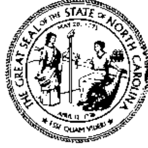

State of North Carolina
Department of Justice

Roy Cooper, Attorney General

February 23, 2011

The Hon. Beverly Perdue, Governor
State of North Carolina
State Capitol Building
Raleigh, N. C. 27602

Dear Governor Perdue:

As you know, House Bill 2 has passed the North Carolina General Assembly. Our staff attorneys, including the Solicitor General, have carefully analyzed the final version which has been sent to you.

House Bill 2 as written makes it illegal for North Carolinians and state officials to comply with certain federal laws. As such House Bill 2 is unenforceable as to the provisions that directly contradict federal law. The Supremacy Clause of the US Constitution provides that state legislatures cannot enact laws that directly violate federal law.

State legislatures cannot pick and choose which federal laws the state will obey. For example, many people in North Carolina may not like going through body scanners or pat downs at airports to board an airplane. If the North Carolina General Assembly passed a law exempting North Carolinians from this requirement, it would be clearly unenforceable. The same principle applies here as with other federal laws, even those laws we don't like or agree with.

I have attached a memorandum from the Solicitor General which provides a legal analysis. Although House Bill 2 is unenforceable where it conflicts with federal laws, it can be enforced to supersede conflicting state laws. The memorandum identifies some existing state laws that may conflict with House Bill 2, although the list is not exhaustive because the language in House Bill 2 is broad. As a result, the State Medicaid and the Children's Health Insurance programs could suffer financial consequences and the state could face extensive litigation. Please let me know if you have any questions.

Very truly yours,

Roy Cooper

cc: The Honorable Thom Tillis, Speaker of the House
The Honorable Phil Berger, President Pro Tempore of the Senate
The Honorable Skip Stam, House Majority Leader

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To: The Honorable Roy Cooper   Date: February 23, 2011

From: Christopher G. Browning, Jr.
Solicitor General

On February 22, 2011, the North Carolina General Assembly enacted House Bill 2. The bill has been transmitted to the Governor for her signature. This memo contains a legal analysis of House Bill 2. As set out below, House Bill 2 violates the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2 (the "constitution and the laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding"). Additionally, the bill stands to jeopardize North Carolina's Medicaid program. Finally, the literal language of the bill could be interpreted to repeal various state statutes discussed below.

Text of House Bill 2

House Bill 2 provides:

> (a) A law or rule shall not do any of the following:
>
> (1) Compel a person to (i) provide for health care services or medical treatment for that person or (ii) contract with, or enroll in, a public or private health care system or health insurance plan.

(2) Interfere with a person's right to pay directly for lawful health care services or medical treatment to preserve or enhance that person's life or health.

(3) Impose a penalty, tax, fee, or fine on a person for (i) providing for, or failing to provide for, health care services or medical treatment for that person or (ii) contracting with, or enrolling in, or failing to contract with or enroll in, a public or private health care system or health insurance plan.

Although the bill does not define the terms "health care services" or "medical treatment," the bill does provide that these terms do not include drug testing, drug screening or communicable disease controls. Additionally, the bill states that it does not apply to people confined in jails or prisons in this State. The bill further provides that it should not be construed to expand, limit or modify certain narrowly defined state laws and requirements (e.g., health assessments for children entering Kindergarten). Finally, the bill purports to impose on the North Carolina Attorney General the duty to "bring or defend a State or federal action or proceeding on behalf of the residents of this State to enforce the provisions of" House Bill 2.

House Bill 2 appears to declare that North Carolina and its residents are exempt from the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010) (collectively, "the ACA"). The ACA implements numerous changes in our Nation's health care system, including strengthening the provisions of Medicaid that are intended to protect against fraud and abuse of that program by health care providers and Medicaid recipients. Additionally, under Section 1501 of the ACA, any person who (beginning in

2014) chooses not to maintain health coverage and who is not exempt will be required to pay a penalty on his or her tax return. Section 1501 is generally referred to as the "individual responsibility requirements."

Legislation exempting North Carolina residents from the federal health care plan directly contradicts federal law and is unenforceable.

A direct conflict exists between House Bill 2 and the ACA.

The ACA is a Federal law passed by Congress and signed by the President of the United States in 2010. As with all Federal laws, United States citizens must comply with that law unless it is repealed by Congress or invalidated or restrained by the Judicial Branch. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"). A state law cannot repeal a federal law. *Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("federal statute may not be set at naught, or its benefits denied, by state statutes"); *Cooper*, 358 U.S. at 18 ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.").

