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

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| **CITY OF CHICAGO,**<br><br>Plaintiff,<br><br>vs.<br><br>**ALEX M. AZAR, II, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al*.,**<br><br>Defendants. | Case No. 20-cv-1566-TJK |

**BRIEF OF AMICI STATES CALIFORNIA, MICHIGAN, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, MARYLAND, MINNESOTA, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

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## INTEREST OF AMICI STATES

The States of California, Michigan, Connecticut, Delaware, District of Columbia, Hawaii, Maryland, Minnesota, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Virginia (collectively "Amici States"), submit this brief as amici curiae in support of Plaintiff's Motion for a Preliminary Injunction or, in the alternative, Expedited Summary Judgment. Amici States have a compelling interest in protecting the health and welfare of their residents, which includes ensuring a strong and stable healthcare system. The most vital authority protecting that system is the Patient Protection and Affordable Care Act (ACA). One crucial aspect of the ACA is the healthcare exchanges, where individuals can purchase affordable, comprehensive healthcare for themselves and their families. Facing the COVID-19 pandemic, the exchanges are even more important, as an infection could mean massive medical bills for people who are uninsured. The ACA permits healthcare exchanges to open special enrollment periods to allow registration into health insurance plans outside of the yearly open enrollment window. States that operate their own healthcare exchanges have already opened special enrollment periods to ensure access to affordable healthcare. The refusal of the Secretary of Health and Human Services (HHS) to open a special enrollment period in the 38 states on the federal exchange during this time is not only irresponsible, but also dangerous, leaving millions of Americans without healthcare options. The refusal of HHS interferes with states' ability to protect the health of their residents and abdicates federal responsibility to run healthcare exchanges.

## INTRODUCTION

To facilitate the Court's consideration of this case, this brief first addresses the significance of the ACA and impact of COVID-19 on states—including the statutory mandates that ensure access to quality, affordable healthcare coupled

with a once-in-a-century pandemic—which have prompted states to open a special enrollment period. Next, the brief addresses the success of state-run exchanges that have already opened special enrollment periods in response to COVID-19. These states have enrolled thousands of people in quality health insurance that provides access to needed care and financial peace of mind—not to mention encouraging consumers to seek the testing and treatment necessary to reduce the spread of COVID-19. Finally, the brief offers the experiences of states to show the effectiveness and desirability of special enrollment periods in order to facilitate the Court's consideration of Plaintiff's Motion. These facts demonstrate that Plaintiff is entitled to a preliminary injunction enjoining Defendants' violations of the Administrative Procedure Act or, in the alternative, Summary Judgment.

## ARGUMENT

### I. THE AFFORDABLE CARE ACT PROTECTS CONSUMERS AND INCREASES ACCESS TO AFFORDABLE HEALTHCARE

#### A. The ACA Reforms Have Helped Millions of People

The ACA, passed in 2010, transformed our nation's healthcare system, increasing access to affordable, quality healthcare. Its purpose was to increase the number of Americans with health insurance, lower health costs, and improve financial security and wellbeing for families. *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519, 538 (2012). Congress accomplished this through a series of reforms, including strengthening consumer protections in the private insurance market, expanding the traditional Medicaid program, providing subsidies to lower premiums, and creating effective state health insurance exchanges. *King v. Burwell*, 135 S.Ct. 2480, 2482 (2015). The ACA has

enabled more than 20 million Americans to obtain health coverage,[1] allowing states to greatly reduce the number of uninsured residents.[2]

These reforms have provided peace of mind to Americans, who now have financial protection in the event of severe illness, irrespective of pre-existing health conditions. Among the ACA's many reforms, insurers may no longer discriminate against those with pre-existing health conditions, charge more for care based on health status, charge women more than men, or set lifetime or annual limits on coverage. In addition, insurers must provide coverage for essential health benefits, including ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use treatment, prescription drugs, laboratory services, and preventative services and chronic disease management, among others.[3]

By dramatically reducing the number of uninsured Americans, the ACA has also ensured that fewer Americans face bankruptcy due to medical bills or forgo treatment out of a fear of the financial costs of doing so.[4] Indeed, the

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[1] Kaiser Family Foundation, *Key Facts About the Uninsured Population* (Dec. 7, 2018), at 1, https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/ (last visited Jun. 15, 2020).

