No. 23-10326

In the United States Court of Appeals for the Fifth Circuit

BRAIDWOOD MANAGEMENT, INC., *et al.*
Plaintiffs-Appellees/Cross-Appellants,

v.

XAVIER BECERRA, *et al.*
Defendant-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Northern District of Texas,
No. 4:20-cv-00283, Hon. Reed O'Connor

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION SUPPORTING DEFENDANT-APPELLANTS/CROSS-APPELLEES AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

TABLE OF CONTENTS

PAGE(S)

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Clinical Preventive Services Recommended by the USPSTF Since 2010 Are Critical to the Health of Older Adults 7

- **A. Pre-Medicare older adults benefit from preventive medications with no cost sharing** 7
- **B. Cancer screenings without cost sharing save lives of older adults** 11
- **C. Infectious disease screenings without cost sharing prevent the transmission of disease among older adults** 13
- **D. Diabetes screening without cost sharing is crucial for older adults** 15
- **E. Injury prevention interventions without cost sharing are essential for older adults** 17

II. Older Adults Benefit from the ACA's Elimination of Cost Barriers to Obtaining Preventive Care 18

- **A. Older adults' access to and utilization of preventive services have increased** 18
- **B. No cost sharing helps mitigate health disparities** 20

III. The Costs of Vacating the Coverage Mandate Are High 23

A. Eliminating coverage without cost sharing puts older adults' health at risk 24

B. Cost sharing for preventive services will jeopardize pre-Medicare older adults' financial security 28

CONCLUSION 31

CERTIFICATE OF SERVICE 32

CERTIFICATE OF COMPLIANCE 33

TABLE OF AUTHORITIES

PAGE(S)

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation advocate for access to high quality affordable health care across the country, and frequently appear as amici curiae in state and federal courts, including in challenges to the Patient Protection and Affordable Care Act (Affordable Care Act or ACA). *See, e.g.,* Br. of AARP and AARP Foundation as Amicus Curiae Supporting Petitioners, *California v. Texas*, 593 U.S. _ (2021); Br. of AARP and AARP Foundation as Amicus Curiae Supporting Appellants; *Assoc. for Comm. Affil. Plans, et al. v. U.S. Dep't of Teasury, et al.,* 19-5212 (D.C. Cir. Nov. 12, 2019); Br. Of AARP and AARP Foundation as Amicus Curiae Supporting Plaintiffs Motion for Preliminary

[1]Amici Curiae certify that no party or party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Amici curiae also certify that only Amici Curiae provided funds to prepare and submit this brief. *See* Fed. R. App. Proc. 29(a)(4)(E). All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Injunction, *Whitman Walker Clinic, Inc. et al. v. U.S. Dep't of Health and Human Servs.,* 1:20-cv-01630 (JEB) (D.D.C. July 15, 2020) (ECF No. 37). In addition, AARP is a Dissemination and Implementation partner organization to the United States Preventive Services Task Force (USPSTF). Dissemination and Implementation partner organizations represent primary care clinicians, consumers, and other stakeholders involved in the delivery of primary care and help disseminate the work of the USPSTF to their members and constituents.

SUMMARY OF THE ARGUMENT

This case concerns whether people will continue to have access to lifesaving preventive care without cost barriers. Preventive care includes services that can identify health problems early, as well as medications and interventions that can either prevent a disease entirely or moderate its harms. The United States Preventive Services Task Force ("USPSTF") makes recommendations concerning such care, in furtherance if its mission to improve the health of Americans by making evidence-based recommendations about clinical preventive services such as screenings, counseling services, and preventive medications. Under the Patient Protection and Affordable Care Act ("ACA"), certain screenings, services, and medications that are recommended by USPSTF must be covered by insurers without cost to patients.

In its decision below, the District Court held that all actions taken to implement or enforce the preventive care coverage requirements for the services recommended by USPSTF on or after the passage of the ACA were unlawful. It further vacated all actions taken pursuant to recommendations from the USPSTF and enjoined the Defendants from any further implementation or enforcement of the provision of the ACA that prohibits cost sharing for the USPSTF's recommended services. *Braidwood Mgmt. v. Becerra*, 4:20-CV-00283-O, 2023 WL 2703229 at *14 (N.D. Tex. Mar. 30, 2023). This breathtaking universal

remedy was in error because the District Court failed to consider the harm such a remedy would cause.

First, the District Court failed to consider the value of these services to millions of Americans. In particular, more than half of the USPSTF recommendations at issue directly benefit the health and wellbeing of older adults ages 50-64, people who do not yet qualify for Medicare (referred to herein as "pre-Medicare older adults"). Those services include screening and medications for diseases that are serious or deadly when left unmitigated but can be treated or managed when detected early or when medication is used.

Second, the District Court ignored the importance of providing preventive care with no cost sharing. Congress recognized that cost is a barrier to obtaining preventive care, and therefore required that the services with the highest rating given by the USPSTF (an "A" or "B") be covered at no cost to patients. Among older adults, access to preventive care and utilization of preventive services has increased because of the ACA's elimination of cost barriers. Likewise, by increasing access, the preventive services at issue here have helped mitigate health disparities.

Finally, the District Court did not account for the significant negative consequences to the health and financial security of Americans, including older adults, if the District Court's universal remedy is left in place. If cost sharing is

permitted, access to preventive care is jeopardized, leading to worse health outcomes. In addition, the introduction of costs will place even more financial strain on a population that is already in a precarious economic situation and, in many cases, burdened with medical debt.

