

Interstate Medical Licensure Compact

December 1, 2023

The Interstate Medical Licensure Compact Commission (“IMLCC” and “Compact”) is founded on the principal that each state has the sovereign right, pursuant to the Tenth (10th) Amendment to the U.S. Constitution, to define what constitutes the practice of medicine by physicians authorized to practice in that state. Subsequent to the recent U. S. Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct.2228 (2023), states have taken a variety of legislative actions regarding how the practice of medicine by physicians is defined, and related issues in providing both women’s reproductive health care and gender affirming care.

This position statement will address the specific questions raised regarding whether enactment of the Interstate Medical Licensure Compact (“IMLC”) by a state will have any detrimental impact on physician’s ethical obligations regarding treatment of patients and protections from unauthorized disciplinary action provided by existing compact member state statutes or encumber the ability of a state to enforce its medical practice act.

The basis for the authority provided to the state by the IMLC with respect to the above concerns expressly states:

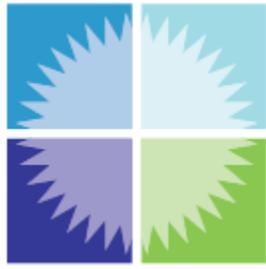
“The Compact also adopts the prevailing standard for licensure and affirms that the practice of medicine occurs where the patient is located at the time of the physician-patient encounter, and therefore, requires the physician to be under the jurisdiction of the state medical board where the patient is located.” (See IMLC Section 1).

The provisions of the IMLC statute clearly and unequivocally require that each and every IMLC member state has the right to establish what constitutes the practice of medicine for its licensees and for the protection of its citizens. It is important to note that under the federal Constitution the legal authority of a member state to define the scope of practice and to subject physicians practicing in that state to discipline resulting from such practice ends at the border of that state as illustrated by a situation in which its citizens may travel to other states in order to receive medical treatment. The Full Faith and Credit Clause of the U.S. Constitution contained in Art. IV, Section 1. imposes the requirement that states respect the laws and judgments of other states¹

Additionally, the Commerce Clause of the U.S. Constitution restricts states from impairing interstate commerce (See *Art. I, Section 8, Cl. 3*) and gives Congress the power to “regulate commerce among the states.”² In applying this Constitutional limitation on state power, an Oregon physician recently challenged state restrictions imposed on non-

¹ *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 494 (2003); *Allstate v. Hague*, 449 U.S. 302 (1981)

² See *Maryland v. Wirtz*. 392 U.S. 183, 190 (1968); *Gibbons v. Ogden*, 22 U.S. 1, 204 (1824) (“Congress may control state laws, so far as it may be necessary to control them, for the regulation of commerce.”)



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residents to come to Oregon to receive medical services that residents of that state could receive, arguing that this violates the Dormant Commerce Clause.³ In a similar case the Supreme Court has granted discretionary review of a recent decision by the U.S. Court of Appeals for the Ninth Circuit as to whether “states may unduly interfere with commercial activities occurring in other states.”⁴ While these cases have yet to be finally decided, the most recent Supreme Court decision directly involving the application of the Dormant Commerce Clause is *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019). In *Thomas*, Justice Alito, wrote for a 7-2 majority striking down such state requirements as violating the Dormant Commerce Clause, holding that “regulations discriminating against non-resident economic actors must be narrowly tailored to a legitimate legislative purpose.”⁵ Particularly given the fact that Justice Alito delivered the majority opinion in *Dobbs*, the *Thomas* decision may be used to interpret the extent to which abortion regulations based upon “residency requirements” and “state protectionism” run afoul of the Dormant Commerce Clause as well as whether it unconstitutionally restricts state laws affecting “medication abortion.”⁶

These limitations of the right to regulate such matters as medical licensure and the scope of medical care which physicians are authorized to provide under state law are firmly established in the Constitution of the United States and by the courts throughout this country. The U.S. Supreme Court has described the nature of these sovereign state powers in a recent decision involving the state regulation of abortion. “As we have observed, our Constitution “ ‘spli[t] the atom of sovereignty.’ ” *Alden v. Maine*, 527 U.S. 706, 751(1999) (quoting *Saenz v. Roe*, 526 U.S. 489, 504, n. 17 (1999)). “The Constitution limited but did not abolish the sovereign powers of the States, which retained ‘a residuary and inviolable sovereignty.’ ” *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. —, —, 138 S. Ct. 1461, 1475, 200 L.Ed.2d 854 (2018) (quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961)). “Paramount among the States’ retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law. See U.S. Const., Art. VI, § 2.” See *Cameron v. EMW Women’s Surgery Center, P.S.C.*, 142 S. Ct. 1002, 1110-1011 (2022). The principal of state authority to regulate health care was one of the key aspects of the *Dobbs* decision. In the wake of *Dobbs* recent commerce clause analysis suggest that through the use of “uniform laws and interstate compacts, state legislatures might be better positioned than Congress to lead the charge in modernizing America’s medical accreditation regime.”⁷