[2] *See* Kaiser Family Foundation, *State Health Facts*, https://tinyurl.com/y7byxtwg (last visited Jun. 11, 2020).

[3] 42 U.S.C. § 300gg(a) (prohibiting premium rating based on pre-existing conditions or gender); 42 U.S.C. § 300gg-4 (prohibiting discrimination based on health status); 42 U.S.C. § 300gg-11 (prohibiting lifetime or annual limits); 42 U.S.C. § 300gg-12 (prohibiting rescissions except in cases of fraud); 42 U.S.C. § 18022 (establishing the essential health benefits package).

[4] "The ACA newly required all private health plans to end the use of annual and lifetime limits and to include an annual out-of-pocket limit on cost sharing. An estimated 22 million people enrolled in employer coverage are now protected against catastrophic costs. [ ] While data collected on personal bankruptcy does not include causes, filings dropped by about 50 percent between 2010 and 2016; experts attribute some of this change to the new financial protections offered by the ACA starting in 2010." Declaration of Henry J. Aaron, ¶ 16, *Texas v. Azar*,

(continued…)

number of families who say they are having problems paying medical bills has fallen dramatically since 2013, particularly among low and moderate income families,[5] and bankruptcy filings dropped approximately 50 percent between 2010 and 2016, which experts attribute in part to the ACA.[6]

### B. The ACA Contemplated the Need for Flexibility in the Administration of the Exchanges through Special Enrollment Periods

In addition to the consumer protections outlined above, the ACA created state and federal healthcare insurance exchanges, where Americans—particularly those without employer-sponsored insurance—can compare and purchase coverage. The ACA provides that if a state elects not to establish its own exchange, the Secretary of HHS "shall . . . establish and operate such exchange within the State." 42 U.S.C. § 18041(c)(1). Twelve states and the District of Columbia have established state-based exchanges. 42 U.S.C. § 18031(b)(1).[7] Thirty-eight states, however, rely on the federal government in whole or in part to operate their insurance exchanges.[8] HHS opens the federal insurance exchanges each year for an open enrollment period, as required by the ACA. 42 U.S.C.

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340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167-O) (*internal citations omitted*).

[5] Michael Karpman and Sharon K. Long, *9.4 Million Fewer Families Are Having Problems Paying Medical Bills*, Urban Inst. (May 21, 2015), at 1, http://hrms.urban.org/briefs/9-4-Million-Fewer-Families-Are-Having-Problems-Paying-Medical-Bills.pdf.

[6] Allen St. John, *How the Affordable Care Act Drove Down Personal Bankruptcy*, Consumer Reports (May 2, 2017), https://www.consumerreports.org/personal-bankruptcy/how-the-aca-drove-down-personal-bankruptcy/.

[7] *See* Kaiser Family Foundation, *State Health Insurance Marketplace Types, 2020*, https://tinyurl.com/yafjlgjn.

[8] *Id.*

§ 18031(c)(6)(B). The 2020 open enrollment period ran from November 1, 2019, to December 18, 2019, well before any American could have been expected to take the COVID-19 pandemic into account when making health insurance decisions for 2020.

The ACA envisioned the need for flexibility in administering the open enrollment period, providing that "the Secretary shall require an exchange to provide for . . . special enrollment periods under circumstances similar to such periods under part D of title XVIII of the Social Security Act [42 U.S.C. 1395w–101 et seq.][ ]" 42 U.S.C. § 18031(c)(6). Special enrollment periods recognize the need for special rules each year to allow individuals to sign up for coverage outside of the open enrollment period. These include qualifying life events, such as marriage, birth of a child, or losing employer-sponsored insurance, which can qualify a person for a special enrollment period within certain parameters. 42 U.S.C. § 1395w-101(b)(3)(C).

