EN BANC ORAL ARGUMENT SCHEDULED FOR DECEMBER 17, 2014
No. 14-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUELINE HALBIG, ET AL.,

Plaintiffs-Appellants

v.

SYLVIA MATTHEWS BURWELL, In Her Official Capacity as U.S. Secretary Of Health And Human Services, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Columbia (No:1:13-cv-00623)

BRIEF OF CERTAIN INDIVIDUALS WITH PREEXISTING CONDITIONS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Dated: November 3, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), I hereby certify as follows:

(A) Parties and Amici. In addition to the parties, intervenors and amici listed in the Brief for Appellants, the following Amici may have an interest in the outcome of this case:

Jared Blitz

Jennifer Causor

Steve Orofino

Aidan Robinson

Martha Robinson

David Tedrow

Mary Tedrow

(B) Rulings under Review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases. Amici curiae are not aware of any related cases within the meaning of Circuit Rule 28(a)(1).

Dated: November 3, 2014

/s/ Kara M. Kapke
Kara M. Kapke
Counsel for Amici Curiae

CERTIFICATE IN SUPPORT OF SEPARATE BRIEF

All parties have consented to the filing of this brief. Certain Individuals with Preexisting Conditions filed notice of intent to participate as amici curiae on October 31, 2014.

Pursuant to D.C. Circuit Rule 29(d), the undersigned counsel certifies that a separate brief on behalf of Amici is necessary because no other amicus brief of which we are aware addresses the life or death consequences of the panel's ruling from the perspective of individuals who have preexisting conditions, such as Amici. The other parties and amici have not focused on the preexisting conditions leg of the "three-legged stool" that comprises the Affordable Care Act.

Dated: November 3, 2014

/s/ Kara M. Kapke
Kara M. Kapke
Counsel for Amici Curiae

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GLOSSARY OF ABBREVIATIONS

Act	Patient Protection and Affordable Care Act, Pub. L. No. 148, 124 Stat. 119
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Statutory & Regulatory Addendum to Brief for Appellants.

INTEREST OF AMICI CURIAE[1]

Amici are individuals with life-threatening preexisting health conditions and their families, at least one of whom is alive today because of insurance he received through a federally run health insurance exchange. In addition to receiving potentially lifesaving care through the Affordable Care Act, Amici now enjoy a degree of financial security that they will almost certainly lose if plaintiffs prevail in this lawsuit.

Each Amicus lives in a state with a federally run exchange, namely, North Carolina, Indiana, Arizona and Tennessee. Moreover, Amici include individuals with specific medical conditions that affect millions of Americans, many of whom reside in the states that would be impacted by this litigation. Thus, Amici bring a unique perspective to this case because this Court's decision will not only affect *how* they and millions of similarly situated Americans with preexisting conditions live their lives, in many cases this Court's decision will decide *whether* they live at all.

[1] Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, the undersigned also states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

When Congress passed the Affordable Care Act (the "Act"), it wanted to ensure that all Americans—especially those with preexisting conditions such as Amici—could access affordable healthcare. Congress heard from a mother of two who was told she could not purchase health insurance unless she got sterilized. It heard from the sister of a young man who died when his defibrillator battery ran out, after he was turned down by private insurers. Senators and Representatives told stories of their constituents who were denied coverage simply because they previously had beaten cancer, developed a heart condition, or had a birth defect.

But Congress also knew that it could not simply require insurers to cover people with preexisting conditions. There was only one way to ensure that Americans with preexisting conditions could afford health insurance: create a tripartite system that would not only prevent insurers from discriminating against people with preexisting conditions, but also provide subsidies so that insurance would be affordable and require individuals to buy insurance when they are healthy.

To achieve Congress's expectation that the Act would achieve "near-universal coverage" while providing financial security to families with expensive health bills, the law relies upon what Senator Franken described as a "three-legged stool." *First*, insurance companies may no longer "discriminate against people with

preexisting conditions." *Second*, the law's so-called individual mandate ensures that "people don't wait until they get sick or hurt to get insurance." And, *third*, the law offers subsidies in its health exchanges to "make sure everyone can afford" insurance. The key to understanding this three-legged stool is that it cannot stand without one of its legs. "If you take any leg out, the stool collapses." 157 Cong. Rec. S737 (Feb. 15, 2011) (statement of Senator Franken).

