



## **The Health Care Freedom Act: Questions & Answers**

by Clint Bolick, Litigation Director, Goldwater Institute

*The Health Care Freedom Act will appear as a proposed constitutional amendment on Arizona's 2010 election ballot, and similar measures are under consideration in more than 30 other states. With the possibility that Congress will enact some sort of national health insurance legislation, questions are being raised about the scope of the Health Care Freedom Act and its effect should a federal bill become law. In the following pages, Clint Bolick, who helped to author the Health Care Freedom Act, answers frequently asked questions.*

**Q:** What is the Health Care Freedom Act?

**A:** The Health Care Freedom Act is a proposed amendment to the Arizona Constitution that would preserve certain existing rights that individuals have regarding health care. It was initially proposed by two Arizona physicians, Dr. Eric Novack and Dr. Jeffrey Singer, with drafting assistance from the Goldwater Institute. The measure qualified as a voter initiative on the 2008 ballot, and despite a well-financed opposition campaign, it was defeated by less than one-half of 1 percent of the vote. Changes were made to address concerns raised by the opponents, and the Arizona Legislature voted to refer the revised version to the 2010 ballot.

The American Legislative Exchange Council adopted model legislation based on the Arizona measure, and activists and legislators in at least 35 additional states are pursuing constitutional amendments or statutes based on the Arizona model.

**Q:** What are the key provisions?

**A:** Although the precise language varies from state to state, the Health Care Freedom Act seeks to protect two essential rights. First, it protects a person's right to participate or not in any health care system, and prohibits the government from imposing fines or penalties on that person's decision. Second, it protects the right of individuals to purchase—and the right of doctors to provide—lawful medical services without government fine or penalty. The Health Care Freedom Act would place these essential rights in the state constitution (or, in some states, it would protect them by statute).

**Q:** What motivated the Health Care Freedom Act?

**A:** No one questions the need for serious health care reform. However, the proponents of the Health Care Freedom Act believe that regardless of how such reform is fashioned, either at the state or federal level, the essential rights protected by the Health Care Freedom Act should be preserved. Many advocates of a larger government role in regulating or providing health insurance support a mandate that would compel individuals to join a government-approved health insurance plan, whether or not they can afford it and whether or not the system best fits their needs. In some countries in which government plays a large role in providing health insurance, medical services are rationed and individuals are prevented or discouraged from obtaining otherwise lawful medical services. Supporters of the Health Care Freedom Act have a variety of perspectives on the form that health care reform should take. But they agree that no matter what legislation is passed, it should not take from Americans their precious right to control their own medical affairs.

**Q:** By what authority can states pass the Health Care Freedom Act?

**A:** It is well-established that the U.S. Constitution provides a baseline for the protection of individual rights, and that state constitutions may provide additional protections—and all of them do. For instance, some states provide greater protections of freedom of speech or due process rights. Because the Health Care Freedom Act offers greater protection than the federal constitution, states are allowed to enact it.

**Q:** Does it matter whether the Health Care Freedom Act is passed as a statute or as a constitutional amendment?

**A:** A state constitution is the organic law of the state, reflecting the most fundamental values shared by the citizens of the state. Moreover, a state constitutional amendment will ensure the state legislature can never infringe upon the protected rights. So a constitutional amendment is preferable, especially to protect against legislative tinkering. However, for purposes of a federalism defense against excessive federal legislation, it should not matter whether the people of the state have acted through their constitution or by statute.

**Q:** Does the Health Care Freedom Act attempt to “nullify” federal health insurance legislation?

**A:** Absolutely not. If federal legislation is enacted, individuals would still have the option to participate in federal health insurance programs. This act simply protects a person’s right not to participate.

**Q:** To the extent that the Health Care Freedom Act conflicts with provisions of federal legislation, isn't the state law automatically preempted by the Supremacy Clause of the U.S. Constitution?

