

Section by Section Analysis of the CARE Act (H.R. 5034)

SECTION 1. SHORT TITLE.

TEXT:

This Act may be cited as the `Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010'.

COMMENT:

This is a self-explanatory section creating the title of the bill.

SEC. 2. PURPOSE.

TEXT:

It is the purpose of this Act to--

- (1) recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof; and*
- (2) reaffirm and protect the primary authority of States to regulate alcoholic beverages.*

COMMENT:

Section 1 of the purpose section is straightforward and simply reaffirms the underlying purposes of the Webb-Kenyon Act. Alcohol is different. The consequences of excessive or underage consumption are dramatically different and more damaging than that associated with other products. It is the only consumer product that has been subject to two constitutional amendments. The 21st Amendment recognizes that communities across the country view alcohol differently and that, in order to be effective, alcohol regulation needs to be promulgated and enforced according to local norms and standards.

Section 2 of the purpose section also is a simple explanation of the primary role of states, especially considering the constitutional language of section two of the 21st Amendment, which provides for the primary authority of states to regulate alcohol.

These are not “new” purposes for Congressional consideration. This language was already considered, debated and passed in the STOP Underage Drinking Act of 2006 (Public Law 109-422). This purpose language is lifted from preexisting federal code.

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

TEXT:

The Act entitled 'An Act divesting intoxicating liquors of their interstate character in certain cases', approved March 1, 1913 (27 U.S.C. 122 et seq.), commonly known as the 'Webb-Kenyon Act', is amended by adding at the end the following:

COMMENT:

This section merely identifies the section of federal code which the below language will be inserted. It amends the Webb-Kenyon Act. The Webb-Kenyon Act was actually passed twice, once in 1913 (before Prohibition) and again in 1935 (following repeal of Prohibition) to make clear Congressional intent supporting the primary role of state alcohol laws from influence of the Commerce Clause.

The Webb-Kenyon Act has been amended previously in the past and the language of the CARE Act is intended to go into this part of the code.

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

TEXT:

(a) Declaration of Policy- It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.

(b) Construction of Congressional Silence- Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the 'Commerce Clause') to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

(c) Presumption of Validity and Burden of Proof- The following shall apply in any legal action challenging, under the Commerce Clause or an Act of Congress, a State or territory law regarding the regulation of alcoholic beverages:

(1) The State or territorial law shall be accorded a strong presumption of validity.

(2) The party challenging the State or territorial law shall in all phases of any such legal action bear the burden of proving its invalidity by clear and convincing evidence.

(3) Notwithstanding that the State or territorial law may burden interstate commerce or may be inconsistent with an Act of the Congress, the State law shall be upheld unless the party challenging the State or territorial law establishes by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.

COMMENT:

This language embodies a dormant commerce clause section and a presumption of validity/ burden of proof section. We will analyze each subparagraph separately.

Subparagraph (a) simply reaffirms existing policy that states have the primary authority to regulate alcohol similar to the purposes in section 2 of the bill.

Subparagraph (b) clarifies congressional intent regarding the extent to which state liquor laws can be challenged under the dormant commerce clause. The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several states.” U.S. CONST. art. I, §8, cl. 3. Through its implied negative command, known as the dormant Commerce Clause, this provision of the Constitution also operates to limit the power of the states to regulate interstate and foreign commerce. Reconciling state power including those related to laws passed under the 21st Amendment with federal power under the dormant Commerce Clause has presented troublesome legal issues which H.R. 5034 seeks to clarify.

A substantial majority of the lawsuits that seek to deregulate the liquor industry have been brought under the dormant Commerce Clause. Over 25 states have had their state alcohol laws challenged in court. Federal District Court Judges have interpreted past Congressional enactments and the 21st Amendment differently leaving a confusing and conflicting set of judicial opinions.

This section attempts to resolve this litigation morass. The dormant Commerce Clause does not apply where Congress has spoken. First, Congress clearly has the authority to insulate state laws from dormant Commerce Clause challenge or to impose certain limitations on dormant Commerce Clause challenges. (*Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981)). Second, Congress has exercised this authority in

the past and exempted state laws regulating insurance and more recently, with state hunting/fishing license matters from such challenges. See *Schutz v. Thorne*, 415 F.3d 1128 (10th Cir.2005).

Finally, the language chosen in H.R. 5034 respects and leaves intact the 2005 *Granholm v. Heald* decision. In that decision the Supreme Court struck down New York and Michigan state laws that it deemed to be protective of in state alcohol producers, but discriminated against out of state producers. Because H.R. 5034 does not seek to authorize a state to facially discriminate against out of state producers, the bill carefully balances the federal interest of preventing undue burdens on interstate commerce with the states' interests in effectively regulating intoxicating liquor.

