

United States Senate
WASHINGTON, DC 20510

October 20, 2020

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20220

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20201

Dear Dr. Secretary Azar and Secretary Mnuchin:

We write to request that the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) provide Congress with its analysis of the impact a Supreme Court decision striking down the Affordable Care Act (ACA) in *California v. Texas* would have on health insurance coverage in the United States. We ask that particular attention be paid to the impact such coverage losses would have on Americans in the midst of the coronavirus disease 2019 (COVID-19) pandemic.

Passed in 2010, the ACA drastically expanded the number of Americans with health insurance. Before the ACA, over 45 million Americans were uninsured¹ and the 133 million Americans with pre-existing conditions could be denied coverage.² After the ACA's passage, over 20 million people gained health care coverage—including roughly 12 million people who were newly enrolled due to the ACA's expansion of the Medicaid program.³ People with pre-existing conditions could no longer be denied coverage⁴; health insurers were required to expand

¹ Kaiser Family Foundation, "The Uninsured and the ACA: A Primer—Key Facts about Health Insurance and the Uninsured amidst Changes to the Affordable Care Act," Rachel Garfield, Kendal Orgera, and Anthony Damico, January 25, 2019, <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-many-people-are-uninsured/>.

² 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," January 5, 2017, <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>.

³ Center on Budget and Policy Priorities, "Chart Book: Accomplishments of Affordable Care Act," March 19, 2019, <https://www.cbpp.org/research/health/chart-book-accomplishments-of-affordable-care-act>; Kaiser Family Foundation, "Potential Impact of California v. Texas Decision on Key Provisions of the Affordable Care Act," September 22, 2020. <https://www.kff.org/report-section/potential-impact-of-california-v-texas-decision-on-key-provisions-of-the-affordable-care-act-appendix/#tableone>.

⁴ New York Times, "If the Supreme Court Ends Obamacare, Here's What It Would Mean," Reed Abelson and Abby Goodnough, September 22, 2020, <https://www.nytimes.com/article/supreme-court-obamacare-case.html>.

coverage for mental health and substance use treatment⁵; and young adults could stay on their parents' health coverage until age 26⁶—making it easier for millions of Americans to access care.

Despite the ACA's unequivocal success in reducing the number of uninsured Americans, Republican lawmakers have spent years working to overturn the law. These years of sabotage have culminated in *California v. Texas*, a case—led by 18 attorneys general and President Trump's Department of Justice—that calls for the courts to declare the entire ACA unconstitutional.⁷ The Supreme Court will hear arguments in the case on November 10, 2020.⁸ The President is currently working to fill the late Justice Ruth Bader's Supreme Court seat with his nominee, 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 “terminate health care under Obamacare [the ACA].”⁹

Prior to the start of the COVID-19 pandemic, analysts predicted that over 20 million Americans would lose health coverage if the ACA was overturned.¹⁰ That number is now likely far higher. In the first three months of the pandemic, unemployment rates rapidly outstripped those of the Great Recession,¹¹ leaving roughly 30 million people unemployed by July.¹² Today, around 28 million workers are receiving or seeking unemployment benefits,¹³ and estimates suggest that 5.4 million workers lost their health insurance as a result of the pandemic—swelling the ranks of

⁵ The Commonwealth Fund, “The ACA at 10: How Has It Impacted Health Care?” Jesse C. Baumgart, Gabriella N. Abaoulafia, and Audrey McIntosh, April 3, 2020, <https://www.commonwealthfund.org/blog/2020/aca-10-how-has-it-impacted-mental-health-care>.

⁶ New York Times, “If the Supreme Court Ends Obamacare, Here's What It Would Mean,” Reed Abelson and Abby Goodnough, September 22, 2020, <https://www.nytimes.com/article/supreme-court-obamacare-case.html>.

