



CENTER *for* HEALTH LAW
and POLICY INNOVATION
HARVARD LAW SCHOOL

May 6, 2020

Sent via email

The Honorable Ken Paxton
Attorney General of Texas
300 W. 15th Street
Austin, TX 78701

Dear Attorney General Paxton,

In light of the extraordinary public health and economic challenges posed by the novel coronavirus (COVID-19), we write to urge that you withdraw from current litigation before the Supreme Court challenging the constitutionality of the Affordable Care Act (ACA).¹ In the case, *California v. Texas*,² you seek the wholesale invalidation of the law.³ That outcome would prove catastrophic given the current emergency, as the ACA will play a critical role in the nation's COVID-19 response over the difficult weeks and months to come.

As health care advocates, insurers, providers, worker representatives and more, the undersigned organizations witness the heartbreaking toll COVID-19 exacts on the health and financial well-being of American families every day. We know that eliminating the ACA would only exacerbate the pandemic and upend our health care system when we can least afford it.

Today, the ACA ensures that millions of Americans can seek diagnosis and treatment for COVID-19-related conditions. The law facilitates insurance for more than 22 million people through its subsidized private insurance marketplaces and expanded Medicaid coverage (in the 37 expansion states).^{4,5,6} Even

¹ *California v. Texas* considers the constitutionality of the ACA's individual mandate, which the Supreme Court had previously upheld as an exercise of congressional taxing power in a 2012 case, *NFIB v. Sebelius*. Rather than confine their challenge to the individual mandate, the 18 state attorneys general challenging the law are asking the Supreme Court to invalidate the entire ACA. The Department of Justice now supports that position as well.

² *Texas v. United States* in the lower courts. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019); *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

³ [Brief in Opposition](#) to Petition for Writ of Certiorari at 27, *California v. Texas*, Nos. 19-840 & 19-841 (Feb. 3, 2020).

⁴ [Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2019 to 2029](#), Congressional Budget Office (May 1, 2019).

⁵ [Health Insurance Coverage in the United States: 2018](#), U.S. Census Bureau, (Nov. 2019).

⁶ All told, 36 states plus the District of Columbia have implemented Medicaid expansion, significantly decreasing uninsurance rates among eligible adults and children. Robin Rudowitz and Larisa Antonisse, [Implications of the ACA Medicaid Expansion: A Look at the Data and Evidence](#), Kaiser Fam. Found. (May 23, 2018).

more Americans are covered through provisions in the law that prohibit the exclusion of those living with pre-existing conditions or allow young adults to remain on their parents' plans until age 26. In the face of a pandemic, preserving the protections afforded by health insurance coverage for such a sizable portion of the population is vital. It is well-documented that individuals with health insurance coverage are more likely to seek out necessary medical care than those without, a potentially life-saving distinction with major public health ramifications in the context of COVID-19.⁷

But what makes this litigation especially misguided is how effectively the ACA can help manage the difficulties to come.

The COVID-19 crisis is without modern precedent. More than 60,000 Americans have died from the disease in a matter of weeks,⁸ while recent news reports suggest that government officials project new cases reaching up to 200,000 per day by the end of May.⁹ With a potential vaccine at least a year away,¹⁰ the Centers for Disease Control and Prevention has warned that the country must prepare for subsequent waves even if the current outbreak subsides.¹¹

Complicating the public health emergency at hand are its attendant economic consequences, which have precipitated a sharp recession.¹² Out of a workforce of 163 million,¹³ a staggering 30 million Americans filed unemployment insurance claims over just six weeks in March and April.¹⁴ The Congressional Budget Office estimates that the unemployment rate will reach 16 percent this year,¹⁵ half again as high as the Great Recession's peak. And because many workers receive health insurance through their employer, mass layoffs are causing large coverage losses.¹⁶ The Economic Policy Institute estimates that 12.7 million Americans have already lost their employer-provided insurance in recent weeks.¹⁷ Health Management Associates predicts that number may ultimately grow to 35 million by the crisis's end.¹⁸

⁷ Jennifer Tolbert, [What Issues Will Uninsured People Face with Testing and Treatment for COVID-19?](#), Kaiser Fam. Found. (Mar. 16, 2020).

⁸ [Cases of Coronavirus Disease \(COVID-19\) in the U.S.](#), Ctrs. for Disease Control (last visited May 4, 2020).

⁹ William Wan et al., [Draft report predicts covid-19 cases will reach 200,000 a day by June 1](#), Wash. Post (May 4, 2020); [A Trump administration projection and a public model both predict deaths rising as states reopen](#), N.Y. Times (May 4, 2020).

¹⁰ [COVID-19 \(coronavirus\) vaccine: Get The Facts](#), Mayo Clinic (Apr. 22, 2020).

