

Congress of the United States
Washington, DC 20515

April 8, 2019

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Seema Verma
Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Mr. Secretary and Administrator Verma:

We are requesting information and documents regarding the involvement of the Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) in the troubling decision by the Department of Justice (DOJ) not to defend the constitutionality of the Affordable Care Act (ACA).

On March 25, 2019, DOJ announced in a letter filed with the U.S. Court of Appeals for the Fifth Circuit that it would no longer oppose the judgment of the district court in *Texas v. United States*, which held that the ACA is wholly unconstitutional. Previously, DOJ had argued that although it believed that certain portions of the law should be held unconstitutional, the rest of the law should stand.¹ In a June 7, 2018 letter to Congress explaining DOJ's position in the litigation, then-Attorney General Sessions stated that he was acting "with the approval of the President of the United States."²

DOJ's sudden and significant reversal from its previous position was reportedly driven by officials inside the White House and the Office of Management and Budget (OMB)—including Acting Chief of Staff Mick Mulvaney, Acting Director of OMB Russ Vought, and Director of the Domestic Policy Council Joe Grogan—over the opposition of Attorney General William Barr and HHS Secretary Alex Azar.³

¹ Letter from Attorney General Jefferson B. Sessions III, Department of Justice, to Paul Ryan, Speaker of the House (June 7, 2018) (online at www.justice.gov/file/1069806/download).

² *Id.*

³ *White House Obamacare Reversal Made Over Cabinet Objections*, Politico (Mar. 26, 2019) (online at

If the Administration's new legal position prevails and the entire ACA is struck down, there would be catastrophic implications for millions of American consumers and the United States health care system. Approximately 21 million Americans would be at risk of losing their health insurance—including 12 million individuals who gained coverage through Medicaid expansion and another nearly 10 million who receive federal subsidies to purchase plans on the individual market.⁴

Striking down the ACA would also have serious implications for the 133 million Americans with pre-existing conditions like asthma, diabetes, and cancer.⁵ The ACA prohibits insurance companies from denying coverage or charging higher premiums to consumers for a pre-existing condition.⁶ It also prohibits insurers from selling policies that exclude coverage for pre-existing conditions and from instituting lifetime and annual limits on benefits.⁷

This new legal position also runs counter to several of the Administration's own policy priorities, which HHS and CMS are charged with carrying out. President Trump has stated that he wants to use CMS's Innovation Center to test drug cost models as part of his initiative to lower drug prices, yet this center was created by the ACA and would no longer exist if the law was to be found unconstitutional. This Administration has praised initiatives to crack down on health care fraud, but the ACA provided stronger tools to fight Medicare fraud. The President's HIV plan relies on a number of provisions of the ACA to expand access to prevention and treatment for Americans with HIV and those at risk. It is not clear how this plan would operate if the law is repealed. The ACA significantly expanded access to substance use disorder treatment, which is an important part of the President's push to reduce opioid use disorder.

Although HHS has asserted that "Secretary Azar fully supports the Administration's litigation position in the ACA case, which bears his name," this statement is at odds with accounts of two individuals with knowledge of the Administration's internal deliberations.⁸ Congress needs to understand what communications HHS and CMS had with White House, OMB, and/or DOJ officials regarding this decision, as well as what contingency plans are being developed to address the disruption that will inevitably occur in the event that the ACA is overturned by the courts.

www.politico.com/story/2019/03/26/trump-obamacare-reversal-cabinet-1238359).

⁴ Center on Budget and Policy Priorities, *Latest Republican ACA Repeal Plan Would Have Similar Harmful Impacts on Coverage Health as All the Others* (June 20, 2018) (online at www.cbpp.org/sites/default/files/atoms/files/6-20-18health.pdf).

⁵ Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 5, 2017) (online at <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>).

⁶ 42 U.S.C. §§ 300gg(a)(1), 300gg-1, 300gg-4(a), 300gg-4(b).

⁷ 42 U.S.C. § 300gg-3; 42 U.S.C. § 300gg-11.

⁸ *White House Obamacare Reversal Made Over Cabinet Objections*, Politico (Mar. 26, 2019) (online at www.politico.com/story/2019/03/26/trump-obamacare-reversal-cabinet-1238359).

