No. 19-840

In The Supreme Court of the United States

CALIFORNIA, ET AL.,

Petitioners,

v.

TEXAS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* 44 COUNTIES, CITIES, AND TOWNS AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

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Town of Carrboro, North Carolina
City of Chicago, Illinois
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Cook County, Illinois
City of Durham, North Carolina
City of Gary, Indiana
City of Hallandale Beach, Florida
Holmes County, Mississippi, Board of Supervisors
City of Houston, Texas
County of Howard, Maryland
City of Indianapolis and Marion County, Indiana
King County, Washington and Public Health—Seattle & King County
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City of Madison, Wisconsin
County of Marin, California
City of Middletown, Connecticut
Milwaukee County, Wisconsin
County of Monterey County, California
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City of Northampton, Massachusetts
City of Oakland, California
City of Palm Springs, California
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Pima County, Arizona
City of Portland, Oregon
County of Pulaski, Arkansas
City of San Diego, California
City and County of San Francisco, California
City of Santa Fe, New Mexico
County of Santa Clara, California
City of Santa Cruz, California
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City of Somerville, Massachusetts
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are counties, cities, and towns located throughout the United States, including throughout the Respondent States of Arizona, Arkansas, Florida, Indiana, Mississippi, Tennessee, and Texas. *Amici* are politically and geographically diverse, ranging from the largest county in the nation, Los Angeles County, with its population larger than that of forty-two states, to sparsely populated rural counties in the heartland, such as Holmes County, Mississippi. *Amici* also include the California State Association of Counties, a non-profit corporation whose membership comprises all fifty-eight California counties.

As local governments, *amici* are responsible, often by legal mandates and always by practical realities, for protecting the health and safety of our communities. We operate law enforcement agencies and jail facilities, maintain roads and public infrastructure, provide emergency medical transportation and public health services, assist children and the elderly, respond to pandemics and emergencies, and much more. *Amici* administer the "smaller governments closer to the governed" "that touch on citizens' daily lives." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (*NFIB*). We share a substantial interest in the

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

well-being of our residents and the effective expenditure of their tax dollars.

Notwithstanding our diversity, we are united in our support for the Affordable Care Act (ACA or Act). *Amici* bear an outsized burden in caring for our uninsured residents, measurable in staggering direct costs for services we must provide, but are not paid or reimbursed for, and in myriad indirect harms to our governments and our communities that flow from our residents' lack of healthcare coverage, and in turn, their unmet healthcare needs. By expanding access to health insurance and promoting primary and preventative healthcare, the ACA reduced the billions in uncompensated costs that we bear and enabled our towns, cities, and counties to better spend taxpayer dollars on more effective health services and to preserve our resources for our other critical government functions. Under the ACA, we are able to better serve our communities as a whole, in times of wellness and in times of emergency. Invalidating the ACA would unravel these gains, undo the complex laws we administer that the ACA reshaped, undermine *amici*'s ability to plan and govern, and impose extraordinary financial and human costs, which are all the more urgent and acute in the midst of a pandemic. It would leave *amici* and our residents worse off along many dimensions than before the ACA was enacted. This was not—and could not have been—Congress's intent.

SUMMARY OF ARGUMENT

In the Tax Cuts and Jobs Act, Congress amended the ACA to make a single sentence, 26 U.S.C. § 5000A, unenforceable. It left the remainder of the over 900-page omnibus ACA intact. In so doing, Congress clearly evidenced its intent for the ACA to function even if Section 5000A did not. The Tax Cuts and Jobs Act thus resolves the "quite simple. . . . severability analysis" raised in this case. J.A. 474 (King, J., dissenting). Yet even if Congress's intent in the Tax Cuts and Jobs Act were not so clear, it is obvious that Congress would have intended Section 5000A to be severable from the remainder of the ACA. As the Intervenor States demonstrate, Section 5000A is severable under all formulations of this Court's well-established severability precedents. *See* Pet'rs' Opening Br. 37-39. Its severability is especially clear under this Court's recent precedents, which assess whether a severability ruling would uphold "a coherent federal policy," or instead produce "exactly the opposite of the general federal approach." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1483, 1484 (2018). In this case, an inseverability ruling would yield the latter.

