IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF CHICAGO,

Plaintiff,

vs.

ALEX M. AZAR, II, in his official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Defendants.

Case No. 1:20-cv-1566

ORAL ARGUMENT REQUESTED

MOTION FOR A PRELIMINARY INJUNCTION
OR, IN THE ALTERNATIVE, EXPEDITED SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM

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INTRODUCTION

The world is facing a global pandemic the likes of which it has not seen in over a century—the end of which is neither known nor in sight. As of shortly before this filing, over two million people in the United States were confirmed to have contracted the novel coronavirus,[1] and over 115,000 people were confirmed to have died from it. Americans are facing severe disruptions to everyday life, from social distancing and school closures to furloughs, layoffs, and collapsing businesses. As states reopen for business, and even with the best social distancing practices in place, some experts believe that the virus may resurge, and that the world will likely face a second wave of the pandemic in the fall or winter of 2020. Even optimistic projections predict that life will not approach normal until a vaccine is developed and distributed sometime in 2021 at the earliest.

During these difficult times, Americans need the security and peace of mind that affordable, high-quality health insurance coverage can offer. Congress enacted the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA") to provide that coverage. The ACA allows Americans to purchase insurance on Exchanges established by states or by the federal government operating in their stead, during either an annual open enrollment or during special enrollment periods ("SEPs") required by the statute and its implementing regulations. Among the various SEPs provided for by the ACA, an Exchange must provide an SEP when consumers are facing "exceptional circumstances"—a broad and inclusive term that certainly encompasses a once-in-a-century health crisis. Indeed, almost every state that runs its own Exchange has reached precisely that conclusion, establishing an SEP so that all of their

[1] For ease of reference, this brief uses "the novel coronavirus" to refer interchangeably to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), as well as the disease it causes, coronavirus disease 2019 (COVID-19).

residents can obtain access to ACA-compliant coverage. And the federal government itself has provided for SEPs in the context of Medicare Part D and group health insurance.

Yet the Trump Administration refused to provide a special enrollment period for the marketplaces administered by the federal government. Recognizing the gravity of the moment, the Department of Health and Human Services ("HHS") and the Centers for Medicare and Medicaid Services ("CMS") initially decided to provide an SEP, and had even gone so far as to communicate that decision to insurers. At the last minute, however, President Trump countermanded that decision for fear of "propping up" the ACA, Orbea Decl. Ex. B-4—an extraordinary about-face those close to the Administration characterized as "purely ideological" and "political," *id.* Ex. B-2. As President Trump has made clear, time and again, he intends to undermine the ACA to the point that Congress is forced to repeal it, or failing that, to effectively repeal it on his own through executive action and/or malign neglect. Defendants ultimately refused to open an SEP and, to date, have offered no cogent explanation for their decision.

Defendants' refusal is unlawful. The term "exceptional circumstances" plainly encompasses a global health crisis that has left millions of Americans in need of high-quality health insurance and could not have been anticipated during open enrollment. Defendants' conclusion to the contrary rests on an impermissible basis for action—the President's desire to sabotage a duly-enacted law. That desire offends the fundamental Constitutional principle that the Executive Branch "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 5. Even leaving that aside, however, Defendants' decision does not reflect the reasoned decisionmaking required by the Administrative Procedure Act, or any attempt to grapple with Americans' desperate need for comprehensive health coverage.

These violations are immensely consequential to Plaintiff the City of Chicago, not to mention millions of Americans. Uninsured and underinsured Americans, including Americans who have contracted the novel coronavirus, frequently do not seek necessary care until it is too late. That is a risk the City cannot afford at a time when encouraging its residents to seek adequate testing and treatment is essential to the City's response to the pandemic. Chicago also provides forms of health services to its residents regardless of insurance status, like ambulance services and free- or reduced-cost health clinics. However, Chicago often cannot recoup the cost of providing such services to uninsured individuals. That burden on the City has been unnecessarily increased by Defendants' decision to prevent Americans from enrolling in ACA-compliant coverage—at a time when the City's operations are already under extraordinary strain.

For these reasons, and as described more fully below, the Court should preliminarily enjoin Defendants to provide an SEP in response to the novel coronavirus for sixty days from the date of its order. That SEP should allow consumers to enroll in coverage that is effective as of the first date of the month in which the order is issued. In the alternative, Chicago respectfully requests that the Court convert this motion to a motion for summary judgment, expedite briefing and consideration of that motion, including the submission of an administrative record, enter judgment for Chicago, and grant such relief on a permanent basis. Simply put, Chicago and millions of Americans cannot wait for the relief that a special enrollment period would provide at this pivotal and fraught point in the Nation's history.

BACKGROUND[2]

A. Statutory and regulatory background

1. The Affordable Care Act

In 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended*, Health Care Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). One of the primary objectives of the ACA is "to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015); *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1315 (2020) (explaining that the Act seeks "to improve national health-insurance markets and extend coverage to millions of people without adequate (or any) health insurance"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) ("The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care."); *Doe #1 v. Trump*, 957 F.3d 1050, 1063 (9th Cir. 2020) (explaining that Congress aimed "[t]o incentivize the purchase of insurance plans through ACA marketplaces").

In enacting the ACA, Congress concluded that high uninsured and underinsured rates harm both individuals who lack adequate insurance and society as a whole. Specifically, Congress found that the uninsured suffer from "poorer health and shorter lifespan"; that the "cost of providing uncompensated care to the uninsured" is high; that "health care providers pass on the cost to private insurers, which pass on the cost to families" by "increas[ing] family premiums"; and that, because many "personal bankruptcies are caused in part by medical expenses," "significantly increasing health insurance coverage … will improve financial security for families." 42 U.S.C. § 18091(2)(E)-(G).

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[2] Chicago will refer to exhibits attached to its request for judicial notice as "RJN Ex. #" and to other declarations and exhibits as "LAST NAME Decl. ¶ # / Ex. #."

To further Congress's goal of expanding access to health coverage, the ACA imposed certain key reforms to the individual health insurance market, including:

- *Nondiscrimination on the basis of health status and health history.* The ACA requires "each health insurance issuer that offers health insurance coverage in the individual … market in a State [to] accept every … individual in the State that applies for such coverage," 42 U.S.C. § 300gg-1(a), and bars insurers from charging higher premiums on the basis of a person's health, *id.* § 300gg.

- *Coverage for essential health benefits.* Insurance for individuals and families sold on ACA Exchanges must cover "essential health benefits," *id.* § 300gg-6(a), and so-called "cost-sharing" payments—for example, deductibles and copayments—for such coverage are limited, *see id.* §§ 300gg-6(b), 18022(a)(2), (c).

- *Subsidized coverage.* The ACA "seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line." *King*, 135 S. Ct. at 2487 (citing 26 U.S.C. § 36B; 42 U.S.C. §§ 18081, 18082).

To help individuals learn about and enroll in the health insurance options that are available to them, the ACA "requires the creation of an 'Exchange' in each State where people can shop for insurance, usually online." *King*, 135 S. Ct. at 2487 (quoting 42 U.S.C. § 18031(b)(1)); *Maine Cmty. Health Options*, 140 S. Ct. at 1315 (explaining that the ACA "called for the creation of virtual health-insurance markets, or 'Health Benefit Exchanges,' in each State," to serve the "end" of increased coverage). These Exchanges, also known as health insurance marketplaces, enable people not eligible for Medicare or Medicaid to obtain adequate, affordable insurance independent of their jobs. The Exchanges therefore serve as "marketplace[s] that allow[] people to compare and purchase" ACA-compliant plans. *King*, 135 S. Ct. at 2485.

An Exchange may be established by the state in which it operates or, in states that have elected not to establish Exchanges, by the federal government. *See id.* at 2487 (citing 42 U.S.C. §§ 18031(b)(1), 18041(c)(1)); 45 C.F.R. § 155.105(f)). Twelve states and the District of Columbia operate "state-based Exchanges" or "SBEs" (operating their own websites rather than

using the federally run HealthCare.gov), thirty-two states rely principally on the federal government to run their "federally-facilitated Exchanges" or "FFEs" using HealthCare.gov, and six states have hybrid Exchanges that assume some, but not all, Exchange functions. RJN Ex. A-1. Illinois has a federally-facilitated Exchange, which, as is relevant here, means that Illinois must defer to the federal government's determinations regarding enrollment periods, although Illinois does exercise some plan certification functions. *Id.*

Exchanges may only offer quality health insurance plans, referred to as "qualified health plans" or "QHPs" under the Act. 42 U.S.C. § 18031(b)(1), (c); *see id*. § 18021(a). Such plans must cover preexisting conditions and essential health benefits and cannot impose annual or lifetime-dollar limits on core coverage. *See*, *e.g.*, *id*. §§ 300gg-3, -6, -11, 18022. Such coverage improves access to care and overall health and reduces financial burdens for individuals. *See, e.g.*, Young Decl. ¶ 5.