The day after DOJ announced that it would reverse its legal position, President Trump pledged at a press conference: “If the Supreme Court rules that Obamacare is out, we will have a plan that is far better than Obamacare.”⁹ It is unclear whether any plan yet exists, though reports indicate that the White House has engaged several conservative think tanks to develop this plan.¹⁰ The President now asserts that Congress will vote on a replacement plan immediately following the 2020 election.¹¹

DOJ’s decision raises serious concerns as to how HHS and CMS will fulfill their mission to “enhance the health and well-being of all Americans” if the ACA is overturned.¹² Congress is entitled to understand the communications that took place and pressures that were applied to achieve these troubling results. Further, there is no legal basis for withholding information from congressional oversight due to the pendency of an ongoing lawsuit. For these reasons, we request that you produce the following documents and information by April 22, 2019:

1. Documents sufficient to identify all HHS and/or CMS personnel—including but not limited to Secretary Azar and Administrator Verma—who were informed of DOJ’s decision to support the district court’s judgment in *Texas v. United States* prior to March 25, 2019. If no responsive documents exist, please provide a list of all HHS and/or CMS personnel who were informed of this decision prior to March 25, 2019.
2. Documents sufficient to identify when the HHS and/or CMS personnel identified in response to Request 1 were informed of DOJ’s decision to support the district court’s judgment in *Texas v. United States*. If no responsive documents exist, please provide a written summary of when each of the HHS and/or CMS personnel identified in response to Request 1 were informed of this decision, including the identity of the parties who relayed this information.
3. All communications dated between December 14, 2018, and March 25, 2019, between any personnel from HHS and/or CMS, and any personnel from the White House and/or OMB, regarding DOJ’s decision to support the district court’s judgment in *Texas v. United States*. If no responsive documents exist, please provide a written summary of all communications (whether telephonic, in-person, or otherwise) between any HHS and/or CMS personnel, and any White House

⁹ *Trump Vows to Have a Health Plan ‘Far Better than Obamacare,’* Politico (Mar. 27, 2019) (online at www.politico.com/story/2019/03/27/trump-health-care-obamacare-1238927).

¹⁰ *White House Working on Secret Healthcare Plan with Three Conservative Think Tanks*, Washington Examiner (Mar. 31, 2019) (online at www.washingtonexaminer.com/news/white-house-working-on-secret-healthcare-plan-with-three-conservative-think-tanks).

¹¹ *Trump, in Reversal, Says Replacing Obamacare Can Wait Until After Election*, Bloomberg (Apr. 2, 2019) (online at www.bloomberg.com/news/articles/2019-04-02/trump-in-reversal-says-replacing-obamacare-can-wait-until-2020?utm_campaign=pol&utm_medium=bd&utm_source=applenews).

¹² U.S. Department of Health and Human Services, *About HHS* (online at www.hhs.gov/about/strategic-plan/introduction/index.html).

and/or OMB personnel regarding this decision dated between December 14, 2018, and March 25, 2019, or state whether there were no such communications.

4. All communications dated between December 14, 2018, and March 25, 2019, between any personnel from HHS and/or CMS, and any DOJ personnel, regarding DOJ's decision to support the district court's judgment in *Texas v. United States*. If no responsive documents exist, please provide a written summary of all telephonic or in-person communications between any HHS and/or CMS personnel, and any DOJ personnel regarding this decision dated between December 14, 2018, and March 25, 2019, or state whether there were no such communications.
5. All analyses, studies, reviews, assessments, reports, memoranda, or opinions regarding the potential impact if the ACA is found unconstitutional as the result of a judicial decision in *Texas v. United States*, including but not limited to potential impacts on health care insurance coverage, impacts on health care providers, and economic impacts of this change. If no such documents exist, please say so in your response.
6. All documents and communications relating to any plans or policies to initiate an alternative health care law in the event the ACA is found unconstitutional as the result of a judicial decision in *Texas v. United States*. If no such plans or policies exist, please say so in your response.
7. All communications regarding any plans or policies to initiate an alternative health care law in the event that the ACA is found unconstitutional as the result of a judicial decision in *Texas v. United States*. If no responsive documents exist, please provide a written summary of all telephonic or in-person communications between any HHS and/or CMS personnel, and any DOJ personnel regarding this decision dated between December 14, 2018, and March 25, 2019, or state whether there were no such communications.

Thank you for your attention this matter.

Sincerely,



Elijah E. Cummings
Chairman
Committee on Oversight and Reform



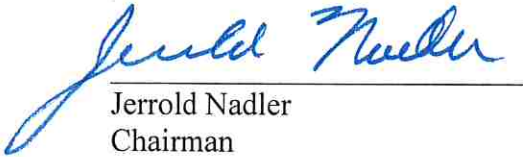
Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce



Richard E. Neal
Chairman
Committee on Ways and Means



Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor



Jerrold Nadler
Chairman
Committee on the Judiciary

cc: The Honorable Jim Jordan, Ranking Member
Committee on Oversight and Reform

The Honorable Greg Walden, Ranking Member
Committee on Energy and Commerce

The Honorable Kevin Brady, Ranking Member
Committee on Ways and Means

The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor

The Honorable Doug Collins, Ranking Member
Committee on the Judiciary