For these reasons, and for those described in Section III of the Defendants-Appellants brief, reversal of the Court's universal remedy is warranted, at a minimum, because the District Court did not consider the balance of equities and universal vacatur is not in the public interest.

ARGUMENT

Free preventive care is vital to millions of people. It is particularly important to the large—and growing—older adult population. In 2019, at least 117 million Americans were 50 and older, and projections show that number will to grow to 132 million people by 2029, and 157 million people by 2050. Jean Accuis & Joo Yeoun Suh, *The Longevity Economy® Outlook: How People Ages 50 and Older Are Fueling Economic Growth, Stimulating Jobs, and Creating Opportunities for All*, 4 (Dec. 2019).[2] The increase in the number of older adults will put pressure on the health care system. In this context, preventive services are essential, not just for the one in three Americans who are older adults, but for all of us.

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[2] https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2019/longevity-economy-outlook.doi.10.26419-2Fint.00042.001.pdf.

The USPSTF makes evidence-based recommendations regarding preventive services. After detailed scientific review, the USPSTF assigns a service a grade. An "A" or "B"—the highest ratings—mean that service has a net benefit that is substantial to moderate. U.S. Preventive Servs. Task Force (USPSTF), *Methods and Processes*.[3] Under the ACA, Congress decided that private insurers must cover services rated an "A" or "B" by USPSTF with no cost sharing. 42 U.S.C. § 300gg-13(a)(1). This means that insurers must make these services free to individuals and cannot charge a deductible, copayment, or coinsurance.

The District Court overlooked the importance of these services, the benefits they provide, and the consequences of permitting cost sharing. This failure to consider the public interest requires reversal of the District Court's universal remedy. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)(stating "[i]n exercising their sound discretion, courts of equity should pay particular regard for the *public consequences* in employing the extraordinary remedy of injunction[.]")(emphasis added); *see also eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006)(explaining that in order to prevail on a claim for permanent injunction a plaintiff must show, among other factors, that "the *public interest would not be disserved* by a permanent injunction."(emphasis added)); *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010)(same).

[3] https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf (last visited June 8, 2023).

If the District Court's decision is implemented, and cost sharing for the services at issue permitted, it will not only impose a barrier to care that the ACA was designed to remove, but it will also harm millions of Americans.

I. Clinical Preventive Services Recommended by the USPSTF Since 2010 Are Critical to the Health of Older Adults

In its recommendations, the USPSTF recognizes the imperative of preventive services for older adults. The USPSTF has made dozens of evidence-based recommendations since the passage of the ACA in 2010. There are currently over fifty published recommendations with "A" or "B" ratings. USPSTF, *Published Recommendations*.[4] Older adults are the beneficiaries of more than half of these recommendations for preventive medications, screenings, and other preventive measures. *Id.*

A. Pre-Medicare older adults benefit from preventive medications with no cost sharing.

Preventive medications are drugs prescribed to avoid disease and maintain health. In particular, the USPSTF recommends that certain pre-Medicare older adults take medicines to prevent cardiovascular disease, breast cancer, and HIV. Each of these recommendations carries the grade of an "A" or "B" and therefore must be provided to patients with no cost sharing.

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[4]https://www.uspreventiveservicestaskforce.org/uspstf/topic_search_results?topic_status=P&grades%5B%5D=A&grades%5B%5D=B&searchterm= (last visited June 8, 2023).

In 2016 and again in 2022, the USPSTF recommended that certain adults take a statin to prevent cardiovascular disease. USPSTF, *Statin Use for the Primary Prevention of Cardiovascular Disease in Adults: Preventive Medication* (Aug. 23, 2022).[5] Cardiovascular disease is the leading cause of death in the United States. Nat'l Ctr. For Health Statistics, CDC, *Leading Causes of Death*.[6] An estimated 80 million Americans have at least one form of cardiovascular disease, and nearly one half of these are aged over 60. Ali Yazdanyar & Anne Newman, *The Burden of Cardiovascular Disease in the Elderly: Morbidity, Mortality, and Costs*, Clinic Geriatric Med., at 2 (2009) (author manuscript).[7] Statins are medications used to prevent heart attacks, strokes, and other life-threatening events associated with heart disease. Strong evidence from clinical studies shows the benefit of statins for adults up to age 75. Maarten Leening, *Who Benefits from Taking a Statin, and When?*, 142 Am. Heart Ass'n. J. 827, 827 (July 23, 2020).[8]

USPSTF also recommends preventive medication to women at increased risk of breast cancer. USPSTF's recommendation has been twice updated—in 2013 and 2019—and includes new information about specific medications and assessments of risk for medication use. USPSTF, *Breast Cancer:Medication to*

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[5] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/statin-use-in-adults-preventive-medication#citation1.
[6] https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm (last reviewed Jan. 18, 2023).
[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2797320/pdf/nihms-135203.pdf.
[8] https://www.ahajournals.org/doi/full/10.1161/CIRCULATIONAHA.120.048340.

