

No. 19-5212

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

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS;
NATIONAL ALLIANCE ON MENTAL ILLNESS; MENTAL HEALTH AMERICA;
AMERICAN PSYCHIATRIC ASSOCIATION; AIDS UNITED; NATIONAL
PARTNERSHIP FOR WOMEN & FAMILIES; LITTLE LOBBYISTS, LLC,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES
DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES; ALEX MICHAEL AZAR, II, in his official capacity as
Secretary of Health and Human Services; EUGENE SCALIA, in his official
capacity as Secretary of Labor; STEVEN T. MNUCHIN, in his official
capacity as Secretary of the Treasury; UNITED STATES OF AMERICA,
Defendants-Appellees.

On Appeal from the United States District Court for the District of
Columbia, No. 1:18-cv-02133-RJL, Hon. Richard J. Leon

**BRIEF FOR *AMICI CURIAE* FAMILIES USA, GEORGIANS
FOR A HEALTHY FUTURE, AND YOUNG INVINCIBLES
IN SUPPORT OF PLAINTIFFS-APPELLANTS'
PETITION FOR REHEARING EN BANC**

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September 8, 2020

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

A. Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in plaintiffs-appellants' petition for rehearing en banc.

B. Ruling Under Review. References to the rulings at issue appear in plaintiffs-appellants' petition for rehearing en banc.

C. Related Cases. This case has not previously come before this Court or any other, and there are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: September 8, 2020

/s/ Joel McElvain

Joel McElvain

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, amici curiae hereby state that the parties to this brief are non-profit consumer advocacy organizations. The parties have no parent corporations and no publicly held corporation has a 10% or greater ownership interest in any party to this brief. Further, no party to this brief includes members that have issued shares or debt securities to the public.

Dated: September 8, 2020

/s/ Joel McElvain

Joel McElvain

Counsel for Amici Curiae

**STATEMENT REGARDING CONSENT TO FILE
AND SEPARATE BRIEFING**

Pursuant to D.C. Circuit Rule 29(b), counsel for amici curiae certifies that we have filed a Motion for an Invitation to Participate as Amici Curiae concurrently with this brief. Counsel further certifies that plaintiffs-appellants have consented to amici curiae's participation and the filing of this brief. The government defers to the Court's judgment whether to invite amicus briefs in support of plaintiffs' rehearing petition.

No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, nor any person other than amici curiae or their counsel, contributed money intended to fund preparing or submitting this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for amici curiae certifies that this separate amicus brief is necessary because no other brief addresses the factual questions discussed in this brief—the significant negative impact of the challenged rule on consumers. As non-profit organizations with deep experience representing the interests of consumers on health care issues, the parties to this brief

also bring unique expertise to the Court's consideration of this petition for rehearing.

Dated: September 8, 2020

/s/ Joel McElvain

Joel McElvain

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GLOSSARY

| | |
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| ACA | Patient Protection and Affordable Care Act |
| COVID-19 | Coronavirus Disease of 2019 |
| ICU | Intensive Care Unit |
| JA | Joint Appendix |

INTEREST OF AMICI CURIAE

While each amicus has particular interests, together they share the mission of ensuring all people can obtain the affordable, comprehensive, quality health care to which they are entitled. The identity and interest of each amicus is detailed in an appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before the enactment of the Patient Protection and Affordable Care Act, the individual health insurance market was dysfunctional. Persons with preexisting conditions were routinely charged more for inadequate coverage or denied coverage altogether. The ACA comprehensively reformed this market by barring insurers from denying coverage or charging higher premiums on the basis of preexisting conditions, and by requiring insurers to offer a standardized set of essential health benefits. “Short-term, limited-duration insurance,” a form of coverage traditionally used as a stopgap while individuals transition from one comprehensive plan to another, was excepted from the Act’s reforms.

In the challenged rule, the Departments of Treasury, Labor, and Health and Human Services have contorted this narrow statutory exception beyond recognition. A renewable plan with a term of 364

days cannot in any meaningful sense be described as “short-term” or “limited-duration” in comparison to a market in which all plans have a maximum term of one year. *See* [42 U.S.C. § 18031\(c\)\(6\)](#). Under the rule, short-term plans no longer serve as a stopgap, but as the foundation of an alternative market that “exists side-by-side” with the market for ACA-compliant plans. 83 Fed. Reg. 38,212, 38,218 (Aug. 3, 2018).

