

No. 14-1158

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DAVID KING, ET AL.,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA (No. 3:13-CV-630(JRS))

**AMICI CURIAE BRIEF OF THE AMERICAN CANCER SOCIETY,
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,
AMERICAN DIABETES ASSOCIATION, AND AMERICAN HEART
ASSOCIATION SUPPORTING APPELLEES URGING AFFIRMANCE OF
THE TRIAL COURT'S DISMISSAL ORDER**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Loc. R. 26.1(b), *Amici* hereby submit the following corporate disclosure statement:

The American Cancer Society, Inc. is a nonprofit corporation. It is not publicly held, and no corporation or other publicly held entity owns more than 10% of its stock.

The American Cancer Society Cancer Action Network, Inc. is a nonprofit corporation. It is not publicly held, and no corporation or other publicly held entity owns more than 10% of its stock.

The American Diabetes Association is a nonprofit corporation. It is not publicly held, and no corporation or other publicly held entity owns more than 10% of its stock.

The American Heart Association is a nonprofit organization. It is not publicly held, and no corporation or other publicly held entity owns more than 10% of its stock.

Amici are not aware of (1) any publicly held corporation that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or (2) any master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded that have any interest in this litigation.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE¹

The American Cancer Society (“ACS”), American Cancer Society Cancer Action Network (“ACS CAN”), American Diabetes Association (“ADA”), and American Heart Association (“AHA”) (collectively, “*Amici*”) are the largest and most prominent organizations representing the interests of patients, survivors, and families affected by the widespread chronic conditions of, respectively, cancer, diabetes, and heart disease and stroke. These conditions result in a significant portion of the nation’s health care spending.

The fight against cancer, diabetes, heart disease, and stroke requires access to affordable, quality health care which can only be obtained through access to affordable, quality health insurance. *Amici* therefore strongly supported the nationwide availability of federal tax credits under the provisions of the Patient Protection and Affordable Care Act (“Affordable Care Act,” “Act,” or “ACA”) during its consideration by Congress, and desire to assist the Court in understanding why those provisions of the Act are so important to millions of cancer, diabetes, heart disease, and stroke patients and survivors, as well as their families. Absent affordable health insurance, people with these chronic diseases

¹ Pursuant to Fed. R. App. P. 29, counsel for plaintiffs and the government have consented to the filing of this *amicus* brief. *Amici* certify that this brief was authored in whole by counsel for *Amici* and no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

have poorer health outcomes and require more costly health care. The Affordable Care Act addresses these problems. However, without the availability of tax credits to all eligible Americans (not just those who purchase insurance from state-run Exchanges), the Act's benefits will be denied to an estimated 12.2 million people in 34 states, many of whom suffer from the chronic diseases addressed by *Amici*.²

ACS is the nationwide, community-based voluntary health organization dedicated to eliminating cancer as a major health problem. ACS has three million volunteers nationwide. ACS's extensive scientific findings have established that health insurance status is strongly linked to medical outcomes. Uninsured cancer patients are more likely than those with insurance to be diagnosed with late-stage disease, which is harder and more expensive to treat than cancer caught early, and more difficult to survive. Accordingly, ACS identified the lack of affordable health insurance as a major impediment to advancing the fight against cancer. Along with its nonpartisan advocacy affiliate, ACS CAN, ACS strongly advocates guaranteeing all Americans adequate, available, affordable health care that is

² See Kaiser Family Foundation, *State-by-State Estimates of the Number of People Eligible for Premium Tax Credits Under the Affordable Care Act*, tbl.1 (Nov. 2013), <http://kaiserfamilyfoundation.files.wordpress.com/2013/11/8509-state-by-state-estimates-of-the-number-of-people-eligible-for-premium-tax-credits.pdf>. This calculation requires adding the number of persons eligible for tax credits in the 34 states listed as "federally-facilitated marketplace" or "partnership marketplace" at <http://kff.org/health-reform/state-indicator/health-insurance-exchanges/>.

administratively simple. ACS CAN has nearly a million patient and survivor advocates nationwide, including thousands that participated in efforts supporting enactment of the Act. During consideration of the Affordable Care Act, ACS CAN was the leading voice for cancer patients and their families seeking to make health insurance affordable for all Americans.

