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The Honorable Delores G. Kelley, Chair
Senate Finance Committee
Miller Senate Office Building
Annapolis, MD 21401

The Honorable Shane E. Pendergrass
House Health and Government Operations Committee
House Office Building
Annapolis, MD 21401

Re: SB 759/ HB 768 as amended

Dear Senator Kelley and Delegate Pendergrass:

I have been asked to opine on whether the amendments to the above-referenced bills as set forth in section I. below would survive Constitutional scrutiny. My opinion is that the amendments will survive Constitutional scrutiny. The following is my legal analysis:

I. Introduction

Section 21-2C-07 (E) (3) of the amended bill adds the following language: on or before July 1, 2022, the Prescription Drug Affordability Board is to set upper payment limits for prescription drug products that have led or will lead to an affordability challenge that are (1) purchased or paid for by a unit of State or local government or an organization on behalf of a unit of State or local government; or (2) paid for through a health benefit plan on behalf of a unit of State or local government. Additionally, the amendment includes purchases of prescription drug products on behalf of a unit of State government or through a health benefit plan on behalf of a unit of State or local government that includes purchases by (1) a State, county, bi-county, or municipal employee health benefit plan; (2) State or county correctional facilities; (3) State hospitals; and (4) health clinics at State institutions of higher education.

II. Discussion


The amendments do not violate the dormant Commerce Clause of the United States Constitution. Under dormant clause analysis, states are prohibited from enacting legislation that interferes with or burdens interstate commerce and are forbidden from regulating commerce occurring wholly outside its borders. Such regulation may also not expressly regulate out-of-state commerce or have the practical effect regardless of the legislature's intent. Regarding, the instant amendments, an exception to the dormant Commerce Clause is applicable since the state is acting as a market participant as opposed to a market regulator.

The Supreme Court has long recognized that when a state enters a market in commerce, not as a regulator, but as a participant acting on its own behalf, it does so unconstrained by the dormant Commerce Clause. In *Kentucky v. Davis*, 553 U.S. 328, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) the Court held that a state can provide a tax exemption for interest received by a resident on the state's bonds while taxing the interest paid to residents on bonds issued by other states. This is because the "market-participant" exception reflects a "basic distinction . . . between States as market participants and States as market regulators," *Reeves*, 447 U.S., at 436, 100 S. Ct. 2271, 65 L. Ed. 2d 244, "[t]here [being] no indication of a constitution plan to limit the ability of the States themselves to operate freely in the free market." *id.*, at 437, 100 S. Ct. 2271, 65 L. Ed. 2d 244. See also *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208, 103 S. Ct. 1042, 75 L. Ed. 2d 1(1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause").

Therefore, to the extent the legislation places an upper payment limit for drug purchases by state and local government, the State would be acting as a participant in the prescription drug market and not as a regulator of prescription drugs purchased by commercial entities. The dormant Commerce Clause would not apply to government purchases of prescription drugs.

Conclusion

For the reasons discussed above, the Drug Affordability Act as amended should withstand legal challenge under the dormant Commerce Clause of the United States Constitution.


Stephanie P. Anderson, Esquire