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March 24, 2010

The Honorable Sonny Perdue
Governor
State Capitol
Atlanta, Georgia 30334-0900

Re: Patient Protection and Affordable Care Act

Dear Governor Perdue:

By letter of March 22, 2010, and press statement of the same date, you have asked that I institute and prosecute in the name of Georgia, litigation against the United States of America in response to the recent passage of the Patient Protection and Affordable Care Act. Implicit in your request is also the question of whether there is, in my opinion, a credible legal basis for challenging this Act of Congress.

Based upon my understanding of the current Act, I am unaware of any constitutional infirmities and do not think it would be prudent, legally or fiscally, to pursue such litigation. I must therefore respectfully decline your request.

While I understand that the new law is the subject of ongoing debate here in Georgia and around the nation, I do not believe that Georgia has a viable legal claim against the United States. Considering our state's current severe budgetary crisis, with vital services like education and law enforcement being cut deeply, I cannot justify a decision to initiate expensive and time-consuming litigation that I believe has no legal merit.

In short, this litigation is likely to fail and will consume significant amounts of taxpayers' hard-earned money in the process.

Throughout the history of this nation, our courts have been reluctant to overturn legislative acts unless a clear constitutional violation is shown. While your letter does not suggest specific claims in the proposed litigation, I will address two that have been raised publicly regarding the law. Some believe that the law's requirement that all individuals purchase health insurance is unconstitutional. I believe such an argument is highly unlikely to succeed. In fact, earlier this month, an appellate court decision rejecting such arguments was issued in the only case I am aware of to be litigated on this topic to date. As you may know, then-Governor Mitt Romney proposed and signed into law in 2006 a bill that

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requires all Massachusetts residents to purchase health insurance. A suit was brought against the Commonwealth by a plaintiff who alleged that the requirement violated his rights under the Fifth, Seventh and Eighth Amendments of the United States Constitution and various provisions of the Massachusetts Constitution. In *Fountas v. Commissioner of the Department of Revenue*, 2010 Mass. App. Unpub. Lexis 223 (March 5, 2010), the Massachusetts Court of Appeals rejected all of those arguments.

I also understand that some believe that the Act's expansion of eligibility for Medicaid violates states' rights by requiring the state to spend additional money to insure more people. While there may be disagreement with that provision as a matter of budgetary priority and policy, I am sure you are also aware that Medicaid is a joint federal-state program in which Georgia's participation is voluntary and in which federal funding provides approximately 60% of our state Medicaid funds. The right of the United States government to require action by states as a condition of receiving federal funding has been litigated repeatedly, including in the United States Supreme Court, and is well established in our nation's constitutional law.

Furthermore, assuming H.R. 4872, the Health Care and Education Reconciliation Act of 2010, becomes law as expected, the federal government will provide 100% of all funds needed to insure additional Medicaid enrollees from 2014 (the first year the program will open) through 2016, 95% in 2017, 94% in 2018, 93% in 2019 and 90% for 2020 and subsequent years. [Details are provided in a Kaiser Family Foundation Report at http://www.kff.org/healthreform/upload/housesenatebill_final.pdf]. In no case do I see such a funding ratio in a joint federal-state program Georgia voluntarily participates in as presenting a valid claim that Georgia's rights have been violated by the law's future changes to Medicaid eligibility.

For the reasons stated above, I cannot in good conscience file a lawsuit against the United States that I believe has little or no chance of success and will undoubtedly consume significant state resources in a time of severe budgetary crisis.

Sincerely,



THURBERT E. BAKER
Attorney General

TEB/pw