

June 21, 2018

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Sessions:

We write in strong opposition to the Department of Justice's recent decision not to defend the constitutionality of major parts of the Affordable Care Act (ACA). The Department's position would once again allow insurance companies to deny coverage or charge more to people with pre-existing medical conditions and could embolden insurance companies to reinstate discriminatory coverage and pricing practices that negatively impact women. As organizations committed to advancing the health and economic security of women and their families, we urge the Department to reverse its position and defend the ACA.

The Justice Department's refusal to defend key provisions of the ACA could have disastrous consequences for the health, well-being, and economic security of millions of women.

The Justice Department's ill-advised argument in *Texas v. United States* fails to defend protections established by the Affordable Care Act that prohibit insurance companies from denying or discontinuing coverage, or charging higher rates for individuals with pre-existing conditions. Women, particularly, women of color, are disproportionately impacted by a number of conditions that would be considered pre-existing.¹ Additionally, due to the gender wage gap in this country and the increase in premium costs, if the Justice Department's position prevailed, it would harm women and their families the most.

Before the ACA, insurance companies routinely denied coverage or charged higher premiums to people with pre-existing conditions, resulting in millions of individuals who were unable to obtain health insurance. More than half of all people under 65 in America have at least one pre-existing condition—that's more than 130 million people, including 67 million women and girls.² Prior to the ACA, many conditions specific to or experienced often by women were labeled pre-

¹ See Am. Cancer Soc'y, Cancer Action Network, *Cervical Cancer Rates Remain Higher in Hispanic/Latina Women* (May 2017), <https://www.acscan.org/sites/default/files/FINAL%20-%20Hispanic%20Latinas%20and%20Cervical%20Cancer%2005.09.17.pdf>; U.S. Dep't of Health & Human Serv. Office of Minority Health, *Chronic Liver Disease and Hispanic Americans* (last modified: Sept. 15, 2017) <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=62>; Breastcancer.org, *U.S. Breast Cancer Statistics* (last modified Jan. 9, 2018) http://www.breastcancer.org/symptoms/understand_bc/statistics; Dep't of Health & Human Serv. Office of Minority Health, *HIV/AIDS and African Americans* (last modified Jan. 17, 2018), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=21>.

² Emily Gee, *Number of Americans with Pre-Existing Conditions by Congressional District*, Ctr. for American Progress (Apr. 5, 2017), <https://www.americanprogress.org/issues/healthcare/news/2017/04/05/430059/number-americans-pre-existing-conditions-congressional-district/>; Dep't of Health & Human Serv., Office of the Assistant Sec'y for Planning & Eval., *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 5, 2017), <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>.

existing conditions; for example, a woman could be denied coverage if she experienced postpartum depression, pregnancy, or Caesarean delivery.³ Black and Latina women already experience systemic barriers to accessing care, and discriminatory practices against people with pre-existing conditions exacerbate those barriers. For instance, Latina women have the highest incidence of cervical cancer and Black women die from breast cancer at higher rates—both chronic illnesses that have been considered pre-existing conditions.⁴ Pre-existing coverage exclusions also made it difficult or impossible for women living with HIV to access lifesaving care and treatment.⁵ And, Black and trans women are among the populations most likely to be diagnosed with HIV and thus, most impacted by these policies.

These ACA protections are of particular importance to women because of a well-documented history of discriminatory insurance practices. Before the ACA, 92 percent of the best-selling plans on the individual market charged women higher premiums simply because of their gender (a practice known as “gender rating”). This discriminatory practice cost women approximately \$1 billion a year.⁶ The ACA put an end to that discriminatory practice; a practice that the Justice Department’s position would open the door for insurance companies to reinstate.

The net effect of the Justice Department’s position is to make quality insurance less available and more costly for women and families. This means fewer people would have access to the benefits of the ACA like maternity care, prescription drugs, and guaranteed coverage for no-cost preventive services, including well-woman visits, cancer screenings, screening for intimate partner violence, breastfeeding services and supplies, STI screening, HIV testing, and contraception.

The ACA has increased access to health care broadly—especially for historically underserved populations. Since the enactment of the ACA, 9.5 million previously uninsured women have gained affordable, comprehensive health care coverage.⁷ Women of color have made historic coverage gains. Between 2012 and 2014, the uninsured rate among African-American women

³ Gary Claxton et al., *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*, Kaiser Family Found. (Dec. 12, 2016), <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/>; Lisa Codispoti et al., *Nowhere to Turn: How the Individual Health Insurance Market Fails Women*, Nat’l Women’s Law Ctr. (2008), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/NWLCReport-NowhereToTurn-81309w.pdf>.

