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June 27, 2018

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.)

Dear Attorney General Sessions:

I am writing regarding the Department's recent decision not to defend critical consumer protections in ongoing litigation challenging the Affordable Care Act (ACA) before the United States District Court for the Northern District of Texas. I urge you to reconsider your position and to defend these critical protections for individuals with pre-existing conditions like asthma, arthritis, cancer, diabetes, and heart disease.

In your June 7, 2018, letter to Speaker Ryan explaining the Department's decision, you argue that the ACA's provisions protecting people with pre-existing conditions are not severable from the individual mandate, and cannot survive if that provision is struck down as unconstitutional. Respectfully, I disagree.

This is no small matter. In 2016, the Kaiser Family Foundation estimated that 27 percent of American adults under age 65 have pre-existing conditions that would leave them uninsurable in the individual market. More recently, 57 percent of Americans responding to a poll said that they or someone in their household suffers from a pre-existing condition. These numbers include 590,000 Mainers, roughly 45 percent of the state's population.

I want to make clear that my concern is to protect individuals with pre-existing conditions, not to defend the individual mandate. Data show that the individual mandate is highly regressive – 80 percent of those who pay the fine make less than $50,000 per year. The Supreme Court was right to find that the individual mandate is not within the powers granted to Congress under the Commerce Clause, and Congress was right in eliminating the individual mandate's penalty through the passage of the Tax Cuts and Jobs Act, P.L. 115-97.

I do not dispute your contention that the individual mandate will cease to be constitutional as a tax when it no longer produces revenue, beginning in 2019. But it does not follow that eliminating this penalty requires that important consumer protections – such as provisions ensuring that Americans with pre-existing conditions have access to health insurance – must also fall. In my view, the severability argument you outlined in your letter is focused on the wrong period of time: severability should not be measured by Congress's intent in 2010, when the Affordable Care Act was passed into law, but rather by Congress's intent in 2017, when Congress amended it through the Tax Cuts and Jobs Act. It is implausible that Congress

intended protections for those with pre-existing conditions to stand or fall together with the individual mandate, when Congress affirmatively eliminated the penalty while leaving these critical consumer protections in place. If Congress had intended to eliminate these consumer protections along with the individual mandate, it could have done so. It chose not to.

Your letter states that it is "rare" for the Department to forgo defense of duly enacted statutes. The Department should do its duty and defend the important consumer protections in the ACA, particularly those that ensure that people with pre-existing conditions can secure insurance.

Sincerely,

Susan M. Collins

Susan M. Collins
United States Senator