The ADA is a nationwide, nonprofit, voluntary health organization founded in 1940 with over 400,000 members and approximately 14,000 health professional members. Its mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. The ADA is the most authoritative source for clinical practice recommendations, guidelines, and standards for the treatment of diabetes. As part of its mission, the ADA works to improve access to high quality medical care and treatment for all people with, and at risk for, diabetes. In seeking to prevent diabetes, protect the rights of patients, and improve access to affordable and adequate insurance for people with diabetes, and based on clear evidence that lack of health insurance leads to increased risk of diabetes complications, the ADA supported provisions in the Affordable Care Act that specifically impact people with diabetes, including the provisions making health care affordable.

The AHA is the nation's oldest and largest voluntary health organization dedicated to fighting heart disease and stroke—the first and fourth leading causes of death in the United States. Since 1924, the AHA and its more than 22 million

volunteers and supporters have focused on reducing disability and death from cardiovascular disease and stroke through research, education, community-based programs, and advocacy. The AHA and its American Stroke Association division (“ASA”) have set goals to improve the cardiovascular health of all Americans by 20 percent and to reduce cardiovascular disease and stroke mortality by 20 percent by 2020. Based on well-documented research that uninsured and under-insured Americans with heart disease and stroke experience higher mortality rates, poorer blood pressure control, greater neurological impairments and longer hospital stays after a stroke, the AHA/ASA worked to represent the needs and interests of heart disease and stroke patients during the congressional debates on health care reform, and supported provisions of the Act making health care more affordable.

SUMMARY OF ARGUMENT

All Americans use or will use health care services, and the lifetime risks for every American of acquiring one of the diseases or conditions towards which *Amici* direct their efforts are very high. Moreover, the costs of treating such serious conditions can often also be very high, and are generally beyond the financial means of individuals or families. The question is thus not whether individual Americans will incur health care expenses, but how they will be financed. How these expenses are financed, in turn, directly impacts access to health insurance. As discussed below, numerous studies have established that,

without affordable health insurance, people have poorer health outcomes and require more costly long-term and invasive treatment.

The provisions of the Affordable Care Act making federal premium tax credits available to all eligible Americans who have limited or no means to pay for health insurance are critical to ensuring that patients with chronic diseases and conditions have access to quality insurance, and hence to quality care. These key provisions were made a part of the Act in response to failures in the health insurance market that left individuals—especially those affected by serious and chronic conditions such as cancer, diabetes, heart disease, and stroke—without insurance and facing overwhelming costs and poor health outcomes. Congress corrected these failures in order to achieve its broader regulatory goals of protecting patients and reducing costs by improving the availability, affordability, and quality of health insurance. The premium tax credit provisions will not accomplish what Congress intended without the availability of tax credits to all eligible Americans.

Amici submit that the district court was correct in finding that “when the statutory context [of the Affordable Care Act] is taken into account,” Plaintiffs’ position that premium tax credits are not available on federally-facilitated Exchanges “is revealed as implausible.” Memorandum Opinion at JA306.

ARGUMENT

I. ACCESS TO AFFORDABLE HEALTH CARE IS ESSENTIAL FOR MANAGING CHRONIC DISEASES

The need for health care is not only difficult to predict, but also practically inevitable at some point in life. Looking just at the diseases that are the focus of these *Amici*:

- One out of two men and one out of three women will develop some form of cancer in his or her lifetime, excluding certain skin cancers and early-stage tumors. AMERICAN CANCER SOCIETY, CANCER FACTS AND FIGURES 2014 1 (2014), <http://www.cancer.org/acs/groups/content/@research/documents/document/acspc-041770.pdf>.
- Currently, an estimated 25.8 million Americans have diabetes, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL DIABETES FACT SHEET 2011 2 (2011), http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2011.pdf.
- If present trends continue, one in three Americans and nearly one in two African Americans and Hispanics born in 2000 will develop diabetes in their lifetime. K. M. Venkat Narayan, et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 J. AM. MED. ASS'N 1884, 1888 (2003).
- By 2050, as many as one in three adult Americans are expected to have diabetes. James P. Boyle, et al., *Projection of the year 2050 burden of diabetes in the US adult population: dynamic modeling of incidence, mortality, and prediabetes prevalence*, POPULATION HEALTH METRICS 4 (Oct. 22, 2010).
- An estimated 83.6 million American adults (more than one in three) have one or more types of cardiovascular disease. Alan S. Go, et al., *Heart Disease and Stroke Statistics-2014 Update: A Report From the American Heart Association* 129 (2014), <http://circ.ahajournals.org/content/129/3/e28.full.pdf+html>.

