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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JOHN DOE #1; JUAN RAMON MORALES;
JANE DOE #2; JANE DOE #3; IRIS
ANGELINA CASTRO; BLAKE DOE;
BRENDA VILLARRUEL; and LATINO
NETWORK,

Plaintiffs,
v.

DONALD TRUMP, in his official capacity as
President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; KEVIN MCALLENAN, in his
official capacity as Acting Secretary of the
Department of Homeland Security; U.S.
DEPARTMENT OF HEALTH AND
HUMAN SERVICES; ALEX M. AZAR II, in
his official capacity as Secretary of the
Department of Health and Human Services;
U.S. DEPARTMENT OF STATE; MICHAEL
POMPEO, in his official capacity as Secretary
of State; and UNITED STATES OF
AMERICA,

Defendants.

Case No. 3:19-cv-01743-SI

BRIEF OF AMICI CURIAE STATES AND
CITY IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE.....	9
ARGUMENT	11
I. Immigrants are Vital to the Economic, Civic, and Social Fabric of Amici States and City	11
A. The Proclamation Will Result in the Separation of Families	11
B. Immigrants Are Key Contributors to Amici's Economies	14
II. The Proclamation May Adversely Affect Amici States' Health Insurance Markets	17
A. The Proclamation Undermines Congress's Objective of Providing Legal Immigrants With Access to Comprehensive and Affordable Coverage	17
B. The Proclamation Directs Immigrants to Purchase Health Insurance That Does Not Comply With the ACA, Which Will Increase Amici's Regulatory Burdens	19
C. Directing Immigrants to Purchase Non-ACA Compliant Insurance May Increase Uncompensated Care Costs and Harm Insurance Markets	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

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430 U.S. 787 (1977).....	11
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135 S. Ct. 2480 (2015).....	17
<i>Moore v. City of East Cleveland</i>	
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132 S. Ct. 2566 (2012).....	17
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401 F.3d 1090 (9th Cir. 2005)	11

STATUTES

8 U.S.C.	
§ 1151(b).....	11
§ 1151(c)	11
§ 1151(d).....	11
 26 U.S.C.	
§ 36B.....	17, 18
§ 36B(b)(3)(A)(i)	18
§ 36B(c)(1)(B)(ii).....	18
 42 U.S.C.	
§ 18022(b)(1)	21
§ 18032(c)(1)	23
§ 18032(f)(1)(A)(ii)	17, 19
§ 18071(b).....	17
§ 18071(c)(2)	17
§ 18071(f)(2).....	17
 Immigration and Nationality Act	11, 19
INA of 1990, Pub. L. No. 101-649, 104 Stat. 497	11
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Patient Protection and Affordable Care Act	<i>passim</i>

Pub. L. 111-148 (Mar. 23, 2010) 17

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https://www.americanimmigrationcouncil.org/research/immigrants-in-maine	15
https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts	16
https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york	16
https://www.americanimmigrationcouncil.org/research/immigrants-in-washington	15, 16
https://www.americanimmigrationcouncil.org/research/immigrants-in-washington-dc	16
https://www.americanimmigrationcouncil.org/research/immigrants-oregon	14, 16
https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/41423-hr-3590-senate.pdf	18
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https://www.chcf.org/blog/uncompensated-hospital-care-costs-in-california-continued-to-decline-in-2016/	19
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https://www.commonwealthfund.org/blog/2019/seeing-fraud-and-misleading-marketing-states-warn-consumers-about-alternative-health.....	22
https://www.commonwealthfund.org/sites/default/files/2019-05/Palanker_states_step_up_short_term_plans_Appendices.pdf.....	21
https://www.coveredca.com/news/pdfs/State_Subsidy_and_Mandate_Fact_Sheet.pdf	18
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https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/	18
https://www.kff.org/health-reform/press-release/analysis-most-short-term-health-plans-dont-cover-drug-treatment-or-prescription-drugs-and-none-cover-maternity-care/	22
https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-many-people-are-uninsured/	17
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INTERESTS OF AMICI CURIAE

Seven citizens and a nonprofit organization filed this nationwide class action lawsuit to challenge Presidential Proclamation No. 9945 (Proclamation),¹ which would unilaterally reduce legal immigration to the United States by up to 375,000 individuals each year.² The Proclamation bars immigrant visa applicants who meet all of the qualifications established by Congress from receiving visas and entering the United States unless they can establish, “to the satisfaction of a consular officer,” that they either “will be covered by approved health insurance” within 30 days after entry or that they have the “financial resources to pay for reasonably foreseeable medical costs.”³ For the many reasons articulated by the Plaintiffs, the Proclamation plainly violates the law and should be enjoined by the Court.