⁷ Center on Budget and Policy Priorities, “Commentary: ACA Repeal Even More Dangerous During Pandemic and Economic Crisis,” Tara Straw and Aviva Aron-Dine, October 5, 2020, <https://www.cbpp.org/health/commentary-aca-repeal-even-more-dangerous-during-pandemic-and-economic-crisis>.

⁸ Kaiser Family Foundation, “Explaining California v. Texas: A Guide to the Case Challenging the ACA,” MaryBeth Musumeci, September 1, 2020, <https://www.kff.org/health-reform/issue-brief/explaining-california-v-texas-a-guide-to-the-case-challenging-the-aca/>.

⁹ Washington Post, “Trump vows complete end of Obamacare law despite pandemic,” Devlin Barrett, May 6, 2020, https://www.washingtonpost.com/world/national-security/trump-obamacare-supreme-court/2020/05/06/4a53ba54-8fe1-11ea-9e23-6914ee410a5f_story.html; NBC News, “Trump Court pick Amy Coney Barrett's past critiques on Obamacare face scrutiny,” Heidi Przybyla, Sahil Kapur and Allan Smith, September 26, 2020, <https://www.nbcnews.com/politics/supreme-court/trump-scotus-pick-amy-coney-barrett-s-past-critiques-obamacare-n1241191>.

¹⁰ Center on Budget and Policy Priorities, “Commentary: ACA Repeal Even More Dangerous During Pandemic and Economic Crisis,” Tara Straw and Aviva Aron-Dine, October 5, 2020, <https://www.cbpp.org/health/commentary-aca-repeal-even-more-dangerous-during-pandemic-and-economic-crisis>.

¹¹ Pew Research Center, “Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession,” Rakesh Kochhar, June 11, 2020, <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

¹² New York Times, “About 30 Million Workers are Collecting Jobless Benefits,” Patricia Cohen, July 24, 2020, <https://www.nytimes.com/live/2020/07/23/business/stock-market-today-coronavirus>.

¹³ Economic Policy Institute, “With millions of workers receiving unemployment benefits and no end in sight for the COVID-19 pandemic, Congress must act,” Heidi Shierholz, October 1, 2020, <https://www.epi.org/blog/with-millions-of-workers-receiving-unemployment-benefits-and-no-end-in-sight-for-the-covid-19-pandemic-congress-must-act/>.

Americans purchasing health insurance on the ACA marketplaces or getting coverage through Medicaid.¹⁴ Meanwhile, wealthy Americans would likely get a tax cut should the ACA be repealed: if the revenue measures included in the law, including taxes on the wealthiest households in the country, were to disappear, “the highest-income 0.1 percent...households would receive tax cuts averaging about \$198,000 per year.”¹⁵

In the midst of a global pandemic that has killed roughly 220,000 people in the U.S. and infected over 8 million others,¹⁶ the President of the United States is actively asking the Supreme Court to eliminate the ACA’s critical health protections. Republicans in the U.S. Senate had the opportunity to pass legislation barring the President from advocating against the ACA in court, but they refused—choosing instead to ram through Amy Coney Barrett’s nomination and place the health care law at even greater risk.¹⁷

It is essential that policymakers understand the implications of a *California v. Texas* decision overturning the ACA. We therefore ask that HHS and Treasury provide us with information on how such a decision would impact health care coverage in the U.S, including any pre-existing internal analyses of such a decision. Specifically, should the Supreme Court overturn the ACA in its entirety:

1. How many individuals would lose health coverage? Of those individuals:
 - a. How many people would lose coverage that are currently enrolled in Medicaid in states that expanded Medicaid under the ACA?
 - b. How many people would lose coverage that are currently enrolled in health insurance through the ACA marketplaces?
 - c. How many adult children under the age of 26 who are currently covered through their parents’ plans would lose coverage?
 - d. How many individuals would lose coverage that acquired coverage through the ACA during the COVID-19 pandemic?
 - e. How many individuals would lose coverage that have pre-existing conditions?
2. To the extent practicable, please provide the number of individuals, by state, that would lose health coverage disaggregated by race, ethnicity, gender, age, disability status, and income level.

