October 20, 2020

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

Dear Attorney General Barr:

We write to urge the Department of Justice to immediately rescind its support of the lawsuit in California v. Texas asking the Supreme Court to declare the Affordable Care Act (ACA) unconstitutional and invalidate the law in its entirety. Passed in 2010, the ACA dramatically expanded the number of Americans with health insurance. Destroying this progress and ripping away critical protections is cruel on its face. Looking to do so in the midst of a nearly unprecedented public health emergency—a coronavirus disease 2019 (COVID-19) pandemic that has claimed over 220,000 American lives and infected over 8 million people—is especially unconscionable.1

Among other critical provisions, the ACA made it illegal for insurance companies to deny insurance coverage for the 133 million Americans with pre-existing conditions.2 Before the ACA, insurers could exclude coverage of care associated with pre-existing conditions; charge higher health premiums based on a person’s health status or gender; limit certain benefits like mental health treatment, prescription drugs, or maternity care associated with pre-existing conditions; and impose lifetime or annual caps on benefits.3

Despite these essential protections, you are currently in court seeking to invalidate the ACA in California v. Texas.4 The Supreme Court will hear arguments in the case on November 10, 2020.5 The President is currently working to fill the late Justice Ruth Bader Ginsburg’s Supreme Court seat with his nominee, Judge Amy Coney Barrett, in time for the November 10th arguments. Barrett’s nomination is a key component of the President’s self-stated goal to

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“terminate” the ACA. Analysts predict that at least 20 million Americans would lose health coverage if the ACA were overturned. That number is now likely far higher: an estimated 5.4 million Americans lost their employer-sponsored health insurance between February and May of this year as a result of the pandemic, and millions more Americans lost their jobs—rendering many eligible for the ACA’s exchanges and Medicaid expansion provisions.

Because of the pandemic, uninsured rates could spiral even further if the ACA’s pre-existing conditions protections are overturned. Health experts warn that, without the ACA, health insurers could classify COVID-19 as a pre-existing condition and deny COVID-19 survivors health insurance. While much remains to be understood about the long-term health impacts of the disease, there is increasing evidence of patients feeling the effects of COVID-19 beyond the average known time of recovery. The Centers for Disease Control and Prevention (CDC) cites on its website a preliminary study of the largest cohort of reported persons with COVID-19 in which roughly 20% of those studied presented with severe to critical illness symptoms, including dyspnea, hypoxia, respiratory failure, shock or multiorgan system dysfunction. Another CDC study found that over one-third of symptomatic adults who tested positive for COVID-19 “had not returned to their usual state of health” two to three weeks later. In July, the Journal of the American Medical Association published a detailed review of 143 patients who had been hospitalized with COVID-19, finding that 12.6% were symptom-free within two weeks of being discharged; a significant number still suffered from fatigue, difficulty breathing, joint pain, and chest pain, with many suffering multiple symptoms.

These risks are not confined to the elderly: the CDC is “investigating reports of multisystem inflammatory syndrome in children (MIS-C) associated with […] COVID-19,

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which may present with Kawasaki disease-like features.” Anecdotal reports confirm that even young people can suffer from severe chronic symptoms, and the CDC found that among younger adults (ages 18-34) with no previously existing chronic medical conditions who were symptomatic and tested positive for COVID-19, “one in five had not returned to their usual state of health” after two to three weeks.

According to Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health, “I have never seen a virus or any pathogen that has such a broad range of manifestations […] Even if it doesn’t kill you, even if it doesn’t put you in the hospital, it can make you seriously ill.” And medical experts warn that:

[W]hile some patients may fully recover […] others will suffer long-term damage, including lung scarring, heart damage, and neurological and mental health effects. […] Other preliminary evidence, as well as historical research on other coronaviruses like severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (MERS), suggests that for some people, a full recovery might still be years off. For others, there may be no returning to normal.

Without ACA protections, individuals who face long-term effects of COVID-19 could be considered “uninsurable” in the individual market altogether, and anyone who ever tested positive for COVID-19 could be denied coverage or kicked off their insurance, impairing their ability to access care for complications from the disease or any other health issues for years in the future. Individuals who never contract COVID-19 could be at risk for discrimination from health insurers, too. Health insurers may assume people who seek COVID-19 tests too frequently are at higher risk for coronavirus exposure and discriminate against them in their coverage. If the ACA is overturned, health insurers could even be allowed to discriminate against people if they thought individuals with certain occupations put them at higher risk of contracting the disease.

The Department of Health and Human Services estimated that as many as 133 million people—or 51% of Americans—had pre-existing health conditions before the pandemic that could have led them to be “denied coverage, or offered coverage only at an exorbitant price”

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19 Id.
without the ACA. With the outbreak of COVID-19 in the United States, that number has likely increased. It is unconscionable for the Department of Justice to pursue this lawsuit in the midst of this unprecedented public health crisis, and we urge you to rescind your support of these efforts immediately.

Sincerely,

/s/ Elizabeth Warren  
United States Senator

/s/ Edward J. Markey  
United States Senator

/s/ Mazie K. Hirono  
United States Senator

/s/ Jeanne Shaheen  
United States Senator

/s/ Kirsten Gillibrand  
United States Senator

/s/ Tammy Baldwin  
United States Senator

/s/ Chris Van Hollen  
United States Senator

/s/ Gary C. Peters  
United States Senator


/s/ Richard Blumenthal
United States Senator

/s/ Jeff Merkley
United States Senator

/s/ Tammy Duckworth
United States Senator

/s/ Margaret Wood Hassan
United States Senator

/s/ Cory A. Booker
United States Senator

/s/ Tina Smith
United States Senator

/s/ Patrick J. Leahy
United States Senator

/s/ Kamala D. Harris
United States Senator

/s/ Jack Reed
United States Senator

/s/ Richard J. Durbin
United States Senator

/s/ Dianne Feinstein
United States Senator

/s/ Christopher Murphy
United States Senator