and Affordability: Key Findings from the 2017 Kaiser Women's Health Survey* 5 (Mar. 13, 2018), https://www.kff.org/womens-health-policy/issue-brief/womens-coverage-access-and-affordability-key-findings-from-the-2017-kaiser-womens-health-survey/.

cancer.[97] Increases in screening have been accompanied by increases in cancer diagnoses—but crucially in earlier disease stages.[98] 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."[99] And under the ACA, improved access to mental health care is already paying dividends—young women in particular have reported a significant relative increase in their mental health.[100]

The ACA's required coverage of the full range of FDA-approved contraceptives without cost-sharing has helped women to obtain the contraception that is most appropriate for them, allowing them to better control when they have children and, in turn, their own economic futures. Nearly 61.4 million women now have coverage of contraception without out-of-pocket costs.[101] As a result, the use of contraception—espe-

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[97] Michael Hendryx & Juhua Luo, *Increased Cancer Screening for Low-income Adults Under the Affordable Care Act Medicaid Expansion*, 56 Med. Care 944, 944 (2018) https://www.ncbi.nlm.nih.gov/pubmed/30199428; Dep't of Health & Human Servs., *Medicaid Expansion Impacts on Insurance Coverage and Access to Care* 8 (Jan. 18, 2017) https://affordablecareactlitigation.files.wordpress.com/2020/03/aspe-medicaidexpansion-1-18-17.pdf.

[98] Hendryx & Luo, *supra*, at 944–45.

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

[100] Marguerite Burns & Barbara Wolfe, *The Effects of the Affordable Care Act Dependent Coverage Expansion on Mental Health*, 19 J. Mental Health Policy Econ. 3, 12 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4834892/pdf/nihms748527.pdf.

[101] NWLC, *New Data Estimates 61.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs* 1 (Dec. 2019),

cially highly effective long-acting reversible contraceptives such as intrauterine devices and contraceptive implants—has increased.[102] This requirement has also advanced women's economic security: women saved an estimated $1.4 billion in 2013 on oral contraception alone.[103]

Investments in prenatal maternal care are generating long-term benefits for mothers and children.[104] Among the latent consequences of pre-ACA coverage disparities and cost barriers are the devastating 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,"[105] particularly for Black and Native women. Compared to white women, Black women were over three times more likely to die of pregnancy-related causes between 2007 and 2016, and Native American and Alaskan Native women were more than twice as likely.[106] But these statistics have not been uniform

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https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/12/preventativeservices2019.pdf.

[102] 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://www.whijournal.com/article/S1049-3867(17)30527-3/pdf.

[103] 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, 1209 (2015), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2015.0127.

[104] Murphey, *supra*, at 2.

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

[106] Emily E. Peterson et al., *Racial/Ethnic Disparities in Pregnancy-Related Deaths – United States, 2007-2016*, 68 Morbidity and Mortality Weekly Report 762, 763 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6835a3-H.pdf.

throughout the country: states expanding Medicaid under the ACA have experienced lower rates of death of pregnant women than those declining Medicaid expansion.[107] Moreover, mean infant mortality declined in Medicaid expansion states, and for Black infants, this decline was more than twice as high in Medicaid expansion than it was in non-Medicaid-expansion states.[108]

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.[109] Since the ACA health insurance

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[107] Jaime Rosenberg, AJMC, *Medicaid Expansion Linked to Lower Maternal Mortality Rates* (Feb. 6, 2019), https://www.ajmc.com/conferences/academyhealth-2019/medicaid-expansion-linked-to-lower-maternal-mortality-rates; EL Eliason, *Adoption of Medicaid Expansion is Associated with Lower Maternal Mortality*, 20 Women's Health Issues 1049, 1049 (Feb. 25, 2020), https://www.whijournal.com/article/S1049-3867(20)30005-0/fulltext; Adam Searing & Donna Cohen Ross, Georgetown University Health Policy Inst., *Medicaid Expansion Fills Gaps in Maternal Health Coverage Leading to Healthier Mothers and Babies* 7 (2019), https://ccf.georgetown.edu/wp-content/uploads/2019/05/Maternal-Health-3a.pdf.