Reduce Risk.[9] Breast cancer is the most common nonskin cancer among women in the United States. Angela Giaquinto et al., *Breast Cancer Statistics, 2022*, CA: Cancer J. for Clinicians 524, 526 (2022).[10] Eighty-three percent of invasive breast cancers are diagnosed among women aged 50 years and older, and 91% of breast cancer deaths occur in this age group. *Id.* Medications including selective estrogen receptor modulators and aromatase inhibitors have proven effective at reducing the incidence of breast cancer for women at an increased risk. Simone Mocellin et al., *Risk-reducing medications for primary breast cancer: a network meta-analysis*, Cochrane Database Systematic Rev., 12 (2019).[11]

The USPSTF recommends the preventive medication PrEP, preexposure prophylaxis, for people at risk for Human Immunodeficiency Virus (HIV) infection. In 2019, USPSTF gave the medication an "A" rating. USPSTF, *Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis* (June 11, 2019).[12] Over a million people in the United States are currently living with HIV, and more than 700,000 people have died of AIDS (late-stage HIV) since 1981. Kaiser Family Foundation (KFF), *The HIV/AIDS Epidemic*

[9] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/breast-cancer-medications-for-risk-reduction#citation1 (last visited May 19, 2023).
[10] https://acsjournals.onlinelibrary.wiley.com/doi/epdf/10.3322/caac.21754.
[11] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6487387/pdf/CD012191.pdf.
[12] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis.

in the United States: The Basics (June 7, 2021).[13] In 2018, over half the people living with HIV were aged 50 and older, and people aged 50 and older accounted for 17% of the 37,968 new HIV diagnoses in that year. CDC, *Diagnosis of HIV Infection in the United States and Dependent Areas, 2018*, at 17 (2020).[14] Older Americans are more likely to be diagnosed with HIV late in the course of the disease. CDC, *Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data*, 8 (2019).[15] According to the CDC, 35% of people aged 50 and older already had late-stage HIV infection (AIDS) when they received a diagnosis. *Id.* However, PrEP reduces the risk of getting HIV from sex from about 74-99% depending on risk factors. CDC, *How effective is PrEP?*.[16]

Preventing this disease is essential for the health and wellbeing of older adults. Fifty-four-year-old Robert York of Arlington, Virginia knows this well. Harris Meyer, *How a Texas court decision threatens Affordable Care Act protections* (Sep. 14, 2022), Nat'l Pub. Radio.[17] He has been taking PrEP for about

[13] https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/
[14] https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2018-updated-vol-31.pdf.
[15] https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-25-2.pdf.
[16] https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html#:~:text=How%20effective%20is%20PrEP%3F,99%25%20when%20taken%20as%20prescribed (last reviewed June 6, 2022).
[17] https://www.npr.org/sections/health-shots/2022/09/14/1122789505/aca-preventive-health-screenings.

six years. *Id.* Having to pay for the drug and associated tests every three months would be difficult: the retail price of the drug is about $2,000 a month. *Id.*

Older people depend upon access to these medications to prevent debilitating and often deadly diseases.

B. Cancer screenings without cost sharing save lives of older adults.

In 2013, the USPSTF recommended annual lung cancer screenings for older adults aged 55 to 80 who have a thirty pack-year smoking history, and then expanded that recommendation in 2021 to recommend low dose CT scans for adults aged 50 to 80 years old who have a twenty pack-year smoking history. USPSTF, *Lung Cancer: Screening, 2021* (Mar. 9, 2021).[18] Lung cancer is the second most common cancer and the leading cause of cancer death in the United States. Am. Cancer Soc'y, *Cancer Facts and Figures 2023*.[19] Two key risk factors for lung cancer are smoking and increasing age, with the median age of diagnosis at 70. Am. Cancer Soc'y, *Key Statistics for Lung Cancer* (Oct. 1, 2019).[20] When detected sooner, early-stage lung cancer has a better prognosis and is more amenable to treatment. Nat'l Cancer Inst., *Non-Small Cell Lung Cancer Treatment*.[21]

[18] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/lung-cancer-screening.
[19] https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2023/2023-cancer-facts-and-figures.pdf (last visited May 18, 2023).
[20] https://www.cancer.org/cancer/types/lung-cancer/about/key-statistics.html.
[21] https://www.cancer.gov/types/lung/hp/non-small-cell-lung-treatment-pdq (last updated Feb. 17, 2023).

Cancer screenings save lives. Nat'l Cancer Inst., *Crunching Numbers: What Cancer Screening Statistics Really Tell Us*.[22] Milli W. was inspired to receive a low dose CT scan after seeing a lung cancer public service announcement. Milli W., *Lung Force Heroes* (Aug. 20, 2019).[23] As a long-time smoker with a family history of cancer, Milli requested the scan at her next doctor's visit. *Id.* With no symptoms, she was diagnosed with early-stage lung cancer. *Id.* A year later at 62, Milli is thriving and has even returned to doing her favorite thing: singing. *Id.*

Colorectal cancer is the third leading cause of cancer death for both men and women. Rebecca Siegal et al., *Cancer Statistics, 2021*, 71 Cancer J. Clin. 7, 25 (2021). To reflect evolving consensus regarding preventive care, in 2021 the USPSTF expanded its recommendation regarding colorectal cancer to include screening starting at age 45. USPSTF, *Colorectal Cancer: Screening* (May 18, 2021).[24] The District Court's decision threatens to turn back the clock on advances in medicine that facilitate cancer screenings at a younger age to catch this deadly disease sooner.

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[22] https://www.cancer.gov/about-cancer/screening/research/what-screening-statistics-mean (last visited June 9, 2023).

[23] https://www.lung.org/lung-force/lung-force-heroes/milli-w.

[24] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/colorectal-cancer-screening.

C. Infectious disease screenings without cost sharing prevent the transmission of disease among older adults.

The USPSTF also makes recommendations regarding screening for infectious diseases, including HIV, hepatitis C, and hepatitis B.