⁴ Breastcancer.org, *supra* note 1; Am. Cancer Soc’y, Cancer Action Network, *supra* note 1.

⁵ HIV.gov, *The Affordable Care Act and HIV/AIDS*, (last updated Jan. 31, 2017), <https://www.aids.gov/federal-resources/policies/health-care-reform/>.

⁶ Danielle Garrett, *Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act*, Nat’l Women’s Law Ctr. (Mar. 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningto_fairness_report.pdf.

⁷ Namrata Uberoi et al., *Health Insurance Coverage and the Affordable Care Act 2010-2016*, Dep’t of Health & Human Serv., Office of the Assistant Sec’y for Planning & Evaluation (Mar. 3, 2016), <https://aspe.hhs.gov/sites/default/files/pdf/187551/ACA2010-2016.pdf>.

fell nearly 7 percent and the uninsured rate among Latina women fell 9 percent.⁸ The uninsured rate for Asian Americans fell from upwards of 15 to nearly 8 percent; Native Hawaiians' and Pacific Islanders' uninsured rate also fell from approximately 15 to 8 percent between 2010 and 2015.⁹ The uninsured rate among Latino children and adolescents declined more than any other group of children or adolescents under 18.¹⁰ The Department of Justice's recent action is another in a long line of attacks from this administration on women's lives and health, particularly on low-income women and women of color.

The rollback of ACA provisions envisioned by the Justice Department would put insurance coverage out of reach for even more individuals by causing uncertainty in insurance markets and contributing to dramatically rising insurance costs. Insurance companies are already seeking double-digit rate hikes across the country because of previous ACA-sabotage efforts like repealing the individual responsibility provision.¹¹ Further uncertainty in the insurance markets, especially when it comes precisely as companies are setting rates for next year, will only result in even higher rates.¹² Moreover, the ACA is a complex law with interlocking provisions. The Justice Department has not addressed the disruptive ripple effects potentially caused by removing key provisions of the ACA. For example, federal subsidies to help people afford insurance are calculated based on the current ACA requirement that healthy and sick people be charged the same—a requirement that the Justice Department is refusing to defend. It is unclear how these subsidies will be calculated if the requirement is removed.¹³

⁸ U.S. House of Representatives Comm. on Energy and Commerce, Democratic Staff Report, *Turning Back the Clock: Republican Plans to Repeal the Affordable Care Act Will Reverse Progress for Women* (Dec. 2016), <http://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/ACA%20Womens%20Health%20FINAL.pdf>.

⁹ U.S. Census Bureau, *2015 American Community Survey 1- Year Estimates* (last visited Feb. 21, 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S0201&prodType=table.

¹⁰ Alisa Chester et al., *Latino Children's Coverage Reaches Historic High, But Too Many Remain Uninsured*, Georgetown Univ. Health Policy Inst., Ctr. for Children & Families (Dec. 15, 2016), <http://ccf.georgetown.edu/2016/12/15/latino-childrens-coverage-reaches-historic-high-but-too-many-remain-uninsured>.

¹¹ Protect Our Care, *Why New Yorkers' Insurance is Getting Even More Expensive: The Trump Administration and Washington Republicans Keep Sabotaging Health Care* (June 4, 2018), <https://www.protectourcare.org/why-new-yorkers-insurance-is-getting-even-more-expensive-the-trump-administration-and-washington-republicans-keep-sabotaging-health-care-2/>; Protect Our Care, *Virginia Insurance Companies, Citing Trump Health Care Sabotage, Plan to Raise Rates Again this Fall* (May 4, 2018), <https://www.protectourcare.org/virginia-insurance-companies-citing-trump-health-care-sabotage-plan-to-raise-rates-again-this-fall/>; Nathaniel Weixel, *Obamacare Insurers in Virginia Propose Major Premium Hikes in 2019*, The Hill (May 4, 2018) <http://thehill.com/policy/healthcare/386294-obamacare-insurers-in-virginia-propose-major-premium-hikes-for-2019>.

¹² Abby Goodnough et al., *Trump's New Plan to Dismantle Obamacare Come with Political Risks*, The New York Times (June 8, 2018), <https://www.nytimes.com/2018/06/08/health/obamacare-pre-existing-conditions-mandate.html>.

