STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 17-45

Preemption of Proposed Legislation to Regulate the Inspection, Licensure, and Operation of Motorboats in Tourist Resort Counties

Question 1

Would Senate Bill 1062/House Bill 1114, 110th Gen. Assem. (2017), (the "proposed legislation"), be preempted under the Supremacy Clause of the U.S. Constitution by purporting to establish state-law requirements related to the inspection, licensure, and operation of motorboats carrying passengers for hire in tourist resort counties, including boats operating on the French Broad River?

Opinion 1

Certain applications of the inspection and licensure requirements in the proposed legislation would likely be preempted by the comprehensive federal statutory and regulatory scheme governing vessels operating on the navigable waters of the United States. But the restrictions in the draft legislation on the time and manner of the operation of motorboats carrying passengers for hire would not be preempted.

Question 2

Does the proposed legislation violate the equal protection guarantees of the Tennessee Constitution or U.S. Constitution by treating vessels that carry passengers for hire in tourist resort counties differently than the same vessels in other counties and differently than recreational vehicles in tourist resort counties?

Opinion 2

No.

ANALYSIS

The proposed legislation, Senate Bill 1062/House Bill 1114, 110th Gen. Assem. (2017), would add a new section to Title 69 of the Tennessee Code to regulate motorboats that carry passengers for hire in certain counties. Section 1 of the proposed legislation would establish new inspection and licensure requirements for motorboats carrying passengers for hire and their operators: Subsection 1(a) would require that all motorboats carrying passengers for hire "be inspected and approved by the Tennessee wildlife resources agency, even if the vessel holds a valid certificate of inspection issued by the United States coast guard." And subsection 1(b) would require that any person operating a motorboat carrying passengers for hire "be licensed under this

part, even if the person holds a valid motorboat operator's license issued by the United States coast guard." The proposed legislation also institutes specific restrictions on the times during which motorboats carrying passengers for hire may be operated and the manner of operation. For example, it would prohibit a motorboat carrying passengers for hire from traveling at any time at a speed greater than thirty miles per hour and from performing "the maneuver commonly called a 'donut' within five hundred feet (500') of any private vessel or the shoreline." The failure to comply with these time and manner restrictions would constitute a Class A misdemeanor and be punishable by a fine between $1,500 and $4,000.

These inspection and licensure requirements and use restrictions would apply only in a "tourist resort county," as defined in Tenn. Code Ann. § 42-1-301, which, by reference to 16 U.S.C. § 403, is a county having more than 5% of its territory within the Great Smoky Mountains National Park. Tenn. Code Ann. § 42-1-301(3). Three Tennessee counties fall within the statutory definition of a "tourist resort county": Blount, Sevier, and Cocke. Tenn. Att'y Gen. Op. 93-04 (Jan. 13, 1993). These tourist resort counties include several bodies of water that are considered "navigable waters" of the United States, including the French Broad River. *See Goodwin v. Thompson*, 83 Tenn. 209, 210 (1885) (holding a land grant to the bed of the French Broad River void given its status as a navigable water); U.S. Army Corps of Engineers, Nashville District, "Navigable Waters List," http://www.lrn.usace.army.mil/Missions/Regulatory/Navigable-Waters-List (listing the navigable waters in Tennessee); *see also State ex rel. Cates v. W. Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746, 750-51 (1913) (defining "navigable waters"); 33 C.F.R. § 329.4 (same).

1. Supremacy Clause Preemption

Because certain applications of the draft legislation would intrude into a field governed by a comprehensive federal regulatory scheme, they would likely be preempted under the Supremacy Clause of the U.S. Constitution. The Supremacy Clause mandates that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. IV, cl. 2. Accordingly, "a law enacted by Congress may preempt an otherwise valid state law, rendering it without effect." *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47, 55 (Tenn. 2013).

