ALAN WILSON
ATTORNEY GENERAL

May 14, 2026

The Honorable Kevin S. Brackett, Solicitor
Sixteenth Judicial Circuit
Moss Justice Center
1675-1 A York Highway
York, SC 29745-7422

Dear Solicitor Brackett:

You have requested our opinion as to whether your office "must report defendant participation in Pre-Trial Intervention to the National Practitioner Database (NPDB hereafter) operated by the Health Resources and Services Administration (HRSA hereafter) and what liability my staff will incur under state law for doing so." You note that it "is impossible for my staff to comply with both requirements," of federal and state law.

By way of background, you provide the following information:

> [r]egarding Pre-Trial Intervention, it is illegal for any state official to release information of an offender's participation in [the] program, not simply completion. S.C. Code Ann. § 17-22-170. It goes on to include that the provisions of this section do not apply to circuit solicitors and their staff in the performance of their official duties § 17-22-170. The Legislature also intended for this program to restore the defendant to "in contemplation of the law, the status they occupied prior to arrest." S.C. Code Ann. § 17-22-150(a), (Code of Laws 1976, as amended). Finally, the Legislature prohibited our offices from releasing identification information on any defendant to the public under any circumstances. S.C. Code Ann. § 17-22-130 (code of Laws 1976, as amended).

In conflict, federal regulation 60.13 provides that state prosecutors must report "criminal convictions" against health care practitioners to the NPDB. 45 C.F.R. § 60.13 (2013). That section provides that non-complying agencies shall have their name published on a public list due to non-compliance. Criminal conviction is a term of art defined as a Section 1128(i) of the Social Security Act. Part (4) of that definition includes:

> "when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program

> where judgment of conviction has been withheld." 42 U.S.C.A. § 1320 a-7(i) (2019).
>
> Pre-Trial Intervention qualifies under the broad language of "other arrangement or program where judgement of conviction has been withheld" under a plain reading and for the sake of argument by the determination of the HRSA. Therefore, we are both bound by state law to not disclose, but mandated by federal law to disclose. The Supremacy Clause of the U.S. Constitution preempts state law where there is an impossible conflict. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). In addition, federal regulations preempt state law the same as federal laws. Priester v. Cromer, 401 S.C. 38, 43-44, 736 S.E. 2d 249, 252 (2012) (citing Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153 (1982)). However, the Pre-Trial Intervention statute is more specific, carries a greater penalty for violation, and establishes clear policy that offenders are intended to be redeemed under the law.
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> In summation, I ask for an opinion regarding whether S.C. Code Ann. § 17-22-170 is preempted by the disclosure requirement under 45 C.F.R. § 60.13 and therefore removes the threat of prosecution from my staff performing their duties. I also ask whether disclosure under Reg. 60.13 is an official duty for which we are exempt under S.C. Code Ann. § 7-22-170.

We are of the view that both provisions may stand and that a court would likely conclude that there is no conflict preemption with respect to federal and state law. Regardless, however, even though federal law (45 C.F.R. § 60.13) requires your office to report a relevant PTI to the Data Base, such reporting constitutes an "official duty" of the Solicitor's Office pursuant to § 17-22-170, thereby providing you and your staff protection from liability for such reporting.

Law/Analysis

As you note, the question of preemption is governed by the Supremacy Clause of the federal Constitution. Art. VI, § 2.

As was stated by the United States Supreme Court in Hillsborough County, Fla. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 712-13 (1985),

> [i]t is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824) (Marshall, C.J.). Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Jones v. Rath

Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977). In the absence of express pre-emptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Ibid.; *see* Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-1218, 10 L. Ed. 2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, *supra*, 312 U.S., at 67, 61 S. Ct. at 404. *See* generally Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-699, 104 S. Ct. 2694, 2700, 81 L. Ed. 2d 580 (1984).

We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes. *See*, e.g. Capital Cities Cable, Inc. v. Crisp, supra, at 699, 104 S. Ct. at 2700; Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153-154, 102 S. Ct. 3014, 3022- 3023, 73 L. Ed. 2d 664 (1982); United States v. Shimer, 367 U.S. 374, 381-383, 81 S. Ct. 1554, 1559-1561, 6 L. Ed. 2d 908(1961)....

Moreover, as has been observed by one court,

> [e]valuating whether a state law stands as an obstacle to federal law "requires 'a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question [of] whether they are in conflict.'" H&R Block E. Enter., Inc. v. Raskin, 591 F. 3d 718, 723 (4th Cir. 2010) (alteration in H&R Block) (quoting Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981)). Mere "tension" between the federal and state law is insufficient. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Rather, a conflict exists "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" Jones v. Rath Packing Co., 430 U.S. 519, 544 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) (Rehnquist, J.,

> dissenting in part and concurring in part) (quoting Kelly v. Washington, 302 U.S. 1, 10, 58 S. Ct. 87, 82 L. Ed. 3 (1937).