The result has been a drastic increase in the sale of skimpy, junk coverage. An estimated three million people were enrolled in short-term plans in 2019, an increase of 27% from the year before. STAFF OF H. COMM. ON ENERGY & COMMERCE, 116TH CONG., *SHORTCHANGED: HOW THE TRUMP ADMINISTRATION’S EXPANSION OF JUNK SHORT-TERM HEALTH INSURANCE PLANS IS PUTTING AMERICANS AT RISK* 20 (Comm. Print June 2020) (“House Report”). These plans typically exclude coverage for preexisting conditions; impose annual and lifetime limits; result in extremely high out-of-pocket costs; exclude entire categories of basic care; and allow retroactive rescission whenever care is needed. Despite these limitations, the plans are deceptively marketed as providing comprehensive coverage, leaving consumers financially devastated

when their claims are denied. Moreover, these plans undermine the ACA's single risk pool by siphoning off younger, healthier consumers from the ACA-compliant market, raising premiums for everyone else.

In short, the challenged rule cannot be reconciled with the ACA's plan of providing comprehensive health coverage for all Americans. For this reason, this case is of exceptional public importance and merits en banc review.

ARGUMENT

I. Short-Term Plans Provide Inadequate Coverage.

Because short-term plans are exempt from the ACA's consumer protections, they routinely provide skimpy coverage that is insufficient to meet consumers' health needs. This coverage gap comes at a devastatingly high price to consumers.

Although ACA-compliant plans cannot exclude coverage for preexisting conditions, [42 U.S.C. § 300gg-1\(a\)](#), short-term plans are exempt from that requirement, *id.* § 300gg-91(b)(5). So these plans often deny all coverage to consumers diagnosed with a preexisting condition, or deny coverage for specific services based on health status and family history. Families USA, Comment Letter on Short-Term, Limited-Duration Insurance Proposed Rule (Apr. 23, 2018), JA427.

Coverage is frequently excluded for most common medical conditions that may result from preexisting conditions, such as heart disease, stroke, and diabetes. House Report at 8–9.

Many short-term plans deny coverage even for conditions that have not actually been diagnosed. They define a condition as preexisting if the patient had any signs that would cause “a reasonable person to seek diagnosis or treatment,” and apply this standard to deny coverage even when the patient had been unaware of a condition. JA429. Insurers often deny coverage on the basis of highly tenuous connections drawn between a patient’s symptoms and an alleged “preexisting” condition. House Report at 9.

In one typical case, a woman who was unaware she had breast cancer bought a short-term plan. The plan deemed the disease a preexisting condition and denied coverage for \$400,000 in medical bills. JA429. Another patient was billed over \$200,000 for heart surgery, although his plan’s stated maximum far exceeded that amount. The patient had never been diagnosed with a heart condition, but his plan initially denied the claim because of his father’s medical history and the

patient's previous diagnosis of a condition that *could* predispose him to heart disease. JA428.

Short-term plans also exclude coverage for basic health care services that consumers would reasonably expect to be covered. JA429. ACA-compliant plans must cover ten “essential health benefits,” such as prescription drugs and maternity care. [42 U.S.C. § 18022\(b\)](#). But short-term plans frequently exclude coverage for routine maternity care, mental health and substance abuse care, and *any* prescription drugs. JA429. Some short-term plans also exclude coverage even for immunizations, routine physical exams, and major medical conditions. House Report at 7–8.

These exclusions are buried in the fine print of short-term plans, even where more prominently displayed language would lead consumers to believe that care is covered. *See, e.g., Report on Testing Consumer Understanding of a Short-Term Health Insurance Plan*, NAT'L ASS'N OF INS. COMM'RS 1, 2 (Mar. 15, 2019).¹ The large print of one policy, for example, states that it covers hospital care. But when a child breaks her leg playing sports, the care is not covered because the

¹ https://healthyfuturega.org/wp-content/uploads/2019/04/Consumer-Testing-Report_NAIC-Consumer-Reps.pdf.

policy's fine print excludes "treatment of injury resulting from participation in organized sports." Similarly, another policy indicates in large print that it covers surgical procedures, but buries exclusions for standard procedures like tonsillectomies. Cheryl Fish-Parcham, *Seven Reasons the Trump Administration's Short-Term Health Plans are Harmful to Families*, FAMILIES USA (Aug. 1, 2018).²

Beyond these significant benefit gaps, short-term plans impose lifetime, annual, and even daily dollar limits on care that is covered, leaving consumers with high out-of-pocket costs. One representative plan, for example, imposes daily per-service limits of just \$1,000 per day for hospital room and board, which is woefully inadequate to pay for a hospital stay. JA430.