The Amici States of Oregon, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia (Amici States), and the Amici City of New York City, (together, Amici) have a strong interest in ensuring that the Proclamation does not go into effect. In the absence of a preliminary injunction, Amici will face significant harm. Many immigrants will not be able to satisfy the requirements of the Proclamation and will not be allowed to enter the country. Yet, immigrants are vital to the economic, civic, and social fabric of our states and city. Immigrants bolster our economies by filling and creating jobs, starting businesses, paying taxes, and purchasing goods

¹ “Presidential Proclamation on the Suspension of the Entry of Immigrants Who Will Financially Burden the United States Healthcare System” (Oct. 4, 2019), available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/> (last visited Nov. 6, 2019); *60-Day Notice of Proposed Information Collection: Public Charge Questionnaire*, 84 Fed. Reg. 58199 (Oct. 30, 2019), <https://www.federalregister.gov/documents/2019/10/24/2019-23219/60-day-notice-of-proposed-information-collection-public-charge-questionnaire> (last visited on Nov. 6, 2019); *see also* Advance Print Emergency Notice (issued Oct. 29, 2019), available at <https://s3.amazonaws.com/publicinspection.federalregister.gov/2019-23639> (last visited on Nov. 6, 2019).

² See <https://www.migrationpolicy.org/news/health-insurance-test-green-card-applicants-could-sharply-cut-future-us-legal-immigration>.

³ *See supra* n.1.

and services. They are valuable contributors to the communities where they reside, and critical to Amici's long-term prosperity. But the Proclamation unlawfully bars hundreds of thousands of prospective immigrants if they cannot ensure that they will have health insurance even before they arrive. Moreover, the Proclamation will result in the separation of families, as individuals will not be able to obtain visas and join awaiting family members in our country. Reuniting families is more than just a humanitarian imperative; Congress intended for our immigration laws to facilitate family reunification, which has broad social benefits for our neighborhoods, communities, and societies.

Those immigrants that manage to satisfy the Proclamation will generally be unable to access the comprehensive and affordable health coverage that they are legally entitled to under the Patient Protection and Affordable Care Act (ACA), because the Proclamation does not count subsidized health plans offered through the ACA's exchanges as meeting its health insurance requirement.⁴ Instead, they will be burdened with non-comprehensive insurance plans that will likely leave them underinsured and exposed to uncovered medical expenses. Directing immigrants to purchase substandard coverage, which need not comply with any of the ACA's consumer protections—and which several Amici States have outlawed—is also likely to harm the Amici States' health insurance markets. Diverting immigrants away from the ACA-compliant market will likely lead to a less healthy risk pool, resulting in premium increases across the market. Higher premiums inevitably lead to higher uninsured rates, which then increase the same uncompensated care costs that the Proclamation claims to tackle. Amici respectfully urge this Court to enjoin this unlawful Proclamation and prevent irreparable harm to our economies and marketplaces, and to the families and communities within our borders.

⁴ While the Proclamation does not impose a legal bar on purchasing health insurance through the exchanges after immigrants arrive in the United States, it effectively precludes that outcome for a period of time by disqualifying such insurance for purposes of obtaining a visa. To satisfy the Proclamation, most immigrants would need to purchase minimal health insurance for their first year in the country and would, as a practical matter, be confined to that plan for a year unless they could afford to pay for comprehensive insurance on top of their visa-procuring insurance.

ARGUMENT

I. IMMIGRANTS ARE VITAL TO THE ECONOMIC, CIVIC, AND SOCIAL FABRIC OF AMICI STATES AND CITY

A. The Proclamation Will Result in the Separation of Families

Congress prioritized family reunification when it established the current immigration system. “The Immigration and Nationality Act (‘INA’) was intended to keep families together.” *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). The INA’s legislative history “establishes that congressional concern was directed at ‘the problem of keeping families of United States citizens and immigrants united.’” *Fiallo v. Bell*, 430 U.S. 787, 806 (1977) (quoting H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957)). During the debates surrounding the INA of 1965, Senator Edward Kennedy affirmed that “[r]eunification of families is to be the foremost consideration.” S. Rep., No. 89-748, 12 (Sept. 15, 1965) (Judiciary Rep.) (Sen. Kennedy). The importance Congress placed upon family reunification is demonstrated by the numeric limit, and the allotment of visas, set by the INA of 1965 and refined by amendments to the INA in 1990.⁵ INA, Pub. L. No. 89-236, 79 Stat. 911; INA of 1990, Pub. L. No. 101-649, 104 Stat. 497. Unlike other visa categories, there is no limit on the number of immediate relatives of U.S. citizens, such as spouses, unmarried children under the age of 21, and parents, who can immigrate to the United States. 8 U.S.C. § 1151(b). Other family preference visas, such as those for adult children, siblings, and relatives of Legal Permanent Residents, are capped at 480,000 per year (with a statutory minimum of 226,000), as compared to 140,000 annual employment visas. 8 U.S.C. § 1151(c)-(d).