It is important to note the foundations of this understanding as expressed in the IMLC:

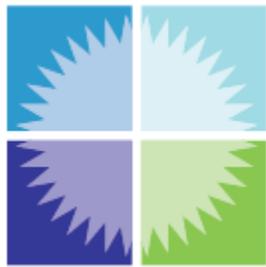
³ *Gideonse v. Brown*, No. 3:21-cv-01568, 2021 WL 8650316 (D. Or. 2021)

⁴ *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021, cert granted, 142 S. Ct. 1413 (2022)

⁵ *Thomas*, supra. Id. at 2457, 2461

⁶ *Federalism and the Right to Travel: Medical Aid in Dying and Abortion*, 26 J. Health Care Law & Policy 49 (2023)

⁷ See “*Is a Federal Medical License Constitutional*” Bill of Health, Harvard Law Petrieflom Center, Timothy Bonis, blog.petrieflom.law.harvard.edu



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First –The medical services provided to a patient are controlled by the medical practice act in the state where the patient is located at the time they are receiving care. This is based on the long-standing principal of medical care is that the practice of medicine takes place where the patient is located regardless of whether it is an in-person or telemedicine encounter. And importantly this standard is codified in each member state’s statutes upon enactment of the IMLC statute. See Art. I, IMLC.

Second – A core tenant of the state-based regulation of care is that a physician must be licensed in the state where the patient is located and receiving care. That license is used to provide care to the patient and that license creates a property right for the physician that is governed by the medical practice act of that state.⁸ A physician who holds licenses in multiple states, must determine the location of the patient where the care is being provided and ensure that they are providing care within the authority granted to them by the license issued by that state. For the physician, this creates an obligation to determine the license being utilized to provide care and that the care provided complies with the requirements of that state. *Id.*

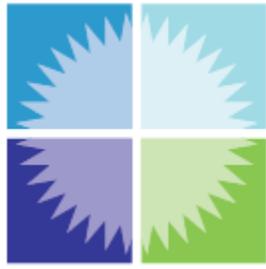
Even a cursory reading of the *Dobbs* decision clearly establishes that the opinion was intended to return to each state the power to decide how abortions should be regulated or prohibited subject to the above referenced federal Constitutional limits. As unequivocally expressed by the Supreme Court in *Dobbs*:

“It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” *Casey*, 505 U.S. at 979, 112 S. Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.” *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2243 (2023)

Further, “Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.” *Id.* at p. 2259.

In his concurrence in *Dobbs*, Justice Kavanaugh stated that the decision, with which he fully agreed, did not constrict the right to travel for abortions. He wrote, “. . . some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to

⁸ See *Barsky v. Board of Regents of State of New York*, 347 U.S. 442, 459 (1954) (“But the right to practice is, as MR. JUSTICE DOUGLAS shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any state to deprive a person of liberty or property without due process of law.”)



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another State to obtain an abortion? In my view, the answer is **no** based on the constitutional right to travel.” *Dobbs*, 142 S. Ct. at 2309 (2023) (emphasis supplied).

Moreover, the *Dobbs* Court expressly recognizes the sovereign right of each state to permit or to ban abortions. “The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.” *Id.* at 2284 (2023).

The IMLCC remains apolitical regarding how a state regulates and enforces its regulation of the practice of medicine. However, the IMLCC takes the position that such regulation and enforcement must be subject to and limited by the U.S. Constitution as referenced above and that in order for medical licensure portability to exist, the sovereign authority of each state, under the Constitution, must be protected. The IMLC statute provides for these protections to be enforced through legal action in the event that a violation of the IMLC regarding its scope of practice obligations on member states should occur.

The success of this approach by the IMLCC can be found in the continued support of member boards with diametrically opposite views on the political approach to women’s health care options, gender affirming care, and access to competent care. License application volume continues to increase in all of IMLC member states which is a significant indication that the physicians, who are acutely aware that they are on the ‘tip of the spear,’ trust the IMLCC’s requirements and the state law protections provided in the IMLC statute and rules.

Simply stated, under the IMLC scope of practice provisions a physician who attempts to perform an abortion or gender affirming care where it is prohibited is subject to be disciplined to the extent that state’s regulatory board wishes to pursue it. That same physician who performs abortions or gender affirming care under a license issued by a state which permits such care to a patient is protected against other states attempting to impose discipline on physicians providing such care to a patient located in that state at the time of treatment under those scope of practice provisions.

Accordingly, IMLCC member states are better able to protect their physicians, and the patients whom they treat by the enactment of the Compact.

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