SUSAN M. COLLINS

413 DIRKSEN SENATE OFFICE BUILDING WASHINGTON, DC 20510-1904 (202) 224-2523 (202) 224-2693 (FAX)

## United States Senate

WASHINGTON, DC 20510-1904

April 1, 2019

The Honorable William P. Barr Attorney General U.S. Department of Justice 950 Pennsylvania Ave., NW Washington, D.C. 20530

Re: Texas v. United States, No. 19-10011 (5th Cir.)

Dear Attorney General Barr:

I am writing to express my profound disagreement with the Department's court filing on March 25, 2019, indicating that it will not defend any portion of the Affordable Care Act (ACA) in the ongoing litigation before the United States Court of Appeals for the Fifth Circuit. This surprising decision goes well beyond the position taken by the Department last June, and puts at risk not only critical consumer provisions such as those protecting individuals suffering from pre-existing conditions, but also other important provisions of that law, such as the Medicaid expansion, dependent coverage for young adults to age 26, coverage for preventive services, and the regulatory pathway for FDA approval of biosimilars.

Last June, then-Attorney General Sessions argued that the ACA's provisions protecting people with pre-existing conditions are inseverable from the individual mandate, and cannot survive if that provision is struck down as unconstitutional. In a letter to Attorney General Sessions at the time, which I attach for your convenience, I noted my opposition to the individual mandate as the penalty for violating it was highly regressive. Nevertheless, I disagreed that eliminating this regressive penalty would require striking the ACA's pre-existing conditions and other critical consumer protections. Now, however, the Department has gone even further by arguing that all remaining provisions of the ACA should be ruled invalid.

The Supreme Court has long held that "the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions." *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). As Chief Justice Roberts put it in a leading case on the doctrine of severability: "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any "problematic portions while leaving the remainder intact." *Free Enterprise Fund v. Public Company Accounting Board*, 561 U.S. 477 (2010). While the ACA lacks an explicit "severability clause," the courts have been clear that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585, n. 27 (1968). In your former position, you authored an opinion, with which I agree, finding that the President could enforce the remainder of a statute after an unconstitutional provision had been severed. That Opinion made no mention of whether the underlying statute contained a severability clause. *Issues Raised by Foreign Relations Authorization Bill. Memorandum Opinion For the Counsel to the President*, February 16, 1990.

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As I explained in my letter to Attorney General Sessions, severability shouldn't be measured solely by Congress's intent in 2010, when the Affordable Care Act became law, but rather by Congress's intent in 2017, when Congress amended it through the Tax Cuts and Jobs Act. It is implausible that Congress intended protections for those with preexisting conditions to stand or fall together with the individual mandate, when Congress affirmatively eliminated the penalty while leaving these and other critical consumer protections in place. If Congress had intended to eliminate these consumer protections along with the individual mandate, it could have done so. It chose not to do so.

Rather than seeking to have the courts invalidate the ACA, the proper route for the Administration to pursue would be to propose changes to the ACA or to once again seek its repeal. The Administration should not attempt to use the courts to bypass Congress.

I continue to believe that the individual mandate should be treated as severable. The Administration should reconsider its decision and defend the remainder of the ACA.

Sincerely,

Susan M. Collins

United States Senator

Swan M. Collins

cc: Mick Mulvaney, Acting White House Chief of Staff
Joe Grogan, Assistant to the President, Director of the Domestic Policy Council
Russ Vought, Acting Director of the Office of Management and Budget