A federal law may preempt state law either expressly or by implication. *Id.* at 56. Express preemption generally occurs when a federal statute includes a provision explicitly indicating congressional intent to preempt specific state laws. *See Stevens ex rel. Stevens v. Hickman Comty. Health Care Servs.*, 418 S.W.3d 547, 557 (Tenn. 2013). Even when there is no express preemption provision, there may be preemption by implication if (1) "federal regulation of a field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (i.e., "field preemption"); (2) there is an "inescapable contradiction between state and federal law," particularly when it is impossible for a party to comply with both (i.e., "direct conflict preemption"); or (3) state law inhibits the realization of the purposes and objectives of federal law (i.e., "purposes and objectives conflict preemption"). *Lake*, 405 S.W.3d at 56 (internal quotation marks omitted). In any preemption analysis, the purpose of Congress in enacting the federal laws at issue is the "ultimate touchstone." *Riggs v. Burson*, 941 S.W.2d 44, 49 (Tenn. 1997) (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Because Congress has, from the founding of the country, enacted a series of statutes governing various types of vessels operating on the navigable waters of the United States, each type of preemption is potentially applicable to state regulation of vessels operating on these waters. *See United States v. Locke*, 529 U.S. 89, 99 (2000) (describing this history); *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859) ("The whole commercial marine of the country is placed by the Constitution under the regulation of Congress[.]"). Other than field preemption, discussed in more detail below, the preemption analysis of the inspection and licensure requirements in the proposed legislation depends on the specific application of those requirements, which are not detailed in the proposed legislation itself. Express preemption, for example, could potentially apply pursuant to the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-11. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56-62 (2002). In this Act, Congress provided for federal regulations to "establish[] minimum safety standards for recreational vehicles and associated equipment," 46 U.S.C. § 4302(a), and, to ensure uniformity, expressly preempted contrary state laws, *see id.* § 4306 (prohibiting state regulation "establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment" if that regulation is not "identical" to a federal regulation). The application of this express preemption provision to the inspection and licensure requirements in the proposed legislation would thus depend on whether the vessels to which they apply are "recreational vessels" under the federal act, *see id.* § 2101(25) (defining "recreational vessel"), and whether their application results in any state regulation that is "not identical" to the federal regulations, *id.* § 4306. Accordingly, the inspection and licensure requirements in the draft legislation do not in and of themselves give rise to any express preemption concerns.

Similarly, the inspection and licensure requirements in the proposed legislation do not in and of themselves give rise to any concerns related to direct conflict preemption or purposes and objectives conflict preemption. Under the analysis applicable to either type of conflict preemption, any potential conflict between the inspection and licensure requirements in the proposed legislation and the applicable federal statutes and regulations would depend on the particular factual circumstances. Motorboats carrying six or fewer passengers for hire would likely be "uninspected vessels" under the complex federal regulatory scheme for vessels operating on U.S. waters administered by the U.S. Coast Guard. *See* 46 U.S.C. § 3301 (indicating which vessels must be inspected); *id.* § 2101(43) (defining "uninspected vessel" as "a vessel not subject to inspection" under § 3301 "that is not a recreational vessel"); 46 C.F.R. § 2.01-7(a) (motorboats under 100 gross tons carrying six or fewer passengers for hire are not required to be inspected and certified by the Coast Guard). Uninspected vessels are not subject to the comprehensive requirements applicable to inspected vessels; nor are they required to carry on board a certificate of inspection from the Coast Guard. S*ee* 46 U.S.C. § 3311. But uninspected vessels are subject to federal regulations in particular areas, such as safety. *See, e.g.*, 46 U.S.C. §§ 4101-4106 (governing uninspected vessels generally); *id.* § 4105 (governing uninspected passenger vessels); 46 C.F.R. pts. 24-28 (establishing requirements for uninspected vessels); *id.* § 15.905 (establishing licensing requirements for operators of uninspected passenger vessels). The proposed legislation does not define any particular standards or requirements that will apply to motorboats carrying passengers for hire; it merely subjects them to inspection and licensure. Accordingly, whether state requirements applicable to these vessels directly conflict with or undermine the purposes and objectives of any specific aspect of the federal regulatory scheme will depend on the manner in which the inspection and licensure requirements are applied and the particular vessel to which they are applied. The proposed legislation itself does not give rise to any conflict preemption concerns.

The proposed legislation does, however, raise field preemption concerns. Its inspection and licensure requirements would apply to all motorboats carrying passengers for hire in tourist resort counties, including motorboats operating on navigable waters that would be considered "inspected vessels" under the federal regulatory scheme. *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 242 (2002) (recognizing that "Congress has divided the universe of vessels into two broad classes: 'inspected vessels' and 'uninspected vessels.'"); 46 C.F.R. § 2.01-7(a) (motorboats under 100 gross tons carrying more than six passengers for hire and motorboats over 100 gross tons carrying more than twelve passengers for hire are required to be inspected and certified). With respect to inspected vessels, Congress has mandated the issuance of comprehensive regulations "[t]o carry out [the statutory scheme] and to secure the safety of individuals and property on board." 46 U.S.C. § 3306(a). The regulations must address almost every aspect of these vessels and their operation, including, among other things:

> (1) the design, construction, alteration, repair, and operation of those vessels, including superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electric installations, and accommodations for passengers and crew, sailing school instructors, and sailing school students;
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> (2) lifesaving equipment and its use;
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> (3) firefighting equipment, its use, and precautionary measures to guard against fire;
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> (4) inspections and tests related to paragraphs (1), (2), and (3) of this subsection; and
>
> (5) the use of vessel stores and other supplies of a dangerous nature.