Approximately 483,037 newly-arrived individuals received visas as an immediate relative of a U.S. citizen or under family-sponsored visas preferences in 2017 (the most recent year for

⁵ Zoya Gubernskaya & Joanna Dreby, *U.S. Immigration Policy and the Case for Family Unity*, 5 Journal on Migration and Human Security 2, 418 (2017), <https://tinyurl.com/JMHSStudy>.

which data is available).⁶ In 2017, an estimated 148,621 individuals obtained lawful permanent residence as immediate relatives of U.S. citizens or through family-sponsored preferences in California; the number was 107,259 in New York, 28,030 in Massachusetts, 15,867 in Washington, 9,143 in Nevada, 5,533 in Oregon, and 1,551 for Delaware.⁷

The Proclamation drastically curbs the family-based immigration system that Congress created and has maintained for decades. Initial estimates indicate that as many as 65% of recently arrived green card holders would not have been granted a visa under the Proclamation.⁸ If allowed to take effect, the Proclamation will, contrary to the intent of Congress, likely deny hundreds of thousands of U.S. Citizens and Legal Permanent Residents each year the right to be united with their loved ones, including spouses, siblings, and adult children.⁹ Minor children, too, could be separated from their non-citizen parents who cannot comply with the Proclamation's requirements. *See* Docket No. 1 at ¶¶ 185, 189.

The Proclamation will result in prolonged or permanent family separations that will have a devastating impact on the welfare of our residents. Multiple studies illustrate that family reunification benefits the economic, social, and psychological well-being of the affected individuals, while family separation results in myriad harms.¹⁰ Separating family members from each other can result in negative health outcomes, including mental and behavioral health issues,

⁶ U.S. Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics*, Table 6 New Arrivals (Table 6), <https://tinyurl.com/y4svmcxk> (last visited Oct. 30, 2019), <https://www.dhs.gov/immigration-statistics/yearbook/2017/table6>.

⁷ *See Profiles on Lawful Permanent Residents: 2017 State*, Persons Obtaining Lawful Permanent Resident Status During Fiscal Year 2017 by State/Territory of Residence and Selected Characteristics, <https://www.dhs.gov/profiles-lawful-permanent-residents-2017-state>. These figures include both new arrivals and individuals adjusting status because this DHS data combines those categories when breaking out class of admission.

⁸ Julia Gelatt & Mark Greenberg, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*, Migration Policy Institute (October 2019), <https://tinyurl.com/GelattMPI>.

⁹ The Proclamation's requirements apply to applicants for all family-based immigrant visas besides children under the age of 18, children of U.S. citizens under the age of 21, and parents of U.S. citizens if they establish to the satisfaction of the consular officer that their health will not impose a substantial burden on the U.S. health system.

¹⁰ Zoya Gubernskaya & Joanna Dreby, *US Immigration Policy and the Case for Family Unity*, 5 Journal on Migration and Human Security 2, 423 (2017), <https://tinyurl.com/JMHSStudy>.

which can lower academic achievement among children; toxic stress, which can delay brain development and cause cognitive impairment; and symptoms of post-traumatic stress disorder.¹¹ Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders such as depression, anxiety, and attention deficit hyperactivity disorder.¹² Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches, which can become chronic if left untreated.¹³ Similarly, spousal separation can cause fear, anxiety, and depression.¹⁴ Prolonging family separation inflicts psychological harm on individuals who cannot reunite with their loved ones.

These harms are not limited to those directly affected. Amici will feel the impact of such harms on their residents. Intact families provide crucial social support, which strengthens not only the family unit, but the neighborhood, community, and civic society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”). The Select Commission on Immigration and Refugee Policy, a congressionally appointed commission tasked with studying immigration policy, expounded upon the necessity of family reunification in 1981:

“[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.”¹⁵

¹¹ Colleen K. Vesely, Ph.D., et al, *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health* (2019) <https://tinyurl.com/NCFRpolicybrief>.

¹² Allison Abrams, *LCSW-R, Damage of Separating Families*, PSYCHOLOGY TODAY (June 22, 2018), <https://tinyurl.com/AbramsSeparation>,

¹³ *Id.*

¹⁴ Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, Reuters (Feb. 29, 2019), <https://tinyurl.com/TorbatiReuters> (describing a U.S. citizen’s plight to obtain a visa for his wife, and that their separation was causing them both to “break down psychologically”).

¹⁵ Human Rights Watch, *US: Statement to the House Judiciary Committee on “The Separation of Nuclear Families under US Immigration Law”* (March 14, 2013), <https://tinyurl.com/HRWFFamilySeparation> (quoting US Select Committee on Immigration and Refugee Policy, “U.S. Immigration Policy and the National Interest,” 1981).

Denying families the ability to reunite contradicts the foundations of our immigration system and will irreparably harm our families, neighborhoods, and communities.