[108] 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://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844390/.

[109] Sabrina Corlette, *The Affordable Care Act and the End of Job Lock*, Georgetown Univ. Health Policy Inst.: CHIRblog, (Oct. 26, 2014), http://chirblog.org/affordable-care-act-end-of-job-lock-early-positive-signs/.

marketplaces became available in 2014, more unmarried women have pursued full-time self-employment, coinciding with their relatively higher uptake of private health insurance purchased on the marketplaces.[110] As of 2018, women of color account for about half of all women-owned businesses.[111]

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.[112] 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."[113] Other analyses find that Medicaid coverage "nearly eliminate[s]" catastrophic med-

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[110] Meg Blume-Kohout, Conference Presentation at Am. Soc'y of Health Economists: *The Affordable Care Act and Women's Self-Employment* (June 11, 2018), https://ashecon.confex.com/ashecon/2018/webprogram/Paper6497.html

[111] American Express, *The 2018 State of Women-Owned Businesses Report* 5 (2018), https://about.americanexpress.com/files/doc_library/file/2018-state-of-women-owned-businesses-report.pdf.

[112] Larisa Antonisse et al., KFF, *The Effects of Medicaid Expansion Under the ACA* 7 (2018), http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review.

[113] Aaron Sojourner & Ezra Golberstein, *Medicaid Expansion Reduced Unpaid Medical Debt And Increased Financial Satisfaction*, Health Affairs Blog (July 24, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170724.061160/full/.

ical expenditures for low-income families and significantly reduces medical debt[114] and evictions,[115] both incredibly destabilizing events. 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.

Health and economic crises, like the COVID-19 pandemic, underscore how vital the ACA's protections are for women and communities of color. In at least eight plaintiff states, Black individuals make up 32% of COVID-19 fatalities,[116] even though they account

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[114] NWLC, *Medicaid at 50* (2015), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/final_nwlc_medicaid50th_whitepaper_3.pdf.

[115] Naomi Zewde, et al., *The Effects of the ACA Medicaid Expansion on Nationwide Home Evictions and Eviction-Court Initiations: United States, 2000-2016*, 109 Am. J. Public Health 1379 (2019), https://www.russellsage.org/sites/default/files/ACA%20Medicaid%20Expansion%20Evictions%20.pdf.

[116] NWLC calculations based on state data as of April 28, 2020. *See* Ala. Pub. Health, *Characteristics of Laboratory-Confirmed Cases of COVID-19*, https://www.alabamapublichealth.gov/covid19/assets/cov-al-cases-042820.pdf; Fla. Div. Emergency Mgmt., *Coronavirus: Summary of Persons Being Monitored, Persons Under Investigation, and Cases*, https://floridadisaster.org/globalassets/covid19/dailies/covid-19-data---daily-report-2020-04-28-1004.pdf; Miss. State Dep't Health, *Coronavirus Disease 2019* (COVID-19), https://msdh.ms.gov/msdhsite/_static/14,0,420.html; Mo. Dep't Health & Senior Servs., *COVID-19 Outbreak*, https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/results.php; S.C. Dep't Health & Envtl. Control, *SC Demographic Data (COVID-19)*, https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-demographic-data-covid-19; Tenn. Dep't Health, *Cases by County*, https://www.tn.gov/content/tn/health/cedep/ncov/data.html; Tex. Dep't State Health Servs., *Coronavirus Disease 2019* (COVID-19), https://dshs.texas.gov/coronavirus/; Wis. Dep't Health Servs.,

for only 16% of the population.[117] Yet these same states have rejected Medicaid expansion and seek to eradicate the ACA's protections against discrimination in health care. And the economic impact of COVID-19 has disproportionately hurt women, landing in particularly harsh ways on women of color. Despite being 50% of the overall workforce, women accounted for 59% of job losses in March 2020 alone—and in women-dominated fields like education and health services (jobs such as teachers and nurses), women accounted for 100% of the net job loss, while men *gained* 10,000 jobs in these sectors during the same time period.[118] Approximately 64% of March's job losses came in the accommodation and food services sector, where one in four workers (25%) are women of color.[119] And because pre-COVID unemployment numbers for Black women and Latinas were already higher than for white men, these COVID-related job losses only exacerbate the economic challenges already faced by these communities.[120]

COVID-19: Wisconsin Deaths, https://www.dhs.wisconsin.gov/covid-19/deaths.htm.