2. The enrollment process

Individuals may enroll in qualified health plans on an Exchange during a specified annual open enrollment period, typically at the end of the calendar year. 42 U.S.C. § 18031(c)(6). On federal Exchanges, open enrollment for 2020 lasted from November 1 to December 18, 2019, and open enrollment for 2021 is likely to have a similar range of dates. RJN Ex. A-2. Typically, plans selected during open enrollment start on January 1 of the next year. RJN Ex. A-3 at 14.

In addition to open enrollment, the ACA mandates that "[t]he Secretary *shall require* an Exchange to provide for ... (C) special enrollment periods specified in section 9801 of Title 26 and other special enrollment periods under circumstances similar to such periods under part D of title XVIII of the Social Security Act." 42 U.S.C. § 18031(c)(6) (emphasis added). Part D of title XVIII of the Social Security Act, colloquially known as Medicare Part D, provides for prescription drug coverage. Among the established Medicare Part D SEPs that the ACA

incorporates is one for "exceptional circumstances," defined as "such exceptional conditions as the Secretary may provide." 42 U.S.C. § 1395w-101(b)(3)(C); *see also* 42 C.F.R. § 423.38.

Pursuant to that statutory mandate, CMS's regulations require that an "Exchange *must* provide special enrollment periods … during which qualified individuals may enroll in QHPs and enrollees may change QHPs" when certain "triggering events" occur. 45 C.F.R. § 155.420(a)(1), (d) (emphasis added). And "the Exchange *must* allow a qualified individual or enrollee, and when specified … , his or her dependent to enroll in a QHP if one of the triggering events specified … occur." *Id.* § 155.420(a)(3) (emphasis added). Triggering events include circumstances such as an individual losing coverage, *id.* § 155.420(d)(1), gaining a dependent, *id*. § (2), enrolling unintentionally or erroneously, *id*. §§ (4), (12), experiencing changes in eligibility or access, *id*. §§ (3), (6), (7), or having a health insurer that violated its contract, *id*. § (5). CMS recently created a special enrollment period to promote access to so-called health reimbursement arrangements (employer-funded plans that reimburse certain health care expenses). *Id*. § (14).

As relevant here, another triggering event occurs if "[t]he qualified individual or enrollee, or his or her dependent, demonstrates to the Exchange, in accordance with guidelines issued by HHS, that the individual meets other exceptional circumstances as the Exchange may provide." *Id*. § (9). CMS has explained that the "flexibility afforded under § 155.420(d)(9) allows the Secretary to provide for additional special enrollment periods in the case of exceptional circumstances, as determined appropriate, and HHS will continue to exercise that authority through sub regulatory guidance." *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016*, 80 Fed. Reg. 10,750, 10,798 (Feb. 27, 2015).

CMS has set forth guidelines for the types of "exceptional circumstances" that warrant an SEP in sub-regulatory guidance, including in the FFE and Federally-Facilitated Small Business Health Options Program (FF-SHOP) Enrollment Manual. RJN Ex. A-3. The Manual identifies general types of "exceptional circumstances" that warrant an SEP, including circumstances that are "the result of an unforeseen event" or that "require[] that [an individual] obtain minimum essential coverage" along with "lack of access to his or her application or account." *Id*. at 100. The Manual does not address whether a pandemic or similarly catastrophic public health event would qualify as an "exceptional circumstance."

CMS has detailed many examples of "exceptional circumstances." On its website, for example, CMS lists circumstances where individuals suffer "[a]n unexpected hospitalization or temporary cognitive disability, or were otherwise incapacitated," or where "[a] natural disaster, such as an earthquake, massive flooding, or hurricane" prevents individuals from enrolling. RJN Ex. A-4. An "exceptional circumstance" can also include circumstances such as an individual being "a victim of a house fire [who] was displaced during [open enrollment]." RJN Ex. A-5.

CMS has also determined on multiple occasions that it has authority to issue blanket SEPs for "exceptional circumstances" affecting a large class of people. For example, in 2017, it allowed all individuals who, because of a hurricane, were unable to take advantage of other SEPs for which they would have qualified to access a blanket SEP. RJN Ex. A-6, A-7. In 2018, it allowed individuals affected by an emergency or major disaster formally recognized by FEMA that prevented them from enrolling to access an "exceptional circumstances" SEP. RJN Ex. A-5. CMS has also provided a blanket SEP for volunteers in Americorps and similar programs. RJN Ex. A-8. And CMS has even provided broad SEPs on an ad hoc basis in response to specific

requests, such as when it gave an "exceptional circumstances" SEP with retroactive coverage dates to a group of coal miners. *See* Orbea Decl. Ex. B-14.

Coverage selected during an SEP can begin as early as the first day of the month following enrollment, or can even be retroactive to a specific date, covering expenses incurred prior to enrollment. 45 C.F.R. § 155.420(b); RJN Ex. A-3 at 92. The regulations also provide that, for "exceptional circumstances" SEPs, "the Exchange must ensure that coverage is effective on an appropriate date based on the circumstances of the special enrollment period." 45 C.F.R. § 155.420(b)(2)(iii). Indeed, the Manual provides that coverage effective dates for enrollment during an SEP will "[v]ary based on circumstances," RJN Ex. A-3 at 100, and can be retroactive in nature, *id.* at 129-30. CMS has therefore reiterated that, depending on the nature of the circumstances, "exceptional circumstances" SEPs may offer retroactive coverage dates. RJN Ex. A-4, A-5 at 2.

B. Factual background

1. The novel coronavirus

As of shortly before this, over two million people in the United States have been confirmed to have contracted the novel coronavirus, and over 115,000 people have been confirmed to have died from it. RJN Ex. A-9. "Coronavirus disease 2019 (COVID-19) is a respiratory illness that can spread from person to person." RJN Ex. A-10. "It is thought to spread mainly from person-to-person via respiratory droplets among close contacts." *Id.* The principal symptoms of the novel coronavirus "include fever, cough, difficulty breathing, and shortness of breath." *Id.* "Older adults and people of any age who have serious underlying medical conditions may be at higher risk for more severe illness," including death. RJN Ex. A-11.

In response to the pandemic, President Trump and HHS Secretary Azar declared states of emergency. *See* Proclamation No. 9994, *Declaring a National Emergency Concerning the Novel*

Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 13, 2020); RJN Ex. A-12. Pursuant to guidance from federal authorities, state officials have ordered their residents to stay at home, forcing the closure of businesses, schools, and government offices. RJN Ex. A-13. As a result, the American economy is facing one of the worst downturns since the Great Depression, *see* RJN Ex. A-14, with unemployment rising to over 30 million people in April 2020, RJN Ex. A-15, and remaining high. That downturn has particularly harmed low-education and low-income workers. *Id.* Whether and when America will be able to fully reopen largely depends on when particular states meet a complicated set of gating criteria based on specific epidemiological thresholds. *See, e.g.*, RJN Ex. A-16 at 5.

It is crucial that Americans have access to comprehensive health insurance coverage amidst the pandemic. CDC has explained that "[e]xtensive, rapid, and widely available COVID-19 testing is essential." *Id.* at 3. It has also urged Americans to "[s]tay in touch with your doctor" and to "[f]ollow care instructions from your healthcare provider and local health department." RJN Ex. A-17. As Christen Linke Young, a fellow with the USC-Brookings Schaeffer Initiative for Health Policy, explains, "[t]hose without comprehensive health insurance coverage experience cost-related barriers to health care at higher rates than insured patients," which "may affect how they seek care and what services they receive, including for care related to COVID-19." Young Decl. ¶ 3. "[A]voidance or delay in seeking care could mean individuals delay seeking a COVID-19 test, resulting in a longer period of time during which a person is capable of infecting others," or "could result in individuals avoiding a test entirely." *Id.* ¶ 15. In comparison, the two legislatively-created funds that reimburse providers for COVID-19-related expenses are inadequate because they do not "provide the assurance of actual health coverage" and continue to expose patients and providers to significant costs. *Id.* ¶¶ 4, 18-36.

Allowing Americans to enroll in ACA-compliant coverage through a special enrollment period would provide relief to previously uninsured and underinsured individuals as well as individuals who have lost employer-provided health insurance as a result of the economic crisis caused by the pandemic. As Dr. Emily Gee, a health economist at the Center for American Progress, explains, "[t]he COVID-19 pandemic is expected to cause tens of millions of Americans to lose their current health insurance coverage." Gee Decl. ¶ 5. "Based on national enrollment figures and figures released by state Exchanges that have conducted their own special enrollment periods," Dr. Gee conservatively estimates that 422,000 to 667,000 Americans might enroll in ACA-compliant coverage during a national coronavirus SEP. *Id.* ¶ 6. As Dr. Gee notes, enrollment on a federal SEP could be even higher, *id.* ¶ 24; some estimates project that as many as 2.4 million Americans might seek to enroll, *id.* ¶ 25, and an SEP might also direct uninsured Americans to other programs, like Medicaid, *id.* ¶ 26. While individuals who lost employer-provided insurance may be eligible for a special enrollment period, the process of applying for such an SEP can be burdensome, and some individuals may already have missed their opportunity to do so. *Id*. ¶¶ 17-18.