A ruling that Respondents have standing and that Section 5000A is unconstitutional and inseverable would produce immensely harmful results for *amici* and our residents that "would have seemed exactly backwards" to the Congress that enacted the Tax Cuts and Jobs Act and reaffirmed the ACA. *Id.* at 1483. As local governments, *amici* bear massive uncompensated costs from our underinsured and uninsured residents,

who disproportionately rely on *amici*'s publicly funded health systems. The ACA overwhelmingly reduced *amici*'s uncompensated costs and the toll these costs exact on our communities, the health of all our residents, and our very ability to govern. It enabled us to supply the more effective, more efficient, and less costly healthcare that Americans want and need. Invalidating the ACA would undo these gains and leave many *amici* and our residents worse off, and with fewer and lower quality options for healthcare. It would produce tremendous cost for *amici*, disruption to our governmental operations and the services our residents rely on us to provide, an intervening period of chaos, and, in the meantime and beyond, great harm to the health and well-being of our residents in the midst of a public health pandemic. Congress did not intend to so negate the ACA's own stated purposes. *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

ARGUMENT

As the Intervenor States and the U.S. House of Representatives articulate, this Court need not decide whether Section 5000A is severable from the remainder of the ACA because Respondents lack standing to challenge Section 5000A, and Section 5000A is clearly constitutional in any event. If this Court does reach the severability question, however, *amici* urge this Court to find Section 5000A severable from the remainder of the ACA. The stakes could not be higher.

I. THE ACA IS CRITICAL TO REDUCING LOCAL GOVERNMENTS' UNCOMPENSATED CARE COSTS

As local governments, *amici* are obligated to provide vital services to our residents and communities. The broad police powers vested in *amici*, as county and city governments, simultaneously vest in us the responsibility to supply an array of essential services. In many jurisdictions, federal, state, and local laws codify these duties in express mandates that *amici* must fulfill. We must protect public safety, operate criminal justice agencies, supply emergency medical transportation and indigent healthcare services, maintain public spaces and infrastructure, assist children and the elderly, and, as we have witnessed recently all across the nation, perform critical public health work. Often as "the facets of governing that touch on citizens' daily lives," *NFIB*, 567 U.S. at 536, local governments are the only entities with the ability to perform these vital public functions that are necessary for our residents to be self-reliant, independent, and healthy.

Before the ACA was implemented, *amici* incurred significant uncompensated costs from supplying healthcare and related services to our uninsured and underinsured residents. *Amici* are obligated to provide many healthcare services to our residents regardless of their ability to pay.[2] We do not, and cannot, condition

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[2] *See* Nat'l Ass'n of Ctys., *Counties' Role in Health Care Delivery and Financing* 3, 5-15 (July 2007), https://perma.cc/Z6SX5JD5; Eileen Salinsky, Nat'l Health Pol'y F., *Governmental*

emergency transportation in our ambulances, examination and treatment in our public health clinics and emergency departments, or emergent care in our safety-net hospitals on a patient's ability to pay the medical bill. *See NFIB*, 567 U.S. at 593 (opinion of Ginsburg, J.). Thus, prior to the ACA, when members of our communities could not cover the costs of the healthcare services they needed because they lacked any or adequate health insurance, our local governments strained to provide services we were responsible for offering but not compensated for supplying. Our public health systems sustained a disproportionate share of these costs because many private practitioners regularly refused to incur them and instead turned away the poor, the underinsured, and the uninsured.

The ACA was enacted in part to address the astronomical "cost of providing uncompensated care to the uninsured . . . $43,000,000,000 in 2008" alone, and the "straining budgets across government" that these costs created.[3] A decade later, the ACA has succeeded greatly in that aim, and state and local governments have saved billions of dollars in reduced uncompensated care costs as millions of Americans became insured.[4] Before the ACA's major coverage provisions

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Public Health: An Overview of State and Local Public Health Agencies 9-10 (Aug. 18, 2010), https://perma.cc/E48M-ADZH.

[3] 42 U.S.C. § 18091(2)(F); U.S. Gov't Printing Off., *Public Papers of the Presidents of the United States: Barack Obama 2009*, at 127 (2010), https://perma.cc/YRM7-B5BB.