B. Immigrants Are Key Contributors to Amici's Economies

In Amici's experience, the benefits of immigration are profound and reciprocal; not only do immigrants benefit from the opportunities associated with living in the United States, but the States, cities, and the country as a whole benefit from immigrants' contributions to our communities. From the outset, immigrants have enriched our country's social and cultural life, injecting new ideas into our intellectual fabric, offering path-breaking contributions in science, technology, and other fields, and ultimately making our diverse communities engines of innovation and more desirable places to live.¹⁶ The Proclamation strikes at this fundamental component of the American experience. And by imposing unreasonable and unlawful barriers to immigration, the Proclamation will decrease the number of immigrants who enter the country legally under the criteria set by Congress. That will cause substantial economic harm to Amici, including by diminishing revenue collection, dampening small business creation, and reducing employment in key sectors of the economy.

Immigrants contribute to local and state economies, and to the national economy, in many ways, including paying taxes, starting businesses, contributing to state and local labor forces, and consuming goods and services. Nationally, immigrants pay over \$405.4 billion in taxes, and immigrant-owned companies employ over 7.9 million workers.¹⁷ In 2014, immigrant-led households in California paid over \$26 billion in state and local taxes and exercised almost \$240 billion in spending power;¹⁸ in Oregon in 2014, immigrant-led households paid \$736.6 million in state and local taxes, and accounted for \$7.4 billion in spending power;¹⁹ immigrant-

¹⁶ Darrell M. West, *The Costs and Benefits of Immigration*, Political Science Quarterly, vol. 126, no. 3, Fall 2011, at 437-41, available at www.jstor.org/stable/23056953.

¹⁷ New Am. Econ., *Immigrants and the economy in: United States of America*, (Nov. 5, 2019), <https://www.newamericanconomy.org/locations/national/>.

¹⁸ See Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017), <https://tinyurl.com/CAP-Immigrants-in-CA>.

¹⁹ <https://www.americanimmigrationcouncil.org/research/immigrants-oregon>

led households in Massachusetts in 2014 paid \$3 billion in state and local taxes; and accounted for \$27.3 billion in spending power,²⁰ 22% of Hawaii's business owners were foreign-born in 2010,²¹ and in 2014, immigrants contributed \$668.5 million in state and local taxes in Hawaii;²² and in Connecticut, immigrants pay \$5.9 billion in taxes, have a spending power of \$14.5 billion, and Connecticut's more than 37,000 immigrant entrepreneurs employ over 95,000 people.²³ In 2014, immigrant-led households in Maine paid over \$116.2 million in state and local taxes and exercised almost \$953.9 million in spending power.²⁴ In Michigan, immigrants pay approximately \$6.7 billion in state and local taxes, have a spending power of \$18.2 billion, and comprise close to 34,000 of the state's entrepreneurs.²⁵ In Washington, immigrant-led households paid \$5.7 billion in federal taxes, \$2.4 billion in state and local taxes, and had \$22.8 billion in spending power in 2014.²⁶ In Maryland, immigrant-led households paid \$3.1 billion in state and local taxes, represented almost a fifth of Maryland small business owners, and exercised \$24.6 billion in spending power.²⁷ In Minnesota in 2014, immigrant-led households earned \$12.2 billion, had \$8.9 billion in spending power, paid \$2.2 billion in federal taxes, and paid \$1.1 billion in state and local taxes.²⁸

In 2017, immigrants contributed \$195 billion to NYC's Gross Domestic Product (GDP), or about 22 percent of NYC's total GDP. Immigrants own 52 percent of NYC's businesses, and

²⁰ Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (Oct. 5, 2017), <https://tinyurl.com/AIC-Imm-MA>.

²¹ Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), <https://tinyurl.com/Imm-Business-Owners>.

²² New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016), <https://tinyurl.com/HI-Immigration-Economy>.

²³ New Am. Econ., *Immigrants and the Economy in Connecticut*, <https://tinyurl.com/CT-Immigration-Economy> (last visited July 24, 2019).

²⁴ <https://www.americanimmigrationcouncil.org/research/immigrants-in-maine>

²⁵ New Am. Econ., *Immigrants and the Economy in Michigan*, <https://www.newamericanconomy.org/locations/michigan/> (last visited November 11, 2019).

²⁶ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>.

²⁷ Am. Immigration Council, *Immigrants in Maryland* 4 (Oct. 16, 2017), <https://tinyurl.com/AIC-Imm-MD>.