In 2019, USPSTF recommended HIV screening with an "A" grade for all adults 15 to 65. USPSTF, *Human Immunodeficiency Virus (HIV) Infection: Screening* (June 11, 2019).[25] Of the approximately 1.2 million people in the United States with HIV, the CDC estimates that 158,500 people are unaware of their status. CDC, *HIV Testing* (June 12, 2022).[26] Eighty percent of new HIV infections are transmitted by people who do not know they have the virus. CDC, *Status of HIV in the U.S*.[27] Testing for older adults is particularly important as data indicates that older people are less likely to get tested and when they are tested, they are more likely to be diagnosed with more advanced HIV. National Institute of Health (NIH), *HIV and Older People* (Aug. 23, 2021).[28]

Likewise, screening for hepatitis C is also now recommended for all adults ages 18 to 79. USPSTF, *Hepatitis C Virus Infection in Adolescents and Adults:*

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[25] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/human-immunodeficiency-virus-hiv-infection-screening.
[26]https://www.cdc.gov/hiv/testing/index.html#:~:text=Nearly%2040%25%20of%20new%20HIV,life%20and%20preventing%20HIV%20transmission.
[27] https://www.cdc.gov/hiv/policies/strategic-priorities/mobilizing/status-of-hiv.html (last reviewed Feb. 2, 2021).
[28] https://hivinfo.nih.gov/understanding-hiv/fact-sheets/hiv-and-older-people#:~:text=CDC%20recommends%20that%20everyone%2013,and%20at%20risk%20for%20HIV.

Screening (Mar. 2, 2020).[29] Hepatitis C is the most common chronic blood-borne pathogen in the United States and a leading cause of complications from chronic liver disease. Roger Chou et al., Agency for Healthcare Research & Quality, *Screening for Hepatitis C Virus Infection in Adolescents and Adults: A Systematic Review Update for the U.S. Preventive Services Task Force*, 2, (Mar. 2020).[30] Hepatitis C is a leading cause of death among infectious diseases. *Id.* at 3. Hepatitis C is an increasing danger: cases of hepatitis C have been on the rise, with infection rates rising more than 60% between 2015 and 2019. CDC, *Screen all Patients for Hepatitis C* (June 14, 2022).[31] About half of people with Hepatitis C are not aware of their infection, and while there is no vaccine, hepatitis C is largely curable: over 90% of people can be cured within 12 months. *Id.*

Older adults, particularly adults born between 1945 and 1965 and adults in congregate care settings are at higher risk for hepatitis C. Michael Reid et al., *Hepatitis C. Virus Infection in the Older Patient*, 31 Infectious Disease Clinics N. Am., at 2 (2017) (author manuscript).[32] Older adults are also more likely to have had the disease for longer. *Id.* Screening—and the ability to access that screening without a cost barrier—is therefore crucial for the pre-Medicare population.

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[29] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/hepatitis-c-screening
[30] https://www.ncbi.nlm.nih.gov/books/NBK554896/pdf/Bookshelf_NBK554896.pdf.
[31] https://www.cdc.gov/knowmorehepatitis/hcp/Screen-All-Patients-For-HepC.htm.
[32] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5675560/pdf/nihms893831.pdf

In 2020, the USPSTF recommended screening for hepatitis B, another blood disease of the liver, for adolescents and adults at increased risk of infection, with a "B" grade. USPSTF, *Hepatitis B Virus Infection in Adolescents and Adults* (Dec. 15, 2020).[33] An estimated 880,000 to 1.89 million people are chronically infected with hepatitis B. U.S. Dep't Health & Human Servs., *Hepatitis B Basic Information* (Mar. 31, 2023).[34] Incidence of hepatitis B is highest among adults aged 30-59. *Id.* The consequences of the disease at an older age can be very serious including cirrhosis, liver cancer, liver failure, and death. *Id.*

Screening without cost sharing for infectious diseases is a way to increase to catch these diseases early, prevent their spread to others, and increase health equity.

D. Diabetes screening without cost sharing is crucial for pre-Medicare older adults.

The USPSTF changed and clarified its diabetes screening recommendation in 2015 and in 2021, and now recommends screening for prediabetes and type two diabetes in adults ages 35 to 70 who are overweight or obese. USPSTF, *Prediabetes and Type 2 Diabetes, Screening* (Aug. 24, 2021).[35] Prior to 2010, screening was only recommended for adults with hypertension. *Id.* The number of

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[33] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/hepatitis-b-virus-infection-screening#bootstrap-panel--4.

[34] https://www.hhs.gov/hepatitis/learn-about-viral-hepatitis/hepatitis-b-basics/index.html.

[35] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/screening-for-prediabetes-and-type-2-diabetes.

adult diabetes diagnoses has doubled in the past twenty years. CDC, *What is Diabetes?*.[36] An estimated 13% of all U.S. adults have diabetes, and 34.5% have prediabetes. CDC, *National Diabetes Statistics Report 2020*.[37] These numbers are even higher in older adults: roughly 26.8% of adults over 65 have diabetes and just under half have prediabetes. *Id.* Almost a quarter of people with diabetes are not aware they have the condition. *Id.* Diabetes is the leading cause of kidney failure and of new cases of blindness among adults in the United States. CDC, *Diabetes Report Card 2021*.[38] With monitoring and treatment however, diabetes can be managed.