These limits would be troubling under any circumstances, but they are devastating during the COVID-19 pandemic. One plan, for example, caps its hospital benefit at \$1,000 in covered services per day and its ICU benefit at \$1,250 per day. Coronavirus treatment without ventilation can cost up to \$20,300, and complex cases requiring ventilation can cost two to four times more. Patients admitted for

² <https://familiesusa.org/resources/seven-reasons-the-trump-administrations-short-term-health-plans-are-harmful-to-families/>.

treatment of coronavirus are thus left holding the bag for thousands of dollars in unanticipated medical costs. Christen Linke Young & Kathleen Hannick, *Misleading Marketing of Short-Term Health Plans Amid COVID-19*, BROOKINGS INST. (Mar. 24, 2020).³

Short-term plans are also not subject to the ACA's "out-of-pocket" maximum protections, putting consumers at further risk of devastating medical debt. Although the ACA limits out-of-pocket costs to \$7,350 for individual coverage for the entire year, some short-term plans require cost-sharing that is almost three times higher. JA430.

Even worse, short-term plan enrollees can lose what little coverage they do have at a moment's notice. Most short-term insurers retroactively rescind coverage by asserting that an enrollee failed to disclose a preexisting condition or risk factors when applying for coverage. Some plans even rescind coverage if an enrollee unwittingly failed to disclose a diagnostic test or a recommendation to seek medical advice. House Report at 9.

³ <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/03/24/misleading-marketing-of-short-term-health-plans-amid-covid-19/>.

By excluding preexisting conditions and offering woefully inadequate coverage, short-term plans can charge lower premiums. But they still turn a larger profit than ACA-compliant plans because they pay out drastically less to cover care. ACA-compliant plans must spend at least 80% of premiums on health care costs. [42 U.S.C. § 300gg-18\(b\)](#). But short-term plans are not bound by this requirement and instead allocate far more to overhead and profit, thereby recreating the deep dysfunction of the pre-ACA market. Larry Levitt et al., *Why do Short-Term Health Insurance Plans Have Lower Premiums than Plans that Comply with the ACA?*, KAISER FAMILY FOUND. 1, 3 (Oct. 2018).⁴

II. Short-Term Insurers Mislead Consumers By Misrepresenting Major Coverage Exclusions.

Consumers who purchase short-term plans under the ACA-noncompliant “alternative market” created by the rule often are unaware of the plans’ coverage limitations, in no small part because brokers frequently obscure key plan details and present misleading information when marketing short-term plans. These consumers generally believe they are securing much more robust coverage than

⁴ <http://files.kff.org/attachment/Issue-Brief-Why-Do-Short-Term-Health-Insurance-Plans-Have-Lower-Premiums-Than-Plans-That-Comply-with-the-ACA>.

they actually are, and discover their plans' limitations only when a claim is denied and they are left with devastating medical debt.

For example, brokers regularly fail to disclose preexisting condition exclusions, or minimize what these exclusions actually mean for consumers in practice. House Report at 7; Sabrina Corlette et al., *The Marketing of Short-Term Health Plans*, ROBERT WOOD JOHNSON FOUND. 1, 7 (Jan. 2019).⁵ Some brokers even falsely represent to consumers that they are buying ACA-compliant plans, see House Report at 38, which would cover preexisting conditions. Without up-front communication about the practical impact of preexisting condition exclusions, consumers are surprised with disastrous medical bills when their claims are denied.

Some brokers also misleadingly claim that their short-term plans include access to an extensive provider network, or that the plan permits consumers to visit any doctor they prefer. In reality, these plans typically do not have any established network of contracted providers. Consumers are often unable to find a single provider in their area who will accept their insurance. House Report at 38; Emily

⁵ <https://www.rwjf.org/en/library/research/2019/01/the-marketing-of-short-term-health-plans.html>.