¹¹ Lena H. Sun, [CDC director warns second wave of coronavirus is likely to be even more devastating](#), Wash. Post (Apr. 21, 2020).

¹² David Gura, [Fed Chairman Jerome Powell: 'We May Well be in a Recession'](#), NBC News (Mar. 26, 2020).

¹³ [THE EMPLOYMENT SITUATION—MARCH 2020](#), Bur. of Lab. Stat., U.S. Dep't of Lab. (Apr. 3, 2020).

¹⁴ Sarah Chaney and Kate King, [Over 3.8 Million Americans Filed for Jobless Benefits Last Week as States Struggle with Coronavirus Claims Surge](#), Wall St. J. (May 1, 2020).

¹⁵ [CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021](#), Congressional Budget Off. (Apr. 24, 2020).

¹⁶ See e.g., Amy Goldstein, [First, the coronavirus pandemic took their jobs. Then, it wiped out their health insurance](#), Wash. Post (Apr. 18, 2020).

¹⁷ Ben Zipperer and Josh Bivens, [12.7 million workers have likely lost employer-provided health insurance since the coronavirus shock began](#), Econ. Pol. Inst. (Apr. 30, 2020).

¹⁸ [COVID-19 Impact on Medicaid, Marketplace, and the Uninsured, by State](#), Health Management Associates (Apr. 3, 2020).

Crucially, as unemployment rolls burgeon, the ACA will provide a safety net for millions of vulnerable Americans. For the many who lose their job and, consequently, their employer-sponsored health coverage, the ACA's subsidized marketplace plans, accessible through federal- and state-run exchanges, can offer affordable options.¹⁹ If an individual's income falls to below 138 percent of the federal poverty line, Medicaid expansion programs will provide comprehensive coverage.^{20,21} As a result of these provisions, millions will not only receive greater access to COVID-19 care, but also to treatment for the normal panoply of medical conditions that affect Americans on a daily basis. And by expanding the insured population, the ACA helps safeguard the financial solvency of front-line health care providers, which foot the bill when uninsured patients show up at their door.²²

Beyond expanding coverage, the law further aids the coronavirus response effort through its focus on prevention and public health. For example, the ACA requires health insurance plans to cover federally-approved vaccines free of charge.²³ Assuming a COVID-19 vaccine eventually becomes available, the law will ensure access to no-cost vaccinations for many health insurance beneficiaries, accelerating the nation's ability to inoculate the population. Meanwhile, another ACA program, the Prevention and Public Health Fund, provides critical financial support to the CDC's infectious disease and local public health functions.²⁴

At all levels of government, elected officials from both parties have acknowledged that the nation's health programs play an integral role in responding to the coronavirus pandemic and its economic repercussions. Hence the Trump Administration quickly authorizing regulatory waivers for Medicaid and Medicare,²⁵ Congress appropriating billions in new health care funding,²⁶ and states removing access restrictions.²⁷ While policymakers could be doing more — the Trump Administration, for example, should reconsider

¹⁹ Under the ACA, individuals who have lost their insurance in the past 60 days or expect to lose coverage in the next 60 days are eligible to enroll in a marketplace plan through a Special Enrollment Period. 42 U.S.C. § 300gg-1.

²⁰ [Medicaid Income Eligibility Limits for Adults as a Percent of the Federal Poverty Level](#), Kaiser Fam. Found. (Jan. 1, 2020).

²¹ Seven of the plaintiffs in this case have expanded their own Medicaid programs: Arizona, Arkansas, Indiana, Louisiana, North Dakota, Utah and West Virginia. Additionally, Nebraska voters approved Medicaid expansion in 2018, and despite its participation in this suit, the state is on track to implement the expansion by October 2020 as required by law.

²² Health care providers are already confronting steep budget shortfalls as a result of the crisis. *See, e.g.*, Shane Harris et al., [Cash-starved hospitals and doctor groups cut staff amid pandemic](#), Wash. Post (Apr. 9, 2020); Melanie Evans and Matt Grossman, [Pandemic Squeezes Profit at HCA as Fewer Patients Treated](#), Wall St. J. (Apr. 21, 2020); Alex Kacik, [Front-line workers face pay cuts amid COVID-19 crunch](#), Modern Healthcare (Apr. 22, 2020).

²³ [Preventative Services Tracker](#), Kaiser Fam. Found. (Mar. 10, 2020).

²⁴ [Prevention and Public Health Fund Detailed Information](#), Trust for America's Health (last visited Apr. 5, 2020). Prior to funding cuts in the 2017 Tax Cuts and Jobs Act, the Fund accounted for over 12 percent of CDC's total program funding. [Accomplishing CDC's Mission with Investments from the Prevention & Public Health Fund, FY 2010-FY 2016](#), Ctrs. for Disease Control.