In this case, plaintiffs are asking this Court to cut off subsidies to some 16 million Americans based on plaintiffs' novel interpretation of a few words in a multi-faceted, comprehensive bill more than ten times the length of the parties' combined briefs before the panel.

In interpreting a statute, this Court must look to the provisions of the entire law and to its object and policy. *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). In reviewing plaintiffs' challenge to the Act, it should remember the stories told in Congress of individuals who died because they were turned down for health insurance. It should think about Amici in this brief—individuals who are alive today and can look forward to tomorrow thanks to the Act, which gives them the peace of mind that they can obtain and pay for their own health insurance, despite their preexisting conditions. This Court should reject plaintiffs' request to dismantle the three-legged stool Congress built to achieve the policy goals of

ensuring that Amici and others with preexisting conditions have access to affordable health insurance.

I. THE ACT IS WORKING TO ACHIEVE CONGRESS'S EXPLICITLY STATED PURPOSE.

Congress believed that the Act would achieve "near-universal coverage" while simultaneously "improving financial security for families" caught in a health care system where "62 percent of all personal bankruptcies are caused in part by medical expenses." 42 U.S.C. § 18091(D), (G). Nearly a year after the law's most significant reforms took full effect, the Act is well on the way to achieving these objectives, as shown by Amici. For them, and for millions more Americans with preexisting health conditions, the Act provides a degree of personal and financial security that would have been impossible before the law took effect.

"I was 48 to 72 hours away from death. It was a true miracle. [The Act] saved my life."

David Tedrow is one of the tens of thousands of Americans who have received an organ transplant.[2] Transplant surgeries often cost hundreds of thousands of dollars and require extensive and expensive aftercare, anti-rejection medication, and other follow-up treatments. In 2013, David Tedrow was suffering from end-stage liver failure disease and desperately needed a liver transplant.

[2] *See* U.S. Dep't of Health and Human Servs., *The Need is Real*: *Data* (2014), http://www.organdonor.gov/about/data.html (explaining that "an average of 79 people receive organ transplants" every day, including 28,953 people who received transplants in 2013).

Before David's illness, he and his wife Mary owned a successful business in South Carolina. David received care from a surgeon at Duke University who specializes in non-alcoholic cirrhosis patients suffering from diabetes, so he and Mary decided to relocate closer to this doctor. Eventually, they closed their business and purchased temporary insurance from North Carolina's high risk pool.

In November 2013, only a few weeks after he was finally added to liver transplant waiting list, David's insurer announced that it was going out of business at the end of the year. David needed insurance to remain on the waiting list, but he was denied coverage by every insurer he contacted due to his preexisting condition. Thankfully, due to the Act, David and his wife Mary obtained a plan through the Exchange, and David received his life-saving transplant on April 3 of this year. He says that the Affordable Care Act "actually saved my life."

Unfortunately, David's doctors discovered a tumor on his original liver when they removed it, and they later found that the cancer had spread. David is one of an estimated 1.6 million people in the United States who will be diagnosed with cancer in 2014.[3] He still receives chemotherapy and needs CT scans, expenses that are covered under the plan he purchased through an Exchange.

[3] American Cancer Society, *Cancer Treatment & Survivor Facts and Figures 2014-2015*, at 4 (2014), http://www.cancer.org/acs/groups/content/@research/documents/document/acspc-042801.pdf.

"I can live the life I want, not the life I have to, because of health insurance."

Because of the Act, Aidan Robinson has gone from being scared and mostly home bound to living a life full of promise. Aidan grew up in a household with two loving parents, Eric, a pastor, and Martha, a former school psychiatrist in a large public school, who left that job—and the health benefits it offered—to help found a small charter school and eventually start her own business.