For that reason, and often expressly invoking the "exceptional circumstances" provision, twelve of the thirteen state Exchanges have provided SEPs. RJN Ex. A-18 (Nevada: "Exceptional Circumstances"), A-19 (Washington: "exceptional circumstances"), A-20 (Connecticut: "exceptional circumstances"), A-21 (Rhode Island: "unexpected and exceptional circumstances"), A-22 (Colorado: "emergency"), A-23 (New York: "exceptional nature of the public health emergency"), A-24 (Vermont: "emergency"), A-25 (Massachusetts: "public health threat"), A-26 (California: "extraordinary"), A-27 (District of Columbia: "public health emergency"), A-28 (Maryland: "emergency"); A-29 (Minnesota: "emergency"). These SEPs

have resulted in significant gains in coverage. *See, e.g.*, Gee Decl. ¶¶ 20, 27; RJN Ex. A-20, A-22. The lone exception is Idaho, which is sparsely populated and has relatively few cases of the novel coronavirus. *See* RJN Ex. A-9.

2. Defendants' refusal to provide a special enrollment period

Although Members of Congress and others repeatedly asked Defendants to implement a special enrollment period on the 38 federally-facilitated and hybrid Exchanges, Defendants ultimately refused to do so. RJN Ex. A-45. On March 21, a CMS spokesperson confirmed that the Administration was "considering whether to create a special enrollment period for Obamacare coverage because of the coronavirus emergency." Orbea Decl. Ex. B-1. The planning for an SEP was sufficiently advanced that "by late March, administration officials sent word to insurers that the call would soon be official: They were reopening Obamacare." Orbea Decl. Ex. B-2. However, "the situation suddenly became 'fluid,' in the description of one executive," while "[a]nother described the administration as divided about whether to proceed, especially given the president's support for the lawsuit that would overturn the law." Orbea Decl. Ex. B-3; *see Texas v. United States*, 945 F.3d 355, 373 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020).

Defendants' refusal to open an SEP ultimately rested on a political calculation made by the White House. "The president opposed reopening the Obamacare marketplaces when presented with the option." Orbea Decl. Ex. B-2. "In meetings at the White House in the time between his stated consideration and his announced rejection of the idea, Trump on multiple occasions … referred to Obamacare as 'a failure,' and questioned why the administration should bother helping to prop it up." Orbea Decl. Ex. B-4. A member of the President's party "close to the administration" characterized the decision as "purely ideological," while an administration official characterized it as "politiciz[ing] people's access to health services during a serious national health emergency." Orbea Decl. Ex. B-2. The decision "surprised even some officials in

the Health and Human Services Department, who believed the concept was still under consideration," and worried officials who "viewed the verdict as an unforced error in the middle of a historic pandemic." *Id.*

Defendants' refusal to open an SEP was first communicated on March 31, when a White House official told Politico that the Trump Administration had decided not to provide a special enrollment period. Orbea Decl. Ex. B-5. HHS Secretary Azar later defended the decision on the grounds that allowing providers to seek reimbursement through two legislatively-created funds is "better for … uninsured individuals" because it provides "disease-specific support of care to make sure that people get treatment." Orbea Decl. Ex. B-2. Defendants have not provided a written explanation of why the novel coronavirus pandemic did not qualify as an "exceptional circumstance," or why reopening the Exchanges would constitute bad policy.

Defendants' refusal is of a piece with President Trump's known hostility toward the Affordable Care Act and his repeated efforts to undermine it. For example:

- On January 25, 2017, President Trump stated, "[T]he best thing we could do is nothing for two years, let [the ACA] explode. And then we'll go in and we'll do a new plan and—and the Democrats will vote for it. Believe me … . So let it all come [due] because that's what's happening. It's all coming [due] in '17. We're gonna have an explosion. And to do it right, sit back, let it explode and let the Democrats come begging us to help them because it's on them." Orbea Decl. Ex. B-6.
- After Congress declined to repeal the Affordable Care Act on July 28, 2017, President Trump tweeted, "3 Republicans and 48 Democrats let the American people down. As I said from the beginning, let ObamaCare implode, then deal. Watch!" RJN Ex. A-30.
- On October 13, 2017, President Trump stated, "We're taking a little different route than we had hoped, because getting Congress—they forgot what their pledges were. … So we're going a little different route. But you know what? In the end, it's going to be just as effective, and maybe it will even be better." RJN Ex. A-31.
- In late April 2018, at a rally in Michigan, President Trump bragged, "Essentially, we are getting rid of Obamacare …. Some people would say, essentially, we have gotten rid of it." Orbea Decl. Ex. B-7.

- In signing a bill unrelated to the ACA on May 30, 2018, President Trump stated: "For the most part, we will have gotten rid of a majority of Obamacare." He went on to confirm that his Administration's objective is to achieve by executive action alone what Congress refused to do: "Could have had it done a little bit easier, but somebody decided not to vote for it, so it's one of those things." RJN Ex. A-32.
- At a rally on June 23, 2018, according to an observer, President Trump complained about Congress's decision not to repeal the ACA and told audience members that "it doesn't matter. We gutted it anyway." Orbea Decl. Ex. B-8.
- On August 1, 2018, President Trump returned to the same theme, stating that even though Congress declined to repeal the ACA, "I have just about ended Obamacare," but "we're doing it a different way. We have to go a different route." Orbea Decl. Ex. B-9.
- On October 2, 2018, President Trump referenced the ACA and stated, "We had it repealed and replaced. A little shock[] took place early in the morning. But the fact is, we didn't get one Democrat vote…. But we've pretty much dismantled it." Orbea Decl. Ex. B-10.
- On November 2, 2018, President Trump boasted that his Administration is "decimating [the ACA] strike by strike," Orbea Decl. Ex. B-11; "we've decimated Obamacare," *id.* Ex. B-12.
- On March 5, 2020, President Trump reiterated that he wanted to "totally kill" the Affordable Care Act. RJN Ex. A-33.
- After the Administration refused to open an SEP, on May 6, 2020, during a press availability in the Oval Office, President Trump declared that his Administration would continue arguing to invalidate the ACA, stating that "Obamacare is a disaster," that "[w]hat we want to do is terminate it," and that his Administration had "already pretty much killed it." Orbea Decl. Ex. B-13.
- On May 26, 2020, during a press availability in the Oval Office, President Trump claimed that "[w]e slashed Obamacare's crippling requirements," and that "essentially we got rid of Obamacare, if you want to know the truth. You can say that in the truest form." RJN Ex. A-34.

In other words, President Trump has repeatedly made plain his desire to, in effect, repeal the Affordable Care Act through executive action alone.

3. Chicago's injuries

Chicago is one of the cities across the country that is working to control the novel coronavirus and protect its residents. According to 2018 Census estimates, 11.9% of Chicago's population under the age of 65, or around 283,000 people, lack health insurance. Arwady Decl. ¶ 6; RJN Ex. A-35. That number has likely risen steeply as a result of the pandemic, which has

increased unemployment and thereby pushed individuals off their employer-provided insurance. Gee Decl. ¶¶ 5, 8. While the Bureau of Labor Statistics reports that the Chicago-Joliet-Naperville, Illinois metropolitan statistical area had 123,900 unemployed individuals in February 2020, it had spiked to 640,300 by April 2020. Arwady Decl. ¶¶ 7, 25; RJN Ex. A-36.

As a consequence of Defendants' refusal to open a special enrollment period, Chicago will face increased costs to provide health services to its residents. As noted above, in enacting the ACA, Congress found that the "cost of providing uncompensated care to the uninsured" is high. 42 U.S.C. § 18091(2)(E)-(G). Thus, as HHS has recognized, "uncompensated care costs will … fall substantially following major insurance coverage expansions." RJN Ex. A-37; *see also* RJN Ex. A-38 at 1-2. "Increasing comprehensive health insurance coverage, including through Exchange enrollment, would … help ensure that health care providers are paid for services they provide," as was the case with the expansion of Medicaid. Gee Decl. ¶ 12.

Chicago bears those costs in several ways. Chicago's Department of Public Health operates and partners with health clinics and other providers to provide certain services to uninsured and underinsured residents, Arwady Decl. ¶¶ 9-13, 15-17, and Chicago's Fire Department provides ambulance transport services to residents regardless of their ability to pay, *id.* ¶¶ 18-22. However, the more residents that lack adequate insurance, the more Chicago can expect to pay to operate many of these programs: "[t]he higher the uninsured and underinsured rate, the more that the clinics operated by the Chicago Department of Public Health and its community-based partners will necessarily have to provide free or reduced-cost care to patients," and "a higher number of uninsured or underinsured individuals or an increase in acute health needs will … result in more ambulance transports for which Chicago does not receive reimbursement." *Id.* ¶¶ 13, 22.

