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MEMORANDUM

Date: April 24, 2023

Re: Analysis of Section 19 of the Veterans Auto and Education Improvement Act of 2022 (H.R. 7939) (PL 117-333)

I. Introduction and Background

The Veterans Auto and Education Improvement Act of 2022 (VAEIA) (House Resolution 7939) was signed into law on January 5, 2023 as PL 117-333. Of particular concern, Section 19 addresses the interstate recognition of professional licenses held by servicemembers or their spouses. The following should serve as a summary of the law at issue and an analysis of the legal and policy concerns regarding same.

II. Text

Sec. 19 of the Act provides, in pertinent part, that Title VII of the Servicemembers Civil Relief Act (50 U.S.C. 4021 et seq.) is amended by inserting after section 705 (50 U.S.C. 4025) the following new language (to be codified as 50 USC 4025a):

> SEC. 705A. PORTABILITY OF PROFESSIONAL LICENSES OF SERVICEMEMBERS AND THEIR SPOUSES.
>
> (a) In General.--In any case in which a servicemember or the spouse of a servicemember has a covered license and such servicemember or spouse relocates his or her residency because of military orders for military service to a location that is not in the jurisdiction of the licensing authority that issued the covered license, such covered license shall be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency for the duration of such military orders if such servicemember or spouse--
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> (1) provides a copy of such military orders to the licensing authority in the jurisdiction in which the new residency is located;
>
> (2) remains in good standing with--
>
> (A) the licensing authority that issued the covered license; and
>
> (B) every other licensing authority that has issued to the servicemember or the spouse of a servicemember a license valid at a similar scope of practice and in the discipline applied in the jurisdiction of such licensing authority;
>
> (3) submits to the authority of the licensing authority in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.
>
> (b) Interstate Licensure Compacts.--If a servicemember or spouse of a servicemember is licensed and able to operate in multiple jurisdictions through an interstate licensure compact, with respect to services provided in the jurisdiction of the interstate licensure compact by a licensee covered by such compact, the servicemember or spouse of a servicemember shall be subject to the requirements of the compact or the applicable provisions of law of the applicable State and not this section.
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> (c) Covered License Defined.--In this section, the term `covered license' means a professional license or certificate—
>
> (1) that is in good standing with the licensing authority that issued such professional license or certificate;

(2) that the servicemember or spouse of a servicemember has actively used during the two years immediately preceding the relocation described in subsection (a); and
(3) that is not a license to practice law.

While this serves to amend Title VII of the Servicemembers Civil Relief Act (50 U.S.C. 4021 et seq.), an already-existing federal statute, the phrasing of Sec. 19 is clear that this is intended to amend such statute in a way that adds an additional section to the Servicemembers Civil Relief Act containing this new portability requirement. Regardless of where Sec. 19 of the VAEIA ultimately codifies the requirements (whether it be within the Servicemembers Civil Relief Act, within the VAEIA itself, or wholly elsewhere in the federal code), the legal and policy objections outlined herein remain the same.

III. Issues and Analysis

Section 19 of the VAEIA (hereinafter, "Section 19") is unconstitutional, as it represents a federal mandate to state governments in violation of the Tenth Amendment and violates the Fifth Amendment Due Process Clause for unconstitutional vagueness. The policy arguments against Section 19, while not as critical as the legal issues, are still significant and as such are addressed herein as well.

A. Unconstitutionality.

i. Tenth Amendment—States' Reserved Powers

Section 19 of the Act dictates that a license "shall be considered to be valid at a similar scope of practice and in the discipline applied for," it is a *per se* direction to the States to enforce this federal statute. The language is an unambiguous directive: States **shall** consider these licenses to be valid. The authority to regulate professional conduct has been repeatedly held to be an exercise of the state's police power, which is a power reserved to the States under the Constitution.

The Supreme Court has routinely held that while Congress may incentivize the States to act in a particular way (as with many sources of federal funding), it may not "commandeer the States' legislative processes." *New York v. United States*, 505 U.S. 144 (1992). Regardless of context, Congress must respect the inherent sovereignty of the States. *See e.g. Gregory v. Ashcroft*, 501 U.S. 452 (1991). In this way, the States are protected from the "forced participation of the State's executive in the actual administration of a federal program." *Printz v. United States*, 521 U.S. 898 (1997) (holding "The Federal Executive's unity would be shattered, and the power of the President would be subject to reduction, if Congress could simply require state officers to execute its laws."). This "basic principle—that Congress cannot issue direct orders to state legislatures—applies" whether Congress is compelling or prohibiting action by a State. *Murphy v. NCAA*, 138 S.Ct. 1461, 1478 (2018).