Without this recommendation, Kellie may not have been screened for diabetes. Johns Hopkins Patient Guide to Diabetes, *Kellie's Story*.[39] After noticing some changes in how she was feeling, Kellie was diagnosed with diabetes after a screening at age 50. *Id.* Together with her mother who has type one diabetes, Kellie has learned to manage her diagnosis to live fuller and healthier life. *Id.* She has learned that understanding diabetes as early as possible can help people get it under control and be more comfortable. *Id.*

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[36]https://www.cdc.gov/diabetes/basics/diabetes.html#:~:text=More%20than%2037%20million%20US,limb%20amputations%2C%20and%20adult%20blindness (last reviewed Apr. 24, 2023).
[37] https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf.
[38] https://www.cdc.gov/diabetes/library/reports/reportcard.html (last reviewed July 19, 2022).
[39] https://hopkinsdiabetesinfo.org/patient-stories/ (last visited June 14, 2023).

E. Injury prevention interventions without cost sharing are essential for older adults.

The USPSTF also has recommendations concerning injury prevention that are particularly important to older adults.[40] In 2011 and again in 2018, the USPSTF added and then expanded its recommendations regarding osteoporosis screening for women. USPSTF, *Osteoporosis to Prevent Fractures: Screening* (June 26, 2018).[41] Osteoporosis is a disease marked by bone loss and reduced bone strength, leading to increased risk of fractures. Off. of Disease Prevention & Health Promotion, U.S. Dep't Health & Human Servs., *Osteoporosis Workgroup*.[42] An estimated 10 million people aged 50 and older have osteoporosis. *Id.* Osteoporotic fractures, particularly hip fractures, are associated with limitation of ambulation, chronic pain and disability, loss of independence, and decreased quality of life. *Id.* Between 21% and 30% of patients who experience a hip fracture die within one year. Carmen Brauer et al., *Incidence and mortality of hip fractures in the United*

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[40] One such recommendation is exercise interventions to prevent falls for community-dwelling adults 65 years or older who are at increased risks of falls. Although this recommendation is likely not implicated in this case, it is nonetheless imperative for older adults, as falls are the leading cause of injury-related morbidity and mortality among older adults in the United States, and studies indicate that exercise is an effective intervention to prevent falls in older adults. CDC, *Web-Based Injury Statistics Query and Reporting System*, https://www.cdc.gov/injury/wisqars/ (last visited May 19, 2023); Catherine Sherrington et al., *Exercise to prevents falls in older adults: an updated systematic review and meta-analysis*, 51 Br. J. Sports Med. 1750 (2017).
[41] https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/osteoporosis-screening#citation2.
[42] https://health.gov/healthypeople/about/workgroups/osteoporosis-workgroup (last visited May 18, 2023).

States, 14 J. Am. Med. Ass. 1573, 1573 (2009). However, studies show that early screening and subsequent treatment reduce fracture risk. Juliana Kling et al., *Osteoporosis Prevention, Screening, and Treatment: A Review*, 23 J. Women's Health 563, Tbl. 1 (2014).

II. Older Adults Benefit from the ACA's Elimination of Cost Barriers to Obtaining Preventive Care.

Access to preventive care and utilization of preventive services have both increased because of the ACA's elimination of cost sharing. This has been beneficial to older adults, who have realized the health benefits of increased access. The elimination of cost sharing has also been important to efforts to reduce health disparities.

A. Pre-Medicare older adults' access to and utilization of preventive services has increased.

Millions of people benefit from 42 U.S.C. § 300gg-13(a)(1). Of older adults ages 50-64, studies indicate about 69% have private insurance, and therefore have access to cost free preventive services under the ACA. Namkee Choi et al., *Unmet Healthcare Needs and Healthcare Access Gaps Among Uninsured U.S. Adults Aged 60-64*, Int'l. J. Env't. Res. & Pub. Health, Tbl. 1 (Apr. 15, 2020).[43] Analyses by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) estimated that in 2020 approximately 151.6 million Americans with private

[43] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7215278/pdf/ijerph-17-02711.pdf.

insurance had access to preventive services without cost sharing. ASPE, *Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act* (Jan. 11, 2022).[44]

Access to preventive care drives utilization. Many people—particularly older adults—utilize these recommended services. For instance, 60% of privately insured people received some ACA preventive care in 2018. Krutika Amin et al., *Preventive services use among people with private insurance coverage* (Mar. 20, 2023).[45] Older adults are among the people most likely to receive ACA-mandated preventive care, with 57% of 56 to 66-year-olds with private insurance receiving such care in 2018. *Id.*

Older adults have benefitted from specific services that have been recommended by the USPSTF. For instance, rates of mammograms among women aged 50-64 increased after cost sharing was eliminated. Abeer Alharbi et al., *Impact of removing cost sharing under the affordable care act (ACA) on mammography and pap test use*, 7, BMC Pub. Health (2019).[46] Screenings for colorectal cancer increased among privately insured adults. See ASPE, *supra* n. 44, at 7. An AARP study indicated that about 15% of adults 40 and older received a

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[44] https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib-2022.pdf.
[45] https://www.healthsystemtracker.org/brief/preventive-services-use-among-people-with-private-insurance-.
[46] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6446257/pdf/12889_2019_Article_6665.pdf.

bone density screening to detect osteoporosis between 2019 and 2021. AARP, *Midlife Adults' Health Study* (May 2021).[47]

B. No cost sharing helps mitigate health disparities.

The elimination of cost sharing is an important tool to increase health equity. It is well documented that the United States suffers from stark and persistent disparities[48] in health care. David Radley et al., *Achieving Racial and Ethnic Equity in U.S. Healthcare* (Nov. 18, 2021).[49] Disparities refer to differences between groups in health insurance coverage, affordability, access to and use of care, and quality of care. *Id.* Black, American Indian/Alaskan Native and Hispanic/Latino people live fewer years, are more likely to die from preventable conditions, and are at higher risk for chronic health conditions. *Id.* Black adults experience a higher incidence of cardiovascular disease risk factors and are more than twice as likely to die of cardiovascular disease relative to white adults. Zulqarnain Javed et al., *Race, Racism, and Cardiovascular Health: Applying a Social Determinants of Health Framework to Racial/Ethnic Disparities in*

[47] https://www.aarp.org/content/dam/aarp/research/surveys_statistics/health/2021/midlife-older-adults-health-annotated-questionnaire.doi.10.26419-2Fres.00446.002.pdf.

