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May 8, 2013

The Honorable Martin O'Malley  
Governor of Maryland  
State House  
100 State Circle  
Annapolis, Maryland 21401-1991

***Re: Senate Bill 632, "State Brain Injury Trust Fund"***

Dear Governor O'Malley:

We have reviewed Senate Bill 632, "State Brain Injury Trust Fund," for constitutionality and legal sufficiency. While we believe that the bill may be signed into law, it is our view that a severable portion thereof is unconstitutional and should not be given effect.

Senate Bill 632 creates the State Brain Injury Trust Fund for the purpose of providing individual case management services and neurological evaluation for individuals who have sustained brain injuries.<sup>1</sup> The bill provides that to be eligible for these services an individual must be "a United States citizen and a resident of the State at the time of the brain injury." It is our view that both portions of this requirement are invalid and cannot be enforced.

<sup>1</sup> The bill, in HG § 13-21A-02(h), also provides that "MONEY EXPENDED FROM THE FUND TO SUPPORT SERVICES TO INDIVIDUALS WITH BRAIN INJURIES IS SUPPLEMENTAL TO AND IS NOT INTENDED TO TAKE THE PLACE OF FUNDING THAT WOULD OTHERWISE BE APPROPRIATED FOR THOSE SERVICES." This language is an expression of legislative intent only and is not binding on the Governor's appropriation decisions. Statutory language suggesting that appropriations must "supplement not supplant" other appropriations is inconsistent with the Executive Budget Amendment unless structured as a constitutional funding mandate. This language does not constitute a funding mandate because it does not identify a specific sum that must be appropriated or a formula by which such an amount may be calculated.

The Supreme Court has long held that discrimination in economic programs against lawful permanent residents who are not citizens is subject to strict scrutiny. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). In the *Graham* case, the Court specifically rejected the argument that "a State's desire to preserve limited welfare benefits for its own citizens" could "justify Pennsylvania's making noncitizens ineligible for public assistance." 403 U.S. at 374. In *Ehrlich v. Perez*, 394 Md. 691 (2006), the Court of Appeals, following these cases and others, applied strict scrutiny to the Governor's decision not to fund comprehensive medical care for legal immigrant women under the age of 18 or who were pregnant. In doing so, it concluded that cost savings were not a sufficient justification to satisfy the strict scrutiny standard and found the failure to fund these services to be invalid.<sup>2</sup> It is our view that this rationale would also apply to the citizenship requirement in Senate Bill 632 and that the provision is invalid.<sup>3</sup>

The Supreme Court has also long held that states may not discriminate against persons who have recently moved to the State in providing welfare benefits. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court found a California law that limited welfare benefits for new residents to the amount that the state they moved from would have paid was invalid, applying strict scrutiny to the classification because it penalized the right to travel. *Id.*, 526 U.S. at 499-504. The Court found that neither the desire to deter welfare applicants from migrating to the State nor the desire to save money could justify the discrimination against recent residents. *Id.*, 526 U.S. at 506-507. Similarly, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court found a one year residency requirement for welfare benefits to be invalid.

While it is clear that the State may require an applicant for benefits from the State Brain Injury Trust Fund to be a resident of the State at the time of the application, Senate

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<sup>2</sup> In the *Perez* case, the Court also discussed whether the discrimination should be subject to a lesser standard because the discrimination was expressly permitted by federal law. The Court rejected this argument based on its conclusion that the federal law did not establish a uniform rule for the states to follow and thus did not call for application of a lesser standard. We are not aware of any federal law that could be read to justify the discrimination against lawful resident aliens in Senate Bill 632.

<sup>3</sup> While benefits under the program must be made available to lawful resident aliens, federal law prohibits the State from providing health benefits to undocumented aliens unless State law expressly provides for such eligibility. 8 U.S.C. § 1621.

The Honorable Martin O'Malley

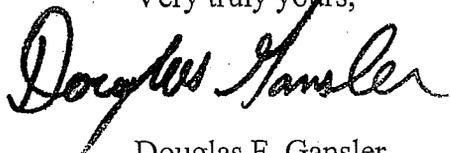
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Bill 632 requires instead that they have been a resident at the time of the brain injury. This effectively imposes the same type of durational residency limitations as were found invalid under *Saenz* and *Shapiro*. As a result, we believe that requirement also is constitutionally invalid.

While we find that these provisions are invalid, it is our view that they are severable from the remainder of the bill. The primary inquiry in this determination is what would have been the intent of the legislature had they known that these provisions could not be given effect. *Davis v. State*, 294 Md. 370, 383 (1982). Generally courts will assume "that a legislative body generally intends its enactments to be severed if possible." *Id*; see also Article 1, § 23 ("[t]he provisions of all statutes . . . are severable unless the statute specifically provides that its provisions are not severable."). Thus, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Id.* at 384. In this case, it is clear that the program is "complete and capable of execution," *Migdal v. State*, 358 Md. 308, 324 (2000), without the invalid limitations. Therefore, it is our view that the invalid provisions should be treated as severable and not given effect.

Very truly yours,



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Attorney General

DFG/KMR/kk

cc: The Honorable Nancy J. King  
The Honorable John P. McDonough  
Stacy Mayer  
Karl Aro