# Congress of the United States
## Washington, DC 20515

April 8, 2019

The Honorable William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Barr,

We write to express our concern regarding the troubling decision by the Department of Justice (DOJ or the Department) not to defend the constitutionality of the Affordable Care Act (ACA). This refusal appears to be violating longstanding policies to defend and enforce Acts of Congress, will have a significant negative impact on the accessibility of health care for Americans, and appears to be driven by political considerations rather than considered legal arguments. The Department owes Congress and the public an explanation as to why it refuses to enforce the law. We also request that you provide previously requested information to us and make certain individuals available for questioning on this matter.

In terms of violating longstanding policies, DOJ is pursuing a substantial shift in its enforcement of the ACA for the second time in two years.[1] The Constitution requires the Executive Branch to "take care that the laws are faithfully executed."[2] Previous Attorneys General understood that the "Attorney General has a duty to defend and enforce both the Acts of Congress and the Constitution; when there is a conflict between the requirements of the one and the requirements of the other, it is almost always the case that he can best discharge the

[1] Last June, when the Department first announced that it would no longer defend the individual mandate—a provision of the ACA that now imposes a tax of zero-dollars on those who do not purchase health care—it also argued that key provisions, such as protections for pre-existing conditions, are inseverable from the individual mandate and should be invalidated. Letter from Attorney General Jefferson B. Sessions to Hon. Jerrold Nadler, Ranking Member, House Committee on the Judiciary, June 7, 2018. In December of last year, a federal district court in Texas issued a ruling that would nullify the entire ACA. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). In this widely criticized decision, the Court went a step further and found "the individual mandate 'is essential to' and inseverable from 'the other provisions' of the ACA." *Texas*, Memorandum Opinion and Order (Dec. 14, 2018). A coalition of state Attorney Generals filed a notice of appeal on January 3, 2019. The Department provided the Court of Appeals a two-sentence letter in which it stated that "the United States is not urging that *any* portion of the district court's judgment be reversed." Letter to Lyle W. Cayce, Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, *Texas v. United States*, No. 19-10011 (5th Cir. Mar. 25, 2019) (emphasis added). This is contrary to the Department's previous stance (in the same case) when it argued only two provisions of the law were unconstitutional: requiring pre-existing conditions coverage and prohibiting insurers from charging those same individuals with higher premiums.

[2] U.S. CONST. art. II, § 3, cl. 5.

responsibilities of his office by defending and enforcing Acts of Congress."[3] As we stated in our June 2018 letter,[4] the Department also has an obligation to defend the ACA if, in former Attorney General Sessions's words, "reasonable arguments" can be made in their defense.[5] This longstanding policy reflects the fundamental structure of our republic: Congress makes the laws and the Executive Branch enforces them.

Although there are exceptions to the rule that DOJ must defend a federal statute in federal court, none of those exceptions appear to apply here.[6] In the past, the Department has declined to defend a federal statute when there has been an intervening Supreme Court decision to eliminate reasonable arguments in support of a law.[7] Another exception involves statutes that infringe on the constitutional powers of the President.[8] A third involves laws that the President has vetoed.[9] None of these exceptions would seem to apply in *Texas v. United States*. The courts have not fundamentally changed our understanding of the ACA since ruling it constitutional, and the President made no mention of an encroachment on his authority while celebrating the intervening changes to the statute.[10] Former Attorney General Sessions informed the relevant committees of the Department's changing position in his June 7, 2018 letter, and we expect the Department to offer an explanation for its March 25, 2019 decision.

Our previous letter to then Attorney General Sessions expressed our concerns about the Department's shift away from defending the ACA.[11] Now, we are concerned by what appears to be the Department's third litigation position in the same case. In refusing to defend the ACA, the Department is endangering the following: coverage for pre-existing conditions for up to 133 million people who may need coverage in the individual market; Medicaid expansion, which now covers over 12 million Americans; the cap on out-of-pocket costs and prohibition on

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[3] Letter from the Hon. Att'y Gen. Benjamin R. Civiletti, Dep't of Justice, to Chairman Max Baucus, S. Comm. on the Judiciary, Subcomm. on Limitations of Contracted and Delegated Authority (July 30, 1980).

[4] Letter to Hon. Att'y Gen. Jeff Sessions, from Ranking Members Jerrold Nadler, House Comm. on the Judiciary, Frank Pallone, Jr., House Comm. on Energy & Commerce, Richard Neal, House Comm. on Ways & Means, Robert C. "Bobby" Scott, House Comm. on Edu. & Labor, and Elijah Cummings House Comm. on Oversight & Gov. Reform (Jun. 13, 2018).

[5] Letter from Attorney General Jefferson B. Sessions to Hon. Jerrold Nadler, Ranking Member, House Committee on the Judiciary, June 7, 2018. For examples of any number of "reasonable arguments," we point you to the brief filed by California and 15 other states that have intervened to defend the law when the Department has not. *Texas v. United States*, No. 4: 1 8-cv-00167-O (N.D. Tex. Apr. 9, 2018) (Motion to intervene and memorandum in support thereof).

[6] Marty Lederman, *Just How Indefensible Does an Argument in a Government Brief Have to Be to Cause All the Career Litigators in Federal Programs to Withdraw from the Case?*, BALKINIZATION, June 8, 2018.