²⁵ Noam M. Levey, [Under pressure, Trump administration opens door to mobilizing Medicaid to fight coronavirus](#), L.A. Times (Mar. 13, 2020).

²⁶ Tracy Jan, [Conservatives gutted the social safety net. Now, in a crisis, they're embracing it.](#), Wash. Post (Mar. 26, 2020).

²⁷ Carmen Heredia Rodriguez, [9 States Reopen ACA Insurance Enrollment To Broaden Health Coverage](#), N.P.R. (Mar. 20, 2020).

opening a special enrollment period for the federal health insurance marketplaces — such efforts mark a strong start in marshalling the nation’s public health machinery to combat this crisis.

Now is not the time to undermine this bipartisan progress by jeopardizing the ACA. The United States cannot risk destabilizing its already-strained health care sector by eliminating a deeply-entrenched law that offers important public health benefits. Nor can millions of Americans afford to lose access to COVID-19 treatment, vaccines and health care generally.

In short, the novel coronavirus has fundamentally transformed the background economic and health care assumptions that informed your decision to join this lawsuit. Therefore, we the undersigned urge you to withdraw from *California v. Texas*.

Sincerely,



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AIDS Action Baltimore
AIDS Alabama
AIDS Alabama South, LLC
AIDS Foundation of Chicago
AIDS Legal Referral Panel
AIDS Treatment Activists Coalition (ATAC)
Alliance for Retired Americans
Alliance of Community Health Plans
American Diabetes Association
American Geriatrics Society
American Public Health Association
Amida Care
APLA Health
Asian & Pacific Islander American Health Forum
Asian Liver Center at Stanford University
Association for Community Affiliated Plans
Asthma and Allergy Foundation of America

Aunt Rita's Foundation
Bazelon Center for Mental Health Law
Black AIDS Institute
California Food is Medicine Coalition
Callen-Lorde Community Health Center
Careteam Plus, Inc.
Cascade AIDS Project
Center for Health Policy and Law at Northeastern University School of Law
Center for Independence of the Disabled, NY
Center for Medicare Advocacy
Ceres Community Project
Charlotte Center for Legal Advocacy
Chronic Disease Coalition
Colorado Organizations and Individuals Responding to HIV/AIDS - CORA
Community Health Councils
Community Servings
Consumers for Affordable Health Care
CrescentCare

Desert AIDS Project
Disability Rights Louisiana
Disability Rights New Jersey
Drug Policy Alliance
El Punto en la Montaña
Enlace Chicago
Equality California
Equality North Carolina
Fenway Health
Fijate Bien/MPact Global Action for Gay Men's
Health and Rights
Florida Health Justice Project
Florida Policy Institute
Food & Friends
G III Associates
Georgia Equality
Georgians for a Healthy Future
GLMA: Health Professionals Advancing
LGBTQ Equality
Harvard Law School Center for Health Law &
Policy Innovation
Health Law Advocates, Inc.
Health Services Center, Inc.
Healthcare Rights Coalition
HealthHIV
Heartland Alliance
HIV Medicine Association
John Snow, Inc. (JSI)
Justice in Aging
Kentucky Equal Justice Center
Kids Forward
Latinos Salud
Law Foundation of Silicon Valley
Legal Action Center
Legal Council for Health Justice
Lifelong AIDS Alliance
Mary and Michael Jaharis Health Law Institute
(DePaul University College of Law)
MCAVHN Care and Prevention Network
Medicare Rights Center
Mississippi Center for Justice
NASTAD

National Association of Social Workers
National Center for Law and Economic Justice
National Coalition for LGBT Health
National Employment Law Project
NATIONAL INDIAN COUNCIL ON AGING
National Multiple Sclerosis Society
Nebraska Appleseed
NETWORK Lobby for Catholic Social Justice
New York Legal Assistance Group
NM Center on Law & Poverty
North Carolina AIDS Action Network
Northwest Health Law Advocates
OASIS
Or Shalom Jewish Community
Planned Parenthood Federation of America
Positive Women's Network-USA
Prevention Access Campaign
Protect Our Care Illinois
Public Health Law Watch
Public Justice Center
Respiratory Health Association
Rhode Island Public Health Institute
San Francisco AIDS Foundation
San Francisco Community Health Center
San Francisco Hepatitis C Task Force
Service Employees International Union
Shriver Center on Poverty Law
Silver State Equality-Nevada
The AIDS Institute
The Arc of the United States
The Center for HIV Law and Policy
The Gerontological Society of America
The Well Project
TPAN
Treatment Action Group
Union for Reform Judaism

cc:

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