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Joseph H. Hunt, Assistant Attorney General
Brett A. Shumate, Deputy Assistant Attorney General
Martin V. Totaro, Attorney, Appellate Staff, Civil Division
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7513
Washington, DC 20530

Dear Mr. Hunt, Mr. Shumate, and Mr. Totaro,

I write to you in my capacity as counsel for a large coalition of federally recognized Tribal Nations and local, regional, and national tribal organizations regarding an urgent and serious matter arising from the Department of Justice's abrupt change in position in *Texas v. United States*, Case No. 19-10011, pending before the United States Court of Appeals for the Fifth Circuit.

Whether intentional or not, the Department's recent action amounts to a gross and irresponsible violation of the federal trust responsibility to Tribal Nations and to American Indian and Alaska Native people, and it requires immediate corrective action.

As you well know, the district court in *Texas v. United States* determined that not only is the "individual mandate" enacted by the Patient Protection and Affordable Care Act (ACA) unconstitutional, but it is inseverable from the remainder of the Act. As a result, the district court determined that the entire Act is invalid. This judgment was contrary to the position taken by the United States below, which advocated that only limited provisions of the ACA need be invalidated along with the individual mandate.

Although never acknowledged by the district court in its ruling, Section 10221 of the ACA amended and permanently authorized the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, which was first enacted in 1976 and serves as the primary, stand-alone statutory framework for the delivery of health care services to American Indian and Alaska Native people by the United States. The ACA also enacted a number of other provisions specifically designed to strengthen the Indian health care system and carry out the federal government's trust responsibility to American Indian and Alaska Native people. These include, for example, Section 2901, which protects scarce Indian Health Service resources by codifying payor of last resort status for the Indian health system. I attach the Brief of *Amici Curiae* 483 Federally Recognized Tribal Nations that we filed in the case earlier today, which outlines the separate genesis and purpose of these unique, Indian-specific provisions.

None of those provisions is related to or dependent upon the individual mandate in any way. There is no legal or policy justification for invalidating them along with the remainder of the ACA. Yet, that is precisely what the district court did.

The result reached by the district court will have devastating effects for Indian Country and for the health of American Indian and Alaska Native communities if it is upheld on appeal. As trustee for the affected Tribal Nations and American Indian and Alaska Native individuals, the United States, acting through the Department of Justice in this case, has a duty to take all possible steps to mitigate those potential effects.

Obviously, the Department's filing with the Fifth Circuit on March 25, 2019 achieves quite the opposite. The Department's new position that "the district court's judgment should be affirmed" and that no part of that judgment should be reversed amounts to an endorsement of the district court's invalidation of the Indian Health Care Improvement Act and other provisions critical to the integrity of the Indian health care system. Such a position is not only legally indefensible, but it is a serious breach of the trust responsibility owed by the United States to Tribal Nations and to American Indian and Alaska Native people.

I urge that you take immediate action to correct this egregious error. At a minimum, the Department should clarify in any further filings with the courts that the Indian Health Care Improvement Act and other Indian-specific ACA provisions are unrelated to the individual mandate, intended to implement the federal trust responsibility to American Indians and Alaska Natives, and must be preserved. The Department should also clearly state this position in arguments before the court.

I further underscore that all future decisions in this and other litigation relating to the ACA must be made with due regard to the federal trust responsibility and a clear understanding of the legal framework for the Indian health care system in the United States.

Sincerely,


Geoffrey D. Strommer
Hobbs, Straus, Dean & Walker, LLP
(by TAE)

cc: United States Attorney General William P. Barr
 Alex M. Azar, Secretary, U.S. Department of Health & Human Services
 Rear Adm. Michael D. Weahkee, Principal Deputy Director, Indian Health Service
 Amici Curiae Federally Recognized Tribal Nations and Tribal Organizations