²⁸ See <http://research.newamericanconomy.org/wp-content/uploads/2017/02/nae-mn-report.pdf>.

create jobs and provide essential goods and services to NYC.²⁹

Immigrants also disproportionately fill positions in important sectors of the economy. In California, immigrants make up over one-third of California's workforce, fill over two-thirds of the jobs in California's agricultural sectors and 45.6% of manufacturing positions, are 43% of the state's construction workers, and 41% of workers in computer and mathematical sciences.³⁰ In Oregon, immigrants accounted for 12.8% of the total workforce in 2015, 39.5% of workers in the farming, fishing and forestry sector, nearly 20% of the workers in manufacturing positions, and 18.4% of accommodation and food service workers.³¹ Similarly, immigrants made up 27.8% of the labor force in New York in 2015;³² 20% of the labor force in Massachusetts;³³ 19.6% of the labor force in Maryland;³⁴ nearly 18% of the labor force in the District of Columbia,³⁵ and 17.2% of the work force in Washington.³⁶ In Delaware in 2015, immigrants accounted for 11.9% of the total workforce in 2015, 27.9% of workers in computer and mathematical sciences, 25.8% in life, physical, and social sciences, and 21.1% in architecture and engineering.³⁷

Immigrants in NYC have a labor force participation rate of 65.6%, which exceeds that of New Yorkers overall (64.8%) and of U.S.-born New Yorkers (64.1%). Immigrants comprise nearly half (45%) of NYC's workforce.³⁸ Approximately 25% of immigrant New Yorkers work

²⁹ New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City (Mar. 2018), available at

https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report_2018_final.pdf.

³⁰ Am. Immigr. Council, *Immigrants in California* (Oct. 4, 2017), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf.

³¹ See <https://www.americanimmigrationcouncil.org/research/immigrants-oregon>.

³² See <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york>.

³³ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts>.

³⁴ Am. Immigration Council, *Immigrants in Maryland* 2 (Oct. 16, 2017), <https://tinyurl.com/AIC-Imm-MD>.

³⁵ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington-dc>.

³⁶ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>.

³⁷ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-delaware>.

³⁸ New York City Mayor's Office if Immigrant Affairs, State of Our Immigrant City (Mar. 2018).

in fields that provide critical services to other New Yorkers—education, health, and human services.³⁹

Amici's interests weigh heavily against unreasonable and unlawful barriers to immigration, such as the Proclamation. Such barriers decrease the number of immigrants who enter the country legally under the criteria set by Congress, hinder the reunification of families which harms our communities, and negatively affect our economies by preventing the entry individuals who contribute positively to our workforces and pay taxes.

II. THE PROCLAMATION MAY ADVERSELY AFFECT AMICI STATES' HEALTH INSURANCE MARKETS

A. The Proclamation Undermines Congress's Objective of Providing Legal Immigrants With Access to Comprehensive and Affordable Coverage

The ACA was enacted by Congress in 2010. Pub. L. 111-148 (Mar. 23, 2010). It is a landmark law that made affordable health coverage available to millions of individuals and sharply reduced the number of people without health insurance.⁴⁰ It authorized the creation of local, state-based markets presenting affordable insurance coverage choices for consumers in order to “increase the number of Americans covered by health insurance and decrease the cost of health care.” *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). The state-based marketplaces—also known as exchanges—“allow[] people to compare and purchase insurance plans.” *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). To purchase health insurance through an exchange, a person must prove that they: (1) reside in a U.S. state or territory; and (2) are “lawfully present.” 42 U.S.C. § 18032(f)(1)(A)(ii); 45 C.F.R. § 155.305(a)(1)-(3). For individuals purchasing health insurance through the ACA’s exchanges, Congress also provided premium tax credits to help offset the cost of insurance.⁴¹ 26 U.S.C. § 36B. On a sliding scale,

³⁹ *Id.*

⁴⁰ See <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-many-people-are-uninsured/>.

⁴¹ In addition to providing tax credits to offset the cost of insurance premiums, Congress also sought to lower individuals’ out-of-pocket costs when using their health insurance. 42 U.S.C. § 18071(b), (c)(2), (f)(2). The ACA requires insurers to provide cost-sharing reductions for

those with incomes up to 400% of the federal poverty line qualify for a tax credit. *See* 26 U.S.C. § 36B(b)(3)(A)(i). And Congress extended those tax credits to any taxpayer who “is an alien lawfully present in the United States . . .” *Id.* at § 36B(c)(1)(B)(ii).

Providing legal immigrants with access to affordable and comprehensive health insurance was a deliberate decision by Congress, one which proved transformational for immigrant communities across the country.⁴² At the time, the Congressional Budget Office expressly predicted that this provision would result in the share of legal, non-elderly residents with health insurance rising to around 94%,⁴³ a fact cited favorably by the ACA’s supporters during the Senate’s deliberations. *See* 155 Cong. Rec. 31991 (2009) (Statement of Sen. Tim Johnson, D-South Dakota) (“CBO also projects that this bill will result in health care coverage for more than 94 percent of legal residents in our Nation.”)⁴⁴ The ACA, therefore, expressly permits legal immigrants to purchase health insurance through the exchanges and to receive premium tax credits for which they qualify. 26 U.S.C. § 36B(c)(1)(B)(ii). But, the Proclamation disallows any health plan that utilizes premium tax credits.⁴⁵

copayments (for medical visits and prescription drugs), coinsurance, and deductibles—the out-of-pocket costs consumers face when seeking care. *Id.* In October 2017, however, the Trump administration ceased reimbursing insurers for those cost-sharing reduction payments. *See* <https://www.hhs.gov/about/news/2017/10/12/trump-administration-takes-action-abide-law-constitution-discontinue-csr-payments.html>.