[48] Health care disparities are differences between health and health care between groups that stem from broader inequities. Nambi Ndugga & Samantha Artiga, *Disparities in Health and Health Care: 5 Key Questions and Answers* (Apr. 21, 2023) https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/. This section will focus on disparities based on race, ethnicity, gender, and sexual orientation.

[49] https://www.commonwealthfund.org/publications/scorecard/2021/nov/achieving-racial-ethnic-equity-us-health-care-state-performance.

Cardiovascular disease, 15 Circulation: Cardiovascular Quality & Outcomes 72, 73 (2022). Similarly, American Indian individuals are 1.5 times as likely to be diagnosed with coronary heart disease compared with white individuals. *Id.* Black women face enormous risk if diagnosed with breast cancer, with a 40% breast cancer mortality rate. Clement Yedjou et al., *Health and Racial Disparity in Breast Cancer*, Advances in Experimental Medicine & Biology, 31-33 (2020). Colorectal cancer disproportionately affects the Black community. Am. Cancer Soc'y, *Colorectal Cancer Rates Higher in African Americans, Rising in Younger People* (Sept. 3, 2020)[50] (explaining that African Americans are 20% more likely to get colorectal cancer and about 40% more likely to die from it than most other groups). Gay and bisexual men are most affected by HIV, with the highest burden among Black and Hispanic/Latino gay and bisexual men. CDC, *Status of HIV in the U.S.*[51] Of the 1.1 million people who could benefit from PrEP, 44% are Black and 25% are Hispanic/Latino. Katie Keith, *New Guidance on PrEP: Support Services Must Be Covered Without Cost-Sharing* (July 28, 2021).[52] Prior to the elimination of cost sharing of PrEP, studies estimate only about 10% of eligible Black and Hispanic/Latino people had started PrEP, often hindered by its high cost. *Id.*

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[50] https://www.cancer.org/cancer/latest-news/colorectal-cancer-rates-higher-in-african-americans-rising-in-younger-people.html.

[51] https://www.cdc.gov/hiv/policies/strategic-priorities/mobilizing/status-of-hiv.html (last reviewed Feb. 2, 2021).

[52] https://www.healthaffairs.org/content/forefront/new-guidance-prep-support-services-must-covered-without-cost-sharing.

Health disparities can be exacerbated as people age. Peter Urban, *Older Black and Hispanic Americans Feel Discrimination by Health Providers* (Apr. 22, 2022).[53] Older adults in the U.S. are significantly more likely to report racial and ethnic disparities in the health care system than those in ten other high-income countries. *Id.* Studies indicate that racist policies and oppression—through a variety of factors including a lack of affordability—can lead to worse health outcomes as people age in a process called weathering. *See* Arline Geronimus, *Weathering: The Extraordinary Stress of Ordinary Life in an Unjust Society*, at 13 (2023). For example, one study explored how older Black veterans' endurance of a lifetime of structural racism generated stress that exacerbated chronic kidney disease. Kevin Jenkins et al., *Perspectives on Racism in Health Care Among Black Veterans With Chronic Kidney Disease* (May 12, 2022).[54]

One way of reducing health disparities is by reducing financial barriers to care—a primary goal of the ACA. Sherri Glied et al., *Did the Affordable Care Act Lower Financial Barriers to Health Care?* (Mar. 3, 2020).[55] A review of thirty-five original studies on ten high-value preventive services found that "low-socioeconomic status groups, and those who experience the greatest financial

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[53] https://www.aarp.org/health/conditions-treatments/info-2022/health-provider-discrimination.html.
[54] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2792218.
[55] https://www.commonwealthfund.org/publications/journal-article/2020/mar/did-aca-lower-financial-barriers-health-care.

barriers to care, appear to benefit the most from cost-sharing elimination." Kara Gavin, *What happens when preventive care becomes free to patients?*, Michigan Medicine (June 28, 2021).[56] And, in fact, utilization of USPSTF-recommended services has increased among marginalized groups since the ACA was passed. *See, e.g., id.* (preventive breast cancer care has increased among African American women); Olive Mbah et al., *The Affordable Care Act and Ethnic Disparities in Colorectal Cancer Screenings*, Am. J. Preventive Med. (2020)[57] (colorectal cancer screenings increased among people of Hispanic origin). Although disparities in health care persist, eliminating barriers to obtaining preventive care is an effective step toward health equity.

III. The Costs of Vacating the Coverage Mandate Are High.

If the prohibition on cost sharing for preventive services that the USPSTF has rated "A" or "B" is removed, it will reverse many of the gains that have been made since the ACA was passed and negatively impact both the health and financial security of many pre-Medicare older adults. The preventive services affected are evidence-based, lifesaving screenings and treatments that many pre-Medicare older adults may be forced to forego if cost sharing is imposed. At the

[56] https://www.michiganmedicine.org/health-lab/what-happens-when-preventive-care-becomes-free-patients.
[57] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8285085/pdf/nihms-1718093.pdf

same time, getting rid of the prohibition on cost sharing will have negative financial consequences for older adults who are already facing financial insecurity.