Curran et al., *In the Age of COVID-19, Short-Term Plans Fall Short for Consumers*, COMMONWEALTH FUND (May 12, 2020).⁶ This deceptive marketing puts consumers at risk of receiving unanticipated bills even when they do secure care. Short-term plans typically pay only what they set as a “reasonable and customary” amount for out-of-network care, which can be thousands of dollars less than the actual bill, subjecting the consumer to a “balance bill[]” for the remainder. Curran, *supra*. Consumers who believed they had comprehensive coverage end up surprised by huge bills as a result of this deceptive marketing.

It is, moreover, virtually impossible for consumers to educate themselves in advance as to the limitations of the coverage they are purchasing. Brokers often push consumers to purchase plans over the phone without access to any written information. Consumers often receive plan documents detailing limitations and exclusions only *after* they enroll, when the time to make an informed decision has passed. House Report at 7; Corlette, *supra*, at 8.

Younger consumers are especially vulnerable to these predatory marketing practices. Most young adults value health insurance

⁶ <https://www.commonwealthfund.org/blog/2020/age-covid-19-short-term-plans-fall-short-consumers>.

coverage, and over 30 million young adults with preexisting conditions need comprehensive coverage. Young Invincibles, Comment Letter on Short-Term, Limited-Duration Insurance Proposed Rule (Apr. 23, 2018), JA418. Young adults generally have lower levels of health insurance literacy, however, making it harder for them to differentiate between ACA plans and short-term plans. *Id.* Short-term plans are heavily marketed as cheaper alternatives to young adults, who may enroll in such plans under the mistaken belief that they are receiving comprehensive coverage. *Id.*

These misleading marketing practices are especially troubling during the COVID-19 pandemic. Millions of Americans have lost their jobs, and thus their employer-based coverage, this year. The Administration has declined to open enrollment periods for ACA-compliant plans, so individuals will now be steered toward short-term plans that appear affordable on paper. But in the face of the pandemic, brokers of short-term plans have “significantly overstated the degree of coverage a plan would provide” and also have “misrepresented the terms” of these plans. Young & Hannick, *supra*. These brokers are misleading vulnerable Americans—who may face hugely expensive bills

for coronavirus care—into purchasing inadequate coverage at a time of crisis.

III. The Challenged Rule Undermines the ACA’s Single Risk Pool and Increases Premiums.

The Departments have not been shy about their aim: they have forthrightly declared that they issued the challenged rule, not to carry out the ACA’s statutory plan, but instead to create a parallel market that “exists side-by-side” with the ACA market. 83 Fed. Reg. at 38,218. The central premise of the ACA, however, is that insurers in the individual market would operate under a “single risk pool,” [42 U.S.C. § 18032\(c\)](#), so as “to prevent issuers from segregating enrollees into separate rating pools based on health status,” 78 Fed. Reg. 13,406, 13,422 (Feb. 27, 2013). The Act’s creation of a single, unified market for health insurance “assured that people who had or who developed health problems would have the same plan choices and pay the same premiums as others, essentially pooling their expected costs together to determine the premiums that all would pay.” Gary Claxton et al., *Pre-*

ACA Market Practices Provide Lessons for ACA Replacement Approaches, KAISER FAMILY FOUND. (Feb. 16, 2017).⁷

The challenged rule segments the insurance market to comply with an Executive Order, which had directed the Departments to create an “alternative[] to expensive, mandate-laden [ACA] insurance.” Exec. Order No. 13,813, § 1(c)(i), 82 Fed. Reg. 48,385, 48,386 (Oct. 12, 2017). The rule thus creates a parallel market for lower-cost and lower-quality short-term plans that pulls healthier, younger consumers into a distinct risk pool. *Strengthening Our Health Care System: Legislation to Reverse ACA Sabotage and Ensure Pre-Existing Conditions Protections: Hearing Before the H. Comm. on Energy & Comm.*, 116th Cong. 3–4 (2019) (statement of Prof. Katie Keith, Georgetown Univ.). As a result, only older, sicker consumers—who would be unwise to purchase short-term plans and are likely to be denied coverage under such plans—will buy comprehensive plans and remain in the ACA risk pool. Fish-Parcham, *supra*. As premiums rise to account for the health care expenses of an overall sicker population, the cost of comprehensive coverage will increase. *Id.*; Dane Hansen & Gabriela Dieguez, *The*

⁷ <https://www.kff.org/health-costs/issue-brief/pre-aca-market-practices-provide-lessons-for-aca-replacement-approaches/>.

