No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF TRINITY HEALTH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL G. NEUMANN
TRINITY HEALTH
20555 Victor Parkway
Livonia, MI 48152

J. MARK WAXMAN
Counsel of Record
FOLEY & LARDNER LLP
111 Huntington Avenue
Suite 2500
Boston, MA 02199
(617) 342-4055
mwaxman@foley.com

Counsel for Amicus Curiae

January 27, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 14-114

DAVID KING, ET AL., PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF TRINITY HEALTH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Trinity Health respectfully submits this brief as amicus curiae. Trinity Health is one of the largest multi-institutional Catholic health care delivery systems in the nation. It serves people and communities in 21 states with 86 hospitals, 128 continuing care facilities and home health and hospice programs that provide nearly 2.8 million visits annually. The organ-

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

ization returns almost $900 million to its communities annually in the form of charity care and other community benefit programs.

Trinity Health is called to be innovative in improving health care delivery, to help restore well-being, to relieve and prevent suffering, and to be a community of persons in service to others. Trinity Health consists of people of Catholic health care, committed to fostering healing, acting with compassion, and promoting wellness for all persons and communities, with special attention to our neighbors who are poor, underserved and most vulnerable. By its service, Trinity Health strives to transform hurt into hope. Its commitment to coverage expansion for those who lack the financial resources to purchase health insurance stems from its mission. Its extensive efforts include advocacy, outreach, education, and enrollment assistance. For example, Trinity Health provided health insurance education and/or enrollment assistance to more than 300,000 people during the 2014 marketplace open enrollment.

Trinity Health's core values include "commitment to those who are poor" and "justice" and for that reason, it seeks to express its views about an issue which does not appear to have been addressed by the parties. Specifically, Trinity Health wishes to address the relief the Court might consider should it rule in favor of Petitioners. By siding with Petitioners, 4.2 million people in states in which Trinity Health operates become at-risk for losing their health insurance. Without subsidies, the most vulnerable among us will again face the reality that their only access to health care (really "sick care") is through an emergency department. This care is uncoordinated and costly. One of the millions Trinity Health serves who

would be impacted is a fast food worker named Perry from Muskegon, MI. After being uninsured for much of his adult life, Trinity Health helped him enroll in a federal marketplace insurance product. He has since gotten two chronic conditions under control and scheduled a much needed surgery. Trinity Health believes it is unjust to stop subsidies mid-year putting the health of so many like Perry at-risk. A just society strives toward the creation of healthier communities. The health status of communities is improving as more people enjoy health insurance coverage. Preventing an abrupt change in direction is an equitable remedy offered for the Court's consideration should the Court side with Petitioners.

SUMMARY OF ARGUMENT

This Court should uphold the rule issued by the Internal Revenue Service (IRS). As set forth in the United States' brief, the government's interpretation of Section 36B is correct, and at the least reasonable and entitled to deference. Petitioners' interpretation, on the other hand, ignores other portions of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119,[2]—in particular, the statutory definitions of "Exchange"—and would render other portions of the ACA unworkable.

If this Court sides with Petitioners, millions of people will suffer serious harm, as will hospitals and the patients they care for, among others. There is no way to avoid that harm if Petitioners prevail. However, in the event this Court *does* reverse the decision below, it should at least delay the damage by ensuring that

[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

its judgment avoids disrupting subsidies for this year's insurance plans.

As explained below, under the ACA, individuals, the poor, and most vulnerable among us, purchase a health insurance plan for a given year based on an advance determination of the tax credit for which they are eligible. The government also issues an advance payment of the credit, resulting in reduced monthly premiums. A decision eliminating subsidies in the middle of the insurance year would be extraordinarily disruptive—to the millions of Americans who purchased this year's plans in reliance on those subsidies, to issuers who provide and manage those plans, and to healthcare providers caring for patients insured by the plans.