⁴² In this respect, the ACA was intentionally broader than other federal programs such as Medicaid or CHIP, which impose a five year waiting period before legal immigrants qualify to receive benefits under these programs. *See* <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>.

⁴³ *See* <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/41423-hr-3590-senate.pdf> at 8-9.

⁴⁴ Available at <https://www.congress.gov/congressional-record/2009/12/16/senate-section/article/s13295-1>.

⁴⁵ When listing various types of “approved health insurance,” the Proclamation includes “an *unsubsidized* health plan offered in the individual market within a State.” The Proclamation never defines what “*unsubsidized*” means. This limitation could include not only federal tax credits, but state-only funded subsidies as well. In California, for example, individuals with incomes between 400% and 600% of the federal poverty line are eligible for state-funded subsidies to offset the cost of their insurance premiums. An estimated 235,000 middle-income Californians are expected to save an average of 23% on their insurance premiums in 2020 under this new program. *See*

https://www.coveredca.com/news/pdfs/State_Subsidy_and_Mandate_Fact_Sheet.pdf.

In theory, the Proclamation considers an unsubsidized health plan purchased through an exchange as qualifying coverage. But even that promise is illusory for prospective legal immigrants because the Proclamation creates a deliberate Catch-22. Under the ACA, immigrants cannot utilize the ACA's exchanges (whether or not they receive tax credits) without establishing their residency and lawful presence. 42 U.S.C. § 18032(f)(1)(A)(ii); 45 C.F.R. § 155.305(a)(1)-(3). The Proclamation, however, precludes immigrants from obtaining residency and establishing their lawful presence (even if they otherwise meet all the criteria in the INA) without first demonstrating that they will have unsubsidized health insurance. That result cannot be squared with Congress's decision to provide access to the ACA's marketplaces—and to offer financial assistance for health insurance premiums to those with qualifying incomes—to all individuals who are lawfully present in the country.

B. The Proclamation Directs Immigrants to Purchase Health Insurance That Does Not Comply With the ACA, Which Will Increase Amici's Regulatory Burdens

The Proclamation does more than simply make it difficult for immigrants to access the comprehensive and affordable coverage to which they are legally entitled. Most immigrants subject to the Proclamation (family and diversity-based immigrants) will need to purchase minimal insurance plans that will leave them underinsured and at *greater* risk of incurring higher costs, relative to immigrants with ACA-compliant plans purchased through an exchange. And those higher costs will result in uncompensated care, which refers to medical goods and services for which neither an insurer nor the patient reimburses the provider.⁴⁶ The ACA made great strides in reducing uncompensated care,⁴⁷ which benefits patients, hospitals, and local and state budgets, which pick up a portion of the tab for those costs.⁴⁸

⁴⁶ See <https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage>.

⁴⁷ In California, for example, uncompensated costs dropped from over \$3 billion in 2013 to \$1.44 billion in 2016, a decline of over 50% in just three years. See <https://www.chcf.org/blog/uncompensated-hospital-care-costs-in-california-continued-to-decline-in-2016/>.

⁴⁸ *Id.*

The Proclamation assumes that legal immigrants financially burden our healthcare system by incurring uncompensated care costs that are passed on to American taxpayers.⁴⁹ But the Proclamation does not provide any data supporting such an assertion.⁵⁰ In fact, the data shows the contrary: that immigrants' overall healthcare expenditures are generally one-half to two-thirds those of U.S. born individuals, across all age groups.⁵¹ And most uninsured people—regardless of immigration status—do not receive health services for free or at reduced charge; in 2015, only 27% of uninsured adults reported receiving free or reduced-cost care.⁵² The Proclamation's factual premise is simply not supported by evidence.

Even taking the Proclamation's goal of reducing uncompensated care costs at face value, the Proclamation is likely counterproductive because it directs immigrants away from comprehensive insurance that will actually cover their medical expenses. Instead, the Proclamation effectively requires immigrants to purchase non-ACA compliant plans such as short-term, limited duration insurance (STLDI), visitor's health insurance, or travel insurance.⁵³ These minimal insurance plans do not comply with the ACA and are likely to lead to the uncompensated care costs that the Proclamation professes to address.

Given the legal and practical limitations of purchasing health insurance abroad, STLDI may be one of the only insurance options theoretically available to immigrants before moving to

⁴⁹ See <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/>.