The ACA also provides for additional "exceptional circumstances" that trigger a special open enrollment period for uninsured individuals, such as unanticipated events, often outside of individuals' control. 45 C.F.R. § 155.420(d)(9). In the past, HHS has used the "exceptional circumstances" provision to create special enrollment periods for people affected by natural disasters such as hurricanes, earthquakes, and flooding[9] and for survivors of domestic violence.[10] Moreover, HHS has opened special enrollment periods for

[9] *See Special Enrollment Periods for Complex Issues*, HealthCare.gov, https://www.healthcare.gov/sep-list/ (last visited June. 15, 2020).

[10] CMS, *Updated Guidance on Victims of Domestic Abuse and Spousal Abandonment*, July 2015, at 1.

anyone living in a county that is eligible to apply for "individual assistance" or "public assistance" by the Federal Emergency Management Agency.[11]

To date, HHS has refused to open a special enrollment period in response to this global pandemic, despite the facts that: (1) HHS declared a public health emergency on January 31, 2020, pursuant to section 319 of the Public Health Service Act, 42 U.S.C. § 247d;[12] (2) President Trump declared a National Emergency on March 13, 2020, retroactive to March 1, 2020;[13] and (3) all 50 states declared an emergency in response to the pandemic.[14]

There is no greater "exceptional circumstance" than a global pandemic. And the current pandemic has left Americans battling a historic economic downturn while simultaneously facing the prospect of costly medical expenses at the hands of a disease for which no vaccine nor approved treatment currently exists. A special enrollment period would not only assist individuals who have lost coverage due to the COVID-19 pandemic, but would also benefit individuals who never enrolled in healthcare coverage in the first place, such as low-wage and "gig" workers who would otherwise be without coverage until 2021, after enrolling in the next open enrollment period later this year.

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[11] *See Special Enrollment Periods for Complex Issues*, HealthCare.gov, https://www.healthcare.gov/special enrollment period-list/ (last visited Apr. 22, 2020).

[12] *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 FR 15198-01.

[13] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited June 8, 2020)(parenthetical in original).

[14] *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 FR 15198-01.

## II. ACCESS TO MEDICAL TREATMENT IS ESSENTIAL TO THIS PUBLIC HEALTH AND ECONOMIC CRISIS

COVID-19 marks the most serious public health emergency this country has faced in over a century. To date, the United States has had more than two million confirmed cases of COVID-19 and 115,000 deaths.[15] The President and HHS Secretary Alex Azar have declared states of emergency in response to the pandemic, as has every state, the District of Columbia, and several U.S. territories.[16]

The impact of the pandemic highlights the pressing societal need for medical treatment and comprehensive insurance coverage. While tests for the disease may be free, treatment may not be. And medical bills for uninsured individuals can cost tens of thousands of dollars.[17] Moreover, many workers who have been deemed "essential" to the economy lack the resources to take time off work, are more likely to be uninsured, and are frequently placed in high-risk situations that facilitate the spread of COVID-19.[18]

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[15] Johns Hopkins University and Medicine, *Coronavirus Resource Center*, https://coronavirus.jhu.edu/map.html (last visited Jun. 15, 2020).

[16] *See* Anagha Srikanth, *This Is Where Your State Stands on Reopening During the Coronavirus Pandemic*, The Hill (Apr. 3, 2020), https://thehill.com/changing-america/well-being/prevention-cures/491064-which-states-have-told-residents-to-stay-home.

[17] Megan Leonhardt, *Uninsured Americans Could Be Facing Nearly $75,000 in Medical Bills if Hospitalized for Coronavirus*, CNBC (Apr. 1, 2020), https://www.cnbc.com/2020/04/01/covid-19- hospital-bills-could-cost-uninsured-americans-up-to-75000.html; Reed Abelson, *Now That Coronavirus Tests Are Free, Some Insurers Are Waiving Costs for Treatment*, New York Times, https://www.nytimes.com/2020/03/19/health/coronavirus-tests-bills.html (updated Mar. 31, 2020); Abigail Abrams, *Total Cost of Her COVID-19 Treatment: $34,927.43*, Time (Mar. 19, 2020), https://time.com/5806312/coronavirus-treatment-cost/.