Impact of Short-Term Limited-Duration Policy Expansion on Patients and the ACA Individual Market, LEUKEMIA & LYMPHOMA SOC'Y 1, 16–17 (Feb. 2020).⁸ Consumers who expect to need high-cost services—such as women expecting a pregnancy, those who need prescription drug coverage, and those with mental health issues—will thus face higher costs for necessary care. Rachel Fehr et al., *How Affordable Are 2019 ACA Premiums for Middle-Income People?*, KAISER FAMILY FOUND. (Mar. 5, 2019).⁹

The Departments themselves have acknowledged this dynamic. The rule recognizes that the risk pool will be segmented and that premiums for ACA-compliant plans will increase. 83 Fed. Reg. at 38,234. Although the rule downplayed this effect, independent sources, including government actuaries, have concluded that the rule's estimates are far too low. *See, e.g.*, Paul Spitalnic, Chief Actuary, Ctrs. for Medicare & Medicaid Servs., *Estimated Financial Effects of the*

⁸ <https://www.lls.org/sites/default/files/National/USA/Pdf/STLD-Impact-Report-Final-Public.pdf>.

⁹ <https://www.kff.org/health-reform/issue-brief/how-affordable-are-2019-aca-premiums-for-middle-income-people/>.

Short-Term, Limited-Duration Policy Proposed Rule 2 (Apr. 6, 2018)¹⁰ (estimating premiums to be 6% higher in 2022 due to the rule); Christina Lechner Goe, *Non-ACA-Compliant Plans and the Risk of Market Segmentation* 1, 17 (Mar. 2018)¹¹ (estimating 18.2% premium increase in states that do not restrict short-term coverage, in part due to this rule). Regardless of the size of this effect, however, it is fundamentally arbitrary for the Departments to drive up premiums by ignoring the ACA's statutory plan for a single, unified insurance market.

¹⁰ <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/STLD20180406.pdf>.

¹¹ https://healthyfuturega.org/ghf_resource/non-aca-compliant-plans-risk-market-segmentation/.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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September 8, 2020

APPENDIX

Families USA, a leading national, non-partisan voice for health care consumers, is dedicated to achieving high-quality, affordable health care and improved health for all. Before the passage of the Affordable Care Act, Families USA heard from consumers who could not buy health insurance due to preexisting conditions, had policies rescinded, or purchased policies only to find that they did not cover their conditions. They were left with medical debt or without access to health care, and their experiences defined Families USA's advocacy for health care reform. The expanded sale of short-term plans once again leaves consumers unprotected, undermining the very reforms Families USA worked to achieve.

Georgians for a Healthy Future is a nonpartisan, statewide, non-profit organization focusing on health care issues that affect Georgia individuals and families. Founded in 2008 with a mission to build and mobilize a unified voice, vision, and leadership to achieve a healthy future for all Georgians, Georgians for a Healthy Future understands the important role that quality, affordable, accessible health care plays in the lives of Georgia consumers. The expansion of

short-term, limited-duration insurance under the challenged rule is an issue of special concern for Georgians, who have suffered from these plans' misleading marketing practices, insufficient coverage benefits, and medical underwriting of pre-existing conditions. In a state that has yet to expand Medicaid, these practices are particularly worrisome for low-income Georgians who would otherwise enroll in Medicaid coverage, but instead have resorted to short-term plans to cover themselves and their families.

Young Invincibles is a national nonprofit organization dedicated to elevating the young adult voice in the political process and advancing economic opportunity for young adults (ages 18-34). Since the organization's founding by young people who fought for young adult values in health care reform, Young Invincibles has become the leading national organization dedicated to expanding young adult health coverage. Focusing on both federal and state policy, Young Invincibles has developed a network of thousands of young people nationwide who continue to fight to ensure all young people have access to comprehensive, affordable, health coverage.

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,511 words, excluding the parts exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). I further certify that 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 the brief was prepared in 14-point Century Schoolbook font using Microsoft Word ProPlus 365.

Dated: September 8, 2020

/s/ Joel McElvain

Joel McElvain

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Dated: September 8, 2020

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