[4] *See*, *e.g.*, Larisa Antonisse et al., Kaiser Family Found., *The Effects of Medicaid Expansion Under the ACA: Updated*

went into effect, state and local governments covered nearly 30% of the uncompensated care costs for the uninsured, amounting to nearly $20 billion dollars in uncompensated care in 2013 alone.[5] After the ACA was implemented, uncompensated care costs fell by about a quarter nationally, and by nearly half in Medicaid expansion states.[6] State and local governments, and their communities, benefitted significantly.

Judicial invalidation of the ACA would erase those cost reductions and impose far larger costs on states, counties, and cities than if the ACA were never enacted. "It is implausible that Congress meant the Act to operate in this manner." *King*, 135 S. Ct. at 2494.

Even before our nation was hit by a pandemic that as of this writing has cost over 65,000 American lives and 30 million American jobs,[7] the Congressional

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Findings from a Literature Review 8-11 (Mar. 28, 2018), https://perma.cc/GU93-U9DE.

[5] John Holahan et al., Kaiser Family Found., *The Cost and Coverage Implications of the ACA Medicaid Expansion: National and State-by-State Analysis* 6 (Nov. 2012), https://perma.cc/GEP9-SXUU; Teresa A. Coughlin et al., Kaiser Family Found., *Uncompensated Care for the Uninsured in 2013: A Detailed Examination* (May 30, 2014), https://perma.cc/RT3K-R8NR.

[6] Jessica Schubel & Matt Broaddus, Ctr. on Budget & Pol'y Priorities, *Uncompensated Care Costs Fell in Nearly Ever State as ACA's Major Coverage Provisions Took Effect* (May 23, 2018), https://perma.cc/YPL6-MN2Q.

[7] Nelson D. Schwartz et al., *How Bad is Unemployment? 'Literally Off the Charts'*, N.Y. Times (May 8, 2020), https://perma.cc/4FBP-2U7H; Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.* (May 7, 2020), https://perma.cc/LQ2R-RKPA.

Budget Office estimated that partial invalidation of the ACA would leave 15 million more Americans uninsured than if the ACA were never enacted.[8] It projected that massive market upheaval and significant premium increases from partial repeal of the ACA would yield 59 million uninsured Americans by 2026.[9] Now that millions of Americans have lost their livelihoods, and with it their employer-sponsored health insurance or their means to purchase health insurance, millions of additional Americans would become uninsured. These staggering uninsurance effects would only be compounded by invalidation of the ACA's array of powerful patient-protective provisions that are necessary for millions of Americans to acquire and afford health insurance.[10]

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[8] Kaiser Family Found., *Key Facts About the Uninsured Population* (Dec. 7, 2018), https://perma.cc/DCL9-QKY3; Cong. Budget Off., *How Repealing Portions of the Affordable Care Act Would Affect Health Insurance Coverage and Premiums* 1, 3 (Jan. 2017), https://perma.cc/ZLD3-LJJQ.

[9] Cong. Budget Off., *supra* note 8; Miranda Dietz et al., UCLA Ctr. for Health Pol'y Res., *ACA Repeal in California: Who Stands to Lose* 5 (Dec. 2016), https://perma.cc/K77T-S6Q8.

[10] *See*, *e.g.*, 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a) (preventing health insurance denials due to pre-existing conditions); 300gg, 300gg-4(b) (barring higher premium charges based on health status); 300gg-11 (prohibiting lifetime or annual limits on the value of essential health benefits); 300gg-12 (banning rescission, a previously common practice where insurance companies rescinded coverage when the insured suffered a catastrophic illness); 300gg-19 (guaranteeing beneficiaries the right to appeal adverse coverage decisions); 18022(c) (imposing annual out-of-pocket maximums for covered benefits).

Were the ACA to be invalidated, legal mandates and practical realities mean states and local governments would be forced to bear ballooning costs for many millions more uninsured Americans than when the ACA was enacted a decade ago.[11] "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, [this Court] must interpret the Act in a way that is consistent with the former, and avoids the latter." *King*, 135 S. Ct. at 2496. This Court should do just that.

II. THE ACA ENABLES LOCAL GOVERNMENTS TO PROVIDE OUR COMMUNITIES WITH BETTER HEALTHCARE

The ACA also enables *amici* to provide our communities with better health outcomes and at significantly lower public expense. By expanding access to health insurance and reducing *amici*'s uncompensated care costs, the ACA has allowed many *amici* to deliver more of the preventative and primary care services that Americans want their governments to provide and that produce better health outcomes earlier, in more appropriate settings, and at lesser expense.