Defendants' refusal to open a special enrollment period also risks exacerbating the spread of the novel coronavirus in Chicago and across the nation. Chicago has mounted an aggressive response to the pandemic, directing its residents to community health centers to receive services during the pandemic (albeit through telemedicine, in many cases), and to city-supported testing centers. Arwady Decl. ¶¶ 28-34. It is essential to the City's health and well-being that City residents obtain testing and treatment if they contract the novel coronavirus: the more the pandemic spreads, the more the City faces increased strains on its budget, job and revenue losses, and impediments to its operations. *Id.* ¶¶ 35-40. But without comprehensive insurance coverage, individuals are less likely to seek out that testing and treatment. *Id.* ¶ 33; Young Decl. ¶¶ 3-4. That hurts those individuals and the City alike.

C. Procedural background

Chicago filed this lawsuit on June 15, 2020. ECF No. 1. Chicago raises three claims under the Administrative Procedure Act: (1) that Defendants' determination that the novel coronavirus does not constitute an "exceptional circumstance" is contrary to law, 5 U.S.C. § 706(2)(A); (2) that Defendants' refusal to provide a special enrollment period is arbitrary and capricious, *id.*; and (3), in the alternative, that Defendants have unlawfully withheld a special enrollment period, *id.* § 706(1). ECF No. 1 ¶¶ 177-87. Chicago asks the Court to declare that Defendants' decision not to provide a special enrollment period is unlawful, to vacate and set aside Defendants' decision, and to enjoin Defendants to provide a special enrollment period. *Id.* at 57-58.

Chicago now moves for a preliminary injunction or, in the alternative, expedited summary judgment.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In this Circuit, it remains an open question whether the "sliding-scale" approach to equitable relief—where "a strong showing on one factor could make up for a weaker showing on another"—still governs. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011).

In resolving a motion for a preliminary injunction, "the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2). At that point, a movant is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. 56(a). Generally, in cases under the Administrative Procedure Act, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Winder HMA LLC v. Burwell*, 206 F. Supp. 3d 22, 31 (D.D.C. 2016) (quotation omitted).

ARGUMENT

I. Defendants' decision not to provide a special enrollment period is unlawful.

Chicago is likely to prevail on the merits. Defendants concluded that a once-in-a-century pandemic did not constitute an "exceptional circumstance" warranting a special enrollment period.[3] That decision violates Defendants' nondiscretionary duty to provide an SEP in response

[3] Defendants' refusal constitutes final agency action subject to review under the APA. 5 U.S.C. § 704. It is agency action because it is the denial of a discrete proposed agency action—

to "exceptional circumstances." § I.A. Specifically, Defendants' refusal to provide a special enrollment period is contrary to any reasonable interpretation of the term "exceptional circumstances." § I.B. That decision was also arbitrary and capricious because Defendants were motivated by President Trump's opposition to the ACA, rather than any permissible and rational basis for agency action. § I.C. Alternatively, if Defendants' decision is instead understood as unlawfully withheld agency action, it violates their mandatory duty to provide an SEP in response to "exceptional circumstances." § I.D.

A. Defendants have a nondiscretionary duty to provide a special enrollment period in response to "exceptional circumstances."

Both the ACA and its implementing regulations require Exchanges to provide a special enrollment period in response to "exceptional circumstances." Specifically, the ACA mandates that "[t]he Secretary *shall require* an Exchange to provide for ... special enrollment periods … similar to such periods under [Medicare Part D]." 42 U.S.C. § 18031(c)(6) (emphasis added). In doing so, the ACA incorporates Medicare Part D's SEP for "exceptional circumstances." 42 U.S.C. § 1395w-101(b)(3)(C). The ACA's implementing regulations reflect this duty by requiring that Exchanges "*must provide* special enrollment periods," 45 C.F.R. § 155.420(a)(1) (emphasis added), when certain "triggering events" occur, *id.* § (d), like when an "individual meets other exceptional circumstances as the Exchange may provide," *id.* § (d)(9).

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namely, the denial of an order or provision for relief authorizing a blanket SEP in response to the pandemic—and one based, presumably, on an agency rule that the pandemic is not an "exceptional circumstance." *See* 5 U.S.C. § 551(14) ("'agency action' includes …. an agency rule, order, … relief, or the equivalent or denial thereof"); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (a denial "is the agency's act of saying no to a request"). That action is final within the meaning of the APA because it is the consummation of HHS's decisionmaking process, not a tentative or interlocutory decision, and because it determines rights and obligations and creates legal consequences, namely the lack of an SEP for uninsured individuals. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

"That language is mandatory, not precatory"—it imposes a duty that "admits of no discretion." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). Indeed, "the mandatory 'shall[]' … normally creates an obligation impervious to judicial discretion." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002).

That duty cannot be committed to Defendants' discretion by law. *See* 5 U.S.C. § 701(a)(2). As the Supreme Court recently explained:

> In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. And we have generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings, or a decision by an intelligence agency to terminate an employee in the interest of national security.

Dep't of Commerce v. New York, 139 S. Ct. 2551, 2568 (2019) (quotations omitted). Neither of those narrow formulations apply here.

To start, the term "exceptional circumstances" provides a meaningful standard for reviewing courts to apply. Courts have routinely interpreted that language in other contexts. *See, e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (patent law); *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 611 (D.C. Cir. 1976) (FOIA); *United States v. Harris*, 2020 WL 1503444, at *5 (D.D.C. 2020) (prisoner release). And courts have applied similarly broad standards in the context of health care, like the requirement that a pilot project be "likely to assist in promoting the objectives" of Medicaid, *Gresham v. Azar*, 950 F.3d 93, 98-99 (D.C. Cir. 2020), and the requirement to provide "high quality and cost-effective" healthcare, *Cody v. Cox*, 509 F.3d 606, 610-11 (D.C. Cir. 2007); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1403-04 (D.C. Cir. 1995) (concluding that the phrase "in the

interest of justice" is not committed to agency discretion by law). Defendants' obligation to provide a special enrollment period is at least as administrable as these requirements, and certainly not couched in language that "provides absolutely no guidance as to how [the agency's] discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam).

The purpose of the ACA and its implementing regulations adds further content to the meaning of "exceptional circumstances." As explained above, the ACA requires Defendants to administer Exchanges in a manner that provides Americans with access to needed comprehensive health coverage, a statutory purpose that informs what constitutes "exceptional circumstances" for triggering an SEP. Similarly, the Supreme Court recently relied on the purpose and structure of the Census Act in concluding that the Secretary of Commerce's authority to select census questions was not committed to his discretion, even though the Secretary was authorized to take the decennial census "in such form and content as he may determine." *New York*, 139 S. Ct. at 2568; *see also Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1223-25 (D.C. Cir. 1993) (reviewing an agency's decision to provide exceptions "as the Secretary deems appropriate" because the statutory scheme provided sufficient standards to guide review).

The phrase "as the Exchange may provide," *see* 45 C.F.R. § 155.420(c)(9), does not commit Defendants' mandatory duty to their sole and unreviewable discretion, nor could it. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1574 (D.C. Cir. 1987) ("[A] federal statute must always be superior to all other forms of law, including regulations."). That language simply reflects that the Exchange is charged with assessing, in the first instance, whether "exceptional circumstances" exist. To the extent the language gives the Exchange any discretion in making that determination, it plainly

does not give Defendants discretion to withhold an SEP where "exceptional circumstances" exist, or to define "exceptional circumstances" in an arbitrary or unreasonable manner.

In that respect, the regulation is akin to duties imposed by other laws that courts have held to be nondiscretionary. For example, the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* confronted a statute that imposed a "categorical requirement that the Secretary [of the Interior] take into consideration economic and other impacts" before designating an area as critical habitat, but then provided that the Secretary "*may* exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of designation." 139 S. Ct. 361, 371 (2018) (quotations and alterations omitted) (emphasis added). The statute therefore required the Secretary to engage in a reasoned cost-benefit analysis even though the Secretary had some discretion over the ultimate decision. *Id.* Put simply, while use of the word "may" confers "*some* discretion," it "does not mean the matter is *committed exclusively* to agency discretion." *Dickson*, 68 F.3d at 1401 (emphasis added); *see also Salazar v. King*, 822 F.3d 61, 80 (2d Cir. 2016) (explaining that even if an agency has "some discretion in making [an] initial triggering decision," that "discretion is not unfettered").

Finally, the administration of the ACA's Exchanges is hardly the kind of task "traditionally committed to agency discretion." *New York*, 139 S. Ct. at 2568. Those traditional domains have included quintessentially sensitive and unbounded decisions like "decision[s] not to institute enforcement proceedings" and "decision[s] by an intelligence agency to terminate an employee in the interest of national security." *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), and *Webster v. Doe*, 486 U.S. 592, 600-01 (1988)). In contrast, the ACA's Exchanges are governed quite specifically and extensively by the ACA and its implementing regulations. And courts can and have adjudicated many cases involving the meaning of those laws. *See, e.g.*,

Maine Cmty. Health Options, 140 S. Ct. 1308; *King*, 576 U.S. 988. This case therefore "involves the sort of routine dispute that federal courts regularly review: An agency issues an order," and a plaintiff "objects that the agency did not properly justify its determination under a standard set forth in the statute." *Weyerhaeuser*, 139 S. Ct. at 370.