[18] *See* Samantha Artiga & Matthew Rae, *The COVID-19 Outbreak and Food Production Workers: Who Is at Risk?*, Kaiser Family Foundation (Jun. 3, 2020),

(continued…)

Widespread numbers of uninsured Americas and high treatment costs will likely cause infected individuals to delay care until it is absolutely necessary (that is, hospitalization is necessary), or to forgo care altogether. [19] According to a Kaiser Family Foundation analysis, costs for patients hospitalized for COVID-19 may reach $20,000 per person, while individuals can expect to pay an average of at least $1,300 in out-of-pocket costs.[20] In addition, almost 40 percent of patients report a negative impact on their mental health stemming from the pandemic.[21] In short, Americans need coverage as they face this pandemic, and states need the

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https://www.kff.org/coronavirus-covid-19/issue-brief/the-covid-19-outbreak-and-food-production-workers-who-is-at-risk.

[19] Although COVID-19 testing is covered for most patients pursuant to the Families First Coronavirus Response Act (FFCRA), there is not yet corresponding coverage for COVID-19 treatment. Rachel Fehr et al., *Five Things to Know About the Cost of COVID-19 Testing and Treatment*, Kaiser Family Foundation (May 26, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/five-things-to-know-about-the-cost-of-covid-19-testing-and-treatment/. Even for patients with employer-sponsored insurance, out-of-pocket costs for a pneumonia admission could exceed $1,300; furthermore, costs and length of hospital stays both increase when a patient requires ventilator support. Matthew Rae et al., *Potential Costs of COVID-19 Treatment for People with Employer Coverage*, Peterson-Kaiser Health System Tracker (Mar. 13, 2020), https://www.healthsystemtracker.org/brief/potential-costs-of-coronavirus-treatment-for-people-with-employer-coverage/.

[20] *Id*. Consumers have reported receiving exorbitant bills following COVID testing: a Vermont resident, for example, received a $1,622.52 bill for hospital charges for an ER visit associated with COVID-19 testing; a Colorado resident reported a $1,200 bill in coinsurance charges for her ER treatment. Elisabeth Rosenthal et al., *Analysis: He Got Tested For Coronavirus. Then Came The Flood Of Medical Bills*, Kaiser Family Foundation (Apr. 1, 2020), https://khn.org/news/covid19-coronavirus-test-surprise-medical-bill/; Walecia Konrad, *After battling COVID-19, survivors may have to fight big medical bills*, Moneywatch (May 15, 2020) at 1, https://www.cbsnews.com/news/covid-19-health-care-costs-medical-treatment/.

[21] Matthew Rae et al., *supra* note 19 at 1.

support of the federal government to help contain the spread of the disease and ensure that residents can obtain needed healthcare.

Furthermore, increasing numbers of uninsured patients seeking hospital care will drive up uncompensated care costs for hospitals and states—one report shows a 13 percent increase over last year; another predicts an 18 percent increase.[22] Although it is difficult to determine the precise distribution of uncompensated care costs between providers and the government, one analysis estimated that in 2013, about 65 percent of such costs ($52.6 billion) were covered by government programs.[23] Out of this sum, about 62.4 percent ($32.8 billion) came from the federal government, and the remaining 37.6 percent ($19.8 billion) came from state and local programs.[24]

The current healthcare crisis has also led to an enormous spike in unemployment. Millions of Americans submit new claims weekly.[25] In April alone, more than 20 million filed for unemployment, pushing the unemployment rate to 14.7 percent.[26] Since mid-March, nearly 45 million people have filed

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[22] Jim Blake et al., *National Hospital Flash Report*, Kaufman Hall (Apr. 2020), https://flashreports.kaufmanhall.com/kha-perspective-april-2020; Federation of American Hospitals, *COVID-19 Alert: U.S. Hospital Finances in Critical Condition*, at 2, https://www.fah.org/fah-ee2-uploads/website/documents/COVID-19_Alert-_U.S._Hospital_-_FINAL.pdf (citing *Survey of Hospital CEO/CFOs on Earnings Impact of COVID-19 and Recession*, Piper Sandler (Apr. 6, 2020)).

