December 30, 2009

The Honorable Nancy Pelosi
Speaker, United States House of Representatives
Washington, DC 20515

The Honorable Harry Reid
Majority Leader, United States Senate
Washington, DC 20510

The undersigned state attorneys general, in response to numerous inquiries, write to express our grave concern with the Senate version of the Patient Protection and Affordable Care Act ("H.R. 3590"). The current iteration of the bill contains a provision that affords special treatment to the state of Nebraska under the federal Medicaid program. We believe this provision is constitutionally flawed. As chief legal officers of our states we are contemplating a legal challenge to this provision and we ask you to take action to render this challenge unnecessary by striking that provision.

It has been reported that Nebraska Senator Ben Nelson's vote, for H.R. 3590, was secured only after striking a deal that the federal government would bear the cost of newly eligible Nebraska Medicaid enrollees. In marked contrast all other states would not be similarly treated, and instead would be required to allocate substantial sums, potentially totaling billions of dollars, to accommodate H.R. 3590's new Medicaid mandates. In addition to violating the most basic and universally held notions of what is fair and just, we also believe this provision of H.R. 3590 is inconsistent with protections afforded by the United States Constitution against arbitrary legislation.

In *Helvering v. Davis*, 301 U.S 619, 640 (1937), the United States Supreme Court warned that Congress does not possess the right under the Spending Power to demonstrate a "display of arbitrary power." Congressional spending cannot be arbitrary and capricious. The spending power of Congress includes authority to accomplish policy objectives by conditioning receipt of federal funds on compliance with statutory directives, as in the Medicaid program. However, the power is not unlimited and "must be in pursuit of the 'general welfare.' " *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In *Dole* the Supreme Court stated, "that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id. at 207.* It seems axiomatic that the federal interest in H.R. 3590 is not simply requiring universal health care, but also ensuring that the states share with the federal government the cost of providing such care to their citizens. This federal interest is evident from the fact this

legislation would require every state, except Nebraska, to shoulder its fair share of the increased Medicaid costs the bill will generate. The provision of the bill that relieves a single state from this cost-sharing program appears to be not only unrelated, but also antithetical to the legitimate federal interests in the bill.

The fundamental unfairness of H.R. 3590 may also give rise to claims under the due process, equal protection, privileges and immunities clauses and other provisions of the Constitution. As a practical matter, the deal struck by the United States Senate on the "Nebraska Compromise" is a disadvantage to the citizens of 49 states. Every state's tax dollars, except Nebraska's, will be devoted to cost-sharing required by the bill, and will be therefore unavailable for other essential state programs. Only the citizens of Nebraska will be freed from this diminution in state resources for critical state services. Since the only basis for the Nebraska preference is arbitrary and unrelated to the substance of the legislation, it is unlikely that the difference would survive even minimal scrutiny.

We ask that Congress delete the Nebraska provision from the pending legislation, as we prefer to avoid litigation. Because this provision has serious implications for the country and the future of our nation's legislative process, we urge you to take appropriate steps to protect the Constitution and the rights of the citizens of our nation. We believe this issue is readily resolved by removing the provision in question from the bill, and we ask that you do so.

By singling out the particular provision relating to special treatment of Nebraska, we do not suggest there are no other legal or constitutional issues in the proposed health care legislation.

Please let us know if we can be of assistance as you consider this matter.

Sincerely,

Henry McMaster
Attorney General, South Carolina

Rob McKenna
Attorney General, Washington

Mike Cox
Attorney General, Michigan

Greg Abbott
Attorney General, Texas

John Suthers
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