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[11] Elimination of health insurance coverage would not eliminate healthcare needs or the accompanying costs. As members of this Court have recognized, without federal Medicaid funding, for example, states and local governments "would almost certainly find it necessary to increase [their] own health care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes." *NFIB*, 567 U.S. at 672 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

Prior to the ACA, the healthcare uninsured and underinsured residents required was costlier and often less effective. Without access to the primary and preventative care, prescription drugs, and early diagnosis and treatment that health insurance enables, our residents were more likely to delay seeking care, with the result that they were sicker and more costly to treat, and also more likely to access healthcare through highly costly means, such as by ambulance calls or emergency department visits.[12] For substance use and mental health conditions in particular, they were also less likely to receive the types of highly effective and less expensive early interventions and treatments that reduce the need for other high-cost government services, including our law enforcement resources and safety-net social services.[13]

Amici bear massive, but avoidable, direct costs from the less effective, less timely, and more expensive

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[12] Lack of health insurance increases healthcare costs: "Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention." *NFIB*, 567 U.S. at 594 (internal citations omitted) (opinion of Ginsburg, J.); *see also* Nat'l Academies Inst. of Med., *Care Without Coverage: Too Little, Too Late* (2002).

[13] *See* Jane B. Wishner, Urban Inst., *How Repealing and Replacing the ACA Could Reduce Access to Mental Health and Substance Use Disorder Treatment and Parity Protections* 3 (June 2017), https://perma.cc/79TG-AXZM.

care people seek when they cannot afford health insurance. For example, for just a single uninsured resident with an ear infection, the County of Santa Clara incurs hundreds of dollars more in cost when treatment is provided not in its clinics but in its emergency departments, on which the uninsured disproportionately rely.[14] Such unnecessary costs were multiplied across *amici*'s millions of uninsured residents in their encounters with our health systems, often forcing us to divert finite funds from our other critical functions or to further tax the public.

With the support of the ACA, many of *amici*'s health systems piloted dramatic system improvements for patients with chronic diseases—the persistent, prevalent, but preventable conditions, such as diabetes, certain heart diseases, and obesity, that are among the most common and costly of America's health problems, and that increase the risk of severe illness from COVID-19.[15] For example, due to the ACA, the County of Santa Clara was able to pilot a chronic conditions care management program that decreased participants' emergency department visits by more than

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[14] Benjamin T. Squire et al., *At-Risk Populations and the Critically Ill Rely Disproportionately on Ambulance Transport to Emergency Departments*, 56 Annals of Emergency Med. 341, 346 (2010).

[15] Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019: People Who Are at Higher Risk* (Apr. 15, 2020), https://perma.cc/UR8W-LNYU.

fourfold.[16] Major gains like this in quality of care and quality of life were made possible because of the ACA's Medicaid expansion, and they are mirrored by similar gains in many public healthcare systems. Because of the ACA, other public healthcare systems were able to increase by 50% the number of diabetes patients with self-management goals,[17] cut by more than fifteen times patients' rates of uncontrolled diabetes,[18] and nearly halve the readmission rate of patients at high risk of heart failure.[19]

Supported by the decreased uncompensated care costs and increased health insurance coverage landscape created by the ACA, *amici*'s health systems also effectively expanded both insured and uninsured people's access to primary and preventative care. For example, the County of Santa Clara slashed patients' wait times for primary care appointments from 53 days to fewer than 48 hours.[20] Other *amici* similarly rolled

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[16] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: Santa Clara Valley Health & Hospital System* 1 (2017), https://perma.cc/XN93-EKAP.

[17] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: Arrowhead Regional Medical Center* (2017), https://perma.cc/J9HN-T6KB.

[18] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: Natividad Medical Center* (2017), https://perma.cc/ADU7-6G5P.

[19] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: San Francisco Health Network* (2017), https://perma.cc/5E5N-CVLT.