[23] Teresa Coughlin et al., *An Estimated $84.9 Billion in Uncompensated Care Was Provided in 2013; ACA Payment Cuts Could Challenge Providers*, 33 HEALTH AFFAIRS 807, 812 (2014), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1068.

[24] *Id.*

[25] U.S. Dept. of Labor, *News Release* (May 28, 2020), at 1, https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20201122.pdf.

[26] U.S. Bureau of Labor Statistics, *The Employment Situation—April 2020*, May 8, 2020, at 1, *available at*

(continued...)

unemployment claims, representing one out of four American workers.[27] Troublingly, the actual number of unemployed may actually be much higher.[28] Although states are proceeding into the early phases of reopening, recent spikes in several states signal new COVID-19 hot spots, and experts have identified a continued wave of infections.[29]

Massive unemployment has important implications for people's ability to obtain healthcare coverage, as well as to pay for medical care. Before March of this year, 160 million Americans under age 65 received health insurance from their employers.[30] Many now find themselves both without a job and without

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https://www.bls.gov/news.release/archives/empsit_05082020.html; *see generally* U.S. Bureau of Labor Statistics, *Local Area Unemployment Statistics*, https://www.bls.gov/lau/.

[27] Tiffany Hsu, *Sobering Jobs Outlook: 'We're Expecting a Long Haul'*, N.Y. TIMES, June 11, 2020, at 1, *available at* https://www.nytimes.com/2020/06/11/business/economy/unemployment-claims-coronavirus.html.

[28] *See, e.g.*, Robert Shapiro, *No, the Unemployment Rate Didn't Really Drop in May*, Brookings Institution, Jun. 8, 2020, *available at* https://www.brookings.edu/blog/fixgov/2020/06/08/no-the-unemployment-rate-didnt-really-drop-in-may/; Marketplace, *The Unemployment Rate Spiked to 14.7% in April. It Doesn't Fully Capture COVID-19 Job Losses*, May 8, 2020, *available at* https://www.marketplace.org/2020/05/08/covid-19-april-unemployment-rate/.

[29] Emma Court & David Baker, *Second U.S. Virus Wave Emerges as Cases Top 2 Million*, BLOOMBERG, (Jun. 10, 2020), at 1, *available at* https://www.bloomberg.com/news/articles/2020-06-10/second-u-s-virus-wave-emerges-after-state-reopenings.

[30] Bowen Garrett & Anuj Gangopadhyaya, *How the COVID-19 Recession Could Affect Health Insurance Coverage*, Urban Inst., May 2020, at 1, *available at* https://www.urban.org/research/publication/how-covid-19-recession-could-affect-health-insurance-coverage/view/full_report (Census data showing that in 2018, 55.1 percent of adults under 65 were covered by employer-sponsored insurance); Edward R. Berchick, et al., *Health Insurance Coverage in the United States: 2018* (Nov. 2019), at 2, *available at* https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-267.pdf.

health insurance. Even more troubling, the past months have exposed just how much the risk of infection—and the outcome of an infection—hinges on one's socio-economic status. Low-wage workers often work in close proximity with others, such as in as in grocery stores, factories, or making home deliveries. These same low-wage workers are also the least likely to have employer-sponsored healthcare benefits.[31]

Unemployment is also affecting those who received insurance through their jobs. A Kaiser Family Foundation report estimates that "as of May 2, 2020, nearly 27 million people could potentially lose ESI [employer-sponsored insurance] and become uninsured following job loss."[32] The report estimates that more than 12 million of these people will be eligible for Medicaid, and another 8 million will be eligible for tax credits on the insurance exchanges. An estimate from the Urban Institute predicts that if the unemployment rate rises to 20 percent, between 25 and 43 million people could lose employer-sponsored insurance.[33] These effects could hit people with employer-sponsored insurance who make less than $50,000 per year the hardest.[34]

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[31] U.S. Congress. Joint Economic Committee. *The Impact of Coronavirus on the Working Poor and People of Color*, https://www.jec.senate.gov/public/_cache/files/bbaf9c9f-1a8c-45b3-816c-1415a2c1ffee/coronavirus-race-and-class-jec-final.pdf (last visited June 19, 2020).