- The lifetime risk for developing cardiovascular disease among those starting free of known disease is almost two in three for men and greater than one in two for women. *Id.* at 31.

These statistics in combination demonstrate the strong likelihood that, even focusing only on this group of chronic diseases, most people will at some point need health care and will participate in the health care system. Without an affordable health insurance market, individuals and their families will continue to bear the burden of substantial costs and worse health outcomes.

A person's health, and the chance for positive health outcomes when sick, are generally not considered to be best left dependent on that person's ability to pay for health care. Thus, we abhor reports of patients diagnosed with cancer who cannot afford potentially life-saving chemotherapy treatment and are left helpless as their condition worsens. We find it tragic when people with diabetes delay treatment or fail to take needed medications for so long because of the high costs that they lose a limb due to amputation. We are frustrated by the reluctance of people experiencing heart attack symptoms to call 9-1-1, thereby depriving themselves of the access to quick diagnosis and treatment in the emergency department that can mean the difference between life and death.

These natural, indeed nearly universal, human responses are why *Amici* have drawn hundreds of thousands of members and millions of volunteers and donors to help increase access to affordable and quality care for those with debilitating or

life-threatening diseases. As organizations dedicated to addressing the devastating impact of these diseases, we know that life-saving treatments are fundamental.

II. TAX CREDITS MUST BE AVAILABLE TO ALL ELIGIBLE AMERICANS SEEKING HEALTH INSURANCE AS A NECESSARY AND PROPER FOUNDATION FOR MAKING HEALTH CARE AFFORDABLE AS CONGRESS INTENDED UNDER THE AFFORDABLE CARE ACT

The debate over health care reform and Congress's enactment of the Affordable Care Act were spurred by the failures and high costs of the health insurance and health care markets. These failures hurt not only the nation's economic well-being, but also the health and well-being of individual Americans. For these and other reasons explained below, reforming health insurance to make it affordable for all eligible Americans was a primary focus of Congress. As the district court properly recognized:

Viewed in a vacuum, it seems comprehensible that the omission of any mention of federally-facilitated Exchanges under section 36B(b)(2)(A) could imply that Congress intended to preclude individuals in federally-facilitated Exchanges from receiving tax subsidies. However, when statutory context is taken into account, Plaintiffs' position is revealed as implausible.

Memorandum Opinion at JA306.

A. The Act addresses the problem of cancer, diabetes, heart disease, and stroke patients and survivors who want and need health insurance but often cannot afford it

The cost of services to treat cancer, diabetes, heart disease, and stroke can be beyond the reach of all but the wealthiest individuals absent some form of

insurance. These chronic conditions have significant financial implications for patients and survivors as well as their families.

A study published in 2004 found that one-third of families lost most or all of their savings following a cancer diagnosis. Ahsan M. Arozullah et al., “The Financial Burden of Cancer: Estimates From a Study of Insured Women with Breast Cancer,” 2 J. Support Oncology 271 (May/June 2004), <http://jso.imng.com/jso/journal/articles/0203271.pdf>. More recently, a study published in May 2013 found that cancer patients are over two and a half times as likely to file for bankruptcy as people who do not have cancer. Ramsey, S. et al., Washington State Cancer Patients Found To Be at Greater Risk of Bankruptcy than People Without a Cancer Diagnosis (May 2013), <http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.full.pdf+html>.

Similarly, the high cost of treating cardiovascular disease is a leading cause of medical bankruptcy. David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741 (2009). Among families with high levels of medical debt resulting in bankruptcy, those with stroke had average out-of-pocket medical costs of \$23,380 and those with heart disease had average medical costs of \$21,955. *Id.* at 745.

The problem is not merely anecdotal. One of every three people diagnosed with cancer under age 65 are uninsured or have been uninsured at some point since diagnosis. AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, *A National Poll: Facing Cancer in the Health Care System* (2010), <http://www.acscan.org/healthcare/cancerpoll>. Of the cancer patients under 65 who reported being uninsured, 37 percent attributed their lack of health insurance to their inability to find an affordable plan. *Id.* at 11.

