

United States Senate
WASHINGTON, DC 20510

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

¹ 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>.

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 Kaiser Family Foundation, "Protecting People With Pre-Existing Conditions Isn't As Easy As It Seems," Larry Levitt, October 5, 2020, <https://www.kff.org/policy-watch/protecting-people-with-pre-existing-conditions-isnt-as-easy-as-it-seems/>.

⁴ Health Affairs, "DOJ, Republican AGs Ask Supreme Court to Strike Down ACA," Katie Keith, June 26, 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200626.180922/full/>.

⁵ Supreme Court, "Supreme Court of the United States October Term 2020," August 19, 2020, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2020.pdf.

“terminate” the ACA.⁶ Analysts predict that at least 20 million Americans would lose health coverage if the ACA were overturned.⁷ 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.⁸

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.⁹ 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.¹⁰ 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.¹¹ 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.¹²

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,

⁶ 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>.

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 FamiliesUSA, “The COVID-19 Pandemic and Resulting Economic Crash Have Caused the Greatest Health Insurance Losses in American History,” Stan Dorn, July 13, 2020, <https://www.familiesusa.org/resources/the-covid-19-pandemic-and-resulting-economic-crash-have-caused-the-greatest-health-insurance-losses-in-american-history/>; 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>.

⁹ The Guardian, “Covid-19 survivors could lose health insurance if Trump wins bid to repeal Obamacare,” Dominic Rushe and Amanda Holpuch, June 27, 2020, <https://www.theguardian.com/us-news/2020/jun/27/obamacare-trump-covid-health-insurance>.

¹⁰ Centers for Disease Control and Prevention, “Coronavirus Disease 2019: Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19),” Last Updated September 10, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

¹¹ Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report (MMWR), “Symptom Duration and Risk Factors for Delayed Return to Usual Health Among Outpatients with COVID-19 in a Multistate Health Care Systems Network – United States, March – June 2020,” Mark W. Tenforde, MD, PhD, Sara S. Kim, MPH, et al., July 31, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6930e1.htm?s_cid=mm6930e1_w.

¹² Journal of the American Medical Association, “Persistent Symptoms in Patients After Acute COVID-19,” Angelo Carfì, et al., July 9, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2768351>.

which may present with Kawasaki disease-like features.”¹³ Anecdotal reports confirm that even young people can suffer from severe chronic symptoms,¹⁴ 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.¹⁵

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.”¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹

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”

¹³ Centers for Disease Control and Prevention, “Kawasaki Disease,” June 4, 2020, <https://www.cdc.gov/kawasaki/index.html>.

¹⁴ Vox, “The emerging long-term complications of Covid-19, explained,” Lois Parshley, June 12, 2020, <https://www.vox.com/2020/5/8/21251899/coronavirus-long-term-effects-symptoms>.

¹⁵ Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report (MMWR), “Symptom Duration and Risk Factors for Delayed Return to Usual Health Among Outpatients with COVID-19 in Multistate Health Care Systems Network – United States, March –June 2020,” Mark W. Tenforde, MD, PhD, Sara S. Kim, MPH, et al., July 31, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6930e1.htm?s_cid=mm6930e1_w.

¹⁶ Financial Times, “Anthony Fauci: ‘We are living in the perfect storm,’” Hannah Kuchler, July 10, 2020, <https://www.ft.com/content/57834c2c-a078-4736-9173-8fb32cfbbf4e>.

¹⁷ Vox, “The emerging long-term complications of Covid-19, explained,” Lois Parshley, June 12, 2020, <https://www.vox.com/2020/5/8/21251899/coronavirus-long-term-effects-symptoms>.

¹⁸ Kaiser Family Foundation, “Is COVID-19 a Pre-Existing Condition? What Could Happen if the ACA is Overturned,” Karen Pollitz, Jennifer Kates, and Josh Michaud, September 30, 2020, <https://www.kff.org/policy-watch/is-covid-19-a-pre-existing-condition-what-could-happen-if-the-aca-is-overturned/>.

¹⁹ *Id.*

without the ACA.²⁰ With the outbreak of COVID-19 in the United States, that number has likely increased.²¹ 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 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

²⁰ Department of Health and Human Services, “Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act,” Office of the Assistant Secretary for Planning and Evaluation, January 5, 2017, <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>.

²¹ The Commonwealth Fund, “Will the Pandemic Increase the Number of Americans with Preexisting Conditions?,” Eric C. Schneider and Arnav Shah, October 8, 2020, <https://www.commonwealthfund.org/blog/2020/pandemic-americans-preexisting-conditions>.

_____/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