[20] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: Santa Clara Valley Health & Hospital System* 1 (2017), https://perma.cc/XN93-EKAP.

out improvements to ensure their residents can feasibly secure timely and needed healthcare, such as co-locating behavioral health services at clinics so that patients with positive screens for depression can now be seen by a specialist in less than an hour,[21] or creating new databases to match people to the care providers who are most convenient for them.[22] Improvements such as these were especially pronounced in rural communities around the country.[23]

More than four in five Americans favor public funding for chronic disease prevention.[24] Americans also overwhelmingly favor free preventative health services.[25] The ACA reflects these values and has enabled *amici* to effectively invest in much needed and desired preventative and primary care programs, and to do so at far less cost than the care provided through

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[21] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: San Mateo Medical Center* (2017), https://perma.cc/678E-2FAX.

[22] Cal. Ass'n of Pub. Hosps. & Health Sys., *Impact of Medi-Cal Expansion: Contra Costa Health Services* (2017), https://perma.cc/8U9Q-TXTT.

[23] Megan B. Cole et al., *Medicaid Expansion and Community Health Centers: Care Quality and Service Use Increased for Rural Patients*, 37 Health Aff. (June 2018), https://perma.cc/W47A-ZXMF.

[24] Ctrs. for Disease Control & Prevention, *The Power of Prevention: Chronic Disease . . . the Public Health Challenge of the 21st Century* 1 (2009), https://perma.cc/LA45-YV77.

[25] Jessica A.R. Williams & Selena E. Ortiz, PLOS One, *Examining Public Knowledge and Preferences for Adult Preventive Services Coverage* 11 (Dec. 20, 2017), https://perma.cc/77CA-T724.

emergency treatment, or even by many private healthcare providers.[26]

The ACA's expansion of insurance access and support for delivery system reforms fueled these health and fiscal gains. Invalidating the ACA would abruptly unravel these and many parallel improvements at a time when they are deeply needed, and by upending the insurance coverage gains created by the ACA and changing the very services people seek and receive, it would force *amici* to spend more taxpayer money only to obtain poorer health outcomes—again, a result that contradicts Congress's intent in enacting the ACA.

III. INVALIDATING THE ACA WOULD HARM OUR RESIDENTS, COMMUNITIES, AND HEALTH SYSTEMS

Tens of millions of people would lose their health insurance without the ACA, and millions of those people are residents of *amici*'s counties, cities, and towns.[27]

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[26] *See*, *e.g.*, Cal. Ass'n of Pub. Hosps. & Health Sys., *Is Medi-Cal Working? Absolutely—Check the Facts* 2 (2018), https://perma.cc/8CCD-LKBN. *Amici* provided these efficient, high-value Medicaid services while earning accolades for their care, with, for example, more than half of California's public healthcare systems performing within the top 10% in the country across multiple healthcare quality metrics. *Id.*

[27] More than 20 million Americans gained health insurance through the ACA—all of whom could be at risk of joining the ranks of the long-term uninsured due to invalidation of the ACA. Kaiser Family Found., *supra* note 8. An additional 15 million previously insured people could also be forced off the insurance rolls due to the market upheaval and significant premium increases

As other *amici curiae* briefs will doubtless detail, the financial and human costs from lack of health insurance are profound and enduring. People without health insurance suffer demonstrably worse health outcomes. They are more likely to contend with financial strain, and their children are more likely to miss developmental milestones;[28] overall, their lives are shorter and less healthy.[29]

Uninsurance hurts our communities. The harms cascade and multiply, creating more sick days that harm employers, diminished educational achievement, lost jobs and tax revenue, greater need for safety-net supports, and much more. In numbers, this means that even before the pandemic made all projections much worse, Chicago alone projected $3.23 billion in lost economic impact due to an invalidated ACA.[30] National estimates are massively larger.[31]

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from just partial ACA invalidation. Cong. Budget Off., *supra* note 8, at 1.

[28] *E.g.*, Nat'l Academies Inst. of Med., *Hidden Costs, Value Lost: Uninsurance in America* 6-7, 69-76 (2003).

[29] *Id.* 3-4; Benjamin D. Sommers et al., *Mortality and Access to Care Among Adults After State Medicaid Expansions*, 367 New Eng. J. of Med. (2012).

[30] Ill. Health & Hosp. Ass'n, *ACA Repeal Economic Impact on Chicago* (2019), https://perma.cc/UAQ3-7LEF.

[31] *See*, *e.g.*, Leighton Ku et al., Commonwealth Fund, *Repealing Federal Health Reform: Economic and Employment Consequences for States* (2017), https://perma.cc/9UVH-4RLK.