Likewise, approximately 7.3 million (or 15 percent) of adults who report having cardiovascular disease are uninsured (Analysis of 2006-10 NHIS data conducted by The George Washington University Center for Health Policy Research for the American Heart Association, August 2011), and nearly one of four cardiovascular disease patients and one of three stroke patients have gone without coverage at some point since their diagnosis. Synovate, *Advocacy Survey Among CVD & Stroke Patients* (American Heart Association) (2010), [http://www.heart.org/HEARTORG/Advocate/IssuesandCampaigns/Why-Health-Care-Reform-Matters\)_UCM_314663_Article.jsp](http://www.heart.org/HEARTORG/Advocate/IssuesandCampaigns/Why-Health-Care-Reform-Matters)_UCM_314663_Article.jsp). More than half of the uninsured with cardiovascular disease cite cost as the reason they lack coverage. Raymond J. Gibbons, et al., *The American Heart Association's 2008 Statement of Principles for Healthcare Reform*, 118 J. AM. HEART ASS'N 2209 (2008).

B. Without affordable health insurance, people have poorer health outcomes and require more costly long-term and invasive treatment

The lack of affordable health insurance has serious consequences for cancer, diabetes, heart disease, and stroke patients and survivors. Individuals without health insurance are less likely to receive preventive care or early detection screenings and are more likely to delay treatment.

A 2010 ACS poll determined that, of individuals under age 65 who have cancer or a history of cancer, 34 percent reported delaying care because of cost in the preceding 12 months. AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, *A National Poll: Facing Cancer in the Health Care System* (2010), <http://www.acscan.org/healthcare/cancerpoll>. More specifically, 29 percent delayed needed health care, 19 percent delayed getting a recommended cancer test or treatment, and 22 percent delayed a routine cancer check-up. *Id.* At every level of education, individuals with health insurance are about twice as likely as those without it to have access to key cancer early detection procedures, such as mammography or colorectal screenings. Elizabeth Ward, et al., *Association of Insurance with Cancer Care Utilization and Outcomes*, 58 *CANCER J. FOR CLINICIANS* 9 (2008).

With respect to heart disease, an AHA survey found that more than half of the cardiovascular patients responding reported difficulty paying for medical care.

Of those patients, 46 percent said they had delayed getting needed medical care, 43 percent had not filled a prescription, and 31 percent had delayed a screening test. Synovate, *supra*. Fewer than half of uninsured adults had had their cholesterol checked within the recommended timeframe. Collins SR, Robertson R, et al. “Insuring the Future: Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act: Findings from the Commonwealth Fund Biennial Health Insurance Survey.” The Commonwealth Fund, April 2013. Even during a heart attack, studies show that uninsured patients are more likely to delay seeking medical care. Kim G. Smolderen, et al., *Health Care Insurance, Financial Concerns in Accessing Care, and Delays to Hospital Presentation in Acute Myocardial Infarction*, 303 J. AM. MED. ASS’N 1392, 1395-99 (2010).

The same patterns occur with respect to uninsured individuals with diabetes. Among persons aged 18 to 64 with diabetes mellitus, those who had no health insurance during the preceding year were six times as likely to forgo needed medical care as those who were continuously insured. JB Fox, et al., *Vital Signs: Health Insurance Coverage and Health Care Utilization—United States, 2006-2009 and January-March 2010*, 59 MORBIDITY AND MORTALITY WKLY. REP. 1448 (2010). Individuals with diabetes who have health insurance see a doctor over four times as often as those who do not have insurance. Those without insurance are more than 30 percent more likely to visit emergency rooms as a

result. Am. Diabetes Ass'n, Scientific Data, Supplementary Tables to Economic Costs of Diabetes in the U.S. in 2012, 36 DIABETES CARE 1033, Supplementary Tables 9-10 (2013), <http://care.diabetesjournals.org/content/suppl/2013/03/05/dc120-2625.DC1/DC126625SupplementaryData.pdf> (supplementary tables available only as an online resource). Lack of health insurance also leads to cases of diabetes going undiagnosed, delaying the start of needed treatment and increasing the risks of complications. Among those with diabetes, 42.2 percent of individuals without health insurance were undiagnosed, compared with 25.9 percent for those with insurance. Xuanping Zhang, et al., *The Missed Patient with Diabetes: How Access to Health Care Affects the Detection of Diabetes*, 31 DIABETES CARE 1748, 1749 (2008).