[7] *See, e.g., U.S. v. Eichman*, 496 U.S. 310 (1990).

[8] *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919 (1983).

[9] *See, e.g., U.S. v. Lovett*, 328 U.S. 303 (1946).

[10] *See, e.g.,* Cristiano Lima, *Trump boasts of individual mandate repeal in GOP tax bill*, POLITICO, Dec. 20, 2017.

[11] Letter to Hon. Att'y Gen. Jeff Sessions, from Ranking Members Jerrold Nadler, House Comm. on the Judiciary, Frank Pallone, Jr., House Comm. on Energy & Commerce, Richard Neal, House Comm. on Ways & Means, Robert C. "Bobby" Scott, House Comm. on Edu. & Labor, and Elijah Cummings House Comm. on Oversight & Gov. Reform (Jun. 13, 2018).

annual/lifetime caps for over 171 million Americans in the individual market and employer-based coverage; financial assistance for over 9 million people who use the exchanges; the ban on charging women more than men for the same coverage; the requirement that health insurance should cover basic essentials such as maternity care, substance use disorder treatment, hospitalization, and prescription drugs; the tax credits for small businesses who provide health insurance; and protections, that if taken away, would result in higher Medicare costs for 60 million seniors and individuals with disabilities. Further, this shift in litigation posture is contrary to President Trump's pledge "to lower the cost of healthcare and prescription drugs—and to protect patients with preexisting conditions," and his promise that "Republicans will totally protect people with pre-existing conditions" and "will become 'the Party of Healthcare.'"[12]

Finally, we are also concerned the Department's litigation posture is being driven by purely political considerations rather than considered legal arguments. We recognize that as an officer of the Executive Branch, the Attorney General serves at the pleasure of the President. It is also within the President's authority to direct or steer the Department's litigation positions for civil cases. However, as *the* litigator for the United States and its administrative agencies, the Department has an obligation to ensure these positions are supported by sound legal or factual arguments.[13] Recent reports suggest that the *Texas* decision was made over both the Justice Department and the Department of Health and Human Services' objections, and was spearheaded by the White House's Acting Chief of Staff and Office of Management and Budget.[14] We also note that the Department's litigation position in the District Court was so indefensible that three of the four career attorneys representing the government refused to sign the June 2018 briefs and removed themselves from the case.[15] Daniel Mauler, the one career attorney willing to sign the June 2018 brief, had only been employed by the Department for a few weeks. On the same day the political appointee in charge of the Federal Programs Section of the Civil Division, Chad Readler, signed the brief, the President nominated him to the Sixth Circuit Court of Appeals.[16]

We respectfully request the following by no later than April 22, 2019:[17]

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[12] President Donald J. Trump, *State of the Union Address for 2019* (Feb. 5, 2019); @realDonaldTrump, TWITTER (Oct. 24, 2018 5:45AM); @realDonaldTrump, TWITTER (Mar. 26, 2019 12:58 PM).

[13] 28 U.S.C. § 516; *see* 28 U.S.C. §§ 517-19.

[14] Eliana Johnson & Burgess Everett, *White House Obamacare reversal made over cabinet objections*, POLITICO, Mar. 26, 2019.

[15] *Texas v. United States,* No. 4: l 8-cv-00167-O (N.D. Tex. June 7, 2018) (Unopposed motion to withdraw appearances).

[16] White House Press Release, *President Donald J. Trump Announces Fifteenth Wave of Judicial Nominees, Fourteenth Wave of United States Attorney Nominees, and Ninth Wave of United States Marshal Nominees* (June 7, 2018).

[17] In keeping with precedent and practice established in the 115th Congress, deliberative process privilege does not apply for relevant Department documents and communications, and those responsive materials will be provided to the Committee. *See* Department of Justice's document production in response to the Joint Judiciary Committee – Oversight & Government Reform Committee's Investigation Into the FBI's Actions During the 2016 Election (115th Cong.). *See also* Reps. Bob Goodlatte – Trey Gowdy, Subpoena, Mar. 22, 2018.

1. A complete response, including supporting documents and communications, to our June 13, 2018 letter relating to the first shift in the Department's policy regarding the ACA;
2. A detailed explanation for the March 25, 2019 determination that the entire ACA is unconstitutional, including any written guidance or memoranda. This should include any prior drafts of written guidance or memoranda, but should not include copies of pleadings or filings found on a public court docket.
3. A list identifying all current and former Department employees involved in the March 25, 2019 determination that the ACA is unconstitutional.
4. The following individuals to be made available for testimony: Dan Mauler, Joseph Hunt, Brett Shumate, and Martin Totaro.

Thank you for your prompt attention to this request.

Sincerely,

Jerrold Nadler
Chairman
House Committee on the Judiciary

Richard Neal
Chairman
House Committee on Ways and Means

Frank Pallone, Jr.
Chairman
House Committee on Energy and Commerce

Elijah E. Cummings
Chairman
House Committee on Oversight and Reform

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

cc: Honorable Doug Collins, Ranking Member, House Committee on the Judiciary
Honorable Greg Walden, Ranking Member, House Committee on Energy and Commerce
Honorable Kevin Brady, Ranking Member, House Committee on Ways and Means
Honorable Jim Jordan, Ranking Member, House Committee on Oversight and Reform
Honorable Virginia Foxx, Ranking Member, House Committee on Education and Labor