So how would this section (b) help against the types of litigation against states? It makes clear that states may not enact pure on its face economic protectionist legislation without justification. However, it also relieves states of the burden of having to defend suits brought by those seeking deregulate the industry who contend that a state liquor law has a discriminatory "purpose" or "effect", a specious claim that can be leveled against any facially neutral liquor regulation. For instance, the champions of deregulation have asserted that a state's right to require sellers of liquor to have a license and a store with secured inventory has been challenged as discriminatory in "purpose" and "effect" because an unlicensed, untaxed, out-of-state retailer is prohibited from selling to that state's consumers. H.R. 5034 would eliminate the right of the out-of-state retailer to bring this specious claim. Similarly, there have been lawsuits claiming that a state law that seeks to make sure that anyone who buys alcohol provides their identification, prove they are 21 and do this in a face to face transaction is somehow protectionist, this language would support states from these spurious attacks. Finally, another expansion on the *Granholm* case have been several lawsuits claiming that state laws that treat small and big alcohol producers differently (regardless of where they are located) are a violation of the Commerce Clause. Every state treats big and small businesses differently. Even the federal government recognizes this with alcohol producers. However, inconsistent federal courts have produced conflicting opinions leaving this often used area of alcohol law further unsettled.

Section (c) simply accords the presumption of validity to state liquor laws that all legislative enactments are entitled to and imposes upon the challengers of those laws the burden of proving their invalidity. This would affect state alcohol laws challenged under the dormant Commerce Clause or when federal and state laws are in conflict. The first section states that laws passed by a state are presumed to be

valid. Section two clarifies that the challenger of the law, not the state, must bear the burden of proof; must carry its burden at all stages of the action; and must prove their case by clear and convincing evidence.

Section two creates a high hurdle for the plaintiff to jump in order to strike down a state liquor law in federal court. This nation has passed two constitutional amendments related to alcohol and federal law supports state alcohol regulation. This hurdle is justified due to the constitutional basis for state authority to regulate alcohol conferred by the 21st Amendment and the long standing policy of the United States to support effective alcohol regulation.

Section three clarifies the legal standard that must be met in order to overturn a state liquor law under the Commerce Clause. The legislation is broadly written to make clear that even if a court finds that the state alcohol law conflicts with a federal statute or burdens interstate commerce, it is not to be set aside unless the plaintiff proves that the state law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age. These core state concerns were chosen as they track various Supreme Court cases and their language used to explain goals of state alcohol laws.

Congress clearly possesses the authority to create presumptions of validity and burdens of proof. For example, Congress has created a presumption that patents are valid, and that someone challenging a patent has the burden of proof to prove that a patent is invalid. There are other aspects of federal code where this is true.

In sum, section (c) of the CARE Act is a novel new way to help courts get the balance right between economic special interests trying to tear down a state alcohol regulatory system and a state trying to effectuate core state powers.

SEC. 4. AMENDMENT TO WILSON ACT.

TEXT:

The Act entitled 'An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases', approved August 8, 1890 (27 U.S.C. 121), commonly known as the 'Wilson Act', is amended by striking 'to the same extent' and all that follows through 'Territory'.

COMMENT:

The proposed Wilson Act amendment does not constitute an effort by Congress to reverse the result reached in *Granholm* because the legislation includes in section 3 above language expressing Congress' wish that a case similar to *Granholm* still be decided the same way.

The Wilson Act is one of those historical parts of the code that has been around so long that it has been interpreted different ways throughout its 120 year history. As the formal title of the Wilson Act above shows, it was intended to "limit the effect" (remove) dormant Commerce Clause protections from review of state alcohol regulations. The most recent pronouncement by the Supreme Court in the *Granholm* decision noted that the Wilson Act is still "good" law but the Court interpreted the Wilson Act differently than previous Congresses had intended.

The removal of these several words from the Wilson act is necessary to conform the CARE Act to the Wilson Act. By passage of this section, Congress is aware that in *Granholm* the Supreme Court used the Wilson Act to interpret the Webb-Kenyon Act. Congress wishes its language in the new proposed Webb-Kenyon Act amendment (H.R. 5034) to be interpreted according to the text alone, without reference to any of its prior acts. This language would not result in a reversal of *Granholm*, because of the language explicitly adopted in section 3 relating to discrimination against producers.

CONCLUSION:

The CARE Act is necessary to preserve the states' authority to effectively regulate alcohol and provide the states with the legal tools to successfully defend their regulations.

It does not permit a state to discriminate against out of state producers and makes it clear that it does not allow this. The legislation does not ban direct shipping of wine nor does it create that right. Rather, it reminds all that this decision belongs in the state legislature. If someone sues to eliminate the winery's right to distribute to the consumer, they will now have a powerful tool to defend their state's law.

Finally, the CARE Act puts a timely reminder about the importance of state legislative decision-making by granting states a presumption of validity and making the aggrieved plaintiff bear the burden of proving their case. This commonsense language will help states and keep the status quo for state alcohol

laws.