Once the Robinsons no longer had insurance through Martha's employer, they purchased COBRA continuation health insurance for a year and a half, paying $1800/month for a family policy. When the continuation coverage expired, Martha tried in vain to obtain health insurance for her family on the open market. Repeatedly, she was told no, because Aidan had been diagnosed with Marfan syndrome, a genetic disorder that affects the body's connective tissue.[4]

Unable to obtain coverage that included their son, the Robinsons went without health insurance until the Exchange opened. Throughout this time, Aidan carried the burden of knowing his family was "uninsurable, because [he] was

[4] According to the Marfan Foundation, "[a]bout 1 in 5,000 people have Marfan Syndrome," so approximately 63,000 Americans have this disorder. The Marfan Foundation, *What is Marfan Syndrome?* (2014), http://www.marfan.org/about/marfan. Approximately 90 percent of patients with Marfan Syndrome experience heart and blood vessel problems, which can lead to potentially fatal consequences such as an aortic rupture. The Marfan Foundation, *Heart and Blood Vessels* (2014), http://www.marfan.org/about/body-systems/heart-and-blood-vessels.

uninsurable." Without insurance, Aidan was not able to obtain the beta-blockers he needed to reduce his blood flow and was not able to get his annual heart screen. He wanted to travel, work, and help around the house, but couldn't. Instead, Martha and Eric had to tell their son to stay inside and limit his mobility even more. Understandably, Martha and Eric worried about Aidan, never knowing if he would be okay. Aidan knew one ambulance call could bankrupt his family.

On January 1, 2014—for the first time in 18 months—Aidan Robinson had health insurance, thanks to a policy that Martha purchased on an Exchange. The policy covered the entire family at a premium that they could afford. No longer restricted by his lack of insurance, Aidan resumed traveling, became engaged to his girlfriend, and started working for his mother's reading business. He appreciates his health insurance, knowing that it provides the peace of mind he and his family need.

"I would have had to declare bankruptcy or I could be dead by now if it weren't for the Act."

Steve Orofino worked as a chemist for a large international corporation and diligently saved money in the hopes of comfortably retiring with his wife. In 2010, not long before the couple had planned to retire, Steve was diagnosed with prostate cancer. At that time Steve had excellent health insurance through his employer, so the costs of surgery to remove his prostate and subsequent follow-up treatments were minimal to him and his wife.

The following year, though, Steve's cancer returned, and his job was downsized. Steve purchased insurance through COBRA for eighteen months to pay for his cancer treatments. As the expiration date for his COBRA plan approached, Steve tried to purchase health insurance through the major insurers, but he and his wife, an insulin-dependent diabetic, were both deemed "medically ineligible." When he could no longer purchase insurance through COBRA, Steve found a policy in a high risk pool to continue to receive his cancer treatments.

The year that the Orofinos had to rely on the high risk pool nearly bankrupted the couple. Steve routinely received shots to prevent his cancer from spreading at an out-of-pocket cost of more than $2,500 each. His wife had an infection in her chest that resulted in an eleven day hospital stay, which cost them nearly $7,500 even with insurance from the high risk pool. Steve and his wife sold their life insurance policies and watched their life savings decrease by 75 percent as they tried to cover the cost of keeping him alive.

As soon as they could, the Orofinos purchased the broadest policy available on an Exchange. They both continue to receive extensive treatment, but their out-of-pocket costs have shrunk dramatically. The new policy pulled the couple out of the financial tailspin: "I would have had to declare bankruptcy or I could be dead by now if it weren't for the Act." The financial stability the Act provided allowed Steve to do what he worked for all his life, retire.

"The financial burden is gone. All I have to worry about is my physical health."

Jared Blitz, an otherwise healthy exercise physiologist and adjunct professor, was born with aortic valve stenosis, a heart disease in which the opening of the aortic valve is narrowed. His parents' health insurance covered his medical expenses and first open heart surgery, which cost approximately $200,000, but Jared aged off their plan after obtaining his college degree. He enrolled in graduate school to obtain coverage through the university, but that, too, eventually expired.

Before the Act took effect, Jared obtained health insurance on the open market, but it came with a significant caveat: it would not cover his heart condition. He paid $3,000 out of pocket for each visit to his cardiologist, relieved to learn each time that his heart could hold up another year. A few years later, while still working as an adjunct professor, Jared looked again on the open market. The best he could find was a plan that would cover his heart condition—but only at 60% and with no out-of-pocket maximum. Had Jared needed surgery under this plan, his out-of-pocket expenses could have easily reached six figures. While waiting for his test results, he considered medical tourism in another country to save money.

