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July 24, 2019

**Testimony of the United South and Eastern Tribes Sovereignty Protection Fund
Submitted for the Record of the House Committee on Oversight and Reform Hearing, "The Trump
Administration's Attack on the ACA: Reversal in Court Case Threatens Health Care for Millions of
Americans" on Wednesday, July 10, 2019.**

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the House Committee on Oversight and Reform with the following testimony for the record of its hearing entitled, "*The Trump Administration's Attack on the ACA: Reversal in Court Case Threatens Health Care for Millions of Americans*" held on Wednesday, July 10, 2019. During the hearing, Committee members and witnesses examined the decision by the Trump Administration to stop defending the Patient Protection and Affordable Care Act (ACA) in *Texas v. United States* and instead taking the position of the plaintiffs that the entirety of the law is unconstitutional. USET SPF is deeply concerned by this development, as the ACA contains the permanent reauthorization of the Indian Health Care Improvement Act (IHCIA), the cornerstone legal authority for the delivery of health care to American Indians and Alaska Natives (AI/AN) in accordance with federal trust and treaty obligations. The IHCIA, as well as several other vital Tribal provisions enacted as part of the ACA, are separate and distinct from the ACA and must be preserved to ensure that the Indian health delivery system remains viable.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine¹. Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for American Indians. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service, which contains 36 IHS and Tribal health care facilities. Our citizens receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

IHCIA and Indian-Specific Provisions are Critical and Severable

In its ruling in December 2018, a federal district court in Texas held that with the repeal of the tax penalty, the "individual mandate" enacted as part of the ACA is both unconstitutional and inseverable from the remainder of the law, thus invalidating the whole ACA. In May 2019, the U.S. filed a brief with the 5th Circuit Court of Appeals reversing its original position to defend the ACA and concurring with the federal district court ruling that the ACA must be struck down in its entirety. This decision to no longer defend the ACA has been incredibly troubling to Indian Country, as the landmark law includes multiple provisions relating to the execution of the federal government's trust obligation to AI/ANs that are not related to or dependent on the individual mandate.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

This includes the permanent reauthorization of the IHClA, which was enacted in Section 10221 of the ACA and is the primary, stand-alone statutory framework for the delivery of health care services to AI/AN people by the United States. It serves as the foundation of the Indian Health Service (IHS)/Tribal/ and Urban Indian (collectively known as the I/T/U) health system. The I/T/U system is largely separate from the mainstream U.S. health system and exists as a result of the cession of millions of acres of land and natural resources to the U.S., oftentimes by force, providing the health care to which AI/AN are legally entitled.

First enacted in 1976, IHClA needed to be periodically reauthorized prior to passage of the ACA. This ran counter to the trust obligation, which exists in perpetuity, and denied the Indian Health System opportunities for modernization. Following IHClA's expiration in the year 2000 and in an effort to address this failure on the part of the federal government, the IHClA amendments and related Tribal provisions were developed over a period of ten years in a separate legislative process from the ACA. In order to escape a legislative log jam, the IHClA and Indian-specific provisions were included as part of the Senate's health care reform bill that became the ACA, because it was a moving legislative vehicle.

Among the many other important provisions, IHClA specifically:

- Authorizes much needed updates to reimbursement by Medicare, Medicaid, and Children's Health Insurance Program for services provided to AI/ANs in Indian Health Service (IHS) and Tribal health care facilities;
- Allows Tribal Nations and Tribal Organizations who operate their own programs the right to recover costs from third parties – such as insurance company, HMO, employee health plan – who do not reimburse for services provided;
- Provides states with a 100% Federal Medical Assistance Percentage for Medicaid services provided through an IHS or Tribal facility;
- Allows Tribal Nations and Tribal organizations to purchase health benefits coverage for IHS beneficiaries;
- Allows a Tribal Nation or Tribal organization carrying out a program under the Indian Self-Determination and Education Assistance Act (ISDEAA) to purchase coverage for its employees from the Federal Employees Health Benefits Program;
- Permits allocations of funds directly or under ISDEAA to eliminate inequities in funding for both direct care and Purchased/Referred Care (formally Contract Health Service) programs.

These provisions are clearly unrelated to the insurance reforms of the ACA and the individual mandate in particular. Rather, they were included as a part of the ACA in order to, at long last, ensure permanence for this foundational law and bring the I/T/U System into the 21st century.

Similarly, there are several other AI/AN-specific provisions within the ACA that were included out of necessity and opportunity. These provisions also seek to deliver upon the federal trust obligation to provide health care to AI/AN and are not dependent upon the individual mandate or the ACA as a whole. These provisions include, but are not limited to:

- **Section 2901(b) Payor of Last Resort.** The payer of last resort provision provides the authority for Indian health programs to seek primary reimbursement from other sources and saves scarce Indian health care resources that can be utilized to provide additional health care services.
- **Section 2902 Elimination of Sunset for Reimbursement for all Medicare Part B Services Furnished by Certain Indian Hospitals and Clinics.** This provision was originally included in the IHClA and attached as an amendment in the Medicare Modernization Act (MMA). This addressed

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an issue with creditable services definitions that left Indian hospitals unable to bill for all Medicare part B services. The MMA amendment was limited to five years and was made permanent in the ACA. Approximately 10% of AI/ANs who use IHS services are enrolled in Medicare, with approximately 30% of this population requiring Part B coverage due to such issues as end-stage renal disease or disability, exacerbating the need for this provision.

- **Title IX, Section 9021 Exclusion of Health Benefits Provided by Indian Tribal Governments as Taxable Income** The provision clarifies that the value of "health services" or "health benefits" received by AI/ANs (whether provided or purchased by the IHS, Tribal Nations, or Tribal organizations) are excluded from gross income because it supplements the programs and services provided by the federal government. Section 9021 was enacted in order to resolve a longstanding dispute Tribal Nations had with the IRS over whether the provision of health care services, including the purchase of insurance for Tribal citizens, should be included as gross income for that Tribal citizen.

We underscore to the Committee that IHClA and other AI/AN specific provisions of the ACA are legally severable from the ACA, as they neither related to the individual mandate nor the associated insurance market reforms and 'fully operative' as independent law. The IHClA and the other AI/AN-specific provisions must be preserved even if the individual mandate is held unconstitutional as they represent the foundation of and opportunities to strengthen the I/T/U system and by extension, the delivery of the trust obligation.

It is of the utmost importance that the Supreme Court's long-established severability rules are applied in this case. These rules dictate that when a court finds a portion of a statute unconstitutional, surviving provisions that remain "fully operative as a law" should be left intact unless it is "evident" that Congress would have preferred otherwise. In this case, neither the district court nor the Department of Justice have applied these rules.

Conclusion

Striking down the ACA without severing IHClA and the AI/AN-specific provisions would have devastating impacts on both the health of American Indian and Alaska Natives (AI/AN). Moreover, all actions taken toward invalidation of these provisions is a breach of the federal treaty and trust responsibility and obligations. We urge the House Committee on Oversight and Reform to use its authority to ensure the vital IHClA and other AI/AN provisions of the ACA are upheld and protected.