

MEMORANDUM

To: The Honorable Roy Cooper

Date: April 16, 2010

From: Christopher G. Browning, Jr.
Solicitor General

Patient Protection and Affordable Care Act, H.R. 3590

You have asked me to review the Patient Protection and Affordable Care Act, H.R. 3590, and advise you as to whether North Carolina should join as a plaintiff in the action recently filed by Florida and 12 other States in the United States District Court for the Northern District of Florida. *Florida v. United States Dep't of Health & Human Servs.*, Case No. 3:10-cv-91 (N.D. Fla., filed Mar. 23, 2010). In that action, the plaintiff States challenge the constitutionality of selected provisions of that Act. It is my strong recommendation that North Carolina not join as a plaintiff in that action.

Two-hundred twenty members of the House of Representative and 56 Senators voted in favor of health care reform. Additionally, the Act was signed into law by the President. Each of these elected representatives has taken an oath of office to abide by the Constitution of the United States. *See* U.S. Const. art. II, § 1, cl. 8; art. VI, cl. 3. The determination by the United States Senate, the House of Representatives and the President that this Act is constitutional must not be ignored. In fact, the United States Supreme Court has made clear that a duly ratified Act of Congress is presumed to be constitutional. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Due respect for the decisions of a coordinate branch of Government demands that we invalidate a

congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”); *Parker v. Levy*, 417 U.S. 733, 757 (1974) (noting “strong presumptive validity” that attaches to acts of Congress).

One of the principal claims set out in Florida’s complaint is an allegation that the Act commandeers the plaintiff States and their employees “as agents of the federal government’s regulatory scheme at the states’ own cost.” Fla. Complaint ¶ 58. The plaintiff States proceed to argue that this “commandeering” of State resources violates the Tenth Amendment to the Constitution. *Id.*; see U.S. Const. amend. X (“The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.”). Medicaid, however, is a voluntary program. States are free to choose not to participate in this program. Florida and the other plaintiff States may drop out of the Medicaid program and not incur the additional costs of which they complain. If Florida, however, chooses to participate in, and accept the benefits of, the Medicaid program, it cannot complain that its resources have been commandeered in violation of the Tenth Amendment. Congress “may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotations omitted). Consequently, the United States Supreme Court has previously upheld Congress’ authority to limit receipt of federal highway funds to States enacting a drinking age of 21 and to require compliance with the Social Security Act in order for States to receive grants for unemployment compensation. *Id.*; *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937). Accordingly,

Florida's argument that the Patient Protection and Affordable Care Act will require Florida to spend more money if it continues to participate in the Medicaid program appears to be without merit.

In addition to a claim based on the Tenth Amendment, the complaint asserts that Congress lacks authority to enact one specific aspect of the legislation – the personal responsibility provision. Under this provision, individuals are required to either maintain health insurance or pay a tax as a result of the failure to do so. The Act sets out detailed factual findings as to the effect that health care expenditures have upon our Nation's economy. Congress enacted this legislation based upon its authority under the Commerce Clause and the Taxing and Spending Clause of the United States Constitution. Congress has extremely broad authority under the Commerce Clause. *See McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980) (“The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually in interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially affect interstate commerce.”); *Fry v. United States*, 421 U.S. 542, 547 (1975) (“Congress’ power under the Commerce Clause is very broad”); *United States v. Zeigler*, 19 F.3d 486, 489 n.1 (10th Cir. 1994) (“It is generally recognized that Congress has extremely broad jurisdiction under the Commerce Clause.”). The same is true of the Taxing Clause. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (“Congress is granted broad power to ‘lay and collect Taxes’”); *see also* Erwin Chemerinsky, *Protecting the Spending Power*, 4 Chap. L. Rev. 89, 91 (2001) (“Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions”). Moreover, the Court has expressly recognized that Congress has the authority to regulate insurance under the Commerce Clause. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

Although Congress' authority under the Commerce Clause is extremely broad, the Court has made clear that this authority is not without bounds. In recent years, for example, the Court has struck down legislation that attempted to criminalize violence against women, as well as legislation that made it unlawful to possess a handgun on school property. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Both *Lopez* and *Morrison* involved federal regulation of noneconomic criminal conduct. As the Court noted in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States." 529 U.S. at 618. The regulation of the economic effect of health care is markedly different from the two criminal statutes before the Court in *Lopez* and *Morrison*. Moreover, subsequent to *Morrison* and *Lopez*, the Court held that the cultivation of marijuana for one's personal use could be restricted by Congress pursuant to the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1 (2005). The collective impact upon our national economy resulting from persons who do not maintain health insurance (but who nevertheless turn to public hospitals when faced with health care emergencies) far exceeds the impacts upon commerce at issue in *Morrison* and *Lopez*. Nevertheless, I recognize that the specific factual scenario raised by the Patient Protection and Affordable Care Act has not previously been addressed by the Court. Accordingly, the arguments made by opponents of this legislation should not be characterized as frivolous. See, e.g., Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional* (Dec. 2009) (available at www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional); see also Jennifer Staman & Cynthia Brouger, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*,

Congressional Research Service 18 (2009) (“While it seems possible that Congress could enact an individual coverage requirement that would pass constitutional muster, there are various constitutional considerations relevant to the enactment of such a proposal.”). Thus, although I would not characterize the present action as frivolous, it appears to have little chance of success.

In addition to the significant legal hurdles that Florida faces in this action, several practical and prudential considerations weigh heavily against North Carolina joining the present action. Being one among 13 other States and the last State to join that lawsuit, North Carolina would have little to no voice as to strategy decisions that are made in the course of that action. Nevertheless, North Carolina would be expected to pay its proportionate share of the lawsuit – an amount that will likely be substantial. Additionally, if we were to participate in this lawsuit, it would be necessary to devote one or more attorneys in our office to monitor the motions, briefing and discovery in that action. Our office’s consistent practice is to closely monitor and to coordinate with outside counsel whenever a private law firm is representing the State of North Carolina. Thus, joining this lawsuit would require us to devote substantial resources to this action. North Carolina, however, could avoid these substantial expenditures by simply awaiting the verdict of the district court. Any decision in this case will ultimately be appealed to the United States Supreme Court and thereby become binding on all 50 States. Thus, it would seem to be in the interest of taxpayers for the State of North Carolina not to incur these litigation expenses unnecessarily. Additionally, it should be noted that the provisions of the Act being attacked do not become effective until the year 2013. Given the fact that this provision could be repealed or amended within the next three years, it would appear to be a waste of taxpayer funds to mount litigation challenging this provision at the present

time. Finally, it should be noted that the private law firm that is representing the plaintiff States in this action is adverse to North Carolina in another pending matter.

For the reasons set forth above, I do not believe that it would be a wise use of state resources to join the litigation pending in Florida. Whether health care reform should be implemented is a policy determination that best lies in the hands of Congress. That decision, whether wise or unwise, should not be derailed by litigation initiated by the States.

C.G.B., Jr.

cc: J.B. Kelly
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