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May 10, 2012

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

Re: House Bill 540 and Senate Bill 415

Dear Governor O'Malley:

We have reviewed House Bill 540 and Senate Bill 415, identical bills titled "Handling Human Remains with Dignity Act of 2012," for constitutionality and legal sufficiency. While we approve the bills, we note that a severable portion may violate the Commerce Clause of the United States Constitution.

House Bill 540 and Senate Bill 415, which was legislation requested by the State Board of Morticians and Funeral Directors, establish requirements for the proper handling of bodies by funeral establishments and crematories. The impetus for the legislation was an exposé by *The Washington Post* that revealed disturbing practices used by a regional clearinghouse that embalms and stores bodies for area funeral homes. Current law regarding the handling of bodies simply requires that before burial or interment a mortician affix an identification tag containing specified information about the decedent and, if the body is cremated, that the tag is placed in the container with the cremains. In addition, the funeral establishment is required to have an approved holding room, but is not required to have a refrigeration unit on the premises.

House Bill 540 and Senate Bill 415 outline numerous requirements and standards for funeral establishments that will help ensure that human remains are handled appropriately, safely, and with dignity. We see no legal infirmity in nearly all of the new standards. One subsection, however, raises a constitutional issue. The legislation prohibits the transportation of a body "for preparation or storage to a facility that is not within the jurisdiction of the State, licensed by the State Board of Morticians and Funeral Directors, or permitted by the Office of Cemetery Oversight" unless, among other things,

"[t]he facility has entered into a written agreement with the State Board of Morticians and Funeral Directors or the Office of Cemetery oversight to allow the State to make unannounced inspections of the facility." Page 5, lines 14 – 22. We believe there is a risk that a court would find that the foregoing provision violates the Commerce Clause.

The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, grants to Congress the power to regulate commerce among the states. The Supreme Court has long interpreted this clause as a barrier to states from regulating interstate commerce even in the absence of federal law. *Gibbons v. Ogden*, 22 U.S. 1 (1824). "When a State proceeds to regulate commerce ... among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Id.* at 10.

> The constitutional grant of authority to Congress to regulate interstate commerce "has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" This "negative command, known as the dormant Commerce Clause," prohibits States from legislating in ways that impede the flow of interstate commerce. The dormant Commerce Clause's limitation on State power, however, "is by no means absolute. In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

Star Scientific, Inc. v. Beales, 278 F.3d 339, 354-55 (4th Cir. 2002) (citations omitted).

The federal courts have developed a two-tiered test for determining whether a state statute violates the Commerce Clause. "'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,' the statute is generally struck down 'without further inquiry.'" *Id.* at 355. The first tier "asks whether a 'statute clearly discriminates against interstate commerce,' or has the 'practical effect of regulating extraterritorially.'" *Volvo Trademark Holding Aktieboaget v. AIS Construction Equipment Corp.*, 416 F. Supp. 2d 404 (W.D.N.C. 2006).

Under the second tier, applicable in the situation where a state statute indirectly affects interstate commerce, a court will apply the test developed by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

A state may not regulate commerce that takes place wholly outside of the state's borders. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (declaring unconstitutional a Connecticut law that required liquor distillers to affirm that the price it sold its products to Connecticut wholesalers was no higher than the price of the same items sold by the distiller in any other state). The Court declared that Connecticut may not adopt a scale of prices for use in other states. *Id. See also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)(declaring that a state law that required any takeover offer for shares of a company which was at least ten percent owned by Illinois shareholders be registered with the Illinois Secretary of State had a "sweeping extraterritorial effect," and hence, unconstitutional). In *Brown*, the Court considered how the challenged statute would "interact with the legitimate regulatory schemes of other States." 457 U.S. at 579. "States and localities may not attach restrictions to exports or imports in order to control commerce in other states." *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994).

In this case, for an out-of-state facility to receive a body from a Maryland funeral establishment, it must agree to submit its operations and premises to the oversight and inspection of Maryland regulators. "[A]ssertions of extraterritorial jurisdiction violate the dormant Commerce Clause ... by subjecting activities to inconsistent regulations." *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 379 (7th Cir. 1998); *see also Nat'l Solid Wastes Management Ass'n* v. Meyer, 63 F.3d 652 (7th Cir. 1995)

("*NSWMA*") (finding that a Wisconsin statute which barred landfill operators from accepting waste from other states unless the other state had adopted an "effective recycling program" violated the Commerce Clause); *Rocky Mtn. Farmers Union v. Goldstene*, 2011 U.S. Dist. LEXIS 149593 (E.D. Ca.) (holding that a state regulation requiring the use of corn ethanol in California which assigned a greater "carbon intensity" to ethanol made in other states violated the Commerce Clause because, among other things, it attempted to control farming practices in other states).

It is possible, however, that even if a court found that House Bill 540 and Senate Bill 415 discriminate against interstate commerce on its face, the bills may still be upheld if the discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). "Once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986)(citation omitted). In the *Taylor* case, the Court upheld a state statute that banned importation of certain species of fish because the law was shown to be the only way to protect the local fishery. On the other hand, in *NSWMA*, the Seventh Circuit noted that the Wisconsin statute at issue, rather than requiring another state to adopt a "Wisconsin-style" recycling program before a Wisconsin landfill may accept waste from that state, Wisconsin could simply require "that all waste entering the State first be treated at a materials recovery facility with the capacity to effect this separation." 63 F.3d at 662.

Maryland is certainly justified in seeking to ensure that when someone in Maryland transports a decedent from the State, the body is going to a place where the deceased's remains will be handled safely and treated with dignity. And yet, it is possible a court could find that there are other ways to further this legitimate local concern without regulating extraterritorially such as requiring a transit permit or proof that the other state would allow the facility to accept the body. All things considered, and applying our "not clearly unconstitutional" standard of review, we find that this section is not clearly unconstitutional. Notwithstanding, even if a court finds that the requirement that an out-of-state facility enter into an agreement with the State Board of Morticians and Funeral Directors or the Office of Cemetery Oversight to submit to unannounced inspections before a body of a decedent may be transported to it is unconstitutional, our view is that that provision would most likely be found to be severable. Maryland law expressly provides for severability. Maryland Code, Art. 1, §23. Moreover, where a provision of a bill is found to be unconstitutional, it is generally presumed, "even in the

absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible." *Davis v. State*, 294 Md. 370, 383 (1982). 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. It is clear that the purpose of the legislation can be accomplished without the offending language. As a result, it is our view that, if the provision applicable to out-of-state requirement was to be found unconstitutional, it would be severable from the remainder of the legislation.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SBB/kk

cc: The Honorable John P. McDonough
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