⁵⁰ *Id.*

⁵¹ See October 22, 2019 letter from the American Medical Association to President Trump, available at <https://searchlhf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTER%2F2019-10-22-Letter-to-Trump-re-Presidential-Proclamation.pdf>.

⁵² See <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-what-are-the-financial-implications-of-lacking-insu/>.

⁵³ Travel insurance is designed for people visiting the United States, not for people intending to move here permanently. It is very limited insurance, often analogous to fixed indemnity coverage, which pays a fixed dollar amount for every covered service, regardless of the actual cost of service. These plans do not provide protection to immigrants for their foreseeable health needs. See Palanker Comments Immigrant Health Insurance Coverage at 3-4, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0266>.

the United States.⁵⁴ Yet, even STLDI is not a realistic option for many in light of state-level restrictions. Several states with large immigrant populations, such as California and New York, have completely banned STLDI coverage.⁵⁵ Many other states, such as Oregon, Colorado, Maryland, and New Mexico, and the District of Columbia, have restricted such plans to three or six months in length, with no extensions or renewals permitted.⁵⁶ Such plans do not meet the Proclamation's 364 day coverage requirement. STLDI, therefore, may not be a viable insurance option because immigrants will face significant restrictions on where they can live.

STLDI plans also leave immigrants underinsured and *more* likely to incur uncompensated care costs. STLDI is non-comprehensive coverage that does not need to comply with the ACA's consumer protections. This type of insurance was intended to fill temporary gaps in coverage when an individual is transitioning between insurance plans. In August 2018, however, the U.S. Department of Health and Human Services finalized a rule to greatly expand the use of short-term insurance.⁵⁷ Previously limited to three months by federal law, STLDI can now last up to 36 months with renewals.⁵⁸ STLDI does not need to cover all ten essential health benefits,⁵⁹ or abide by the ACA's prohibitions on annual and lifetime benefit limits.⁶⁰ STLDI

⁵⁴ As discussed above, *see supra* at II.A, immigrants cannot purchase insurance through the exchanges from abroad. And as the Court recognized, other options ostensibly made available to immigrants under the Proclamation are effectively foreclosed too: Medicare requires five years of residency in the United States; TRICARE plans are only available to members of the military; family member plans only cover spouses and children under age 27; employer plans will typically not be available to family and diversity immigrants prior to their arrival; and catastrophic plans require residency in the United States. Docket No. 33 at 8-9.

⁵⁵ *See* https://www.commonwealthfund.org/sites/default/files/2019-05/Palanker_states_step_up_short_term_plans_Appendices.pdf.

⁵⁶ *Id.*

⁵⁷ *See* <https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/CMS-9924-F-STLDI-Final-Rule.pdf>.

⁵⁸ *Id.* at 12.

⁵⁹ The ACA requires all health plans to cover: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including oral and vision care. 42 U.S.C. § 18022(b)(1).

⁶⁰ *See* https://www.urban.org/sites/default/files/updated_estimates_of_the_potential_impact_of_stld_policies_final.pdf.

plans typically involve medical underwriting and thus exclude coverage of preexisting health conditions⁶¹ or charge exorbitant premiums to cover such conditions.⁶² One recent analysis found that 43% of STLDI did not cover mental health services, 62% did not cover substance abuse treatment, 71% did not cover outpatient prescription drugs, and 100% did not cover maternity care.⁶³

If the Proclamation goes into effect, it is also likely that potential immigrants will be subjected to deceptive marketing and fraudulent health insurance products. Amici States may have to increase their regulatory oversight to protect consumers from such products.⁶⁴ Experts see the Proclamation “as an opportunity for those looking to prey on people applying for visas by either fraudulently selling what they claim to be is an insurance product or by selling subpar insurance products without disclosing the limitations of the plan . . .” Docket No. 57, ¶ 37. And insurance products created to comply with the Proclamation may involve policy holders outside the United States, and thus beyond the reach of state insurance regulators altogether. *Id.* at ¶ 38. The proliferation of non-ACA compliant insurance that meets the Proclamation’s health insurance requirement could impair the Amici States’ ability to properly regulate the individual insurance market, harm the risk pool of those markets, and increase uncompensated care costs.

C. Directing Immigrants to Purchase Non-ACA Compliant Insurance May Increase Uncompensated Care Costs and Harm Insurance Markets

Directing immigrants to purchase insurance that does not comply with the ACA leaves those individuals exposed to uncovered medical expenses when undergoing routine medical services such as giving birth, filling a prescription, or seeking treatment for a

⁶¹ Because STLDI plans typically exclude coverage of preexisting health conditions, immigrants who suffer from such conditions and are most in need of familial support may have the hardest time meeting the Proclamation’s requirements.

⁶² See <https://ccf.georgetown.edu/2018/07/30/coverage-that-doesnt-count-how-the-short-term-limited-duration-rule-could-lead-to-underinsurance/>.