Rather than unleash this additional hardship on millions of vulnerable Americans—over and above the hardship that inevitably would come with a ruling for Petitioners—the Court should specify that any judgment invalidating the challenged regulations does not take effect until next plan year—January 1, 2016. That course of action would be consistent with the Court's past holdings and statutory authority. And it would allow time for Congress, the Administration, affected States, insurers, providers, and individual plan participants to plan for future insurance years.

ARGUMENT

IF THIS COURT STRIKES DOWN SUBSIDIES, IT SHOULD DELAY THE EFFECT OF ANY JUDGMENT TO MINIMIZE DISRUPTION.

A. THE COURT MAY SPECIFY WHEN ITS JUDGMENTS TAKE EFFECT IN LIGHT OF EQUITABLE CONSIDERATIONS.

This Court has broad authority, rooted in equity, to tailor the timing of its judgments to the circumstances of particular cases. It has used that authority in select cases, to delay the effective date of its judgments to minimize the disruptive effect, and allow time for the political system and the public to react. If the Court agrees with Petitioners' theory, this case cries out for such a remedy.

Thus, for example, in *Buckley* v. *Valeo*, 424 U.S. 1, 142-43 (1976) (per curiam), the Court examined the framework around a complex administrative system with national reach. It held unconstitutional the process for selecting members of the Federal Election Commission. At the same time, the Court—without dissent—decided to "stay" its judgment, allowing the Commission to continue to exercise "the duties and powers granted it" by Congress. As the Court explained: "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." *Id.* at 143.

The Court similarly delayed the effective date of its decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982)

(plurality opinion). There, the Court struck down aspects of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, as violating Article III. *See* 458 U.S. at 87. As in *Buckley*, the Court stayed its judgment to avoid an immediate disruptive effect and allow other actors time to adjust. *Id.* at 88. Once the initial stay lapsed, the Court granted a motion to further extend "the stay of judgment" for an additional two months. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 459 U.S. 813, 813 (1982).[3]

If the Court were to agree with Petitioners, the rationale for staying its judgment would be stronger here than in *Buckley* or *Northern Pipeline*. In those cases, the Court let entities it deemed unconstitutional continue to exercise administrative and judicial powers affecting the rights of the public. The Court concluded that the ongoing exercise of unconstitutional powers was acceptable to minimize the disruptive effects of its decisions, and allow other actors an opportunity to respond. In contrast to *Buckley* and *Northern Pipeline*, the challenge here is one of statutory interpretation, and staying the effect of a judgment would not require the Court to countenance an ongoing constitutional violation.

---

[3] Lower courts have followed this Court in delaying the effect of judgments in appropriate cases. *See, e.g.*, *Bd. of Trade* v. *SEC*, 883 F.2d 525, 536-37 (7th Cir. 1989) (Easterbrook, J.) (quoting *Buckley*, 424 U.S. at 144) ("Because this decision has the potential to unsettle the expectations of the many investors who have traded on the System, and to require the closing of all positions Delta has taken and guaranteed, we defer for 120 days after the date of our mandate the effectiveness of our judgment vacating the SEC's order."

Staying any adverse judgment until after this year also would reflect this Court's statutory authority. Congress has provided that:

> The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.[4] Under the circumstances of this case, it would be both "just" and "appropriate" to enter a judgment that avoids disrupting insurance plans for the current year.

A judgment that permits subsidies to remain in effect for the current plan year would not run afoul of this Court's doctrine on the retroactive effect of its decisions. *See Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993). Following *Harper*, this Court has acknowledged that there remain circumstances where a holding need not apply retroactively. *See Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 755 (1995) (noting various doctrines that limit retroactive application of new decisions). As the concurring opinion in *Hyde* explains:

> We do not read today's opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of dis-

[4] The open-ended remedial authority Congress gave this Court stands in contrast to other tribunals, for which Congress has mandated precise effective dates of decisions. *See Amax Coal Co.* v. *Dep't of Labor*, 892 F.2d 578, 582 & n.6 (7th Cir. 1989).

> ruption of important reliance interests or the unfairness caused by unexpected judicial decisions. We cannot foresee the myriad circumstances in which the question might arise.