Id. Inspected vessels are required to obtain and have on board a certificate of inspection from the Coast Guard indicating they have complied with all of the applicable requirements. *Id.* §§ 3309, 3311.

Congress has thus enacted a "comprehensive, pervasive regime of Federal regulation," governing inspected vessels. *Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard*, 78 Fed. Reg. 79,242, 79,246 (Dec. 27, 2013) ("*Preemption Assessment Framework*"). The scope and extent of the scheme "make reasonable the inference that Congress left no room for the States to supplement it." *Lake*, 405 S.W.3d at 56 (internal quotation marks omitted). Accordingly, the Coast Guard has concluded that "[t]hese fields are foreclosed from State regulation regardless of whether the Coast Guard has issued a particular regulation on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation." *Preemption Assessment Framework*, 78 Fed. Reg. at 79,246. In *Locke*, the U.S. Supreme Court determined that state regulations relating to oil tankers were preempted by a comprehensive federal regulatory scheme that mirrors the scheme governing inspected vessels. 529 U.S. at 110-11. The primary federal provision on which *Locke* relied to find field preemption was modeled on the predecessor to 46 U.S.C. § 3306 and included almost identical language mandating the issuance of comprehensive regulations governing the vessels at issue, oil tankers. *See Locke*, 529 U.S. at 111 (noting that, under that provision, "only the Federal Government may regulate the 'design, construction, alteration, repair, maintenance,

operation, equipping, personnel qualification, and manning' of tanker vessels" (quoting 46 U.S.C. § 3703(a)). Other courts have applied the reasoning in *Locke* to conclude that Congress intended to occupy the entire field of regulation over inspected vessels with respect to the categories listed in § 3306 as well as related statutes and regulations. *See Diamond Offshore Co. v. Survival Sys. Int'l*, 902 F. Supp. 2d 912, 940 (S.D. Tex. 2012).

Current Tennessee law acknowledges the limits of state regulation over vessels inspected and certified by the Coast Guard. The Tennessee Code exempts from the "rules, regulations and procedures for the inspection and approval of motorboats carrying passengers for hire" any motorboat that "holds a valid certificate of inspection issued by the United States coast guard, or any federal agency successor to the coast guard." Tenn. Code Ann. § 69-9-212(a). Similarly, a person "holding a valid motorboat operator's license issued by the United States coast guard" or any successor agency, "shall be exempt from the licensing requirements" of the Tennessee Code. *Id.* § 69-9-212(b). Uninspected vessels are thus subject to Tennessee "rules, regulations and procedures," which is appropriate given that Congress has not indicated an intent to occupy the entire field of regulation with respect to that class of vessel. *See, e.g.*, *Chao*, 534 U.S. at 243 ("Uninspected vessels . . . present an entirely different regulatory situation."); *Preemption Assessment Framework*, 78 Fed. Reg. at 79,246 (noting that, in contrast to inspected vessels, "'uninspected vessels' . . . are subject to Coast Guard regulation but under a much less comprehensive and prescriptive scheme"). But motorboats carrying passengers for hire that are classified as inspected vessels under the federal scheme and have satisfied the applicable requirements are currently exempted from these state regulations.

The proposed legislation would undo this exemption for motorboats carrying passengers for hire in tourist resort counties and, for that reason, would likely be preempted. Under the proposed legislation, a motorboat carrying passengers for hire that had been inspected and licensed by the Coast Guard would not be able to operate on navigable waters in tourist resort counties in Tennessee without satisfying additional inspection and licensure requirements imposed by the state. But because Congress and the Coast Guard have established an exhaustive federal regime governing almost every aspect of inspected vessels and their operation, the proposed legislation's extension of current Tennessee law to regulate these vessels would likely be preempted under the Supremacy Clause. *See Harman v. City of Chicago*, 147 U.S. 396, 406-07 (1893) ("The requirement that . . . [certain vessels] for hire, in the Chicago river or its branches, shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States except upon the conditions imposed by the city."). As the Supreme Court said with respect to the provision at issue in *Locke*, the language of which mirrors § 3306: "[T]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment," and thus "[e]nforcement of the state requirements would at least frustrate what seems to us to be evident congressional intention to establish a uniform federal regime controlling the design of [the vessels]." 529 U.S. at 111 (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (first alteration in original)).

The foregoing analysis applies only to the licensure and inspection requirements in the proposed legislation, however. The restrictions on the time and manner of the operation of motorboats carrying passengers for hire in tourist resort counties would not be preempted by the federal regulatory scheme because they serve a different purpose than the federal scheme and are

addressed to local concerns that are neither addressed by nor in conflict with the federal scheme. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447-48 (1960) (holding a local Detroit regulation was not preempted because it served a local purpose distinct from the purpose of the federal provisions); *cf. English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990) ("[P]art of the pre-empted field is defined by reference to the purpose of the state law in question[;] . . . another part of the field is defined by the state law's actual effect[.]").