⁶³ See <https://www.kff.org/health-reform/press-release/analysis-most-short-term-health-plans-dont-cover-drug-treatment-or-prescription-drugs-and-none-cover-maternity-care/>.

⁶⁴ See <https://www.commonwealthfund.org/blog/2019/seeing-fraud-and-misleading-marketing-states-warn-consumers-about-alternative-health>.

preexisting health condition. And when neither the insurer nor the patient pays for that care, the result is uncompensated care costs which are borne by medical providers (such as hospitals and clinics) and by federal, state, and local governments. Overall, approximately 65% of uncompensated care costs are offset by government funds, and 36.5% of that governmental funding comes from state and local governments.⁶⁵ Because of the comprehensive coverage reforms made by the ACA, state and local governments have saved billions of dollars in reduced uncompensated care costs.⁶⁶ But directing hundreds of thousands of immigrants to purchase non-ACA compliant insurance threatens to increase the uncompensated care costs that the ACA sought to prevent, harming state budgets in the process.

The Proclamation could also harm Amici States' health insurance markets by negatively impacting the overall risk pool in each state. One of the ACA's key innovations was requiring insurers to treat all enrollees in the individual insurance market as "members of a single risk pool." 42 U.S.C. § 18032(c)(1). This allows insurance premiums to reflect the average level of risk of the entire market, rather than the cost of enrollees in a particular plan. But in order to function properly, a unified risk pool requires a mix of individuals who have greater and lesser healthcare need. Because immigrants are generally healthier than others, by diverting immigrants away from the individual market's single risk pool, the Proclamation is likely to make that risk pool less healthy, leading to increased insurance premiums for citizens and non-citizens alike. Indeed, the American Medical Association has warned that "the expansion of STLDI will ultimately undermine the

⁶⁵ See <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1068> at 812-13.

⁶⁶ In 2013, before the ACA's major provisions went into effect, state and local governments spent approximately \$19.8 billion on uncompensated care costs. See <https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/view/print/>. By 2015, when the ACA was fully implemented, nationwide hospital uncompensated care costs fell by about 30% on average, and in Medicaid expansion states that figure was roughly 50%. See <https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage>. State and local government budgets benefitted greatly as a result.

individual insurance market and create an uneven playing field by luring away healthy consumers, thereby damaging the risk pool and driving up premiums for consumers left in the ACA-compliant market.”⁶⁷

It is well established that immigrants are more likely to represent “favorable” insurance risk because they tend to be younger, healthier, and below-average users of healthcare goods and services (when compared to the insured population at large).⁶⁸ Several studies have concluded that immigrants are net contributors to both private coverage and Medicare, paying more in insurance premiums than they receive in benefits.⁶⁹ State exchange data confirms this trend. In Massachusetts, immigrant enrollees on the state Exchange have, on average, 25% lower medical claims than citizen enrollees.⁷⁰ In California, immigrant enrollees have 10% lower medical claims than citizen enrollees.⁷¹ Oregon similarly reports that “[l]awfully present immigrants in Oregon are more likely to represent ‘favorable’ insurance risk, because they are often younger, healthier, or lower-than-average users of health care services when compared to the general insured population.”⁷²

Fewer immigrants in the ACA-compliant market will likely lead to a less healthy risk pool, which will result in commercial market premium increases for all healthcare users (citizens and non-citizens alike).⁷³ In some Amici States, the harm will extend beyond the

⁶⁷ See <https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2019-10-22-Letter-to-Trump-re-Presidential-Proclamation.pdf>.

⁶⁸ See, e.g., Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

⁷² See OHIM Comments – Immigrant Health Insurance Requirement (10.31.19) at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0237>.

⁷³ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>; Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

individual market. Massachusetts, for example, has a “merged market” structure that combines the individual and small employer markets.⁷⁴ Individuals and small businesses in Massachusetts share a risk pool, insurance products, and premiums.⁷⁵ Both could experience premium increases from the Proclamation’s exclusion of immigrants from the ACA-compliant market.⁷⁶ Higher premiums lead to higher uninsured rates for citizens and legal residents, increasing the uncompensated care burden that the Proclamation purports to address.⁷⁷

In sum, the Proclamation will preclude hundreds of thousands of immigrants from entering the country, reuniting with their families and communities, and contributing to the economic, social, and cultural milieus of Amici. The Proclamation will likely harm Amici States’ health insurance markets, increase our administrative and regulatory burdens, and impose uncompensated care costs on our fiscs.

CONCLUSION

The Court should preliminarily enjoin the Proclamation.

⁷⁴ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>; Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

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CERTIFICATE OF SERVICE

I certify that on November 19, 2019, the foregoing BRIEF OF AMICI CURIAE STATES AND CITY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION was electronically filed with the CM/ECF system, which will send a Notice of Electronic Filing to all parties of record in this matter.

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