Id. at 761 (Kennedy, J., concurring). That is because these issues must be confronted in the context of a specific "hard case," "for the law in this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law." *Id.* at 762.

B. THE HARSH CONSEQUENCES OF REMOVING TAX SUBSIDIES MID-YEAR WARRANTS DELAYING THE EFFECT OF A JUDGMENT.

If the Court were to agree with Petitioners, it should specify that its judgment only invalidates subsidies for future plan years, effective January 1, 2016. Allowing a decision to affect this year's tax subsidies and plans would disrupt numerous important reliance interests, with harsh consequences to millions of vulnerable Americans.

The ACA's mechanism for determining and paying the premium tax credit would make a mid-year elimination of tax credits massively disruptive. Under the Act, participants in the individual health insurance market purchase a plan through an exchange during an open enrollment period at the beginning of the insurance year. The ACA provides for "advance determinations" to be made of an individual's eligibility for a premium tax credit during the open enrollment season. 42 U.S.C. § 18082(a), (b). The tax credit itself is then paid in advance to the plan issuer. 42 U.S.C. § 18082(c)(2)(a). As a result, when individ-

uals purchased a health insurance plan during this year's open enrollment, they did so in reliance on a monthly premium that already takes into account the premium subsidy.[5]

Millions of Americans in States that would be affected by this litigation thus have already purchased plans for this year on the basis of available tax subsidies. For the months preceding the time of this Court's decision, those individuals have been paying premiums that account for the payment of tax credits to plan issuers. If the Court eliminates those credits, and permits its decision to go into effect in the middle of this plan year, the consequences will be numerous and dramatic.

Individual plan participants will, at a minimum, see a sharp rise in their monthly premiums, as they will no longer have the benefit of tax credits. Many, likely most, will no longer be able to afford their health insurance premiums (indeed, the very purpose of the subsidies is to make the premiums affordable) and will lose access to coverage. Hospitals—which have been discouraged from covering shortfalls in health insurance premiums payments for those in need, *see* CMS, *Third Party Payment of Qualified Health Plan Premiums*, 79 Fed. Reg. 15,240, 15,242 (Mar. 19, 2014) (rule to be codified at 45 C.F.R. pt. 156)—will have little or no ability to replace lost coverage, much less provide the type of preventive care that would prevent hospitalizations.

---

[5] The advance determinations and payments are based on an estimate of the subsidy. The actual amount of credit owed to an individual is calculated at the end of the year and reconciled with the advance payment, with the individual either owing additional tax or receiving a further credit. 26 U.S.C. § 36B(f).

It is hard to imagine that Congress, had it anticipated this litigation, would have wanted to see the disruptive consequences of removing tax credits mid-year from individuals who purchased insurance in reliance on them. *Cf. National Federation of Independent Business* v. *Sebelius,* 132 S. Ct. 2566, 2608 (2012) ("We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so."). As in *Buckley* and *Northern Pipeline*, a delay in the effect of the judgment would provide time for Congress (as well as the Administration, the States, and private parties) to react to this Court's decision.

There is no need for the Court to inflict additional chaos—above the chaos a judgment for Petitioners already would be inflicting—on those who are poor and without the financial resources to purchase health insurance without subsidies. Consistent with its precedents, equitable power, and statutory authority, this Court should specify that, if it invalidates the tax subsidies on certain exchanges, its judgment does not affect this year's subsidies and insurance plans.

CONCLUSION

For the foregoing reasons, while the judgment of the court of appeals should be affirmed, if the Court strikes the subsidies, it should delay the effect of any judgment to minimize disruption.

Respectfully submitted,

Paul G. Neumann
TRINITY HEALTH
20555 Victor Parkway
Livonia, MI 48152

J. MARK WAXMAN
Counsel of Record
FOLEY & LARDNER LLP
111 Huntington Avenue
Suite 2500
Boston, MA 02199
617-342-4055
mwaxman@foley.com

Counsel for Amicus Curiae

January 2015