[117] NWLC calculations based on 2018 ACS, using IPUMS.

[118] NWLC calculations based on Bureau of Labor Statistics Emp't. Situation Summary (Apr. 3, 2020), https://www.bls.gov/news.release/empsit.nr0.htm. During March 2020, women accounted for 77% of net job loss in retail trade and 57% of job loss in leisure and hospitality.

[119] NWLC calculations based on Bureau of Labor Statistics Emp't. Situation Summary (Apr. 3, 2020), https://www.bls.gov/news.release/empsit.nr0.htm and 2018 ACS, one-year estimates, using IPUMS.

[120] In March, for example, the unemployment rate for Black women increased from 4.8% to 5.2%, and for Latinas it went from

Because about half of all U.S. workers have employer-sponsored health care, this statistic is especially sobering,[121] since it means these women have now lost access to their employer-sponsored health care in the middle of a global viral outbreak, when they would need it most.[122] With the ACA, these newly unemployed women have options for obtaining health insurance to protect themselves and their families, through expanded Medicaid coverage or through tax credits to offset the cost of plans on the ACA marketplaces.[123]

4.9% to 6%. The unemployment rate for white men remained under 4%. NWLC calculations based on Bureau of Labor Statistics Emp't. Situation Summary (Apr. 3, 2020), https://www.bls.gov/news.release/empsit.nr0.htm.

[121] Ben Zipperer & Josh Bivens, *3.5 Million Workers Likely Lost Their Employer-Provided Health Insurance in the Past Two Weeks*, Econ. Policy Inst. Blog (Apr. 2, 2020), https://www.epi.org/blog/3-5-million-workers-likely-lost-their-employer-provided-health-insurance-in-the-past-two-weeks/. As the article title states, it is estimated that 3.5 million workers lost their employer-provided health insurance in the last two weeks of March 2020 alone.

[122] *Id.* Women are also disproportionality at-risk for contact with infected individuals, since women make up the majority of health care and grocery store workers. Maya Raghu & Jasmine Tucker, NWLC, *Protected: The Wage Gap Has Made Things Worse For Women on the Front Lines of COVID-19*, (March 26, 2020), https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/.

[123] Selena Simmons-Duffin, *Coronavirus Reset: How to Get Health Insurance Now*, NPR (Apr. 3, 2020), https://www.npr.org/sections/health-shots/2020/04/03/826316458/coronavirus-reset-how-to-get-health-insurance-now. Losing health coverage due to job loss is a qualifying life event permitting a special enrollment period in ACA marketplaces. *Qualifying Life Event*, HealthCare.gov, https://www.healthcare.gov/glossary/qualifying-life-event/. Also, at least nine states re-opened ACA enrollment

B. Congress Did Not Intend to Eliminate The ACA's Key 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 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.[124] And for good reason: in addition to being effective in improving health coverage and outcomes, the ACA's protections 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% of Americans, including more than half

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to residents in light of the COVID-19 crisis. Rachel Nania, *Some States Hold Special ACA Open Enrollments Due to the Coronavirus*, AARP (Apr. 23, 2020), https://www.aarp.org/health/health-insurance/info-2020/coronavirus-aca-open-enrollment.html.