All of our residents are harmed when many of our residents lack health insurance.[32] When our communities are home to sizable uninsured populations, everyone's healthcare suffers. Medical providers strain to stay open and patients report they receive lower quality care.[33] With many uninsured people in our midst, all of our residents are less satisfied with their healthcare, less able to access it, and more likely to have unmet medical needs, with especially concerning consequences for critical capital-intensive health services like mammography screenings, trauma care, neonatal intensive care, and communicable diseases.[34] "The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance." *NFIB*, 567 U.S. at 594 (opinion of Ginsburg, J.). These many harms cannot be undone after the fact. "No possible way exists to compensate in the future for health problems triggered in the past." *Cmty. Nutrition Instit. v. Butz*, 420 F. Supp. 751, 757 (D.D.C. 1976).

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[32] Julie Rovner, Kaiser Health News, *Millions More Uninsured Could Impact Health of Those with Insurance Too* (July 14, 2017), https://perma.cc/FP3A-2A8P.

[33] Mark V. Pauly & Jose A. Pagan, *Spillovers and Vulnerability: The Case of Community Uninsurance*, 26 Health Aff. 1304, 1309-10 (2007), https://perma.cc/SH4B-FA5B.

[34] *Id.* at 1307-11.

IV. INVALIDATING THE ACA WOULD LEAVE US WORSE OFF THAN BEFORE THE ACA WAS ENACTED

A ruling that Section 5000A is unconstitutional and inseverable would invalidate "one of the most consequential laws" in U.S. history. *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc). And that would just be the beginning.

The ACA amended and fundamentally reshaped laws that are themselves astounding examples of technocratic and administrative complexity. Itself "far from a *chef d'oeuvre* of legislative draftsmanship," *King*, 135 S. Ct. at 2493 n.3, the ACA altered the workings of the Medicare and Medicaid Acts, which are "among the most completely impenetrable texts within the human experience," *Rehab. Ass'n of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994).[35] The "multifaceted" "omnibus" ACA reshaped sprawling preexisting statutes and legal regimes too numerous and diverse to catalog, *NFIB*, 567 U.S. at 697, 705 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting), and then vast federal, state, and local statutory, regulatory, contractual, and

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[35] *Accord Cooper Univ. Hosp. v. Sebelius*, 636 F.3d 44, 45 (3d Cir. 2010); *Pers. Care Prods., Inc. v. Hawkins*, 635 F.3d 155, 159 (5th Cir. 2011); *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 564 (6th Cir. 2014); *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 541 (7th Cir. 2012); *Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1076 (9th Cir. 2001); *Sunshine Haven Nursing Operations, LLC v. U.S. Dep't of Health & Human Servs.*, 742 F.3d 1239, 1258 (10th Cir. 2014); *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 13 (D.C. Cir. 2011).

operational superstructures were built on top of the ACA to implement it.

A declaration that the ACA cannot be constitutionally enforced would require teasing out how these vast and varied statutory, regulatory, administrative, and contractual regimes operate without the ACA. Although "courts cannot take a blue pencil to statutes," *Murphy*, 138 S. Ct. at 1483 (Thomas, J., concurring), they would be forced to detail the rights and obligations of millions of Americans and nearly one-fifth of the American economy based on a decade-long counterfactual. Members of this Court previously estimated that it would take "years, perhaps decades," merely to litigate the validity of the provisions of the over 900-page ACA. *NFIB*, 567 U.S. at 697 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). *Amici* shudder to estimate what it would take to adjudicate all of the laws, rights, and obligations that were built on and around the ACA.

This unprecedented process would impose catastrophic costs—first and foremost on the millions of Americans who would become immediately uninsured or uninsurable. It would also devastate our counties' and cities' ability to govern and administer the laws that the ACA reshaped. *Amici* made substantial commitments under the ACA in physical infrastructure, budgets, human capital, research, services, outreach, public education, electronic systems, and much more based on the reasonable expectation that the ACA—which Congress repeatedly amended but did not repeal—would remain in place. These commitments

cannot be undone without tremendous disruption and an intervening period of chaos.