A. Eliminating coverage without cost sharing puts pre-Medicare older adults' health at risk.

The services USPSTF rates "A" or "B" have known health benefits. These benefits are especially important to pre-Medicare older adults, 70% of whom are already diagnosed with one chronic condition, and 37% who have two or more. Nat'l Ctr. for Health Statistics, CDC, *Percent of U.S. Adults 55 and Over with Chronic Conditions*[58] (measuring arthritis, asthma, cancer, cardiovascular disease, chronic obstructive pulmonary disease, and diabetes). Preventive screenings and treatment are effective at preventing disease, catching disease early, reducing risk factors, and managing complications. Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, CDC, *How We Prevent Chronic Disease and Promote Health*.[59]

Prior the passage of the ACA, older adults cited cost as a major reason for not receiving preventive care. AARP, *Preventive Health Screenings Among Midlife and Older Adults* (Feb. 2010).[60] A survey done by AARP in 2009 indicates that the cost of a screening, insufficient funds to cover a copayment or deductible, and uncertainty over what health insurance would cover were among the reasons older

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[58] https://www.cdc.gov/nchs/health_policy/adult_chronic_conditions.htm (Nov. 6, 2015).
[59] https://www.cdc.gov/chronicdisease/center/nccdphp/how.htm (last reviewed April 28, 2021)
[60] https://assets.aarp.org/rgcenter/health/prevmed.pdf.

adults did not receive recommended health screenings or vaccinations during that time. *Id.* It is well documented that when people are required to pay—even a nominal amount—out of pocket for health care services, utilization of those services decreases. Hope C. Norris, et al., *Utilization Impact of Cost-Sharing Elimination for Preventive Care Services: A Rapid Review*, 79 Medical Care Rsch. & Rev., 175, 175-97 (2022) ("[t]here is significant evidence that the presence of cost-sharing, even if the amount is relatively modest, deters patients from receiving care."); Rajender Agarwal, et al., *High-Deductible Health Plans Reduce Health Care Cost and Utilization, Including Use of Needed Preventive Services*, 36 Health Affs. 1762, 1766 (2017)[61] (reporting, "consistent with a large body of evidence on cost sharing," that deductibles can cause patients to "forgo needed care," including preventive care, "to save money"); Mitchell D. Wong, et al., *Effects of Cost Sharing on Care Seeking and Health Status: Results from the Medical Outcomes Study*, Am. J. Pub. Health (2001)[62] ("Requiring patients to pay a portion of their medical bill out of pocket[] … sharply reduces their use of health care resources."); cf. Karishma Srikanth, et al., *Associated Costs Are a Barrier to HIV Preexposure Prophylaxis Access in the United States*, 112 Am. J. Pub. Health 834, 835 (2022)[63] (explaining the role of "actual and perceived cost barrier[s]" in inhibiting use of

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[61] https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2017.0610.
[62] https://ajph.aphapublications.org/doi/epub/10.2105/AJPH.91.11.1889.
[63] https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2022.306793?role=tab.

prophylactic HIV medications and increasing the "transmission and prevalence of HIV"). If the District Court's remedy stands, these barriers to obtaining preventive health services will assuredly return.

When pre-Medicare older adults encounter obstacles to obtaining preventive services, it leads to worse health outcomes. This includes delayed diagnoses of health conditions that may have been better managed or treated if caught earlier. For example, using data from 2010 to 2016, one study measuring the ACA's impact on cancer detection among adults ages 60-64 found that the 45% jump in cancer detection that previously occurred when people reached Medicare eligibility age was eliminated by the ACA expansion of coverage of preventive services, specifically cancer screenings. Fabian Duarte, et al., Health Affairs, *The Effect of the Affordable Care Act on Cancer Detection Among the Near-Elderly* (Feb. 2021).[64] The same study found that 68% of newly detected cancers over the same period were early- and middle-stage cancers. *Id.* As described in Section I and II, *infra*, the health benefits of various services and medications are evidence-based and significant, and without access to these medications and services, people are worse off. Without access to statins, people's cardiovascular health will suffer. Without access to regular mammograms, women's breast cancer may go undetected until it is deadly. Without access to PrEP, people may contract HIV.

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[64] https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00369.

Without access to osteoporosis screening, people may be at risk of falls that could be catastrophic. And, without no cost preventive services, the progress we have made to increase health equity is at risk.

"Investments in prevention in the early and middle decades of life, when people are more likely to be covered by private health coverage including Marketplace insurance and Medicaid, may also help people enter the Medicare program at age 65 in better health." *See* ASPE, *supra* n. 44, at 10. Indeed, this logic carries through as people age, with the CDC finding that "older adults [ages 65 and older] who obtain clinical preventive services and practice healthy behaviors are more likely to remain healthy and functionally independent." Carol Tangum et al., *CDC, Focuses on Need for Older Adults to Receive Clinical Preventive Services*, 2[65] (citing Erik Crankshaw et al., *An Overview of Programs and Initiatives Sponsored by DHHS to Promote Healthy Aging: A Background Paper for the Blueprint on Aging for the 21st Century Technical Advisory Group (TAG) Meeting* (Jan. 11, 2003)).[66] This is why one of the Healthy People 2030 goals is to "[h]elp people get recommended preventive health care services" and includes an objective to "[i]ncrease the proportion of adults who get recommended evidence-based preventative health care." Off. of Disease Prevention & Health

[65] https://www.cdc.gov/aging/pdf/cps-clinical-preventive-services.pdf (last viewed June 23, 2023).
[66] https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//40071/programs.pdf.