Once the Exchanges opened, Jared shopped again for health insurance, and this time purchased a policy with a maximum out-of-pocket limit of $5,000. Instead of leaving his condition untreated, traveling for surgery with a completely

unknown medical staff, or facing massive debt, Jared can now focus on recovering from the surgery he needs later this year to replace his pulmonary valve. "I can do $5,000," he said. "With this plan, I know I am not going to be financially ruined with my operation."

"The threat of being uninsured was always looming over my head and always stressful."

Like David, Jennifer Causor is a transplant patient; she received a double-lung transplant in 2013. Jennifer is also one of approximately 30,000 people in the United States with cystic fibrosis, a life-threatening genetic disorder that targets the lungs and the digestive system.[5]

Good timing saved Jennifer's life. She was able to stay on her father's health insurance until she graduated from college and found a job which also provided health insurance. In 2012, her lungs collapsed, and taking care of herself became a full-time job. By 2013, her health forced her into long-term disability leave. Fortunately for Jennifer, COBRA continuation insurance covered a double lung transplant, anti-rejection medications, and a follow-up surgery. Also fortunately for Jennifer, she was able to obtain a plan on an Exchange once that continuation coverage expired.

Without insurance, Jennifer's treatments would be completely unaffordable. Her transplant cost nearly $280,000. She takes three anti-rejection drugs, one of

[5] Cystic Fibrosis Foundation, *About CF* (2014), at http://www.cff.org/AboutCF/.

which has a sticker price of $2,400 per month. Jennifer is also unsure if or when she will return to work, in part because of post-transplant infections that are expensive, prevent her from keeping a regular work schedule, and could possibly kill her.

Jennifer is "relieved" to know that under the Affordable Care Act, she cannot be turned down for insurance on the open marketplace. Without the Act's regulations on preexisting conditions, she knows that it would be difficult to obtain insurance that suits her needs as she gains the independence her new lungs provide. Should she become uninsured, Jennifer would face bankruptcy and even death. "My anti-rejection meds, I have to be on them. Like, I ***have*** to. If I went off of them, I would go into rejection and I would eventually die."

David, Mary, Aidan, Martha, Steve, Jared, and Jennifer are just a few of the millions of Americans with preexisting conditions who are now able to live their lives without the fear that they will not be able to get the medicine or treatment they need. For Jennifer, the Act has enabled her to purchase insurance on the marketplace while she recovers from her transplant. For Jared, it means getting the surgery he needs in America, with the doctor he's had his entire life. For Martha and Aidan, it means peace of mind while enabling them to pursue their dreams of working in a family business. The Act is working for them and others like them, just as Congress intended.

II. A READING OF THE AFFORDABLE CARE ACT THAT DOES NOT PROTECT PEOPLE WITH PREEXISTING CONDITIONS IS INCONSISTENT WITH THE ACT'S PURPOSE.

The Act's protections for Amici and others with preexisting conditions cannot function without the other two legs of the three-legged stool. *See infra* Part III. Congress, moreover, viewed protections for people with preexisting conditions as a matter of such paramount importance that the law's supporters were willing to face significant political risk to ensure that the law's preexisting conditions provisions worked effectively. An opinion poll taken late in the Congressional debate over the Act found that most of the bill's provisions were supported by solid majorities of the nation, including the protections for people with preexisting conditions (63% support) and the health exchange subsidies (57% support). The individual mandate, by contrast, was the single most unpopular individual provision of the law. Only 22 percent of poll respondents supported this provision, while 62 percent opposed it. The Henry J. Kaiser Family Foundation, *Kaiser Health Tracking Poll* 5 (Jan. 2010), http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8042-f.pdf.

Men and women who depend upon the approval of their constituents to remain in office do not enact unpopular legal provisions lightly. Yet Congress also understood that it could not provide for people with preexisting conditions unless it also enacted the unpopular individual mandate. As the Act explains:

> By significantly increasing health insurance coverage, the [individual mandate] requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The requirement is essential to creating effective health insurance markets in which improved health insurance products that . . . do not exclude coverage of preexisting conditions*[.]

42 U.S.C. § 18091(2)(I) (emphasis added). Ultimately, majorities in both houses of Congress decided that protecting people with preexisting conditions was a matter of such paramount importance that they were willing to pay the political price that came with ensuring that those protections would work to protect people like Peggy Robertson, who shared her personal experiences in a congressional hearing.

