Congress of the United States
Washington, DC 20515

June 13, 2018

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

Dear Attorney General Sessions,

We write to you with serious concerns regarding your refusal to defend key patient protections enacted by the Affordable Care Act (ACA). The provisions at issue in *Texas v. United States* guarantee coverage regardless of health status ("guaranteed issue") and prohibit insurers from charging higher premiums base on health status ("community rating").[1] In failing to defend these provisions, the Trump Administration is trying—yet again—to sabotage the ACA at the expense of consumers across the nation. Your decision could subject millions of Americans with pre-existing conditions to the same discrimination they faced before the passage of the ACA. Moreover, the legal justification you have offered for making this decision is deeply flawed.

First, you appear to have abandoned a longstanding, bipartisan commitment by the Department of Justice to defend duly enacted federal statutes in federal court.

The Constitution requires the Executive Branch to "take care that the laws are faithfully executed."[2] Your predecessors 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 responsibilities of his office by defending and enforcing Acts of Congress."[3] At your confirmation hearing, you agreed that the laws "should be defended vigorously, whether or not the Solicitor General agrees with them or not, unless it can't be reasonably defended."[4]

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[1] 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a), 300gg-(a)(1), 300gg-4(b).

[2] U.S. CONST. art. II, § 3, cl. 5.

[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] *Hearing on the Nomination of Sen. Jeff Sessions to be Att'y Gen. before the S. Comm.on the Judiciary*, 115th Cong. (Jan. 10, 2017).

This longstanding policy reflects the fundamental structure of our republic: Congress makes the laws and the Executive Branch enforces them.

On June 7, 2018, you wrote to Congress to inform us of your decision not to defend the constitutionality of the ACA's protections for guaranteed issue and community rating in *Texas v. United States*.[5] Although you acknowledge the view that "the Executive Branch has a longstanding tradition of defending the constitutionality of duly enacted statutes if reasonable arguments can be made in their defense," you go on to suggest that "not every professionally responsible argument is necessarily reasonable in this context."[6] Your suggestion seems to be that the Department has eliminated every reasonable argument in defense of the ACA's protections for those with pre-existing conditions. That claim is not credible.

We follow the same set of facts you lay out in your letter. In 2012, the Supreme Court upheld Section 5000A of the ACA—the "individual mandate"—as a constitutional exercise of Congress's power to tax.[7] In 2017, Congress passed and President Trump signed the so-called Tax Cuts and Jobs Act—which lowered the penalty for failing to purchase health insurance to zero.[8] In February, the State of Texas filed suit seeking an injunction against the entire ACA under the implausible theory that, by reducing the "tax" to zero, Congress has eliminated the constitutional basis for the individual mandate.[9] On June 7, 2018, you notified Congress of your decision not to defend the ACA's protections against pre-existing conditions—as well as your basic agreement with the plaintiffs' ludicrous argument.

The Department has an obligation to defend the ACA and the vital protections it provides to the 130 million Americans with pre-existing conditions if, in your words, "reasonable arguments" can be made in their defense.[10] For 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 where you will not. These states show that "the courts have routinely rejected claims that would have gutted [the ACA's] key reforms" and that, although our colleagues have attempted to repeal the statute "an estimated 70 times," they failed to do so and instead chose to maintain the ACA as federal law.[11] They also show that repealing the ACA's protections for patients with pre-

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[5] Letter to Ranking Member Jerrold Nadler, House Comm. on the Judiciary, from the Hon. Att'y Gen. Jeff Sessions, (Jun. 7, 2018) [hereinafter "Notification Letter].

[6] *Id.*

[7] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

[8] Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092.

[9] *Texas v. United States*, No. 4: 18-cv-00167-O (N.D. Tex. Feb. 26, 2018) (Complaint for declaratory and injunctive relief).

[10] Notification Letter, *supra* note 5.

[11] *Texas v. United States*, No. 4: 18-cv-00167-O (N.D. Tex. Apr. 9, 2018) (Motion to intervene and memorandum in support thereof).

existing conditions will cause immediate, grievous harm "to their residents' health and financial security, to state healthcare systems, and to state budgets."[12] These arguments are by all accounts "reasonable," and have been upheld in federal court again and again.[13]

Second, although there are certainly exceptions to the rule that the Department of Justice must defend a federal statute in federal court, none of those exceptions apply here.[14] 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.[15] Another exception involves statutes that infringe on the constitutional powers of the President.[16] A third involves laws that the President has vetoed.[17] Again, none of these exceptions apply in *Texas v. United States*. The courts have not fundamentally changed our understanding of the ACA since ruling it constitutional, and President Trump made no mention of an encroachment on his authority while celebrating the intervening changes to the statute.[18]

President Trump's political allies have pointed to the Obama Administration's refusal to defend the Defense of Marriage Act (DOMA) in 2011 as precedent for your decision here—but the "Obama did it too" excuse is also not persuasive.