[124] 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://fas.org/sgp/crs/misc/R43289.pdf; Chris Riotta, *GOP Aims To Kill Obamacare Yet Again After Failing 70 Times*, Newsweek (July 29, 2017, 6:53 PM), https://www.newsweek.com/gop-healthcare-bill-repeal-and-replace-70-failed-attempts-643832.

of Republicans, wanted the Administration to do what it could to make the current health care law work.[125]

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.[126]
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> …
>
> "[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 …."[127]

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[125] 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://www.kff.org/health-costs/press-release/poll-acas-pre-existing-condition-protections-remain-popular-with-public/; Ashley Kirzinger et al., KFF, *August 2017: The Politics of Repeal and Replace* (Aug. 11, 2017), https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-august-2017-the-politics-of-aca-repeal-and-replace-efforts/.

[126] 163 Cong. Rec. S7542 (daily ed. Nov. 30, 2017) (Sen. Toomey).

[127] 163 Cong. Rec. S7229 (daily ed. Nov. 15, 2017) (Sen. Cotton).

Moreover, Congress has *continued* to amend the ACA even *after* the TCJA.[128] 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. These continued appropriations are a clear sign of Congress's consistent understanding that passing the TCJA would have no adverse impact on the other provisions of the ACA, and thus on the health of women and their families.[129]

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 their families. The success of the ACA in advancing the goals of Congress 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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[128] 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; Pub. L. No. 116-94 (2019).

[129] *Id.*

CONCLUSION

There is no evidence that Congress, in lowering the tax associated with the individual-responsibility provision, intended to dismantle the ACA and thereby undermine the critical gains for women's health and economic security attributable to it. But that's just what the courts below have done, and what this Court should reverse.

Respectfully submitted.

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May 13, 2020

APPENDIX

ADDITIONAL *AMICI CURIAE*

American Association of University Women

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)

American Federation of Teachers

American Sexual Health Association

American Society for Emergency Contraception

Athlete Ally

Bold Futures

California Black Women's Health Project

California Women Lawyers

California Women's Law Center

Catholics for Choice

Center for Constitutional Rights

Center for Reproductive Rights

Central Conference of American Rabbis

Champion Women; Legal Advocacy For Girls And Women in Sport

Chicago Alliance Against Sexual Exploitation

Clearinghouse on Women's Issues

Coalition of Labor Union Women

Connecticut Citizen Action Group

Desiree Alliance

Equal Rights Advocates

Equality California

EverThrive Illinois

Feminist Majority Foundations

Gender Justice

Guttmacher Institute

HOPE for All: Helping Others Prosper Economically

Ibis Reproductive Health

In the Public Interest

International Action Network for Gender Equity & Law

Kentucky Association of Sexual Assault Programs

KWH Law Center for Social Justice and Change

LatinoJustice PRLDEF

Leadership Conference on Civil and Human Rights

Legal Voice

Lift Louisiana

Maine Women's Lobby

MANA, A National Latina Organization

Men of Reform Judaism

Minority Veterans of America

NARAL Pro-Choice America

National Alliance to End Sexual Violence

National Asian Pacific American Women's Forum

National Association of Social Workers (NASW)

National Center for Law and Economic Justice

National Coalition on Black Civic Participation-Black Women's Roundtable

National Council of Jewish Women

National Crittenton

National Education Association

National Equality Action Team

National Institute for Reproductive Health

The National Network to End Domestic Violence

National Organization for Women (NOW) Foundation

National Urban League

National Workrights Institute

Northwest Health Law Advocates

Nurses for Sexual and Reproductive Health

Oklahoma Call for Reproductive Justice

Partnership for Working Families

People For the American Way Foundation

Planned Parenthood Federation of America

Power to Decide

Reproaction

Shriver Center on Poverty Law

SisterReach

SPARK Reproductive Justice NOW!, Inc.

Ujima Inc.: The National Center on Violence Against Women in the Black Community

UltraViolet

Union for Reform Judaism

URGE: Unite for Reproductive & Gender Equity

Washington Lawyers' Committee for Civil Rights and Urban Affairs

Women Lawyers On Guard, Inc.

Women of Reform Judaism

Women's Bar Association of the District of Columbia

Women's Bar Association of the State of New York

The Women's Law Center of Maryland

Women's Law Project