After giving birth to her second child through a cesarean delivery, Robertson applied for health insurance, only to find out she was denied coverage because her cesarean was considered a preexisting condition. *Equal Health Care Premiums for Women: Hearing Before the Comm. on S. Health, Edu., Labor and Pensions*, (Oct. 16, 2009) (Testimony of Peggy Robinson). When she called to inquire further about the denial, the insurer stated they would cover her if she "would get sterilized[.]" *Id.* Robertson filed a complaint with the Colorado Division of Insurance only to learn "there was nothing [she] could do about it," because, before the Act, all but five states permitted insurers to "discriminate against women who have had a C-section." *Id.*[6]

[6] *See* 155 Cong. Rec. S11132-05 (Nov. 5, 2009) (Statement of Senator Brown).

Congress also heard from Vernal Branch, a fifteen-year breast cancer survivor. *Impact of Health Care Law Repeal, Hearing Before the Comm. on H. Democratic Steering Policy*, (Jan. 18, 2011) (Testimony of Vernal Branch). She was first diagnosed in 1995 when she had insurance through her husband's employer. *Id.* But, when her husband lost his job, the couple also lost their health insurance. *Id.* After COBRA continuation health coverage expired, Branch was unable to obtain insurance. *Id.* She remained uninsured for three years, "never kn[o]w[ing] if there would be a reoccurrence" of the cancer, and, if so, if she would have the resources for treatment. *Id.* The Act ensures that Branch, one of the 3.1 million women living with breast cancer, and the more than 232,000 women expected to be diagnosed in 2014, cannot be denied health insurance.[7]

Similarly, the approximately 400,000 Americans who receive and rely on heart device implants each year to survive cannot be denied health insurance.[8] The Act came too late to save Billy Koehler, who suffered his first cardiac arrest at age 39 and was diagnosed with a sudden death arrhythmia. *Healthcare Challenges in Pennsylvania, Hearing Before the Comm. on H. Edu. and the Workforce, and*

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[7] American Cancer Society, *Cancer Treatment & Survivor Facts and Figures 2014-2015*, 3 (2014), http://www.cancer.org/acs/groups/content/@research/documents/document/acspc-042801.pdf; *see also, e.g.*, 155 Cong. Rec. S12565-01 (Dec. 7, 2009) (Statement of Senator Shaheen, sharing the story of breast cancer survivor Judith Pietroniro).

[8] Eric Buch, MD et al. American Heart Association, *Pacemaker and Defibrillator Lead Extraction*, (Mar. 22, 2011) (hereinafter Buch 2011), http://circ.ahajournals.org/content/123/11/e378. full.pdf+html.

Subcomm. on Health, Employment, Labor and Pensions, (Feb. 22, 2012) (Testimony of Georgeanne Koehler, Billy's Sister). At the time, Koehler had health insurance through his employer and was able to receive the defibrillator he needed. *Id.* However, in the spring of 2003, his employer shut down. "No more job, no more health care." *Id.* Koehler knew having insurance was paramount because defibrillator batteries should be replaced every 5-10 years.[9] "Not wanting the government to give him anything," he tried to buy private insurance, calling "every health insurance company in Pittsburgh[.]" *Id.* But the answer was the same: "denied due to his pre-existing [heart] condition." *Id.* When he collapsed in December 14, 2007 because his defibrillator battery was low, Koehler was rushed to a local hospital but was discharged the next day without a new battery because he was uninsured. *Id.* One year before the Act's passage, Koehler was found in his car, slumped over his wheel at a stop sign; his heart had stopped. *Id.* A low battery likely cost him his life.

In addition to hearing the personal testimony of dozens of Americans with preexisting conditions, members of Congress received letters from constituents recounting their stories of being denied health insurance because of preexisting conditions. Many members made statements explaining that their intent in reforming healthcare was to provide coverage to those with preexisting

[9] Buch 2011 (stating the surgery to replace the battery is "simple").

conditions.[10] Senator Shaheen shared the story of Colleen Conners, a part-time lecturer and mother, who had been denied coverage from every provider she contacted because she was born with a hip condition and suffers from lupus and scoliosis.[11] Senator Stabenow told the story of Glenn, who wrote, "I have a preexisting condition and no one wants to insure me." Glenn was laid off from his job at age 62, too young for Medicare. Before the Act's passage, had Glenn gotten sick before turning 65, his "savings and everything [would] be wiped out. This is not the way [he] pictured retirement[.]"[12]