Accordingly, Section 19 is facially unconstitutional. Whether this language is interpreted as compelling the States to recognize covered licenses or as prohibiting the States from taking action to enforce its statutes against an individual who holds a covered license; in either event, it is an unconstitutional requirement that the States enforce a federal statute.

Further, Section 19 purports to regulate an area over which Congress has no authority. It is well established that Congress's authority is limited in scope; while "[t]he legislative powers granted to Congress

are sizable," it is axiomatic that "they are not unlimited." *Id.* at 1476. In expressing its legislative authority, Congress is limited to those powers expressly conferred upon it by the Constitution; all other matters are reserved for the States. One such power reserved for the States—namely the power to police the conduct of their citizens—inherently includes the power to regulate the licensure of professional conduct as an expression of the State's interests in regulating their local economies and protecting the health and welfare of its inhabitants. *See Barsky v. Bd. of Regents*, 347 U.S. 442, 449, 74 S. Ct. 650, 654 (1954); *see also Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847) (explaining that police powers include "sovereignty, the power to govern men and things within the limits of its dominion"); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 791-793 (1975). Where the States act to express their inherent police powers in furtherance of these well-established interests (as in the case of the States' election to regulate and license the professions affected by this Act) they may only be interfered with where the Constitution so requires. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) ("States are accorded wide latitude in the regulation of their local economies under their police powers."). Far from permitting the federal interference with State sovereignty embodied in Section 19, the Constitution forbids it.

ii. Fifth Amendment – Due Process Clause

Section 19 is also unconstitutionally vague. The due process requirements of the Constitution dictate that, in order to be enforceable, statutes must specifically define what conduct is permitted and what is prohibited (*see Coates v. City of Cincinnati*, 402 U.S. 611 (1971), *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012)) and provide sufficient guidance to the executive and judicial branches in order to avoid arbitrary prosecutions under the law. *See Kolender v. Lawson*, 461 U.S. 352 (1983). Section 19 is thus fatally vague as it fails to provide definitions or interpretive guidance for its material terms (i.e. "scope of practice", "good standing", "actively used"), and thus does not provide sufficient grounds to determine what conduct it permits or prohibits.

A statute is considered unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." *See Coates,* 402 U.S. at 614 (citing *Fox Televisions Stations Inc,* 567 U.S. at 253) (holding that "The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed … is essential to the protections provided by the Fifth Amendment's Due Process Clause … which requires the invalidation of impermissibly vague laws." *Internal citations omitted.*) The fundamental provisions of Section 19 require the States to "consider[] valid" a license issued by another State that "remains in good standing" to permit an individual to engage in a "similar scope of practice and in the discipline applied for." None of these terms are defined, and each may be subject to a variety of reasonable interpretations.

The existing compacts have each considered and addressed these terms in the compact drafting process, and some terms vary significantly from profession to profession and state to state. To say that the states disagree about the import of these terms for almost any given profession would be a severe understatement. For example, in most licensed professions the definition of the "scope of practice" varies wildly from state to state and many states criminalize the unlicensed practice of such a regulated profession. Where there are almost certain to be two or more competing definitions for the applicable "scope of practice" in any given case, there is undoubtedly a question of vagueness. Section 19 provides no guidance as to which state's scope of practice laws should apply and merely directs that the state "consider[] valid" a license with a "similar" scope of practice.

Without a readily applicable standard to define the conduct permitted or mandated, it cannot be said that the Act gives "fair notice" such that "men of common intelligence" can understand what actions are or are not being endorsed or prohibited. Given that similar vagueness issues arise from the use of terms like "good standing", "considered valid", and "actively used," even the judiciary is likely to struggle with the factual application of Section 19.

B. Inefficiency and Ineffectiveness.

Beyond the fundamental legal flaws with Section 19, there are several policy arguments against addressing interstate license portability through federal legislation. Not only are the States already actively engaged in addressing this issue through the establishment of interstate compacts, but these compacts represent the most efficient and effective tool to address both current and future issues facing interstate licensure portability. While Section 19 does attempt to carve out those individuals whose licenses are already covered by an interstate compact, that language is insufficient to address the myriad problems that this statute will create for individuals who are attempting to navigate the already complicated field of interstate licensure.

i. The States, acting collectively, are already engaged in addressing the issue of license portability.

