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ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

April 5, 2010

The Honorable Tim Pawlenty
Governor
State of Minnesota
130 State Capitol
St. Paul, MN 55155

Dear Governor Pawlenty:

You asked that I review The Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, a federal statute that was signed into law by President Barack Obama on March 23, 2010. After you made your request, the PPACA was amended by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, which the President signed on March 30, 2010. I will assume that your request encompasses both of these laws.

For background purposes, the PPACA passed the United States Senate on December 24, 2009 and the United States House of Representatives on March 21, 2010. The Senate originally proposed it as an alternative to the Affordable Health Care for America Act, H.R. 3962, which the House of Representatives passed on November 7. The House thereafter passed the Senate version and amended it with the HCERA. The Senate then passed a version of the third bill through the reconciliation process. The amended bill was then passed by the House of Representatives. The President signed the reconciliation bill on March 30, 2010.

Seven minutes after President Obama signed the first bill into law on March 23, 2010, 12 Republican Attorneys General and the Attorney General from Louisiana filed a lawsuit in federal court in Florida challenging the constitutionality of the law. The provisions being challenged do not take effect until 2014, four years from now. The Republican Attorney General from Virginia later filed a separate lawsuit in federal court in Virginia.

After receiving your letter, I advised you and our fellow Minnesotans that I would undertake a legal review of the law. Since your initial request, your office has asked if you may file an amicus brief in support of the position undertaken by the above-described Republican Attorneys General.

Throughout history, the United States Supreme Court has shown great reluctance to overturn acts of Congress absent a clear constitutional infirmity. Rather, the courts have afforded Congress substantial leeway to use its judgment to pass laws under both its tax and

spending and Commerce Clause powers. For example, the United States Constitution gives Congress broad authority to pass laws that affect interstate commerce. *See* U.S. Const. art. I, sec. 8. Proponents of the lawsuits point to the decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), to argue that the health care law does not fall within Congress' authority to regulate interstate commerce. In *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act, a federal law that prohibited possession of guns near school property. The Supreme Court held that the act exceeded the authority of Congress to regulate commerce among the states because the act was a criminal statute, had nothing to do with any economic enterprise, and was not part of a larger regulation of economic activity. *Lopez*, 514 U.S. at 561-62. In *Morrison*, the Supreme Court invalidated the Violence Against Women Act of 1994. Relying on *Lopez*, the Supreme Court held that Congress' authority to regulate interstate commerce did not apply to noneconomic, violent criminal conduct taking place entirely in one state. *Morrison*, 529 U.S. at 617-18.

In the more recent case of *Gonzales v. Raich*, 545 U.S. 1 (2005), however, the Supreme Court upheld the federal Controlled Substances Act ("CSA"), distinguishing *Lopez* and *Morrison* by noting that both were single-subject statutes designed to regulate noneconomic criminal conduct. *See Gonzales*, 545 U.S. at 23-25. In *Gonzales*, two California residents argued that Congress had no authority to prohibit them from growing their own marijuana in their own homes for personal medical purposes as authorized by California law. They argued that because their marijuana would not enter the stream of commerce, Congress lacked authority to regulate its possession. In rejecting their argument and finding that Congress had the authority to enact the CSA, the Supreme Court noted: "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22. The *Gonzales* Court relied on *Wickard v. Filburn*, 317 U.S. 111 (1942), in which a farmer growing wheat on his own farm for consumption by his own cattle was deemed to affect interstate commerce. *Gonzales*, 545 U.S. at 17-20.

Having carefully reviewed the applicable Supreme Court precedent and other legal authority, it is my legal opinion that health care--which comprises over one-sixth of our country's economy--substantially affects interstate commerce. *See Gonzales*, 545 U.S. at 17 (noting that Congress has the authority to regulate even purely local activities if the local activities are part of a "class of activities" that have a substantial affect on interstate commerce). The United States government has been involved for years in many aspects of health care, including Medicare and Medicaid, both of which were enacted in the 1960's, the Employee Retirement Income Security Act, enacted in the 1970's, and the Public Health Service Act, enacted in 1944.

As noted above, the United States Supreme Court has been very reluctant throughout our history to overrule acts of Congress passed under its tax and spending or interstate commerce powers, absent a clear constitutional violation. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 302-04 (1964) (upholding Civil Rights Act of 1964 as applied to a local restaurant on the basis that Congress had a rational basis for its chosen regulatory scheme); *United States v. Darby*,

312 U.S. 100, 119-20 (1941) (upholding Fair Labor Standards Act, noting that Congress may regulate even intrastate activities that have substantial affect on commerce); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944) (insurance business is interstate commerce subject to federal regulation); *Helvering v. Davis*, 301 U.S. 619, 641 (1937) (upholding the Social Security Act of 1935 under Congress' spending power, noting that unemployment was a nationwide problem). Furthermore, the courts have regularly upheld the authority of Congress to place various requirements on states that elect to receive federal funds. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987). Medicaid is an example of such a program.

Based upon my legal analysis and review of the Constitution and applicable legal authority, I have determined that a lawsuit by the State of Minnesota against the United States of America is not warranted and, accordingly, I will not be filing such a lawsuit. I have further determined to file an amicus brief in support of the United States to set forth what I believe to be a correct reading of the Constitution. I have made these decisions in fulfillment of the oath I took as Attorney General to uphold the Constitutions of the United States of America and the State of Minnesota.

The debate over health care reform has spilled from the halls of the United States Congress to the corridors of the judicial branch, with the Constitutional debate unfortunately dividing along partisan lines. In states like Washington, Michigan, Pennsylvania, and Colorado, Democratic Governors have questioned the motivations of the Republican Attorneys General who filed the lawsuit, and the Governors plan to file amicus briefs on behalf of the United States; conversely, in states like Georgia, Nevada, and Mississippi, Republican Governors have questioned the motivations of the Democratic Attorneys General who have not filed lawsuits, and the Governors are considering filing amicus briefs in support of the suit. There undoubtedly will be a multitude of amicus briefs filed by Governors, Attorneys General, state legislators, members of Congress, health care advocates, insurance companies and HMOs, nonprofit advocacy organizations, and members of various political organizations. With these things in mind, I leave it to your discretion as to filing an amicus brief with the federal court in your individual capacity as Governor to articulate your views about the legislation.

I appreciate the respect you have shown for the role of this office as we have reviewed and considered the constitutional issues involved in the health care legislation. If you have any further questions, please let me know.

Sincerely,

LORI SWANSON
Attorney General