Throughout the healthcare debate, Congress focused on ensuring healthcare coverage for Americans with preexisting conditions. "[I]f it takes 10 pages or 100 pages or 1,000 pages, we have to make it clear that insurance companies cannot . . . underwrite based upon preexisting conditions. . . . *All the bills reported out of*

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[10] *See, e.g.*, 156 Cong. Rec. H1854-02 (Mar. 21, 2010) (Statement of Representative Waxman); 155 Cong. Rec. S13796-04 (Dec. 23, 2009) (Statements from Senators Cardin, Kaufman, Klobuchar, and Levin); 155 Cong. Rec. S13661-01 (Dec. 21, 2009) (Statement of Senators Bennet, Klobuchar, Brown, Boxer, and Menendez); 155 Cong. Rec. S13410-01 (Dec. 18, 2009) (Statement of Senators Durbin, Brown, and Kerry); 155 Cong. Rec. S12565-01 (Dec. 7, 2009) (Statement of Senator Shaheen); 155 Cong. Rec. S11191-01 (Nov. 5, 2009) (Statements of Senator Brown); 155 Cong. Rec. H12341-07 (Nov. 4, 2009) (Statements of Representatives Watson and Chu); 155 Cong. Rec. H12623-03 (Nov. 7, 2009) (Statement of Representatives Hoyer, Clyburn, Van Hollen, Waxman, Rangel, Eshoo, Engel, Gene Green, Schakowsky, Sutton, and Boswell) 155 Cong. Rec. S8968-01 (Aug. 6, 2009) (Statement of Senator Dodd); 155 Cong. Rec. S8152-03 (July 28, 2009) (Statements of Senator Murray and Merkley).

[11] 155 Cong. Rec. S12565-01 (Dec. 7, 2009) (Statement of Senator Shaheen).

[12] 155 Cong. Rec. S10284-01 (Oct. 8, 2009) (Statement of Senator Stabenow).

the committees do that. You cannot be denied coverage due to preexisting conditions," stated Senator Cardin one month before the Act would pass the Senate.[13] Likewise, Senator Kaufman stated, "no one should be denied coverage because of a preexisting condition. . . . We are going to pass a bill that eliminates" denials for preexisting conditions."[14] Moreover, Senator Stabenow stated she intended "to stop the banning of insurance because of preexisting conditions. That is extremely important."[15]

Even in the final hours leading to the Act's passage, the focus remained on protecting Americans with preexisting conditions. Senator Feingold, on the eve of the passing the legislation, stated that "because of [the Act,] restricting or denying coverage based on preexisting conditions is prohibited for all Americans."[16] Similarly, on March 21, 2010, when the House affirmed the Senate's amendments, Representative Maffei's first response to "what's in [the Act]?" was that "[p]eople who have been denied coverage because of a pre-existing condition will finally have access to affordable coverage."[17]

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[13] 155 Cong. Rec. S11023-01 (Nov. 3, 2009) (Statement of Senator Cardin) (emphasis added).
[14] *Id.* (Statement of Senator Kaufman).
[15] 155 Cong. Rec. S10284-01 (Oct. 8, 2009) (Statement of Senator Stabenow).
[16] 155 Cong. Rec. S13796-04 (Dec. 23, 2009) (Statement of Senator Feingold); *see also* 155 Cong. Rec. S13796-04 (Dec. 23, 2009) (Statements of Senators Murray, Durbin, Rockefeller, Harkin, Burris, Levin, Klobuchar, and Casey).
[17] 156 Cong. Rec. H1854-02 (Mar. 21, 2010) (Statement of Representative Maffei); *see also, e.g.*, 156 Cong. Rec. H1854-02 (Mar. 21, 2010) (Statement of

A 2011 study revealed that between 50 to 129 million Americans currently have a preexisting condition.[18] Even at the low end of the spectrum, that is one-in-five Americans who suffer a preexisting condition. The truth is, as Representative Perlmutter stated on the House floor, most, if not everyone, "has somebody in their family[,] a close friend, [or] a neighbor with a preexisting condition."[19] And many people who are healthy now may find themselves with conditions that would have rendered them uninsurable in the past.

