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Opinion No. 12-99

Health Care Compact

QUESTION

Is House Bill 0369/Senate Bill 0326, 107th General Assembly, 2nd Sess. (2012), as amended ("HB0369"), which proposed to make Tennessee a party to an interstate health care compact, constitutional?

OPINION

HB0369 appears to be facially constitutional.

ANALYSIS

HB0369 proposes to adopt and to make Tennessee a party to an interstate health care compact ("Compact") by which the member states seek to "return the authority to regulate Health Care to the Member States consistent with the goals and principles articulated" in the Compact.[1] HB0369, § 1, proposed Tenn. Code Ann. § 68-1-2502, Section 2. The compact would be added to Tennessee Code Annotated, Title 68, Chapter 1 (proposed §§ 68-1-2501 to -2504).[2] Under the Compact, the legislature of each member state would have the primary responsibility for regulating health care in its state. *Id.*, Sections 3 and 4. Funding would be provided as detailed in the Compact "by Congress as mandatory spending and not subject to annual appropriation, to support the exercise of Member State authority under this Compact." *Id.*, Section 5(a).

By its terms, the Compact requires Congressional consent pursuant to the Compact Clause of the United States Constitution. *Id.*, Section 1(2) & 7. The Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. Const. art. I, § 10, cl. 3. The Compact would require that member

[1] Although several amendments were proposed for SB0326 and HB0369, the House and Senate Conference Committee recommended that House Amendment 2 be adopted and that the other amendments previously passed in the Senate and House be deleted. Therefore, this opinion addresses HB0368 as amended by House Amendment 2 (copy attached).

[2] The Compact is contained in proposed § 68-1-2502; references throughout this opinion to the sections of the Compact refer to that part.

states "take joint and separate action" to secure Congress's consent to the Compact. HB0369, § 1, proposed Tenn. Code Ann. § 68-1-2502, Section 2. The Compact would "become effective for purposes of the operation of State and Federal law in a Member State" only after the Compact has received such Congressional consent. *Id.*, Section 1(2).

Once given, congressional consent "transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Interstate compacts are binding on future state legislatures and have precedence over any conflicting state statutes. *See, e.g.*, Caroline N. Broun, et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide*, § 1.2.2 (ABA 2006) ("*Broun on Compacts*"). Congressional approval "provides states with the authority to regulate in an area that would otherwise be unavailable to them." *Id*. at § 1.3, p. 28.

The Compact Clause provides Congress with broad power to grant, condition, or withhold consent to proposed interstate compacts. *See, e.g., Cuyler*, 449 U.S. at 438-41; *Broun on Compacts*, Chapter 2. The Compact Clause was designed to ensure that Congress maintains "ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler*, 449 U.S. at 440. *See also Petty v. Tennessee - Missouri Bridge Comm'n*, 359 U.S. 275, 281-82 (1959). As one commentator has observed:

> Congressional consent presents a political question and the refusal of Congress to grant consent or to impose terms and conditions on the member states is a nonjusticiable question. Consequently, as a rule, there are no limitations on Congress's substantive right to grant or withhold consent, or condition the granting of its consent, save a finding that the compact itself somehow violates the Constitution.

Broun on Compacts, § 2.1.2, pp. 41-42.

On its face, HB0369 does not appear to violate the United States Constitution.[3] Courts will "uphold the constitutionality of a statute whenever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). *See also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 339 (6th Cir. 2007) (observing that "federal courts are required to seek to uphold the constitutionality of state statutes where possible"); *United States v. Miller*, 604 F.Supp.2d 1162, 1169 (W.D.Tenn. 2009) (recognizing that "every duly enacted federal law is entitled to a presumption of constitutionality"); 2A Singer, *Sutherland Statutory Construction* § 45.11 (7th ed.) ("every presumption favors the validity of an act of the legislature"). Indeed, "[t]he presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute" given "the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid." *Waters*, 291 S.W.3d at 882. *See also United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[3] A statute also may be found to be unconstitutional as applied to a particular set of circumstances. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-94 (6th Cir. 1997); 16 C.J.S. *Constitutional Law* § 187 (2012). "[T]he constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation." *Voinovich*, 130 F.3d at 193. HB0369 was not adopted and has not been applied, and no circumstances have been suggested for an "as applied" assessment at this time.

HB0369, by its terms, will not effect any change in law or policy in Tennessee until and unless the referenced interstate health care compact is approved by Congress. HB0369 specifies that "Federal administration and regulation of health care in this state" shall continue unless and until Congress consents to the Compact and until the Tennessee General Assembly "enacts by law a sufficient administrative framework to provide effective and efficient state administration and regulation over health care." HB0369, § 1, proposed Tenn. Code Ann. § 68-1-2504. HB0369 does not require any citizen action, impose penalties or sanctions of any kind, or require state expenditures at this time. Therefore, HB0369 does not implicate constitutional principles concerning equal protection, due process, unconstitutional vagueness, or state appropriations.

Likewise, the Compact that is the subject of HB0369 appears to be facially constitutional. The Compact does not implicate dormant Commerce Clause[4] concerns because, if approved, it will be federal law. *Cuyler* 449 U.S. at 438. Thus, by definition, it cannot be deemed a state law that impermissibly interferes with commerce. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1236 (10th Cir. 2011); *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d. 568, 570 (9th Cir. 1985); *Broun on Compacts*, § 2.1.2, p. 41.

Section 8 of the Compact, which would authorize amendment of the Compact without prior congressional approval, is constitutionally defensible given that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." *Cuyler*, 449 U.S. at 441. *See also Broun on Compacts*, § 2.1.6, pp. 55-56 (recognizing that interstate compacts may permit member states to amend the compacts subject to congressional veto).

Section 5 of the Compact, which would mandate federal funding as detailed in the Compact, also appears to be constitutionally defensible. If Congress approves the Compact as written, Congress will be exercising its own broad spending power by approving the funding provision.[5] *See, e.g.*, *Broun on Compacts*, § 2.1.2, pp. 39-42. Such approval will not prevent future legislative action that would alter or limit the funding or the Compact in general. *Id*. at § 2.1.4, pp. 43-47. (stating "congressional assent to a compact in no way estops the Congress from effectively undercutting an agreement through ordinary legislation"). *See also Congressional Supervision of Interstate Compacts*, 75 Yale L. J. 1416, 1431 (1966). It is well established "that one legislature cannot enact a statute that prevents a future legislature from exercising its lawmaking power." 82 C.J.S. § *Statutes* 11 (2012). *See also Lockhart v. United States*, 546 U.S. 142, 147-48 (2005) (Scalia, J., concurring); c*f. Louisville Bridge Co. v. United States*, 242 U.S. 409, 421-25 (1917). Generally "a compact is not immune from subsequent or alternative federal legislation that may alter the landscape in which the compact operates or even render the compact a nullity in practice, if not under the law." *Broun on Compacts*, § 2.1.4, p. 44.

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[4] The dormant Commerce Clause prevents states from placing burdens on the flow of commerce across state borders. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). It is the "negative command" in Article I, Section 8, Clause 3, of the United States Constitution, which expressly grants to Congress the power to regulate commerce among the states. *Id*.

[5] Alternatively, Congress may impose limitations or conditions on its approval of the Compact that would alter the funding formula or explicitly provide for future changes to the funding or Compact. *See, e.g.*, *Broun on Compacts*, § 2.1.2, pp. 39-42.

For these reasons, a court would likely determine that HB0369, if enacted as amended, would be facially constitutional.

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