[32] Rachel Garfield, et al., *Eligibility for ACA Health Coverage Following Job Loss*, Kaiser Family Foundation (May 13, 2020), at 1, https://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/.

[33] Garrett & Gangopadhyaya, *supra* note 30 at 1.

[34] Health Management Associates, *COVID-19 Impact on Medicaid, Marketplace, and the Uninsured, by State* (Apr. 3, 2020), at 1, https://www.healthmanagement.com/wp-content/uploads/HMA-Estimates-of-COVID-Impact-on-Coverage-public-version-for-April-3-830-CT.pdf.

## III. THE EXPERIENCES OF STATES THAT OPENED SPECIAL ENROLLMENT PERIODS DEMONSTRATE THE IMPORTANCE OF PROVIDING ACCESS TO AFFORDABLE HEALTHCARE WHEN CONSUMERS MOST NEED IT.

As part of their obligation to protect the health and well-being of their residents, twelve of the thirteen states with their own exchanges have opened a special enrollment period in response to COVID-19.[35] These states determined that the public health crisis and corresponding economic crisis constituted an "exceptional circumstance" and recognized that many of their residents may have experienced a change in circumstances that necessitated coverage or a switch in healthcare plans, or that they may now qualify for exchange subsidies or Medicaid.[36]

Collectively, states with open special enrollment periods have enrolled more than two hundred thousand new residents during the pandemic, many of whom are eligible for exchange subsidies. In California, for example, the rate of sign-ups during the pandemic has been nearly 2.5 times as high as the rate during the same period last year.[37] Other states have also greatly expanded the number of health insurance enrollees by opening a special enrollment period, as summarized in the table below:

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[35] Idaho did not open a special enrollment period for COVID-19. However, Idaho has streamlined the process for enrollees eligible due to a loss of ESI, requiring only a written statement explaining loss of employer-sponsored coverage to enroll. Health Idaho, *COVID-19 and Your Health Idaho*, https://www.yourhealthidaho.org/covid-19/#1586207511613-c6b8c5cc-7d70.

[36] Louise Norris, *COVID-19: State and Federal Efforts to Improve Access to Testing, Treatment, and Health Coverage*, HealthInsurance.org (May 28, 2020), https://www.healthinsurance.org/obamacare/state-and-federal-efforts-to-improve-access-to-covid-19-testing-treatment/#sep.

[37] *Id.*

| **New Enrollees in State-based Exchanges** | | |
|---|---|---|
| State | SEP Dates | New Enrollees |
| California | Mar. 20–Jun. 30 | 155,470[38] |
| Colorado | Mar. 20–Apr. 30 | 14,263[39] |
| Connecticut | Mar. 19–Apr. 17 | 7,345[40] |
| District of Columbia | Feb. 6–Sep. 15 | 2,072[41] |
| Maryland | Mar. 16–Jun. 15 | 43,232[42] |
| Massachusetts | Mar. 11–Jun. 23 | 20,000[43] |

[38] Covered California, *Covered California's Enrollment Continues to Surge During the COVID-19 Pandemic* (June 12, 2020), https://www.coveredca.com/newsroom/news-releases/2020/06/12/covered-californias-enrollment-continues-to-surge-during-the-covid-19-pandemic/. As of June 12, 2020.