Congress passed the Act so the more than three million patients who use a defibrillator,[20] like Billy Koehler, will not be discharged without a simple surgery to replace their battery. 156 Cong. Rec. H1854-02 (March 21, 2010) (Statement of Congressman Doyle, "'Yes' to health reform. 'Yes' to Bill Koehler."). The Act was passed so that women like Peggy Robertson cannot be required to "get

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Representatives Waxman, Davis, Ellison, Norton, Schiff, Jackson Lee, Miller, Dent, Meeks, and Roybal-Allard); 156 Cong. Rec. H1891-01 (Mar. 21, 2010) (Statements of Representatives Waters, McCollum, Pelosi, Kilpatrick, Garamendi, Valezquez, and Hirono); 156 Cong. Rec. H1824-03 (Mar. 21, 2010) (Statements of Representatives Farr, Castor, Langevin, Matsui, Slaughter, Perlmutter, Pingree, Nadler, Boccieri, and Holt).

[18] U.S. Dep't of Health and Human Servs., *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans* (Nov. 2011), http://www.aspe.hhs.gov/health/reports/2012/pre-existing/index.pdf. "Day after day, new studies are showing just what's at stake in this debate over health care reform. The Department of Health and Human Services released a staggering report stating that up to 129 million." 157 Cong. Rec. H262-01 (Jan. 11, 2011) (Statement of Representative Doyle).

[19] 156 Cong. Rec. H1824-03 (Mar. 21, 2010) (Statement of Representative Perlmutter).

[20] Buch 2011 (stating over three million patients use implant devices).

sterilized" to obtain healthcare simply because of a prior cesarean section.[21] It was passed so breast cancer survivors like Vernal Branch do not have to live in fear that they will not have the resources available to defeat the cancer again if it returns.[22] As Congressman Kennedy said on the day the Act passed the House, quoting Dr. Martin Luther King Jr., "of all the forms of inequality, injustice in health care is the most shocking and inhuman[]."[23]

III. THE ACT'S INSURANCE SUBSIDIES ARE ONE LEG OF A 'THREE-LEGGED STOOL' THAT MUST REMAIN INTACT TO FUNCTION.

If plaintiffs' interpretation of the Act prevails, Aidan's, David's, Jared's, Jennifer's and Steve's stories may end as tragically as Billy Koehler's. Congress passed the Act so that there would not be another Billy Koehler, who died because no insurance company would cover his heart condition and pay for the new battery he needed in his defibrillator. But removing subsidies for healthy Americans in 34 states with federally run exchanges will severely undermine the exchanges in those states, and will likely strip Amici and others with preexisting conditions of the insurance they are presently able to purchase.

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[21] 155 Cong. Rec. S13661-01 (Dec. 21, 2009) (Statement of Senator Bennet).
[22] 155 Cong. Rec. S12565-01 (Dec. 7, 2009) (Statement of Senator Shaheen).
[23] *See* 156 Cong. Rec. H1824-03 (Mar. 21, 2010) (Statement by Representative Kennedy); Amanda Moore, HUFFINGTON POST, *Tracking Down Martin Luther King, Jr.'s Words on Healthcare*, (Jan. 1, 2013), http://www.huffingtonpost.com/amanda-moore/martin-luther-king-health-care_b_2506393.html (tracking the quote's origin and stating it is usually found in connection with the Affordable Care Act debate).

As discussed above, Congress viewed the first leg of this stool, protecting men and women who are desperately in need of insurance but could not obtain it because of their preexisting conditions, as a matter of paramount importance. But Congress also knew that it could not simply require insurers to cover people with preexisting conditions without doing more. An individual mandate, Congress explained, "is essential to creating effective health insurance markets" where people with preexisting conditions enjoy equal access to insurance. 42 U.S.C. § 18091(2)(I). A law that protects people with preexisting conditions, without also imposing a financial consequence on people who delay buying insurance until they become sick, "threaten[s] to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2013).