¹³ See Margot Sanger-Katz, *The New Obamacare Lawsuit Could Undo Far More Than Protections for Pre-existing Conditions*, The New York Times (Jun. 12, 2018), <https://www.nytimes.com/2018/06/12/upshot/the-new-obamacare-lawsuit-could-undo-far-more-than-protections-for-pre-existing-conditions.html>.

The Justice Department has an obligation to defend the laws of the land.

The Justice Department has a duty to defend duly enacted statutes. The Department's argument in *Texas v. United States* is not only meritless, but also abdicates this duty.

It is a longstanding principle, spanning Republican and Democratic administrations, that the Executive Branch must faithfully execute the laws passed by Congress—and only in the narrowest of cases can the Executive Branch decline to do so. The Department of Justice's filing does not fulfill the Constitutional duties of the Executive Branch and is a significant departure from past practice. This is nothing more than a blatant attempt to undermine the ACA from within. The Justice Department attempts to achieve by Executive Branch fiat what the Legislative Branch repeatedly tried but could not wholly accomplish—destruction of the ACA.¹⁴

We stand in strong support of the gains that the ACA has ensured for the health and economic security of women and families.

Attempts, like this, to sabotage the ACA, are bad for women; bad for people of color; bad for underserved populations; bad for anyone who needs health care now or in the future. Broad swaths of the patient advocacy, medical, and insurance communities oppose the Department of Justice position. Physician and medical student associations like the American Academy of Family Physicians, American Academy of Pediatrics, The American College of Obstetricians and Gynecologists, the American College of Physicians, the American Osteopathic Association, and the American Psychiatric Association oppose this position.¹⁵ The Justice Department's argument is opposed by patient advocacy groups like the American Cancer Society Cancer Action Network, American Diabetes Association, American Heart Association, American Lung Association and the National Multiple Sclerosis Society.¹⁶ Even insurance groups are opposed to the Department's position.¹⁷

We strongly support maintaining the protections in the ACA and steadfastly oppose any efforts to weaken access to affordable, quality health coverage. The Department's argument urging the court to allow insurance companies to discriminate against women and people with pre-existing conditions is just another callous and politically motivated effort to undermine the ACA. The

¹⁴ The Justice Department's actions in this case unfortunately reveal a political agenda—overturning the ACA at any cost—above upholding the rule of law. That three career Justice Department lawyers on the case withdrew from the matter just before the filing, presumably to avoid being associated with such a specious argument, casts further doubt on the motivations behind the Justice Department's position. Moreover, the Department argues that the removal of ACA protections should not occur until January 2019, conveniently after the 2018 mid-term elections. Political ideology has never been, and should never be, a reason to abdicate one's Constitutional duties.

¹⁵ Am. Acad. of Family Physicians et al., *Joint Statement on Texas v. United States* (Jun. 9, 2018), <https://www.aafp.org/dam/AAFP/documents/advocacy/coverage/aca/ST-TexasVUnitedStates-060818.pdf>.

¹⁶ Am. Cancer Soc'y, Cancer Action Network, *Justice Department Argues to Roll Back Critical Patient Protections in Health Care Law* (June 8, 2018), <https://www.acscan.org/releases/justice-department-argues-roll-back-critical-patient-protections-health-care-law>.

¹⁷ Goodnough, *supra* note 11; Kristine Grow, *AHIP Issue Statement Regarding Tx. v. United States of America*, AHIP (June 8, 2018), <https://www.ahip.org/ahip-issues-statement-regarding-tx-v-united-states-of-america/>.

Department advocated for a world where insurance will once again be prohibitively expensive and difficult to obtain, and millions of people will suffer as a result. We strongly oppose this action and urge the Department of Justice to reverse its position.

Sincerely,

American Civil Liberties Union
American Medical Student Association
Asian & Pacific Islander American Health Forum
Association of Reproductive Health Professionals (ARHP)
Black Women's Health Imperative
Center for Biological Diversity
Center for Reproductive Rights
Global Justice Center
Hadassah, The Women's Zionist Organization of America, Inc.
In Our Own Voice: National Black Women's Reproductive Justice Agenda
MomsRising
NARAL Pro-Choice America
National Abortion Federation
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights
National Family Planning & Reproductive Health Association
National Health Law Program
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National Organization for Women
National Partnership for Women & Families
National Women's Health Network
National Women's Law Center
Physicians for Reproductive Health
Planned Parenthood Federation of America
Population Connection
Population Institute
Power to Decide, the campaign to prevent unplanned pregnancy
SIECUS
The United Methodist Church - General Board of Church and Society