[39] Rachel Schwab, Justin Giovannelli & Kevin Lucia, *During the COVID-19 Crisis, State Health Insurance Marketplaces Are Working to Enroll the Uninsured*, Commonwealth Fund (May 19, 2020), https://www.commonwealthfund.org/blog/2020/during-covid-19-crisis-state-health-insurance-marketplaces-are-working-enroll-uninsured. The data for Colorado reflects enrollees through both the COVID-19 SEP and the loss of minimum essential coverage SEP as of April 30, 2020, when the SEP ended.

[40] Data from Access Health CT, Jun. 4, 2020. Data reflects enrollment numbers as of June 1, 2020. 2,209 of these enrolled through the COVID-19 SEP.

[41] Schwab, Giovannelli & Lucia, *supra* note 39. Data is as of April 19, 2020.

[42] Maryland Health Benefit Exchange, *30,000+ Marylanders Have Enrolled During the Coronavirus Emergency Special Enrollment Period* (May 18, 2020), at 1, https://www.marylandhbe.com/wp-content/uploads/2020/05/Coronavirus-SEP_One-Month-Left-Press-Release.pdf. Data is as of May 15, 2020.

[43] Massachusetts Health Connector, *Massachusetts Health Connector Continues Extended Enrollment as Nearly 45,000 People Enroll in New Plans, Update Current Coverage* (Apr. 28, 2020), https://www.mahealthconnector.org/health-connector-continues-extended-enrollment. Data is as of April 28, 2020. 8,300 of these enrolled through the COVID-19 SEP. Massachusetts Health Connector, *Massachusetts Health Connector COVID-19 Special Enrollment Period: Results to Date* (May 1, 2020), at 1, https://www.mahealthconnector.org/wp-content/uploads/Health-Connector-COVID-19-SEP-Brief-050120.pdf.

| | | |
|---|---|---|
| Minnesota | Mar. 23–Apr. 21 | 9,482[44] |
| Nevada | Mar. 17–May 15 | 2,712[45] |
| Rhode Island | Mar. 14–Apr. 30 | 1,316[46] |
| Washington | Mar. 10–May 8 | 21,411[47] |
| Vermont | Mar. 20–Jun. 15 | 857[48] |

These special enrollment periods also benefit those who still have coverage. People who are still employed but experience a change in income or working hours may become eligible for a different plan or for exchange subsidies to help pay for their coverage. For example, in Massachusetts, between March 11 and April 28, 12,000 people changed their plans after reporting a change in income, and another 11,600 moved to MassHealth (Medicaid and CHIP in Massachusetts).[49] Likewise, Connecticut has recorded 41,001 HUSKY Health enrollments (Medicaid and CHIP in Connecticut) between March 19 and June 1.[50] And in Maryland, more than 64 percent of residents used the pandemic special

[44] Schwab, Giovannelli & Lucia, *supra* note 39. Data is current as of April 21, when the SEP ended. 6,023 of these enrolled through the COVID-19 SEP.

[45] *Id.* Data is as of April 15, 2020.

[46] *Id.* Data is as of April 19, 2020.

[47] Washington Health Benefit Exchange, *Supplemental Report: Uninsured Special Enrollment Period* (Jun. 2020), at 4, https://www.wahbexchange.org/wp-content/uploads/2020/06/Supplemental-report_uninsured-FINAL.pdf. Data is as of May 8, 2020, when the SEP ended. 7,000 of these enrolled through the COVID-19 SEP.

[48] Data from Vermont Health Connect, May 28, 2020. Data is current as of May 28. 389 of these enrolled through the COVID-19 SEP.

[49] Massachusetts Health Connector, *Massachusetts Health Connector Continues Extended Enrollment as Nearly 45,000 People Enroll in New Plans, Update Current Coverage* (Apr. 28, 2020), https://www.mahealthconnector.org/health-connector-continues-extended-enrollment. As noted in the table, another 20,000 people in Massachusetts were new enrollees during the SEP, bringing the total to almost 45,000 people who either updated or enrolled in coverage.