Ultimately, the question before the Court is whether the novel coronavirus pandemic qualifies as an "exceptional circumstance" within the meaning of the ACA. If it does, Defendants have no discretion—they must provide an SEP to the public.

B. Defendants' determination that the pandemic is not an "exceptional circumstance" is contrary to the Affordable Care Act and its implementing regulations.

The pandemic is a national emergency that calls out for an aggressive response. There can be no question that it qualifies as an "exceptional circumstance" under any reasonable interpretation of the term. § I.B.1. That conclusion is reinforced by the ACA's fundamental purpose of providing access to affordable health insurance when it is needed the most. § I.B.2. And other relevant actors, including the state Exchanges and the federal government in other enrollment contexts, have reached this very conclusion. § I.B.3. Finally, issuing an SEP for the ACA's Exchanges would be consistent with CMS's own prior interpretations and practices. § I.B.4.

1. The pandemic is an "exceptional circumstance" under any reasonable interpretation of the term.

The pandemic is an "exceptional circumstance" that triggers the duty to provide an SEP. That term must be "construe[d] … in accordance with [its] ordinary meaning": "uncommon," "rare," or "not ordinary." *Octane Fitness*, 572 U.S. at 553 (quotations omitted); *see also Harris*, 2020 WL 1503444, at *5 (explaining that "exceptional … means clearly out of the ordinary, uncommon, or rare") (quotation omitted). While the term "exceptional circumstances" is

necessarily expansive, it includes, at a minimum, extraordinary, unpredictable events that dramatically increase the need for health insurance coverage and for enrollment flexibility.

There can be no question that our current circumstances are exceptional. On March 13, 2020, President Trump declared that "the COVID-19 outbreak in the United States constitutes a national emergency," and conferred authority on the HHS Secretary to waive or modify certain statutory and regulatory requirements. 85 Fed. Reg. at 15,337. Similarly, HHS Secretary Azar formally declared a "public health emergency," and CMS Administrator Verma referred to the pandemic as a "national emergency." RJN Exs. A-12, A-39. Courts, too, have referred to the pandemic as an "exceptional circumstance." *See, e.g.*, *United States v. Roeder*, 2020 WL 1545872, at *3 (3d Cir. 2020) (per curiam) (noting that "the COVID-19 pandemic has given rise to exceptional and exigent circumstances that require the prompt attention of the courts"); *Cassell v. Snyders*, 2020 WL 2112374, at *12 (N.D. Ill. 2020) ("In these exceptional circumstances, controlling the spread of COVID-19 counts as a compelling interest."); *Harris*, 2020 WL 1503444, at *5 ("[T]he Government (sensibly) does not dispute that COVID-19 constitutes 'exceptional' circumstances—at least in a 'broad sense.'").

Those determinations reflect reality. The novel coronavirus is a "severe acute respiratory illness that has killed … more than 100,000 nationwide," one which has "no known cure, no effective treatment, and no vaccine," and therefore presents an "extraordinary health emergency." *S. Bay United Pentecostal Church v. Newsom*, --- S. Ct. ----, 2020 WL 2813056, at *1 (2020) (Roberts, C.J., concurring); *see also* RJN Ex. A-9. In response to the pandemic, federal, state, and local governments have all imposed unprecedented limitations on Americans' ability to travel and congregate, physically closing schools, businesses, agencies, courts, houses of worship, entertainment venues, and others. RJN Ex. A-13; Arwady Decl. ¶ 24. As a result, the

economy faces a major economic crisis, and tens of millions of Americans have lost their jobs—with which often goes employer-provided insurance. RJN Ex. A-14, A-15.

If anything, a term like exceptional "seems too mild a word" for the pandemic, and but "a feeble description of the circumstances." *Taylor v. Milwaukee Election Comm'n*, 2020 WL 1695454, at *9 (E.D. Wis. 2020) (finding the pandemic "extraordinary"). The impacts of the pandemic are as severe and far more widespread than any of the natural disasters that CMS has previously determined to be "exceptional circumstances," much less the conclusion of service in AmeriCorps, another "exceptional circumstance." There is no basis to treat it any differently.

2. The ACA's purpose reinforces the conclusion that the pandemic is an "exceptional circumstance."

The conclusion that the pandemic is an "exceptional circumstance" is reinforced by the purpose of the ACA and its implementing regulations. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King*, 135 S. Ct. at 2492 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Again, the ACA's raison d'être is "to expand coverage in the individual health insurance market," providing Americans with comprehensive coverage that reduces financial burdens. *King*, 135 S. Ct. at 2485; *see also Maine Cmty. Health Options*, 140 S. Ct. at 1315; *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 538; *Doe #1*, 957 F.3d at 1063. And that objective is buttressed by the Secretary's weighty responsibilities to aggressively respond to public health emergencies, including outbreaks of communicable diseases. *See, e.g.*, 42 U.S.C. §§ 243(a), (c)(1), 247d(a), 1320b-5.

Thus, to the extent there is any ambiguity as to whether "exceptional circumstances" includes an event like the current pandemic, these fundamental purposes compel the conclusion

that it does. *See King*, 135 S. Ct. at 2492-93 (concluding that the purpose and structure of the ACA compelled the rejection of an interpretation of an ambiguous term that would "destabilize the individual insurance market"). To stop the spread of the pandemic, CDC has explained that it is "essential" to encourage Americans to seek testing and treatment for the novel coronavirus. RJN Ex. A-16 at 3. It has also urged Americans to "[s]tay in touch with your doctor" and to "[f]ollow care instructions from your healthcare provider and local health department." RJN Ex. A-17. As Christen Linke Young has explained, providing Americans with comprehensive health insurance coverage through a special enrollment period is necessary to assure Americans that their care will be covered, and to allow them to seek care in ways that are both easy and safe to uninfected members of the public. *See, e.g.*, Young Decl. ¶¶ 3-4, 13-17. And, as Dr. Gee has estimated, a national coronavirus SEP could result in hundreds of thousands of Americans enrolling in such coverage, Gee Decl. ¶ 6, or potentially millions, *id.* ¶ 25.

Moreover, allowing Americans to obtain coverage through a special enrollment period would provide them with one measure of financial security in the face of the economic crisis that the novel coronavirus has unleashed. ACA-compliant coverage helps to ensure that individuals will not face steep medical bills for obtaining necessary health care. Young Decl. ¶¶ 6-10. Those who cannot afford such coverage may also be eligible for significant subsidies to defray the cost, or may be redirected to enroll in Medicaid if they qualify. Gee Decl. ¶¶ 9, 25, 26. At a time when many Americans are facing extraordinary hardship, lack of access to affordable health care should not exacerbate their challenges.

3. Both state Exchanges and the federal government in other contexts have recognized that the "exceptional circumstance" of the pandemic should trigger a special enrollment period.

Other relevant actors have overwhelmingly concluded that the novel coronavirus is an "exceptional circumstance." The state Exchanges are subject to the same statutes and regulations

regarding special enrollment periods as the federal government, including the same mandatory triggering events. 45 C.F.R. §§ 155.420(a)(1), (d)(9). Exercising their parallel authority, *twelve* of the thirteen state Exchanges have provided SEPs in response to the novel coronavirus. RJN Exs. A-18-29. In doing so, these Exchanges expressly referred to the pandemic as an "exceptional circumstance" or an "emergency," thereby basing their decision on the same SEP-triggering event at issue here. *See supra* pages 11-12. These virtually unanimous state decisions confirm that any reasonable reading of "exceptional circumstances" must encompass the pandemic.

Moreover, HHS, its subagencies, and other federal agencies have *themselves* recognized the gravity of the pandemic by issuing special enrollment periods in other enrollment contexts—just not the ACA's Exchanges. Specifically, CMS has announced that, in the context of Medicare Advantage and Medicare Part D, it would interpret the "exceptional conditions Special Enrollment Period (SEP)" to apply to "beneficiaries who were eligible for—but unable to make—an election because they were affected by the COVID-19 pandemic." RJN Ex. A-40 at 1-2. For other Medicare parts, CMS has announced that it will retroactively provide "equitable relief" to "eligible individuals who could not submit a timely enrollment," allowing them to enroll in coverage effective as of when they would have originally been able to enroll, without requiring such individuals to "show proof they were impacted." RJN Ex. A-41 at 1. The fact that CMS has nonetheless decided to treat the ACA's Exchanges differently is flatly contrary to the underlying statute, which mandates "special enrollment periods … under circumstances similar to such periods under part D." 42 U.S.C. § 18031(c)(6)(C).

Citing the "national emergency" posed by the pandemic, the IRS and the Employee Benefits Security Administration also extended deadlines for enrolling in group health plans and

other benefit plans until 60 days after the end of the pandemic, as well as for enrolling in COBRA continuation coverage. *Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak*, 85 Fed. Reg. 26,351 (May 4, 2020). In doing so, those agencies recognized the need to "take steps to minimize the possibility of individuals losing benefits because of a failure to comply with certain pre-established timeframes." *Id.* HHS reviewed and expressly concurred with that decision. *Id.*; RJN Ex. A-49. There is nothing that distinguishes those contexts from this one—except, of course, President Trump's well-known distaste for the ACA.