Especially concerning, much of *amici*'s pre-ACA healthcare system for the uninsured no longer exists due to the very success of the ACA. Political and practical realities mean that many counties and cities could not revert to providing the same services as they did before the ACA was enacted. Many of *amici*'s public health clinics, such as Orange County, California's Ryan White HIV/AIDS Clinic, dramatically decreased their medical services because the ACA enabled newly insured residents to access medical care in more traditional primary care settings so that they no longer need medical services from clinics designed to serve the uninsured and underinsured.[36] Other parts of our safety-net systems shuttered in response to the ACA as well. *Amici* that previously operated health centers to serve their underserved rural or urban residents closed these centers after the ACA's initial insurance changes made it possible for private providers to open or expand and provide healthcare to these populations instead. Other *amici* reduced the scope of their

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[36] *See* Cal. Healthcare Found., *Locally Sourced: The Crucial Role of Counties in the Health of Californians* 27 (Oct. 2015), https://perma.cc/M3QL-TFU5 (predicting that the ACA's "expansion of insurance coverage for prevention may reduce the need for screenings typically offered by county public health departments and even for entire public health clinics" because "many people now have insurance coverage for screening and prevention programs traditionally offered by county public health departments").

indigent care coverage programs.[37] Due to the changed healthcare landscape Congress created through the ACA, many *amici* would be less able to provide programs and services for the uninsured today than before the ACA was enacted.

Even much of the funding that local governments relied on to care for the uninsured before the ACA was enacted has been repurposed or become unavailable. *Amici* projected our budgets and structured our programs to efficiently leverage federal and state healthcare funding based on the core expectation that the ACA would continue. In many cases, the highly regulated, non-fungible funds we would have used to provide indigent care have been obligated elsewhere and cannot simply be redeployed. In California, for example, although counties have been obligated to provide health services to their indigent residents for over a century,[38] due to the ACA's dramatic reduction in the ranks of the uninsured, counties now receive only a fraction of the state money they have long relied on to fund these services, and that money is largely obligated to cover state social services instead.[39] The laws that created this change are "labyrinthine"[40]—both the product and source of highly negotiated, multi-year, multi-entity obligations that could not be unwound

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[37] *Id.* at 7.

[38] *See id.* at 3-4 (describing the history of Cal. Welf. & Inst. Code § 17000).

[39] *Id.* at 9; Cal. Dep't of Fin., *California State Budget 2018-19*, at 45-46 (2019), https://perma.cc/BJN9-EEFU.

[40] Mac Taylor, Legislative Analyst's Off., *Rethinking the 1991 Realignment* 20 (Oct. 15, 2018), https://perma.cc/Z9GE-SF86.

without great cost and chaos. Nor could California counties' designated public hospital systems claim all of the traditional federal funds for uninsured healthcare services that were available before the ACA was enacted due to changes in their cost reporting and programs driven by the ACA.[41] *Amici* today simply do not have the money or services to return to the *status quo ante* as though the ACA were never enacted.

V. INVALIDATING THE ACA WOULD UNDERMINE *AMICI*'S PANDEMIC RESPONSE WORK

Invalidation of the ACA would be all the more harmful now due to the ongoing COVID-19 pandemic. Already, Americans' prior lack of access to healthcare is expected to prolong the pandemic and increase morbidity and mortality.[42] Loss of health insurance by tens of millions more Americans could only greatly worsen those outcomes.

Undoing the ACA would imperil our cities' and counties' urgent COVID-19 response work in specific and significant ways too numerous to name. In

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[41] *See* Ctrs. for Medicare & Medicaid Servs., *Special Terms and Conditions, California Medi-Cal 2020 Demonstration* 130-140, https://perma.cc/Y8CY-4QXD (describing the current Global Payment Program reimbursement model, which replaced the Disproportionate Share Hospital reimbursement model for healthcare for the uninsured due to the ACA).

[42] *See* Jaime S. King, New Eng. J. of Med., *COVID-19 and the Need for Health Care Reform* (Apr. 17, 2020), https://perma.cc/K45Q-FCA7.