¹⁴ New York Times, “Millions Have Lost Health Insurance in Pandemic-Driven Recession,” Sheryl Gay Stolberg, July 13, 2020, <https://www.nytimes.com/2020/07/13/us/politics/coronavirus-health-insurance-trump.html>.

¹⁵ Center on Budget and Policy Priorities, “ACA Repeal Lawsuit Would Cut Taxes for Top 0.1 Percent by an Average of \$198,000, Weaken Medicare Trust Fund,” October 6, 2020, <https://www.cbpp.org/research/health/aca-repeal-lawsuit-would-cut-taxes-for-top-01-percent-by-an-average-of-198000-weaken>.

¹⁶ New York Times, “Covid in the U.S.: Latest Map and Case Count,” October 19, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

¹⁷ Politico, “Endangered Republicans back Senate Democrats’ bill opposing Obamacare lawsuit,” Alice Miranda Ollstein, October 1, 2020, <https://www.politico.com/news/2020/10/01/vulnerable-republicans-obamacare-424585>.

3. By how much would consumers' health care costs, including out-of-pocket costs and premiums, increase? To the extent practicable, please provide this information disaggregated by race, ethnicity, gender, age, disability status, and income level.
4. How many individuals currently covered through marketplace plans would lose ACA subsidies for their plans, and what would be the average amount lost per person in subsidies?
5. How many individuals currently enrolled in Medicare Part D would likely hit the program's prescription drug coverage gap, or the "doughnut hole," in the first year following the ACA's repeal? Assuming a complete reopening of the coverage gap (i.e., 100% beneficiary coinsurance, with 0% plan contribution and no manufacturer coverage gap discount program), what would be the average increase in out-of-pocket drug costs for enrollees who reach the coverage gap phase? What would be the estimated 10-year savings that would accumulate to drug manufacturers under a scenario where there is no coverage gap discount program?
6. How many Medicare beneficiaries would be affected if preventive services were no longer exempt from cost-sharing requirements, what would be the effect on out-of-pocket spending if preventive services were not "free", and how would the drop in preventive service use affect Medicare spending?
7. What impact would the repeal have on the solvency of the hospital insurance trust fund?
8. What is the average tax cut that households earning over \$200,000 a year, over \$1 million a year, and over \$3 million a year, respectively, would receive?
9. Please provide copies of any internal analyses conducted at HHS or Treasury that assess the impact of a *California v. Texas* decision that overturns the ACA on health care coverage. What analysis, if any, have your agencies conducted? What plans, if any, have your agencies developed to address the predicted loss of health care coverage that would accompany such a decision?

Given the grave implications of this lawsuit and the pending nature of a Supreme Court decision, we ask for your attention to this urgent matter.

Sincerely,

/s/ Elizabeth Warren
Elizabeth Warren
United States Senator

/s/ Christopher S. Murphy
Christopher S. Murphy
United States Senator

/s/ Mazie K. Hirono
Mazie K. Hirono
United States Senator

/s/ Jeanne Shaheen
Jeanne Shaheen
United States Senator

/s/ Cory A. Booker
Cory Booker
United States Senator

/s/ Richard Blumenthal
Richard Blumenthal
United States Senator

/s/ Kirsten Gillibrand
Kirsten Gillibrand
United States Senator

/s/ Mark R. Warner
Mark R. Warner
United States Senator

/s/ Ron Wyden
Ron Wyden
United States Senator

/s/ Tina Smith
Tina Smith
United States Senator

/s/ Tammy Duckworth
Tammy Duckworth
United States Senator

/s/ Sherrod Brown
Sherrod Brown
United States Senator

/s/ Jeffrey A. Merkley
Jeffrey A. Merkley
United States Senator

/s/ Benjamin L. Cardin
Benjamin L. Cardin
United States Senator

/s/ Edward J. Markey
Edward J. Markey
United States Senator

/s/ Michael F. Bennet
Michael F. Bennet
United States Senator