[50] Data from Access Health CT, Jun. 4, 2020.

enrollment period to enroll in Medicaid, and the majority of those who opted to enroll in private insurance qualified for financial help to lower the cost of the plan.[51]

The experience of the state-based exchanges demonstrates a special enrollment period would benefit all Americans, including those in states dependent upon the federal exchange. The 38 states that rely on the federal HealthCare.gov exchange, in whole or in part, including *amici* Michigan Delaware, Hawaii, New Mexico, North Carolina, Oregon, and Pennsylvania have the same interests in the health of their residents and the preservation of state resources.[52] States that use the federal exchange have significant number of residents who have already obtained health insurance through these exchanges. The numbers total in the millions, as confirmed by reviewing six larger states in 2020: Pennsylvania (331,825), Illinois (292,945), Ohio (196,806), Georgia (463,910), North Carolina (505,275), and Michigan (262,919).[53]

A special enrollment period would create an opportunity for the millions more in these states who remain uninsured to obtain healthcare coverage. Moreover, the economic consequences of the pandemic—namely historic levels of unemployment—have not been limited to any particular region of the country. In Michigan, for example, the unemployment rate exceeds 22%, the highest in generations, with more than a million Michigan residents seeking unemployment

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[51] Maryland Health Benefit Exchange, *30,000+ Marylanders Have Enrolled During the Coronavirus Emergency Special Enrollment Period* (May 18, 2020), https://www.marylandhbe.com/wp-content/uploads/2020/05/Coronavirus-SEP_One-Month-Left-Press-Release.pdf.

[52] Kelsey Waddill, *Special Enrollment Period Trends on State ACA Marketplaces*, Health Payer Intelligence (May 20, 2020), https://healthpayerintelligence.com/news/special-enrollment-period-trends-on-state-aca-marketplaces.

[53] Kaiser Family Foundation, *Marketplace Enrollment 2014–2020* (Jun. 12, 2020), https://www.kff.org/health-reform/state-indicator/marketplace-enrollment/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

in April.[54] A special enrollment period would help residents of Michigan, and other similarly situated states, obtain coverage with greater ease.

Opening a special enrollment period will improve public health, as residents with insurance are more likely to seek out appropriate medical care if they need not worry about the potentially catastrophic costs of doing so. In the face of a pandemic, seeking out healthcare can make the difference between a single patient treated by a doctor with instructions as to how to reduce transmissions, or an untreated patient circulating widely throughout the community, infecting many others.

Should HHS open a special enrollment period, the residents who live in the 38 states that operate under the federal exchange would have the same opportunity to obtain healthcare coverage as those living in almost all of the states with their own exchanges. With the zeroing out of the shared responsibility payment at the federal level, millions of Americans decided to forgo healthcare coverage. However, now living through the COVID-19 pandemic, many of them likely want healthcare coverage now, and they can obtain it only if they are fortunate enough to reside in one of the 12 states that has established a special enrollment period. It is crucial that HHS utilize the tools it has available to ensure as many people have access to affordable healthcare as possible.

## CONCLUSION

The Amici States join in asking the Court to grant Plaintiff's Motion for a Preliminary Injunction or, in the alternative, Expedited Summary Judgment.

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[54] Keith Laing, *Michigan Unemployment Rate Tops 22%, Worse than Great Recession*, DETROIT NEWS (May 20, 2020), https://www.detroitnews.com/story/business/2020/05/20/michigan-jobless-rate-tops-22-worse-than-great-recession/5229657002/.

Dated: June 22, 2020

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# CERTIFICATE OF SERVICE

Case Name: *City of Chicago v. Alex M. Azar* No. 20-cv-1566-TJK

I hereby certify that on June 22, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**BRIEF OF AMICI STATES CALIFORNIA, MICHIGAN, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, MARYLAND, MINNESOTA, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Additionally, pursuant to Federal Rule of Civil Procedure 5(b)(2)(E), and with the written consent of the parties, the foregoing document and accompanying exhibits were served on both parties by electronic mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 22, 2020, at Sacramento, California.

| Neli N. Palma | */s/ Neli N. Palma* |
|---|---|
| Declarant | Signature |