Just Puppies, Inc. v. Frosh, 565 F. Supp. 3d 665, 711 (D. Md. 2021), affd. sub nom. Just Puppies, Inc. v. Brown, 123 F. 4th 652 (4th Cir. 2024). Finally, as the Supreme Court has emphasized, "[o]ur precedents establish that a high threshold must be met if state law is to be pre-empted for conflicting with the purposes of a federal Act." Chamber of Commerce of United States of America v. Whiting, 563 U.S. 582, 607, 131 S. Ct. 1968, 1985, 179 L. Ed. 2d 1031 (2011).

We turn now to examination of the preemptive effect, if any, of the Healthcare Quality Improvement Act (HCQIA) of 1986, 42 U.S.C. § 11101 et seq. The Fourth Circuit, in Freilich v. Upper Chesapeake Health, Incorporated, 313 F. 3d 205, 211-12 (4th Cir. 2002) summarized the purpose of the Act as follows:

> [t]he legitimacy of Congress's purpose in enacting the HCQIA is beyond question. Prior to enacting the HCQIA, Congress found that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care… [had] become nationwide problems," especially in light of "the ability of incompetent physicians to move from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance," 42 U.S.C § 11101. The problem, however, could be remedied through effective peer review combined with a national reporting system that made information about adverse professional actions against physicians more widely available. However, Congress also believed that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourage[d] physicians from participating in effective professional peer review." Id. Congress therefore enacted the HCQIA in order to "facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in civil lawsuits. The statute attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action." Bryan v. James E. Holmes Regional Med. Ctr., 33 F. 3d 1318, 1322 (11th Cir. 1994).

Your letter correctly points to 45 C.F.R. § 60.13, as part of HCQIA's implementation. The Regulation requires prosecutors to report "Federal or state criminal convictions related to the delivery of a health care item or service" to the national data base. Failure to report a "criminal conviction" requires the Secretary of Health and Human Services to "provide for publication of a public report that identifies those agencies that have failed to report information on criminal convictions as required to be reported under this section." The authority for this Regulation is 42 U.S.C. §§ 11101-11152, or the Healthcare Quality Improvement Act (HCQIA).

Thus, the first question is what is meant by a "criminal conviction" in 45 C.F.R. § 60.13. Certainly, under state law, successful completion of Pre-Trial Intervention (PTI) means there has

been no criminal conviction. State v. Tootle, 330 S.C. 512, 516, n.6, 500 S.E. 2d 481, 483, n.6 (1998). However, 45 C.F.R. § 60.13 provides a definitional section which contradicts state law. Pursuant thereto, a "criminal conviction" is defined as a "conviction as described in section 1128(i) of the Social Security Act." As you note in your letter, §1128(i), Part (4) of the Social Security Act expressly provides that a "criminal conviction" includes that "[t]he person has entered into a participation in a first offender, deferred adjudication, or other program where judgment of conviction has been withheld." This would include PTI.

Your concern is that § 17-22-170 makes confidential the fact that an offender "has participated" in a pre-trial intervention program, and yet, 45 C.F.R. requires reporting of this fact to the NPDB. Section 17-22-170 states that

> [a]ny municipal, county, or state entity, or any individual who unlawfully retains or leases information on an offender's participation in a pretrial intervention program is guilty of a misdemeanor and, upon conviction, must be punished by a fine not exceeding two thousand dollars or by imprisonment not to exceed one year.
>
> The provisions of this section do not apply to circuit solicitors or their staff in the performance of their official duties.

We have previously issued an opinion which concluded that records relating to arrest and docketing of a defendant who has applied for PTI remain public records until an order of expungement has been issued following successful completion of the PTI program. The opinion noted that the words "PTI" were noted on the docket while the offender was participating in PTI. The opinion concluded that such records "remain public records unless and until an order of expungement is received after an individual has successfully completed a pretrial intervention program...." Moreover, the opinion concluded that "the terms of § 17-22-170 as to unlawful retention of records do not come into consideration until the order of expungement has been received by a municipal, county, or state entity and has been violated or disregarded." Op. S.C. Atty. Gen., 1996 WL 452773 (May 14, 1996).

Nevertheless, § 17-22-170 is crystal clear. Pursuant to the terms thereof, once PTI has been completed, and the court's order of expungement issued, release of "information on an offender's participation in a pretrial intervention program" constitutes a crime. As was stated in State v. Joseph, 328 S.C. 352, 359, 491 S.E. 2d 275, 279 (Ct. App. 1997),

> [t]he Act's provisions for expungement and confidentiality of the arrest reflect a legislative policy decision that, under certain circumstances, the interest of justice require that an offender be given a fresh start, free from the stigma of a criminal conviction.