Unfortunately, as a result of lack of preventive care and delayed treatment, uninsured patients have poorer health outcomes and require more costly long-term and invasive treatment than individuals with insurance. This is illustrated by an extensive ACS study published in 2008 showing that uninsured Americans are less likely to get screened for cancer, more likely to have their cancer diagnosed at an advanced stage, and less likely to survive that diagnosis than their insured counterparts. See E. Ward et al., "Association of Insurance with Cancer Care Utilization and Outcomes," *CA: A Cancer Journal for Clinicians* 58:1 (Jan./Feb.

2008), <http://www.cancer.org/cancer/news/report-links-health-insurance-status-with-cancer-care>.

For example, health insurance status was found to be the strongest predictor of oropharyngeal cancer and tumor size at diagnosis, with uninsured patients having the greatest likelihood of advanced disease stage at diagnosis. *See* Chen, Amy Y. et al., *The Impact of Health Insurance Status on Stage at Diagnosis of Oropharyngeal Cancer*, 110 *CANCER* 395, 400-01 (2007). Moreover, patients who are uninsured have substantially elevated risks of being diagnosed with advanced-stage breast cancer compared with privately insured patients. Michael T. Halpern, et al., *Insurance Status and Stage of Cancer at Diagnosis Among Women with Breast Cancer*, 110 *CANCER* 403, 409 (2007). Cancer patients diagnosed at an advanced stage experience lower survival, more debilitating, invasive treatment, and greater long-term treatment-related morbidity. *Id.* at 408.

Most recently, an ACS study published in early 2014 showed that uninsured adolescents and young adults are more likely than those with private insurance to be diagnosed with cancer at advanced stages. Elizabeth Mendes, *For the Young and Uninsured, Cancer Diagnosis Often Comes Late* (Feb. 24, 2014), <http://www.cancer.org/research/acsresearchupdates/more/for-the-young-and-uninsured-cancer-diagnosis-often-comes-late>. The study found that, compared with individuals covered by private insurance, uninsured females aged 15 to 39

were nearly twice as likely, and uninsured males in the same age group were about 1.5 times as likely, to be diagnosed with cancer that has metastasized to distant parts of the body. *Id.*

Likewise, uninsured patients with cardiovascular disease experience higher mortality rates and poorer blood pressure control than their insured counterparts. Jay J. Shen & Elmer L. Washington, *Disparities in outcomes among patients with stroke associated with insurance status*, 38 STROKE 1010, 1013 (2007); J. Michael McWilliams, et al., *Health insurance coverage and mortality among the near-elderly*, 23 HEALTH AFFAIRS 223, 229 (2004); O. Kenrik Duru, et al., *Health insurance status and hypertension monitoring and control in the United States*, 20 AM. J. HYPERTENSION 348 (2007).

Similarly, those who suffer a stroke who are uninsured experience greater neurological impairments, longer hospital stays and up to a 56 percent higher risk of death than the insured. Shen, *supra*, at 1013. Patients with no health insurance were also twice as likely to have a diabetic complication as patients who had insurance. Nina E. Flavin, et al., *Health Insurance and the Development of Diabetic Complications*, 102 SO. MED. J. 805 (2009).

To address the failures of the health insurance market and the tragic consequences they have for individuals, especially cancer, diabetes, heart disease, and stroke patients and survivors, Congress provided for federal premium tax

credits to make health insurance affordable. By ensuring that health insurance is available to all individuals regardless of their financial status, the Affordable Care Act protects patients with chronic conditions from the negative health and financial outcomes that accompany being uninsured or underinsured. The availability of tax credits is critical; otherwise cancer, diabetes, heart disease, and stroke patients and survivors who could not afford health insurance will continue to be plagued by the serious financial and health consequences associated with the lack of insurance.

CONCLUSION

Amici submit that the district court's decision granting the government's motion to dismiss and denying as moot all remaining motions (Memorandum Opinion at JA314) should be affirmed.

Dated: March 20, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)(2) or 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- this brief contains 3,457 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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s/ Mary P. Rouvelas

Attorney for *Amici Curiae*

Dated: March 20, 2014

CERTIFICATE OF SERVICE

I certify that on this 20th day of March, 2014, the foregoing was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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