

[ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014]

No. 14-5018

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

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JACQUELINE HALBIG, ET AL.,

*Appellants,*

v.

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

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA (No. 13-623(PLF))

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***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 SUMMARY JUDGMENT ORDER**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 29(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.

**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici* certify as follows:

**(A) Parties and *Amici***

In addition to the parties and *amici* listed in the Brief of Appellant, The Pacific Research Institute, The Cato Institute, and the States of Kansas, Michigan and Nebraska filed *amici* briefs on February 6, 2014.

**(B) Rulings Under Review**

References to the rulings at issue appear in the Brief of Appellant.

**(C) Related Cases**

References to the related cases appear in the Brief of Appellant.

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**CERTIFICATE OF COUNSEL REGARDING FILING OF SEPARATE  
BRIEF BY THESE *AMICI***

Pursuant to D.C. Circuit Rule 29(d), counsel for *Amici* certify that a separate brief is necessary, because no other *amicus* brief of which *Amici* are aware will address issues raised in this brief. Specifically, *Amici* are the only entities providing statistical and other information to the Court from a non-partisan public health perspective that includes patient advocacy groups and discusses the scientific link between health insurance coverage and medical outcomes. This brief of *Amici* focuses on points relevant to the issues before this Court but that are not made or adequately elaborated upon in the principal brief or other *amicus* briefs. In light of their non-partisan activities discussed below, these *Amici* are uniquely prepared to assist the Court in understanding those points.

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## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES .....	ii
CERTIFICATE OF COUNSEL REGARDING FILING OF SEPARATE BRIEF BY THESE <i>AMICI</i> .....	iii
TABLE OF AUTHORITIES .....	v
INTEREST OF <i>AMICI</i> .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT.....	6
I. ACCESS TO AFFORDABLE HEALTH CARE IS ESSENTIAL FOR MANAGING CHRONIC DISEASES .....	6
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.....	8
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 .....	8
B. Without affordable health insurance, people have poorer health outcomes and require more costly long- term and invasive treatment.....	10
CONCLUSION.....	15
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE .....	18

**TABLE OF AUTHORITIES\***

**Statutes**

ACA § 1501(a)(2)(D), <i>codified at</i> 42 U.S.C. § 18091(2)(D) .....	8
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AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, <i>A National Poll: Facing Cancer in the Health Care System</i> (2010), <a href="http://www.acscan.org/healthcare/cancerpoll">http://www.acscan.org/healthcare/cancerpoll</a> .....	10, 11
AMERICAN CANCER SOCIETY, CANCER FACTS AND FIGURES 2014 1 (2014), <a href="http://www.cancer.org/acs/groups/content/@research/documents/document/acspc-041770.pdf">http://www.cancer.org/acs/groups/content/@research/documents/document/acspc-041770.pdf</a> .....	6
Analysis of 2006-10 NHIS data conducted by The George Washington University Center for Health Policy Research for the American Heart Association, August 2011 .....	10
Arozullah, Ahsan M., 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), <a href="http://jso.imng.com/jso/journal/articles/0203271.pdf">http://jso.imng.com/jso/journal/articles/0203271.pdf</a> .....	9
Boyle, James P., et al., <i>Projection of the year 2050 burden of diabetes in the US adult population: dynamic modeling of incidence, mortality, and prediabetes prevalence</i> , POPULATION HEALTH METRICS 4 (Oct. 22, 2010). .....	6
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\* We do not chiefly rely upon any of these authorities but rely upon them all.

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Gibbon, Raymond J., et al., <i>The American Heart Association’s 2008 Statement of Principles for Healthcare Reform</i> , 118 <i>J. AM. HEART ASS’N</i> 2209 (2008) .....	10
Go, Alan S., et al., <i>Heart Disease and Stroke Statistics-2014 Update: A Report From the American Heart Association</i> 129 (2014), <a href="http://circ.ahajournals.org/content/129/3/e28.full.pdf+html">http://circ.ahajournals.org/content/129/3/e28.full.pdf+html</a> .....	6, 7
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Himmelstein, David U., et al., <i>Medical Bankruptcy in the United States, 2007: Results of a National Study</i> , 122 <i>AM. J. MED.</i> 741 (2009).....	9
<a href="http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.abstract">http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.abstract</a> .....	9
Kaiser Family Foundation, <i>State-by-State Estimates of the Number of People Eligible for Premium Tax Credits Under the Affordable Care Act</i> , tbl.1 (Nov. 2013), <a href="http://kaiserfamilyfoundation.files.wordpress.com/2013/11/8509-state-by-state-estimates-of-the-number-of-people-eligible-for-premium-tax-credits.pdf">http://kaiserfamilyfoundation.files.wordpress.com/2013/11/8509-state-by-state-estimates-of-the-number-of-people-eligible-for-premium-tax-credits.pdf</a> .....	2

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**GLOSSARY**

ACA or Act	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 11-152, 124 Stat. 1029
ACS	American Cancer Society
ACS CAN	American Cancer Society Cancer Action Network
ADA	American Diabetes Association
AHA and ASA	American Heart Association and its American Stroke Association division
<i>Amici</i>	The parties filing this brief: ACS, ACS CAN, ADA and AHA
JA____	Joint Appendix

### **INTEREST OF *AMICI*<sup>1</sup>**

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 and to 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

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<sup>1</sup> This brief is filed pursuant to the Order entered on January 29, 2014 granting the parties’ joint motion to set due dates for *amicus* briefs. Counsel for plaintiffs and for the government have consented to the filing of this 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*.<sup>2</sup>

The ACS is the nationwide, community-based voluntary health organization dedicated to eliminating cancer as a major health problem. The ACS has three million volunteers nationwide. The ACS's extensive scientific findings have established that health insurance status is strongly linked to medical outcomes. Cancer patients with adequate insurance coverage are more likely to be diagnosed at an earlier stage of disease resulting in lower medical costs, more thorough treatment, better outcomes, and lower rates of death. Accordingly, the 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, the ACS strongly advocates guaranteeing all Americans adequate,

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<sup>2</sup> 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/>.

available, affordable health care that is 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 purchases 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 assuring that patients with chronic diseases and conditions have access to 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 “the plain text of the [Affordable Care Act], the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges.” Opinion at JA361.

## 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, even if certain skin cancers and early-stage tumors are excluded. 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](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 to participate in the health care market. 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:

In adopting the ACA, Congress believed that the Act would address the lack of access of many Americans to affordable health care, ACA § 1501(a)(2)(E)-(G), *codified at* 42 U.S.C. § 18091(2)(E)-(G), and would lead to “near-universal coverage.” ACA § 1501(a)(2)(D), *codified at* 42 U.S.C. § 18091(2)(D). Indeed, Title I of the ACA is titled “Quality, Affordable Health Care for *All* Americans.”

Opinion at JA357 (emphasis by the district court).

### **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. See <http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.abstract>

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 not being able 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. Gibbon, 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 preventative treatment 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 preventative 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.

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 summary judgment motion and denying the plaintiffs' cross-motion should be affirmed.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 4,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)((7)(B)(iii).

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of February, 2014, a true and correct copy of the foregoing was filed with the Clerk of the D.C. Circuit Court via the Court's CM/ECF system, which will send notice of such filing to all counsel in this appeal who are registered CM/ECF users.

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