President Obama opposed DOMA and believed that it should be repealed. Nevertheless, the Department defended the statute in federal court on several occasions: "Each of those cases . . . was considered in jurisdictions in which binding circuit court precedents hold that laws singling out people based on sexual orientation . . . are constitutional if there is a rational basis for their enactment."[19] However, between the passage of DOMA and the litigation that led to its repeal, several intervening Supreme Court decisions suggested that a higher level of scrutiny was merited in cases of discrimination based on sexual orientation.[20] When the Obama Administration decided to no longer defend DOMA, it did so based on three decades' worth of change in the law and on a good faith legal theory that it had reason to believe would be adopted

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[12] *Id.*

[13] *See, e.g.*, *Sissell v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014), *cert. denied* 136 S. Ct. 925 (2016); *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1699 (2015); *Oklahoma ex rel. Pruitt v. Sebelius*, 2103 U.S. Dist. LEXIS 113232 (E.D. Okla. Aug. 12, 2013).

[14] 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.

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

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

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

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

[19] *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. Dept. of Justice, Feb. 23, 2011.

[20] *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans* 517 U.S. 620 (1996).

by the Court.[21] None of those elements are present in *U.S. v. Texas*, where the Court upheld the individual mandate just a few years ago.

Finally, we note that the Department's new litigating position is so indefensible that, hours before the brief was due, three of the four career attorneys representing the government refused to sign it and removed themselves from the case.[22] Those three attorneys represent decades of experience in the Civil Division. To our knowledge, their last-minute withdrawal is without precedent. Joel McElvain, a senior career official with more than 20 years of experience in court, resigned from the Department in protest.[23] Daniel Mauler, the one career attorney willing to sign the brief, has worked at the Department for just a few weeks. It is notable that on the day Chad Readler—a political appointee in charge of the Federal Programs Section of the Civil Division—signed this brief, the President announced Mr. Readler's nomination to the Sixth Circuit Court of Appeals.[24] These do not appear to be the actions of an independent Department of Justice or an Administration that respects the rule of law.

In light of these developments, we request a briefing from the Department of Justice to explain the Department's decision not to defend the ACA's protections for Americans with pre-existing conditions soon as possible. We ask that you transmit copies of all documents and communications related to this decision to the House Committee on the Judiciary. We also ask for responses to the following questions:

1. Did the Department solicit or consider any analysis from either the U.S. Department of Health and Human Services (HHS) or the Centers for Medicare and Medicaid Services (CMS) of the consequences of striking down guaranteed issue and community ratings on Americans with pre-existing conditions and on the cost and coverage of health insurance in the United States? Please provide us with copies of all communications the Department may have had with HHS or CMS regarding this decision.

2. What, if any, "professionally responsible argument[s]" supporting the constitutionality of the ACA did you, any other political appointee, or any career Department employee

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[21] Letter from the Hon. Att'y Gen. Eric Holder, Dep't of Justice, to Speaker John Boehner, U.S. House of Representatives, Feb. 23, 2011. *See U.S. v. Windsor*, 570 U.S. 744 (2013) and *Obergefell v. Hodges*, 576 U.S. __ (2015).

[22] *Texas v. United States,* No. 4: 18-cv-00167-O (N.D. Tex. June 7, 2018) (Unopposed motion to withdraw appearances).

[23] Devlin Barrett and Matt Zapotosky, *Senior Justice Dept. lawyer resigns after shift on Obamacare*, Wash. Post, June 12, 2018.

[24] 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).

consider and discard before reaching the conclusion that the ACA is unconstitutional? Please provide copies of any documents or opinions in support of this determination.

3. What was the legal basis for your determination that any "professionally responsible argument[s]" in support of the ACA were "unreasonable?" Please provide copies of any documents or opinions in support of this determination.

4. Which Department personnel did you consult regarding your decision not to defend the constitutionality of the ACA? Please provide copies of these communications.

5. When did President Trump inform the Department of his conclusion that the ACA is unconstitutional? Please provide copies of any documents or communications between the White House and the Department Justice cited in support of this conclusion.

6. When were the career employees handling the case on behalf of the Department informed of President Trump's conclusion that the ACA is not constitutional? Please provide copies of these communications.

7. Who informed the career employees of President Trump's conclusion? Please provide copies of these communications.

8. Did any of the career employees raise concerns about the decision not to defend the constitutionality of the ACA? Please provide copies of these communications.

9. Please provide copies of any documents or communications between the White House and Department employees related to the matter of *Texas v. United States*.

10. Please provide copies of any communications between the Department and the White House regarding the Department's decision not to defend the constitutionality of the ACA.

11. When did you learn that the President planned to nominate Mr. Readler for a federal judgeship? Please provide copies of these communications.

12. Who informed you that the President planned to nominate Mr. Readler? Please provide copies of these communications.

13. Did you consult with Mr. Readler prior to your decision not to defend the constitutionality of the ACA? If yes, please provide copies of these communications.

14. Are you aware of any communication between Mr. Readler and the White House regarding President Trump's conclusion that the ACA is unconstitutional? If so, please provide copies of these communications.

Please provide us with the above information no later than Wednesday, June 27. Thank you for your prompt attention to this matter.

Sincerely,