Promotion, U.S. Dep't of Health & Human Servs., *Healthy People 2030,* P*reventive Care, Overview and Objectives*[67] (also including objectives concerning prevention of primary and secondary conditions relating to cancer, diabetes, heart conditions, mental health, oral conditions, osteoporosis, among others).

B. Cost sharing for preventive services will jeopardize pre-Medicare older adults' financial security.

If cost sharing is imposed for preventive services, it will also negatively impact pre-Medicare older adults' financial security. Nearly half of older adults ages 50-64 are concerned that they or their household will not be able to pay for needed health care services in the next 12 months. Nicole Willcoxon, *Older Adults Sacrificing Basic Needs Due to Healthcare Costs*, Gallup (June 5, 2022).[68] A recent AARP survey of adults ages 40-64 shows that finding affordable health care is already an issue, with most responding that it would be a challenge to pay a $1,000 medical bill. *See* AARP Research, *Health Care Affordability Among Adults Ages 40-64*, 4 (Oct. 2022).[69] Affordability is a problem even for those who are insured. People ages 50-64 experience higher out of pocket costs for employer-based health care than their younger counterparts. Rabah Kamal, et al., KFF, *What do we know about people with high out-of-pocket health spending?* (Sept. 29,

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[67] https://health.gov/healthypeople/objectives-and-data/browse-objectives/preventive-care.
[68] https://news.gallup.com/poll/393494/older-adults-sacrificing-basic-needs-due-healthcare-costs.aspx.
[69] https://www.aarp.org/content/dam/aarp/research/surveys_statistics/health/2022/health-care-affordability-older-adults-report.doi.10.26419-2Fres.00578.001.pdf.coredownload.pdf.

2020)[70] (showing 20% of enrollees in employer-based care had out-of-pocket spending over $2,000 in 2018, the largest share of any age group). Additional cost sharing for preventive services will only exacerbate these financial concerns.

Moreover, because of the high costs of health care, many older adults are carrying medical debt. In a recent survey, 44% of respondents aged 50-64 indicated they have health care debt of at least $100 and another 16% said they have had health care debt in the past five years. *See* Lunna Lopes, et al., KFF, *Health Care Debt in the U.S.: The Broad Consequences of Medical and Dental Bills* (June 16, 2022).[71] Medical debt is now the number one source of debt collections, surpassing debt in collections from credit cards, utilities, auto loans, and other sources combined. Krysten Crawford, *America's Medical Debt is worse than we think*, Stanford Inst. For Econ. Pol'y Res. (July 20, 2021).[72] In 2018, 75% of older adults with medical debt were retired. Consumer Fin. Prot. Bureau, *Medical debt among older adults before the pandemic* (Nov. 15, 2021).[73] People who already have debt due to medical or dental care are disproportionately likely to put off or skip medical care. *Id.*; *see also* Nicole Willcoxon, supra at n. 68

[70] https://www.healthsystemtracker.org/chart-collection/know-people-high-pocket-spending/#Percent%20of%20nonelderly%20people%20with%20large%20employer%20coverage%20who%20have%20out-of-pocket%20spending%20>%20$2000,%20by%20age,%202018
[71] https://www.kff.org/health-costs/report/kff-health-care-debt-survey/.
[72] https://siepr.stanford.edu/news/americas-medical-debt-much-worse-we-think.
[73] https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-medical-debt-among-older-adults-before-pandemic/full-report/.

(noting that one in four adults age 59 to 64 did not seek health care treatment because of costs).

This is not dissimilar from the way that many uninsured adults put off needed medical care until reaching Medicare eligibility prior to the passage of the ACA. *See, e.g.,* Joseph Sudano & David Baker, *Intermittent lack of health insurance coverage and the use of preventive services*, 93 Am. J. Pub. Health 130, 130-37(2003)[74] (examining use of preventive services); J. Michael McWilliams et al., *Impact of Medicare Coverage on Basic Clinical Services for Previously Uninsured Adults*, JAMA Network (Aug. 13, 2003).[75] Lack of access to lifesaving preventive care for the pre-Medicare older population will not only lead to more expensive care in the long run, but it will also increase the cost burdens on Medicare once they reach eligibility. Megan Multack, AARP Public Policy Institute, *Use of Clinical Preventive Services and Prevalence of Health Risk Factors among Adults Aged 50-64: National and State-Level Racial/Ethnic, Socioeconomic, and Health Insurance Coverage Status Disparities* (2013).[76] In sum, the financial consequences of imposing cost sharing will likely be felt both by

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[74] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447707/pdf/0930130.pdf
[75] https://jamanetwork.com/journals/jama/fullarticle/197076
[76] https://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/2013/clinical-preventive-services-and-prevalence-of-health-risks-AARP-ppi-health.pdf.

individuals who wish to utilize preventive services, and the health care system at large.

CONCLUSION

For the reasons raised by Defendants-Appellants, and for the further reasons described herein, amici respectfully request that the District Court's decision be reversed as requested by Defendants-Appellants.

Dated: June 27, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 27, 2023

/s/ William Alvarado Rivera
William Alvarado Rivera

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Circuit Rule 32(a)(2) because: this brief contains 6,242 words, (excluding the parts of the brief exempted by Fed. R. App. P. 32(f) as determined by the word counting feature of Microsoft Word 365 Version 2208.

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Dated: June 27, 2023

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