The ACA is currently the subject of multiple challenges resulting in conflicting decisions. *See Liberty Univ., Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. 2010) (upholding the constitutionality of the ACA); *United States Citizens Ass'n v. Sebelius*, 2010 U.S. Dist. LEXIS 123481 (N.D. Ohio 2010) (rejecting challenge to ACA that was based on the First Amendment right to freedom of association, due process clause and the constitutional right of privacy); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (upholding the constitutionality of the

ACA); *Florida v. United States Dep't of Health & Human Servs.*, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011) (holding the ACA unconstitutional); *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (holding portions of the ACA unconstitutional); *Mead v. Holder*, No. 10-950 (D.D.C. Feb. 22, 2011) (upholding the constitutionality of the ACA).

Given the conflicting decisions, it is likely that the resolution of the ACA's constitutionality will be determined by the United States Supreme Court. The State and its residents must comply with the ACA until and unless a court orders otherwise.

House Bill 2 attempts to invalidate portions of the ACA as it relates to North Carolina and its residents. This runs afoul of the Supremacy Clause of the United States Constitution.

For example, House Bill 2 provides that no law or rule shall "[c]ompel a person to . . . contract with, or enroll in, a public or private health care system or health insurance plan." The bill further provides that no law or rule shall "[i]mpose a penalty, tax, fee, or fine on a person for . . . failing to contract with or enroll in, a public or private health care system or health insurance plan." This language purports to render the individual responsibility requirements of the federal legislation, ACA § 1501 (codified at 26 U.S.C. § 5000A; 42 U.S.C. § 18091), illegal and unenforceable in North Carolina.

House Bill 2 also conflicts with at least one other provision of the ACA. Under the ACA, States are required to minimize fraud and abuse in the Medicaid program. The anti-fraud provisions require States which participate in the federal Medicaid program to collect a fee of $500 from certain providers, such as hospitals, nursing homes, pharmacies, home health agencies, medical equipment suppliers, laboratories and others, to offset the cost of increased enrollment and verification requirements. ACA § 6401 (codified at 42 U.S.C. § 1395cc(j)); *see* 42 C.F.R. §§ 455.405, 455.410,

455.460. States are also required to account for the cost of the provider enrollment and verification activities, measure it against total fees collected, and remit any excess to the federal government. 42 C.F.R. § 455.460(b). House Bill 2, however, provides that no law or rule may impose a fee on a person for "contracting with . . . a public . . . health care system." Thus, House Bill 2 appears to prevent the State Medicaid agency from collecting this federally-required enrollment fee.

Once a State voluntarily chooses to participate in Medicaid, it must comply with the Social Security Act and federal rules. 42 U.S.C. § 1396a; *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985). North Carolina has chosen to participate in the Medicaid Program. *See* N.C. Gen. Stat. § 108A-56 ("All of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted . . . ."). North Carolina cannot accept the benefits of the federal Medicaid program and then avoid its requirements by simply enacting a state statute declaring those federal requirements to be a violation of state law. Moreover, a declaration by North Carolina that it will not comply with the requirements of the Medicaid statute could jeopardize federal funding of Medicaid in North Carolina. *See* 42 U.S.C. § 1396c.

Under the United States Constitution, States are not free to enact legislation in conflict with the laws of the United States.

The Supremacy Clause of the United States Constitution provides that the "constitution and the laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under this clause, federal statutes preempt and nullify any conflicting or otherwise inconsistent state law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824) (state laws must "yield" to congressional enactments). As the United States Supreme Court has repeatedly stated, "'[a]ny state legislation which frustrates the

full effectiveness of federal law is rendered invalid by the Supremacy Clause.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992) (quoting *Perez v. Campbell*, 402 U.S. 637, 652 (1971)). A state legislature does not have the authority to nullify federal legislation: "Any question of state nullification was resolved against the states in *Marbury v. Madison*, 5 U.S. 137 (1803), which established the [United States Supreme] Court as the final arbiter of the Constitution." *United States v. Navarro-Vargas*, 408 F.3d 1184, 1203 n.24 (9th Cir. 2005) (en banc) (internal quotation omitted). Most certainly, any theory that a state legislature could somehow nullify a federal statute "did not survive the Civil War." *United States v. Fell*, 571 F.3d 264, 269 n.5 (2d Cir. 2009) (en banc) (Raggi, J, concurring).