Congress is not well-positioned to make the factual determinations necessary for the efficient and effective administration of an interstate license model like the one envisioned by Section 19. No extant federal agency would be readily able to administer such a program. Conversely, state agencies are already engaged in this endeavor. State agencies are already familiar with the industries they regulate and have a well-established history of addressing the material factual and legal questions that Section 19 leaves unanswered. These States, acting together through reciprocity statutes, free waiver programs, expedited or temporary licensure programs, and interstate compacts, make up the best and most efficient framework for the implementation of an interstate license portability program.

Where federal legislation has static terms and is limited by the federalism system of the Constitution, interstate compacts involve the establishment of interstate commissions which serve as oversight and enforcement bodies for the compact. Each of these commissions is empowered by its compact to make the factual determinations necessary to harmonize the discordant statutes of the member states. Compact commissions are well situated to address to complex legal landscape of interstate licensure portability and are empowered to resolve the legal challenges that arise from such programs. As entities created through a sharing of sovereign power by the member states, interstate compact commissions are not beholden to any individual member state nor limited by the Tenth Amendment and as such have the flexibility and authority to ensure that an interstate licensure portability program is successful and effective.

Further, states have already taken steps to address the concerns purportedly addressed by the subject statute. In addition to the adoption of interstate compacts, forty-nine states have provided either expedited licensure, temporary licensure or endorsement for military spouses, thereby alleviating barriers to employment caused by state regulatory structures. Forty-four states have passed legislation that includes language stating that a licensing body 'shall issue' an employment credential to a military spouse licensed in another state. Thus, the states have tools—and have utilized them—which are designed to address specific issues presented to

military members and their spouses in the context of licensure that can adapt to the needs to both military members/spouses and the individualized professions without the need for a rigid federal framework.

ii. Interstate Compacts Are Optimized For Addressing Interstate Occupational Licensure Issues.

Interstate compacts and their commissions are dynamic entities capable of adapting to changes in the landscape of professional licensure in any given industry. Through the consent and agreement of the member states, the Commissions are empowered to create, amend, and repeal rules governing the interstate transition of occupational licenses. In this way, compact commissions are well equipped to deal with both current and unforeseen concerns in their industry as those concerns arise. Where other tools (such as federal legislation or reciprocity statutes) are inherently static and require significant legislative efforts to revise or amend their provisions, interstate compacts are both stable and able to adapt in real time (through the rules of their commissions) to the needs of the member states and the respective professions.

Further, compacts provide robust and enduring benefits for military members and their spouses. Both existing compacts and those still in development represent a positive and effective cooperative effort between state governments to specifically address the challenges faced by active military members and their spouses. This ensures that military mobility concerns can be addressed without infringing upon the inherent sovereignty of the States. Interstate compacts are uniquely situated to accomplish this goal by establishing programs for interstate license portability that are adaptable, enforceable, and effective.

iii. Section 19's carve-out for professionals covered by interstate compacts is insufficient to address the conflicts between VAEIA and existing interstate compacts.

While Section 19(b) does attempt to prevent the Act from overlapping or conflicting with interstate compacts regarding occupational licensure, the paradigm established by the remainder of Section 19 would place a substantial burden on state regulators (and by extension, state treasuries). Section 19(b) would leave it up to the States to determine, potentially through costly litigation, whether Section 19 or a particular interstate compact would apply to any given individual. The necessity of this determination would create a new, threshold analysis for state regulators (in *every* licensed profession except lawyers) regarding whether any interstate compact exists to cover a given case, whether Section 19 applies, or whether neither Section 19 nor any extent compact would be applicable. This new question creates an unnecessary layer of bureaucratic analysis which will take time, effort, and sorely needed state resources away from other more efficient uses.

IV. Conclusion

Section 19 is unconstitutional as it facially violates the Tenth Amendment and Fifth Amendments. Furthermore, federal legislation is an inflexible and inefficient tool for addressing the complex factual and legal issues that arise during the administration of an interstate licensure program; and no federal agency is currently prepared to administer such a program. States are already engaged in addressing the issue of interstate occupational licensure, primarily through the adoption of interstate compacts. As an alternative to this legislation, interstate compacts represent adaptable and enduring tools for creating enforceable and reliable programs to govern interstate license portability across a wide variety of professions while still maintaining

state sovereignty to appropriately address concerns of public protection in conformity with our federal and state constitutions.