Thus, the confidentiality of "participation" in PTI is an overriding state interest, protected by state sovereignty. With respect to your specific questions, regarding conflict preemption, two

Fourth Circuit decisions are particularly instructive. In Freilich v. Upper Chesapeake Health, Inc., *supra*, the Court held that "Congress has the power to enact the HCQIA" and that this federal Act does not impinge upon state sovereignty, 313 F. 3d at 213-14. According to the Fourth Circuit,

> [a]ll that the HCQIA requires of states is the forwarding of information. And the HCQIA specifically provides that "nothing in this part shall be construed as changing the liabilities or immunities under law or as preempting or overriding any state law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this part." 42 U.S.C. § 11115. We thus agree with the district court's conclusion that the HCQIA "does not require the state to do anything that the state has not already required, authorized or provided by its own legislative command." Freilich, 142 F. Supp. 2d at 696. In sum, the HCQIA does not come close to offending the Tenth Amendment.

Id.

Thus, the intent of Congress, in enacting the HCQIA, was mere reporting, and Congress had no purpose in preempting state law. As the Supreme Court has recognized, "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Moreover, in Wahi v. Chas. Area Med. Center, 562 F. 3d 599 (4th Cir.2009), the Fourth Circuit addressed a situation in which the argument was in part that a breach of confidentiality, protected by state law, occurred when the Charleston Area Medical Center disclosed that information to the local media. The argument by Wahi was that 45 C.F.R. § 60.13 "prohibited CAMC from disclosing to the local news media the fact that it had reported Wahi to the NPDB," 562 F. 3d at 618. The Court quoted that portion of § 60.13 as follows:

> [i]nformation reported to the [NPDB] is considered confidential and shall not be disclosed outside the Department of Health and Human Services. Persons and entities which receive information from the [NPDB] either directly or from another party must use it solely with respect to the purpose for which it was provided.
>
> Any person who violates [the above provision] shall be subject to a civil money penalty of up to $10,000 for each violation. We find no error in the district court's conclusion that Wahi failed to allege that CAMC's conduct constituted a breach of confidentiality. Section 60.13 guarantees the confidentiality of "information reported to" the NPDB and specifically limits the actions of individuals who "receive information from an NPDB report." Id. (emphasis added). It therefore does not prevent the entity who reported to the NPDB from disclosing the mere fact that a report was filed. Accordingly, the district court did not err in granting CAMC's Rule 12(b)(b) motion as they claim.

Thus, federal law "guarantees the confidentiality of information reported to the NPDB and specifically limits the actions of individuals 'who receive information from an NPDB report.'" Nothing in these decisions suggests any conflict preemption, thereby causing § 17-22-170 to be preempted. Indeed, as was said in Freilich, all that is required by the HCQIA is "the forwarding of information." Moreover, the HCQIA §11115 makes it clear that the Act does not seek to preempt state law. Further, the federal Act makes information reported to the Data Base confidential and, like § 17-22-170, provides for punishment if confidentiality is violated. *See* Wash. AGO 1989 No. 8, 1989 WL 428967 (April 21, 1989) [Washington Attorney General concludes there is no conflict preemption of Washington state law by HCQIA]. Thus, we doubt that § 17-22-170 is preempted by the federal laws in question. As was suggested in Med. Soc. of New Jersey v. Mottola, 320 F. supp. 2d 254, 259 (D.N.J. 2004), the federal law, for the most part, defers to state law.

Conclusion

Section 17-22-170 is quite clear that release of information "on an offender's participation" in PTI is a crime in South Carolina. State officials treat the confidentiality of PTI information with the utmost seriousness. However, we seriously doubt that § 17-22-170, or any portion of the Pre-Trial Intervention Act, is preempted by federal law in the form of the HCQIA or 45 C.F.R. § 60.13. The clear intent of Congress in enacting the HCQIA was not to preempt state law, but simply to provide for a national Data Base in an effort to curb medical malpractice by preventing doctors who are sanctioned in one state moving to another and practicing medicine there. The Fourth Circuit has held that the HCQIA does not intrude upon state sovereignty.

Moreover, with respect to any arguable conflict preemption, federal law makes information reported to the Data Base, as well as use of such information reported, to be confidential. Thus, federal and state law appear to be generally compatible. As the Fourth Circuit observed in Freilich, "all that the HCQIA requires of states is the forwarding of information" made confidential by federal law. While a conflict may appear to be present, in reality, we do not think such is the case. Certainly, Congress did not appear to intend such a conflict. Courts will not find conflict preemption unless such is clear. Here, it is not.

Regardless, however, § 17-22-170 protects the Solicitor and staff in carrying out duties to report, pursuant to 45 C.F.R. § 60.13. Such provision states clearly that the penalties or provisions of § 17-22-170 "do not apply to circuit solicitors or their staff in the performance of their official duties." The reporting requirements of 45 C.F.R. § 60.13 imposed upon solicitors and their staffs have been made part of their "official duties." Thus, the requirement to report under federal law should be followed by your office, but is fully protected from any liability under § 17-22-170 and other parts of the Pre-Trial Intervention Act.

Sincerely,

Robert D. Cook
Solicitor General