House Bill 2 declares that individuals shall not be required to obtain health coverage when the bill is enacted. The bill does not state that its provisions will only take effect should the ACA be declared unconstitutional by the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit or a federal district court judge sitting in North Carolina. Instead, House Bill 2 unconditionally declares any law that requires a person to obtain health coverage (or subjects that person to a penalty, tax, fine or fee) shall not be enforced in North Carolina. House Bill 2 therefore must be read as an effort by the State to nullify federal legislation. Under the Supremacy Clause of the United States Constitution, state laws must yield to federal legislation. *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). As set out above, House Bill 2, on its face, is in direct conflict with federal law, and as such, cannot be enforced.

House Bill 2 could be interpreted to amend various state laws and rules at a potentially significant cost to the State and its citizens.

Under the Supremacy Clause of the United States Constitution, House Bill 2 cannot nullify or amend any federal statute or rule. The General Assembly, however, may amend state statutes and rules, provided that those amendments do not conflict with federal law. The literal language of House Bill 2 could be interpreted to alter several state statutes that have been in place for years. The Legislature appears to be aware that House Bill 2 could effect existing state laws as it sets out numerous exemptions. However, there may be many other state laws that are impacted that are not exempted in the bill.

For example, House Bill 2 provides that: "A law or rule shall not . . . [i]mpose a . . . tax . . . on a person for . . . providing for . . . medical treatment for that person." The term "medical treatment" is not defined by the bill. The term, however, could include over-the-counter drugs. *See Robinson v. Walser,* 2009 U.S. Dist. LEXIS 129589, at *5 (E.D.N.C.), *aff'd*, 328 Fed. Appx. 221 (4th Cir. 2009). North Carolina, of course, imposes a sales tax on over-the-counter drugs. *See* N.C. Gen. Stat. § 105-164.3(25a) (definition of "over-the-counter drug"); N.C. Gen. Stat. § 105-164.4 (obligating retailers to collect sales tax); N.C. Gen. Stat. § 105-164.13(13) (exempting from sales tax only over-the-counter drugs sold on prescription). To the extent that the State's statutes relating to sales taxes are in conflict with the more recent and specific provisions of House Bill 2, courts could conclude that those tax statutes must yield to House Bill 2. *See Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 535, *cert. denied,* 354 N.C. 228, 554 S.E.2d 832 (2001).

Similarly, House Bill 2 provides that: "A law or rule shall not . . . [i]mpose a . . . fee . . . on a person for . . . contracting with, or enrolling in, . . . a public . . . health care system or health

insurance plan." Currently the State imposes deductibles, copayments and other cost-sharing charges upon families that participate in the Child Health Insurance Program ("CHIP"). CHIP is a federal program that helps States insure low-income children who are ineligible for Medicaid but who cannot afford private insurance. The General Assembly has concluded that North Carolina should participate in this federal program. N.C. Gen. Stat. § 108A-70.21. That state statute sets out various fees that must be paid by families that participate in CHIP. N.C. Gen. Stat. § 108A-70.21(d) ("Cost-Sharing"). This cost sharing requirement does not appear to be exempt from House Bill 2.

House Bill 2 also provides that: "A law or rule shall not . . . [c]ompel a person to . . . provide for health care services or medical treatment for that person." State law requires all drivers to carry uninsured motorist coverage. N.C. Gen. Stat. §§ 20-279.1 to -279.39. Specifically, state law requires the owner of a vehicle be insured against bodily injury arising from a motor vehicle accident. N.C. Gen. Stat. § 20-279.21(b)(2). This coverage must include not only passengers in the vehicle but also the vehicle owner if he or she suffers bodily injury. It could be argued that our state statutes compel motor vehicle owners to provide insurance to cover the cost of medical treatment should the vehicle owner be injured in an automobile accident in which the driver who is at fault is uninsured. If such a position is sustained, House Bill 2 would appear to stand as a repeal of this aspect of our State's uninsured motorist statute.

It is currently unknown how many state laws and rules are at risk by the prohibitions set forth in House Bill 2. At a minimum, House Bill 2 will likely embroil the State in costly and protracted litigation over whether the General Assembly intended to alter or amend these (and potentially other) state statutes.

For the reasons set out above, the Attorney General should not attempt to enforce state legislation that clearly violates federal law.

C.G.B., Jr.

cc: J.B. Kelly
Grayson Kelley