Separately, HHS has issued a number of waivers designed to alleviate regulatory burdens on insurers, providers, and other major companies. RJN Exs. A-42-A-44. In issuing one set of such waivers, CMS Administrator Verma referenced "President Trump declar[ing] the rapidly evolving COVID-19 situation a national emergency"; asserted that "it remains vital that our healthcare system be equipped to respond effectively to the additional cases that do arise," and "that federal requirements designed for periods of relative calm do not hinder measures needed in an emergency"; and characterized the pandemic as "the rarest of situations." RJN Ex. A-39. Those seeking to enroll should receive the same flexibility as regulated industries.

4. CMS's own prior interpretations and practices confirm that the pandemic is an "exceptional circumstance."

CMS has repeatedly recognized that the "exceptional circumstances" event is designed to address unanticipated events and resulting health insurance needs. As CMS has explained: "The exceptional circumstances special enrollment period provides an important avenue to coverage for consumers who experience or are affected by *unanticipated events, often outside of their control*." *Patient Protection and Affordable Care Act; Market Stabilization*, 82 Fed. Reg. 18,346, 18,366 (Apr. 18, 2017) (emphasis added). Similarly, in the context of Medicare Part D, CMS has

concluded that "the Secretary's authority to establish SEPs for exceptional circumstances should be reserved for situations that are not specifically contemplated in the statute and … exercised on a case-by-case basis depending on the circumstances of a particular situation." *Medicare Program; Medicare Prescription Drug Benefit*, 70 Fed. Reg. 4,194, 4,437 (Jan. 28, 2005). And CMS has recognized that "exceptional circumstances" can result from a personal event or an event with widespread consequences, such as a natural disaster. RJN Ex. A-4; RJN Ex. A-5 at 2.

These descriptions fit the novel coronavirus like a glove. A global pandemic is quintessentially an "unanticipated event … outside of [consumers'] control." 82 Fed. Reg. at 13,866. By no fault of their own, families across the country are now forced to face the pandemic without adequate coverage. They could not possibly have predicted the outbreak of the pandemic during 2020 open enrollment. Nothing of the sort had occurred in recent memory, and so Americans reasonably made enrollment decisions based on their existing and expected future health needs, rather than the potential long-tail risk of a pandemic. There is therefore no basis for holding consumers to decisions they made months before they could have known of the risk.

While CMS's guidelines focus on circumstances that limit an individual's ability to enroll in health insurance in the first instance, like natural disasters, they do not restrict the term to only those events, nor could they reasonably do so. To the contrary, CMS itself has explained that an "exceptional circumstances" SEP "should be granted as consistently as possible based on established criteria, *while still allowing enough flexibility to account for the inherent unpredictability* of exceptional circumstances." 82 Fed. Reg. at 18,366 (emphasis added). And in the context of Medicare Part D, which guides the ACA's SEP-triggering events, CMS has explained that there may be unanticipated situations where it is in the "best interest of the beneficiary to have an enrollment (or disenrollment) opportunity," and so examples of

"exceptional circumstances" are "not meant to be exhaustive." *Medicare and Medicaid Programs*, 85 Fed. Reg. 9,002, 9,120 (Feb. 18, 2020).

Moreover, the regulatory text does not limit the meaning of "exceptional circumstances." *See* 45 C.F.R. § 155.420(d)(9). If Defendants wish to impose a narrower or higher standard, they must formally amend the regulation, not "ignore [its] plain language." *Clean Air Project v. EPA*, 752 F.3d 999, 1011 (D.C. Cir. 2014) (quotation omitted). Where Congress or an agency has limited the circumstances that qualify as exceptional, they have done so expressly. *See, e.g.*, 5 U.S.C. § 552 ("[T]he term 'exceptional circumstances' does not include a delay that results from a predictable agency workload."); 8 U.S.C. § 1229a(e)(1) ("The term 'exceptional circumstances' refers to exceptional circumstances … beyond the control of the alien."); 5 C.F.R. § 831.1715(h)(2) ("[O]nly in rare and exceptional circumstances meeting all of the following conditions."); 26 C.F.R. § 301.7701-13A ("For this purpose, transactions necessitated by an excess of demand for loans over savings capital in the association's area are not to be deemed to be necessitated by exceptional circumstances."); 32 C.F.R. § 651.29(b) ("Extraordinary circumstances that preclude the use of a CX are…."); 37 C.F.R. § 401.3 ("In exceptional circumstances when …."); 42 C.F.R. § 421.214(j) ("[U]nder the following exceptional conditions…."). No such limitations appear here.

Even assuming that "exceptional circumstances" means only events that prevented individuals from enrolling when they would have otherwise been eligible, an SEP is required. Many individuals, including those that lost employer-related insurance, have encountered or will encounter difficulties in establishing eligibility and applying for special enrollment periods for which they qualify. Gee Decl. ¶¶ 17-18. In providing an SEP for Medicare Part D, for example, CMS expressly analogized the novel coronavirus to a natural disaster, recognizing that

individuals may have been "unable to and did not make an election during another valid election period as a result of the emergency," and that individuals may also "rely on help making healthcare decisions from friends or family members" who were affected. RJN Ex. A-40 at 1. Thus, extending a blanket SEP without any documentation requirements would be consistent with what CMS has done in past circumstances.

C. Defendants' refusal to provide a special enrollment period is arbitrary and capricious.

Even if Defendants' decision were permissible under the governing statutes and regulations, it was arbitrary and capricious. Under the APA, the Court "shall … hold unlawful and set aside agency action … found to be arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). An agency's action is invalid if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or [if it] is so implausible that [the decision] could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Defendants' decision was arbitrary and capricious for two principal reasons: it relied on an impermissible basis for action—President Trump's bare desire to sabotage the ACA, § I.C.1—and it is irrational and unjustified, in light of the threat posed by the pandemic and HHS's other efforts to give enrollment flexibility, § I.C.2.

1. Defendants refused to open a special enrollment period to prevent Americans from enrolling in ACA-compliant coverage.

By definition, President Trump's desire to undermine a duly-enacted statute cannot be a "factor[] Congress … intended [the agency] to consider." *State Farm*, 463 U.S. at 43. It is fundamental that "the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cty.*, 725 F.3d

255, 260 (D.C. Cir. 2013). Were it otherwise, the executive branch's obligation to "take Care that the Laws be faithfully executed" would be a nullity. U.S. Const. art. II, § 3.

Indeed, "[a]gencies are … 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)). Thus, while the executive branch's "power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014), the President may not "refrain from executing laws duly enacted by the Congress," *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974).

The D.C. Circuit's recent decision in *Gresham v. Azar* illustrates these principles. In *Gresham*, residents of Kentucky and Arkansas challenged a series of Medicaid work requirements implemented by those states and approved by the HHS Secretary. 950 F.3d 93, 96-97 (D.C. Cir. 2020). At the outset, the Court noted that "[t]he district court is indisputably correct that the principal objective of Medicaid is providing health care coverage," a goal it described as consonant with "the Affordable Care Act's expansion of health care coverage to a larger group of Americans." *Id.* at 100-01. The Secretary had impermissibly focused instead on "three alternative objectives" directed toward "better health outcomes," a goal the statute does not mention. *Id.* at 101.

The D.C. Circuit then considered whether the Secretary had adequately considered the risk that the work requirements would lead to lost coverage. It determined that "estimates and concerns raised in the comments were enough to alert the Secretary that coverage loss was an

important aspect of the problem," but that the Secretary had simply "dismiss[ed] them in a conclusory manner." *Id.* at 103. That, the Court explained, was arbitrary and capricious: "[w]hile we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose." *Id.* at 104. The Court therefore vacated the Secretary's approval of the requirements.

Defendants' last-minute decision not to open a special enrollment period was, if anything, more egregious than in *Gresham*. Not only did Defendants prioritize a non-statutory objective, as in *Gresham*, but that objective was to sabotage the statute itself. After considering an SEP for several weeks, Orbea Decl. Ex. B-1, CMS officials went so far as informing insurers that the Administration intended to open one, Orbea Decl. Ex. B-2. Yet Defendants reversed that decision on direction from the White House. *Id*. This decision came after President Trump "referred to Obamacare as 'a failure,' and questioned why the administration should bother helping to prop it up." Orbea Decl. Ex. B-4. Administration officials also thought an SEP might conflict with "the president's support for the lawsuit that would overturn the law." Orbea Decl. Ex. B-3. Administration officials and others characterized the decision as "purely ideological" and "politic[al]." Orbea Decl. Ex. B-2.

