

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

JIM SPENCER
Chief of Staff

March 30, 2010

The Honorable Jim Gibbons
Governor, State of Nevada
101 North Carson Street
Carson City, NV 89701

Dear Governor Gibbons:

You have asked that on behalf of the State of Nevada, I join in litigation filed by 14 other states against the United States of America to challenge the Patient Protection and Affordable Care Act (Act). Your request requires a review of existing case law to determine if a lawsuit would have a credible basis for success.

First, we should note that legislation is presumed to be valid. *Parker v. Levy*, 417 U.S. 733, 757 (1974). Any suit against the Act would therefore have to show clearly that it is unconstitutional. *Id.*

One theory to consider is that Congress lacks authority under the Constitution's Commerce and Spending Clauses. However, the authority given to Congress is extensive and appears strong enough to support the Act. Health care costs affect our nation's economy, and the Act is Congress' answer to alleviating those costs. The United States Supreme Court long ago determined that insurance is commerce and is therefore subject to federal regulation. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Since the 1930s and the "long-rejected *Lochner*-era precedents," *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 128 S.Ct. 1498, 1510 (2008) (Thomas, J. concurring), Congress' broad authority has been acknowledged to, among other things, uphold mandatory contributions to the Social Security Act system, *Helvering v. Davis*, 301 U.S. 619 (1937), and legislate many other federal programs.

The only recent decisions limiting Congress' powers invalidated federal criminal statutes that had no relationship to commerce. In *U.S. v. Lopez*, 514 U.S. 549 (1995), the Court struck down a federal criminal statute criminalizing handgun possession in proximity to schools. It reasoned that handgun possession in a school zone was not economic

activity that substantially affected interstate commerce. In *U.S. v. Morrison*, 529 U.S. 598 (2000), the Court invalidated the Violence Against Women Act for the same reason. In addition, in so ruling, the Court acknowledged "one of the few principles that has been consistent since the [Commerce] Clause was adopted." 529 U.S. at 618. "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.*

The Act is nothing like the laws considered in the *Lopez* or *Morrison* cases, and appears to be supported by Congress' authority under the Commerce and Spending Clauses.

Another theory to consider would be a Tenth Amendment challenge. The Tenth Amendment provides: "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."

As discussed above, Congress has express authority to regulate interstate commerce and spend for the general welfare. The Act is within those powers delegated to Congress, therefore it would be difficult to argue there is a violation of the Tenth Amendment. Compare *U.S. v. Butler*, 297 U.S. 1 (1936) (violation of Tenth Amendment where Congress was attempting to regulate a local activity, not within its power to regulate interstate commerce); with *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (upholding regulation of marijuana locally grown and used because it is activity having substantial effect on interstate commerce).

Furthermore, the Act allows states to voluntarily participate. When states voluntarily participate, conditions Congress attaches to a program have been found to be constitutional. A recent demonstration of this is the decision in *S.D. v. Dole*, 483 U.S. 203 (1987), in which the Court upheld a federal statute conditioning receipt of highway funds on a state's adoption of a minimum drinking age.

Although the above analysis is not exhaustive, it appears that other legal challenges to the Act also fall victim to Congress' broad powers. For instance, there has been much discussion surrounding the fact that the mandated Medicaid expansion under the Act would cost our state millions of dollars. Like you, I dislike unfunded mandates. However, an unfunded mandate by itself is not unconstitutional. See 46 *Duke L.J.* 903, 907 (1997), "[n]o Supreme Court decision has applied the Tenth Amendment to invalidate congressional action on the ground that the action constituted an unfunded mandate." While this may be an opportunity for those who question the state of the existing case law, legal scholars seem to agree that it is not a strong case for that change.

The Honorable Jim Gibbons

March 30, 2010

Page 3

I have the upmost respect for the Office of the Governor and its responsibility to the people of this state. That is why I have always ensured that my office provided well researched and reasoned legal counsel to your office. For instance, a few years ago you requested that my office review the proposed acquisition of Sierra Heath Services, Inc. by UnitedHealth Group Incorporated, a national company.

You, like many, were concerned the health care services for the people of our state would be negatively affected. This office worked diligently on the legal issues surrounding this merger and worked with your Department of Health and Human Services to review many of the substantive issues resulting from the proposed acquisition. After a careful review of the proposed acquisition of Sierra Health, Inc. by UnitedHealth Group Incorporated, this office utilized existing federal law to successfully file a legal challenge in federal court.

I bring this to your attention to point out that it would be disingenuous for our state to make the argument that Congress does not have the authority to regulate health care under the Act, when we happily acquiesced to this fact and used the legal tools that Congress gave us under the Sherman Antitrust Act and the McCarran-Ferguson Act to protect the citizens of this state from a merger that had a substantial effect on interstate commerce.

Our state is now facing another health care issue. This office is again working with the Nevada Department of Health and Human Services to determine the facts so that we can be assured the health care services for the people of our state are not negatively affected. The staff in the Nevada Department of Health and Human Services appears to be working diligently. Like the UnitedHealth Group case, these things take time and are not professionally handled within a few days.

You have always left to the sound judgment of my office the legal affairs of this state. When the confidentiality of the Executive Budget process came into question, you trusted our legal analysis; when the issues related to the approval process for budget reductions arose, you trusted our legal analysis; when the Legislature requested action with respect to the Western Watershed case, you trusted our legal judgment to proceed into litigation; and during the course of the Yucca Mountain litigation, you have deferred all legal strategy to my office. As in those cases, our analysis in this case is based on careful study of relevant legal principles and the interests of the State of Nevada.

In my professional judgment, joining the litigation filed by 14 other states, as you have suggested, is not warranted by existing law at this time.

Additionally, the proposed litigation would not come without a cost. The State of Florida has hired a Washington, D.C. law firm to handle the case you have asked us to join. Florida, in turn, now proposes that the cost of that attorney be borne by the participating states. Further, the existing litigation against the Act will affect all of the states, including Nevada. Therefore, Nevada can ride for free at this time by allowing other

The Honorable Jim Gibbons

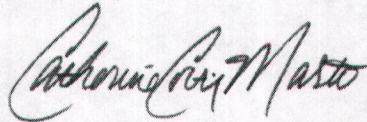
March 30, 2010

Page 4

states to foot the bill. There is no practical reason for Nevada to join in the litigation, absent a clear and separate legal interest that Nevada has apart from those other states. We are not aware of such a reason and you have not directed our attention to one.

I will continue to monitor the litigation and work with the Nevada Department of Health and Human Services to discern new facts and determine whether a credible legal argument presents itself that should require us to join the litigation at a later date.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine Cortez Masto". The signature is fluid and cursive, with the first name "Catherine" being more prominent.

CATHERINE CORTEZ MASTO
Attorney General

CCM/lf