California, for example, the ACA's expansion of Medicaid to single childless adults enables counties to provide tens of thousands of the most vulnerable people who are experiencing homelessness in our communities with Medicaid-covered mental health and substance use services that allow them to successfully isolate in emergency non-congregate shelter.[43] These vital behavioral health services help our most at-risk residents experiencing homelessness isolate in motels, hotels, and trailers.[44] This in turn protects the health of our communities as a whole—preventing infectious outbreaks on our streets and public transit and overutilization of our emergency departments and critical care resources.[45]

Judicial invalidation of the ACA would also defund Prevention and Public Health Fund grants for Epidemiology and Laboratory Capacity that support many *amici*'s pandemic responses. Houston relies on these funds to support its immunoglobulin testing and the staff who manage, perform, and report on this antibody

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[43] *See* Cal. Dep't of Health Care Servs., *DHCS COVID-19 Frequently Asked Questions: Behavioral Health Services for Homeless Persons Under Project Roomkey* (Apr. 23, 2020) [hereinafter Project Roomkey], https://perma.cc/7PC7-N6Y7 (describing Project Roomkey); *see also* Nat'l Health Care for the Homeless Council, *Health Insurance at HCH Program: Fact Sheet* (2018), https://perma.cc/BRJ6-49E2.

[44] Off. of Governor Gavin Newsom, *At Newly Converted Motel, Governor Newsom Launches Project Roomkey: A First-in-the-Nation Initiative to Secure Hotel & Motel Rooms to Protect Homeless Individuals from COVID-19* (Apr. 3, 2020), https://perma.cc/5MLN-VGZY.

[45] Project Roomkey, *supra* note 43.

testing. In Chicago, the grants support syndromic surveillance and case investigations; additional staffing, including infection prevention specialists and others dedicated to infection reduction at long-term care facilities; and public health informatics improvements. Philadelphia's grant supports surveillance and containment work in response to the current pandemic. Los Angeles County uses the grant to fund key epidemiology and laboratory staff who are helping respond to the COVID-19 pandemic.

Elimination of the ACA would harm our cities' and counties' critical pandemic coordination in still other ways. It would cut off access to mental health and substance use supports at a time when a global pandemic is expected to swell population-wide need for just these services.[46] It would also jeopardize *amici*'s ability to help people with disabilities receive the care that they need in their homes and communities, rather than in the nursing homes and institutional settings that have been the sites of many of our nation's largest and most lethal COVID-19 outbreaks.[47] The ACA enacted a slate

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[46] *See* 42 U.S.C. § 18022(b)(1)(E) (making mental health and substance use services essential benefits); 42 U.S.C. §§ 300gg-26(a), 1396u–7(6), 18031(j) (strengthening the Mental Health Parity and Addiction Equity Act); Sandro Galea et al., JAMA Internal Med., *The Mental Health Consequences of COVID-19 and Physical Distancing: The Need for Prevention and Early Intervention* (Apr. 10, 2020), https://perma.cc/J48U-GQJQ.

[47] Farah Stockman et al., *"They're Death Pits": Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. Times (Apr. 17, 2020), https://perma.cc/89RK-JNYB.

of programs that together support hundreds of thousands of Americans with disabilities in receiving home and community-based services, including by funding non-institutional long-term care,[48] by supporting transition services that help people move from institutions to community-based care,[49] and by expanding home supports for people who need assistance but not institutional level care.[50] Invalidating the ACA would defund these essential services that support the health and independence of many of our most at-risk residents, while harming *amici*'s ability to assist our communities as a whole. In innumerable ways, finding Section 5000A unconstitutional and inseverable would produce "exactly the opposite" result from the one Congress sought. *Murphy*, 138 S. Ct. at 1483. This is not—and could not be—what Congress would want.

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[48] Sarita L. Karon et al., U.S. Dep't Health & Human Servs., *Final Outcome Evaluation of the Balancing Incentive Program* 12 (2019), https://perma.cc/JKN2-KDHN.

[49] Rebecca Coughlin et al., Mathematica Pol'y Res., *Money Follows the Person Demonstration: Overview of State Grantee Progress, January to December 2016*, at 1 (2017), https://perma.cc/M7J2-CMFM.

[50] Molly O'Malley Watts et al., Kaiser Family Found., *Medicaid Home and Community-Based Services Enrollment and Spending* 5 (2020), https://perma.cc/FBY8-4GQC; Elizabeth Edwards, Nat'l Health Law Program, *Helping Those on HCBS Waiting Lists: Positive Impacts of the ACA* 14 (2017), https://perma.cc/KKE8-LGDX.

CONCLUSION

Amici urge this Court to reverse the judgment of the Court of Appeals.

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