That decision is part and parcel of the Administration's other efforts to sabotage the Affordable Care Act. Beginning with his inauguration, President Trump has repeatedly said that he would like the ACA to "explode" to force Congress to make a "new plan" with him. After the ACA did not, in fact, explode, and Congress declined to repeal the law, President Trump instead took unilateral executive action to, in his words, "get[] rid of Obamacare"; "gut[] it anyway"; "end[] Obamacare"; "dismantle[]," and "decimate[] it"; and "totally kill" it. Indeed, when asked

about his support for the lawsuit seeking to invalidate the ACA less than a month ago, and after the Administration decided not to open an SEP, President Trump confirmed: "Obamacare is a disaster," "[w]hat we want to do is terminate it," and his Administration had "already pretty much killed it" (or at least tried to do so). *See supra* pages 12-14.

Defendants' refusal to open a special enrollment period therefore placed the President's political interests in sabotaging the ACA over any reasoned analysis of whether the current circumstances are exceptional or the ACA's purpose. Any other explanation the agency might offer for the decision not to open an SEP would only be a pretext—an "explanation for agency action … incongruent with what the record reveals about the agency's priorities and decisionmaking process." *New York*, 139 S. Ct at 2575.

2. Defendants' refusal was unreasonable.

Assuming, for the sake of argument, that Defendants decided not to open a special enrollment period for a reason other than to sabotage the ACA, that decision was irrational. In reviewing agency action, the Court cannot "defer to the agency's conclusory or unsupported suppositions," *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quotation omitted). "[T]he mere fact that there is some rational basis within the knowledge and experience" of the agency, "under which [it] might have" justified its conclusion, "will not suffice to validate [its] decisionmaking," *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (quotation omitted). And the agency's appeal to its "expert judgment" is unavailing where it failed "to point … to any data of the sort it would have considered if it had considered [the issue] in any meaningful way." *Nat'l Treasury Emps. Union*, 854 F.2d at 499.

Defendants have not provided any rational basis for their refusal to open an SEP. In their public statements regarding the decision, Defendants have not explained how they interpret the term "extraordinary circumstances" or why they concluded that a once-in-a-century pandemic

does not qualify. Nor have they explained how the decision is consistent with the ACA's goal of expanding access to needed health coverage. Instead, all Defendants have said is that refusing to provide an SEP and instead allowing providers to seek reimbursement for novel coronavirus-related expenses through the two legislatively-created funds is "better for … uninsured individuals" because it provides "disease-specific support of care to make sure that people get treatment." Orbea Decl. Ex. B-2; *see also id.* Ex. B-4.

For the reasons explained above, that rationale is plainly not the whole story. But it is also wrong. As Christen Linke Young explains, those funds "do not provide the assurance of actual health coverage" to uninsured patients. Young Decl. ¶ 4. For example, the testing fund cannot be accessed if a provider does not ultimately order a test, *id.* ¶ 20; other services cannot be reimbursed, *id.* ¶ 21, including the cost of a hospital admission, *id.* ¶ 22; and uninsured individuals cannot access the fund directly, *id.* ¶ 23. The treatment fund suffers from many of the same shortcomings, but also can only be used if COVID-19 is the primary diagnosis, *id.* ¶ 30, cannot be used for related services or illnesses, *id.* ¶¶ 30-33, and may have been exhausted by the time an individual seeks treatment, *id.* ¶ 34. Given these gaps, these funds do not provide the same reassurance as comprehensive coverage. *Id.* ¶ 36.

Defendants also "failed to consider [other] important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. Specifically, Defendants apparently did not consider the regulatory text or the overarching purpose of the ACA. Nor have they considered the experiences of states that have operated their own SEPs and seen significant enrollment. There is a reason that support for an SEP has been virtually unanimous among the affected community, including among insurers that might otherwise be expected to voice concerns that permitting special enrollment would lead to adverse selection problems, RJN Ex. A-46-A-47, as well over 200 non-profits, including

provider groups. RJN Ex. A-48. These are serious policy questions that require reasoned deliberation, explanation, and evidentiary support—not the back of the hand.

Finally, Defendants' explanation cannot be squared with Defendants' other efforts to give enrollment flexibility. As explained above, HHS and CMS have assented to special enrollment periods in the context of Medicare, RJN Ex. A-40 at 1-2, A-41 at 1, and for group health plans, 85 Fed. Reg. at 26,351. There is no reason, in Defendants' professed explanation or in logic, why the individuals who were permitted to enroll by virtue of these actions could not also have resorted to the testing and treatment funds. Nor have Defendants explained why the circumstances are so exigent that they need to give extraordinary flexibility to regulated industries, but not consumers. RJN Exs. A-42-A-44. These fundamental inconsistencies further illustrate the arbitrariness in Defendants' refusal to provide an SEP.

D. In the alternative, Defendants have unlawfully withheld a special enrollment period.

Defendant's decision not to provide a special enrollment period is best understood as a denial of agency action or as a rule that the novel coronavirus does not constitute an exceptional circumstance. *See supra* note 3. "A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request." *S. Utah Wilderness All.*, 542 U.S. at 63.

However, to the extent Defendants' decision is instead characterized as the unlawful withholding of agency action, Chicago remains entitled to relief. The APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A plaintiff may sue under Section 706(1) where they assert that "an agency failed to take a *discrete* agency action that it is *required* to take," *S. Utah Wilderness All.*, 542 U.S. at 64—*i.e.*, where "a federal agency has a 'ministerial or non-discretionary' duty amounting to 'a

specific, unequivocal command.'" *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (quoting *id.* at 63-64).

Those standards are met here. In seeking a special enrollment period, Chicago asks for a "discrete agency action," and does not mount a "broad programmatic attack." *S. Utah Wilderness All.*, 542 U.S. at 64. And, as explained above, Defendants have no discretion in determining whether to provide an SEP in response to "exceptional circumstances." The only question is, again, whether "exceptional circumstances" exist; they do, for the reasons described above. Defendants' failure to provide an SEP therefore constitutes unlawfully withheld agency action.

II. Defendants' decision not to provide a special enrollment period irreparably harms Chicago.

Chicago also meets the other preliminary injunction factors. Defendants' decision exacerbates the spread of a deadly pandemic and places additional demand on the already-strained uncompensated care services that Chicago provides. Those are injuries that are "certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation omitted). And they are irreparable: "there can be no do over and no redress" if Chicago prevails at a delayed final judgment. *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016).[4]

Courts across the country have recognized that "the escalating spread of COVID-19," and the government's "critical interest in protecting the public health," present harms that are both

[4] Because Chicago is suffering irreparable harm, it has also suffered injury for purposes of Article III standing. *See League of Women Voters*, 838 F.3d at 9 (holding that the same harms provided "injury for purposes both of standing and irreparable harm"); *In re Navy Chaplaincy*, 516 F. Supp. 2d 119, 125 (D.D.C. 2007) ("In the bulk of cases, a finding of an irreparable injury *a fortiori* signals the existence of an injury-in-fact sufficient to confer standing."), *aff'd*, 534 F.3d 756 (D.C. Cir. 2008).

substantial and irreparable. *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020); *see also, e.g.*, *Altman v. Santa Clara*, 2020 WL 2850291, at *19 (N.D. Cal. 2020) ("the government's—and the public's—interest in controlling the spread of a dangerous pandemic"); *Bayley's Campground Inc. v. Mills*, 2020 WL 2791797, at *13 (D. Me. 2020) ("upset[ting] the bedrock of the state's public health response to COVID-19"); *Benner v. Wolf*, 2020 WL 2564920, at *9 (M.D. Pa. 2020) ("grave harms that could result to all Pennsylvanians from a widespread COVID-19 outbreak"); *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496, at *17 (D. Md. 2020) ("more transmissions of COVID-19 and more cases of serious illness and death"); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2468194, at *6 (N.D. Ill. 2020) ("the health and safety of the public"), *injunction pending appeal denied*, Order, No. 20-1811 (7th Cir. May 16, 2020) ("extraordinary public health emergency"); *Calvary Chapel of Bangor v. Mills*, --- F. Supp. 3d ----, 2020 WL 2310913, at *10 (D. Me. 2020) ("If the prevalence of COVID-19 pulses up within a community, it puts lives … at risk."); *SH3 Health Consulting, LLC v. Page*, 2020 WL 2308444, at *11 (E.D. Mo. 2020) ("the severe harm the residents of the City and County could suffer"); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586, at *44 (D.N.M. 2020) ("[t]he public's interest in limiting the COVID-19 outbreak in the state"). And with good reason: the pandemic is inflicting incalculable damage on state and local governments and their residents.

If Chicago's residents cannot enroll in affordable, ACA-compliant health insurance coverage, they will be less likely to seek medical care, further spreading the novel coronavirus. As Dr. Gee estimates, the consequence of Defendants' decision is that several hundred thousand Americans—and potentially millions—will not obtain affordable, high-quality health insurance, Gee Decl. ¶¶ 5, 25, many of whom reside in the City. And, as explained above, Americans who lack health insurance coverage are less willing to seek critical testing and treatment from places

that charge, including for the novel coronavirus. That conclusion has been confirmed by study after study, including those conducted by federal agencies, as well as recent polling about Americans' reactions to the novel coronavirus. Young Decl. ¶¶ 6-14. Uninsured and underinsured individuals also delay care, allowing conditions to worsen, *id.* ¶ 15; seek care from emergency services, like the ambulance services provided by the City, *id.* ¶ 16; and are less able to obtain care at home, forcing them to go places where they might infect others, *id.* ¶ 17. Increased funding for testing and treatment, and non-ACA-compliant coverage, simply cannot provide uninsured and underinsured Americans with the peace of mind needed to encourage them to seek care. *Id.* ¶¶ 18-40; Gee Decl. ¶¶ 11, 13.