The field occupied by Congress has the purpose of establishing uniform standards for inspected vessels generally but does not address the time or manner of the operation of motorboats carrying passengers for hire on specific local waters. Accordingly, because, "[t]he two areas of regulation are distinct from one another," the time and manner restrictions are not preempted. *Kaneohe Bay Cruises, Inc. v. Hirata*, 75 Haw. 250, 268 (1993). As the Supreme Court of Hawaii recognized when facing a similar question, "simply because commercial thrill craft must be held to a federal standard regarding performance and safety standards, it does not follow that the State is thereby precluded from restricting the time periods during which those same thrill craft may be operated in State waters." *Id.* at 267-68; *see also Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250, 1254-55 (9th Cir. 1983) (holding that an Idaho statute focused on ensuring the safety of local white-water rafting tours was not preempted because it addressed "unique local characteristics" and "the Coast Guard ha[d] [not] exercised any authority it may have [had] to regulate white-water rafting on Idaho's rivers").

In sum, certain applications of the inspection and licensure requirements in the proposed legislation would likely be preempted by the comprehensive federal statutory and regulatory scheme governing inspected vessels operating on the navigable waters of the United States. But the restrictions in the draft legislation on the time and manner of the operation of motorboats carrying passengers for hire would not be preempted.

2. Equal Protection

The proposed legislation does not violate the equal protection guarantees of the Tennessee and U.S. Constitutions. Under the framework adopted by the U.S. and Tennessee Supreme Courts for evaluating whether a statute violates equal protection, the level of scrutiny to be applied depends on "the nature of the right asserted or the class of persons affected." *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). Strict scrutiny applies only "when the classification at issue . . . operates to the peculiar disadvantage of a suspect class" or "interferes with the exercise of a fundamental right." *Id*.

The proposed legislation does not disadvantage a suspect class. *See Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 503 (6th Cir. 2007) (noting that the classifications the U.S. Supreme Court has identified as suspect include "race, alienage, national origin, gender, or illegitimacy"). Nor does the proposed legislation infringe on a fundamental right. No court appears to have recognized a fundamental right to operate a motorboat carrying passengers for hire, and to do so would be to ignore the long history of both federal and state regulation of vessels operating in the waters of the United States. *See, e.g.*, *Sprietsma*, 537 U.S. at 56-60; *Locke*, 529 U.S. at 99-100.

Accordingly, the draft legislation must satisfy only rational basis scrutiny, *see Riggs*, 941 S.W.2d at 52-53, under which the inquiry "is limited to whether the challenged classifications have a reasonable relationship to a legitimate state interest," *Gallaher*, 104 S.W.3d at 461. Under this test, a "statute may discriminate in favor of a certain class as long as the discrimination is founded upon a reasonable distinction or difference in state policy." *Id.* And the legislature need not state a rationale for the differential treatment: "A classification will pass constitutional muster if [the court] can conceive of some rational basis for the distinction." *Id.* at 462; *see also Riggs*, 941 S.W.2d at 53 (a statutory classification is rationale "if any state of facts may reasonably be conceived to justify it").

The proposed legislation satisfies these requirements. The state may have several legitimate interests that are fostered by distinguishing between recreational motorboats and motorboats carrying passengers for hire in tourist resort counties and for distinguishing between motorboats carrying passengers for hire in tourist resort counties and motorboats carrying passengers for hire in other counties. *Cf.* Op. Tenn. Att'y Gen. 97-51 (concluding that restrictions on motor vehicle racing that applied only in certain "tourist resort counties" did not violate equal protection). For example, motorboats carrying passengers for hire may generally include larger or more disruptive boats or may generally travel at higher speeds thus warranting special treatment. Or because these boats carry passengers who have paid for the trip, the state may have an interest in protecting consumers or in regulating commercial activities to preserve recreational opportunities. The tourist resort counties to which the proposed legislation applies are rationally distinguishable from other counties in which motorboats carrying passengers for hire may operate. These counties include waters in or near the protected natural area of Great Smoky Mountains National Park, and the legislature may have rationally concluded there is a greater need in these counties to protect natural areas and to accommodate and regulate tourist activities, including water activities. *Cf. Riggs*, 941 S.W.2d at 53 (upholding legislation that applied only in areas within nine miles of the Great Smoky Mountains National Park under the rational basis test because of the "unique problem[s]" that may be applicable there).

In short, though the draft legislation itself does not state the rationale for its narrow application, the classifications that would be created by the proposed legislation have a reasonable relationship to various conceivable and legitimate state interests. Accordingly, the draft legislation should survive rational basis review.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General

Requested by:

The Honorable Mike Bell
State Senator
309 War Memorial Building
Nashville, TN 37243