Similarly, without subsidies, the Act's health exchanges "would not operate as Congress intended and may not operate at all." *Id.* at 2674 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). Without subsidies, "insurance companies will have little incentive to sell insurance on the exchanges" where they are also subject to additional regulation. *Id.* Moreover, if this Court accepts plaintiffs' invitation to rule that subsidies are unavailable in the states with federally run exchanges, that would trigger an upward spiral in premium costs similar to the one that would

occur in the absence of an individual mandate. As an *amicus* brief filed on behalf of several economists explains, without subsidies "health insurance coverage would remain unaffordable for more than 99 percent of the families and individuals eligible for subsidies under the current IRS rule." Brief of Amici Curiae for Economic Scholars in Support of Appellees, *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir.), 35.[24] Without near-universal coverage for all, provided through the individual mandate and subsidies, insurers will simply exit the market—as they did in many states passing regulations prohibiting insurance discrimination. *See, e.g.*, *Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2612-14 (opinion of Ginsburg, J.) (describing the "death spiral" that could occur if Congress does not achieve near-universal coverage among all Americans, including healthy ones).

Instead of looking to the specific purpose of the Act as set forth in its text, *see* 42 U.S.C. § 18091, or the Act's legislative history, plaintiffs and their amici claim to have found a purpose (incentivizing states to provide exchanges) that is *nowhere* to be found in its text, its legislative history, or the media coverage surrounding the Act's passage. Indeed, plaintiffs ask this Court to hold that Congress viewed the question of whether state or federal officials operated a

[24] In accordance with Circuit Rules 29(a) and 29(d), Amici adopt and reference arguments made before the panel by the Government, pp. 35-40, and the following amici, on the interconnectedness of the Act's three-legged stool: America's Health Insurance Plans, pp. 23-28; American Hospital Association, pp. 11-12; Economic Scholars, pp. 7-15, 20-25.

particular exchange as a matter of such overriding importance that it trumped Congress's explicitly stated objectives.

Outside the context of this lawsuit, opponents of the statute repeatedly emphasize the interconnectedness of the law's subsidies with its insurance reforms and its individual mandate in other litigation involving the Act. For example, in the *NFIB v. Sebelius* litigation, 36 Senators who oppose the law filed an amicus brief explaining how the Act is "dependent on each of its interlocking provisions" and quoting Senator Franken's description of the law's "three-legged stool" to emphasize how the law could not function without all of its interlocking pieces. Brief of Members of the United States Senate as *Amici Curiae* in Support of Petitioners on the Issue of Severability in *NFIB v. Sebelius*, Nos. 11-393 & 11-400 (S. Ct.), pp. 11, 23. Similarly, governors and attorneys general representing 24 states personally signed a brief in the same litigation explaining the Act's "core provisions are carefully constructed to work in unison to achieve Congress' paramount goal of 'near-universal' insurance coverage." Brief for State Petitioners on Severability in *NFIB v. Sebelius*, Nos. 11-393 & 11-400 (S. Ct.), pp. 43–44.

Now, however, plaintiffs ask this Court to hold that the Act "unambiguously" permits each state—including the states which sued the federal government in an effort to convince the courts to strike down the law in its entirety—to render the health insurance exchange in their state ineffective simply

by electing for a federally run exchange. The premise of their argument, in other words, is that each state that sued to block the Act has (and always has had) the power to frustrate the law's most important provisions, and that Congress intended to give each state this power. At the very least, if the statute were unambiguous in the way plaintiffs suggest, it is unlikely that so many who opposed the Act would have signed their names to a description of the law that is wholly inconsistent with plaintiffs' legal theory.

Plaintiffs' novel reading of the statute ignores the long-standing principle that "[i]n expounding a statute, [this Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013) (quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1849)). Plaintiffs' reading of the statute wrongfully interprets its various provisions "with blinders on, refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014). The *only* construction of the law's text that "produces a substantive effect that is compatible with the rest of the law," *see id.* (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988)), is the one offered by the Government—a meaning that will allow Aidan, Jennifer, the other Amici, and the millions of other Americans with preexisting conditions to

live their lives as fully as Congress intended when it passed the Affordable Care Act.

CONCLUSION

For the foregoing reasons, Amici Individuals with Preexisting Conditions respectfully request this Court affirm the judgment of the district court.

Dated: November 3, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,798 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit. Rule 32(a)(1).

I hereby certify this brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word-2010, in 14-point Times New Roman font.

Dated: November 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of November, 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I will also cause to be filed on this date thirty copies of the foregoing document, by hand delivery, with the clerk of this Court.

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