The spread of the novel coronavirus, in turn, places additional strain on the city's health and other systems. If more City residents become sick, more City residents will seek forms of free- or reduced-cost care from clinics and community health centers, call ambulance services when their conditions worsen, and the like. The continued spread of the pandemic also requires Chicago to further stretch its emergency response capabilities, including the support it provides with respect to testing, tracking, and personal protective equipment. Arwady Decl. ¶¶ 14, 29-34. And it will continue to harm the City's operations, impacting City offices and programs and sickening City employees. *Id*. ¶ 38. That's not to mention the downstream harm to a City's health, productivity, and liveliness that comes from the continued threat posed by the pandemic. *Id.* ¶ 36. The two reimbursement funds, which suffer from serious shortcomings and cannot substitute for widespread coverage, do not cure these injuries. Young Decl. ¶¶ 4, 18-36.

Even forgetting for a moment that a once-in-a-century pandemic is ravaging the Nation, there is a close relationship between the uninsured and underinsured rate in a given jurisdiction and the cost of uncompensated care paid for by local authorities. Arwady Decl. ¶¶ 10-13, 20-22;

RJN Exs. A-37, 38; Gee Decl. ¶ 12. All things equal, Chicago would prefer that as many of its residents as possible have health insurance, so that they will not need to resort to the City's uncompensated care programs. But when they do, Chicago is committed to providing those services, often at significant cost. To take one example, Chicago recovers, on average, about 2-3% of what it bills for providing ambulance transports to uninsured individuals, yielding a shortfall in the tens of millions. Arwady Decl. ¶ 21. Thus, even in normal times, Defendants' decision to limit the ability of Chicagoans to enroll in health coverage predictably increases the burden on Chicago's uncompensated care services.

To be clear, Chicago's interests in fighting the spread of the pandemic, ensuring that its residents can get the care they need, and preventing City health systems from being overburdened, are not easily reducible to mere dollars-and-cents. To the contrary, Chicago's specific "expenditures are merely a symptom of [its] programmatic injury." *League of Women Voters*, 838 F.3d at 9. What Chicago faces is a series of profound disruptions to its health, its economy, and its way of life, harming the City's overall ability to function.

To the extent those injuries have a financial component to them, however, they qualify as irreparable all the same. "Economic loss sustained due to a federal administrative action is typically 'uncompensable' in the sense that federal agencies enjoy sovereign immunity, and the waiver of sovereign immunity in the APA does not reach damages claims," so long as it is particularly "serious." *Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018). Should Chicago prevail at final judgment, it obviously "will not be able to recover from CMS for any economic loss [it] suffer[s]." *Northport Health Servs. of Arkansas, LLC v. HHS*, 2020 WL 2091796, at *3 (W.D. Ark. 2020). Those losses are significant; as explained above, the increased strain on Chicago's operations comes at a time when the City can

least afford to bear it. That is all the more true where "COVID-19 and the public health measures necessary to combat the novel coronavirus have … creat[ed] a crisis in funding" for many jurisdictions, including Chicago (which faces at least a $700 million budget shortfall, Arwady Decl. ¶ 39). *Confederated Tribes of Chehalis Reservation v. Mnuchin*, 2020 WL 1984297, at *8 (D.D.C. 2020); *cf. Asante v. Azar*, 2020 WL 1930263, at *4 (D.D.C. 2020) (declining "to disrupt funding to California hospitals during this national emergency").

At the end of the day, thousands of Chicago residents lack health insurance when they could otherwise have it. Chicago's resulting injuries are irreparable and significant and therefore warrant preliminary relief.

III. The balance of equities and the public interest favor a preliminary injunction.

The balance of the equities and public interest factors "merge when the Government is the opposing party." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019). In considering whether to grant a preliminary injunction, the Court must "balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief." *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 503 (D.D.C. 2018) (quoting *Texas Child. Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014)). That balance here favors a preliminary injunction.

First, for all the reasons explained above, a special enrollment period is essential to ensuring that uninsured and underinsured individuals can access health coverage amidst a global pandemic. That coverage is, in turn, key to limiting the spread of the pandemic, and to reducing the strain on health care providers. In this respect, Chicago's injuries are emblematic of those faced by city and state governments, as well as private entities like privately owned hospitals, health clinics, and EMS services, in every state with a federally-facilitated or hybrid Exchange.

Indeed, many of the cases cited above recognize the *public's* interest in abating the effects of the pandemic.

Second, Chicago has shown that Defendants' decision contravenes the Administrative Procedure Act as well as the Affordable Care Act and its implementing regulations. The D.C. Circuit has emphasized that "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (citation omitted); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58-59 (D.C. Cir. 1977) (recognizing that "there is an overriding public interest … in the general importance of an agency's faithful adherence to its statutory mandate"). In particular, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). Defendants did not do so here.

And ***third***, Defendants cannot point to any harm that would result from providing a special enrollment period. The only cost that Defendants might face is the expense necessary to adapt Healthcare.Gov to facilitate an enrollment period. Nor would opening an SEP harm any private parties, a conclusion reinforced by the manifest insurer and provider support for doing so. RJN Exs. A-46-47. Indeed, twelve of thirteen state Exchanges already have, RJN Exs. A-18-29, with no indication that doing so resulted in any problems for insurers or providers. Thus, the public interest and the balance of the equities plainly point toward allowing uninsured and underinsured Americans to purchase high-quality, affordable coverage under the ACA when the need for such coverage simply could not be greater.

IV. In the alternative, the Court should convert Chicago's motion to a motion for summary judgment, expedite consideration of that motion, and enter judgment for Chicago.

For the reasons explained above, Chicago is likely to prevail on the merits, and its injuries tip the scales toward relief. Nevertheless, if the Court concludes that Chicago is not entitled to a preliminary injunction, or believes that summary judgment would be a more efficient way of resolving this case, Chicago respectfully requests that the Court convert this motion to a motion for summary judgment, expedite briefing and consideration of that motion, including the submission of an administrative record, and enter judgment for Chicago.

Such expedited consideration is consistent with the federal rules. "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2). And "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." *Id.* 56(b); *see also* 28 U.S.C.A. § 1657 ("[T]he court shall expedite the consideration of any action … if good cause therefor is shown."). "In APA cases early summary judgment motions are often appropriate, as '[t]he entire case on review is a question of law, and only a question of law.'" *Am. Hosp. Ass'n v. HHS*, 2018 WL 5777397, at *2 (D.D.C. 2018) (quoting *Marshall Cty. Health Care Auth. v. Shalala*, 988 F. 2d 1221, 1226 (D.C. Cir. 1993)). Courts therefore can and do adjudicate APA cases on the basis of expedited cross-motions for summary judgment where there is reason for expedition. *See, e.g.*, *L.M.-M. v. Cuccinelli*, --- F. Supp. 3d ----, 2020 WL 985376, at *8 (D.D.C. 2020); *Policy & Research, LLC v. HHS*, 313 F. Supp. 3d 62, 71 (D.D.C. 2018); *Clean Water Action v. Pruitt*, 2017 WL 8292486, at *1 (D.D.C. 2017); *Sierra Club v. Pruitt*, 238 F. Supp. 3d 87, 89 (D.D.C. 2017).

Expedition is warranted here. For the reasons explained above, Defendants' decision not to provide a special enrollment period has prevented, and is preventing, Americans from

enrolling in ACA-compliant health coverage amidst a global pandemic. Those individuals are less likely to seek testing and treatment for the novel coronavirus, allowing it to spread. And Chicago and other governments are bearing the cost with every day that passes. The legal issues raised by Chicago's lawsuit can be addressed quickly and efficiently through briefing on dispositive cross-motions.

Chicago is likewise entitled to judgment for the reasons explained above. And if the Court enters judgment for Chicago, it should vacate Defendants' decision not to provide a special enrollment period and enjoin them to do so. Defendants' decision is contrary to the governing statutes and regulations, and given that the agency had already decided to provide an SEP before that decision was countermanded based on impermissible and unreasoned grounds, there is not a "serious possibility" that the agency will be able to "substantiate its decision on remand." *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993). Moreover, "the Court should not turn a blind eye to the danger of leaving the current rule in place," *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 271 (D.D.C. 2014)—*i.e.*, preventing people from obtaining coverage when they need it the most. The Court should therefore require Defendants to provide an SEP rather than permit them to continue to deny that desperately needed relief to the public.

CONCLUSION

Plaintiffs' motion for a preliminary injunction or, in the alternative, expedited summary judgment should be granted.

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Respectfully submitted,

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