**A:** No. In any clash between state and federal provisions, at least four federal constitutional provisions are relevant. The Supremacy Clause establishes the Constitution as the supreme law of the land and provides that federal laws prevail over conflicting state laws where Congress has the legitimate authority to enact the legislation and where it does not impermissibly tread upon state sovereignty. The federal government will have to demonstrate that its legislation legitimately is derived from congressional authority to regulate interstate commerce. It will also have to show the legislation does not violate the 10<sup>th</sup> Amendment, which reserves to the states all government power not expressly delegated to the national government; and the 11<sup>th</sup> Amendment, which protects states from being used as mere instrumentalities of the national government. This constitutional construct is known as federalism.

**Q:** Are certain provisions of proposed federal health care legislation vulnerable to constitutional challenge even without the Health Care Freedom Act?

**A:** Yes, in at least three ways. First, to the extent that the legislation purports to regulate transactions that do not directly affect interstate commerce, such as mandating insurance for individuals, Congress may lack authority to do so under the Commerce Clause. Several relatively recent decisions by the U.S. Supreme Court have invalidated federal legislation on this basis. In *U.S. v. Lopez* (1995), the Court struck down federal laws that restricted guns in school zones; and in *U.S. v. Morrison*, it struck down a federal statute involving violence against women. In both cases, the Court found the subject matter of the federal laws did not “substantially affect” interstate commerce, so Congress had no power to regulate it under the circumstances presented.

Second, to the extent the legislation interferes with the individual’s right to choose health insurance providers, doctors, or lawful medical services, it may violate the right to medical self-determination recognized under the U.S. Constitution. As the Court declared in *Griswold v. Connecticut* (1965), “We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause.” Several of the early abortion cases involved what Justice William O. Douglas, concurring in *Doe v. Bolton* (1973), described as the “right to seek advice on one’s health and the right to place reliance on the physician of one’s choice.” Whether or not one agrees with those abortion rulings, they establish a strong basis for challenging certain federal and state intrusions.

Third, several recent decisions have invalidated federal laws that “commandeer” state governments to do their bidding. In *New York v. United States* (1992), for instance, the Court struck down federal rules requiring states to take ownership of certain radioactive waste and to expose themselves to liability. Speaking for the Court, Justice Sandra Day O’Connor ruled that

“no matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.” Tellingly, she added “the Constitution protects us from our own best intentions: It divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.” To the extent that federal health insurance legislation forces states to implement its provisions, it could be subject to robust constitutional challenge.

**Q:** Could the Health Care Freedom Act provide additional protection against federal health insurance legislation that violates protected rights?

**A:** Yes. Although the federal government usually prevails in federalism clashes, the current U.S. Supreme Court is the most pro-federalism Court in decades. There are no cases precisely on point, but the Court under Chief Justice John Roberts has sided with the states in at least three major recent federalism clashes. In the case most closely on point, *Gonzales v. Oregon* (2006), the Court upheld the state’s “right-to-die” law, which was enacted by Oregon voters, over the objections of the U.S. Attorney General, who argued that federal law pre-empted the state law. Applying “the structure and limitations of federalism,” the Court observed that states have great latitude in regulating health and safety, including medical standards, which are primarily and historically a matter of local concern. Holding that the attorney general’s reading of the federal statute would mark “a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality,” the Court interpreted the statute to allow Oregon to protect the rights of its citizens.

*Horne v. Flores* (2009) considered a measure adopted by Arizona voters to require English immersion as the state’s educational policy for students for whom English is a second language. Lower federal courts had imposed an injunction based on a finding that Arizona was failing to comply with federal bilingual education requirements. The Supreme Court held that injunctions affecting “areas of core state responsibility, such as public education,” should be lifted as quickly as circumstances warrant. It observed that “federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities.” The Court remanded the case to lower courts to reconsider the injunction.

In *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009), the Court examined a challenge to section 5 of the Voting Rights Act, which places certain states and localities in a penalty box, requiring them to obtain “pre-clearance” by the U.S. Department of Justice for any changes that impact voting. The Court was sharply critical of the “federalism costs” imposed upon the covered jurisdictions. It avoided the constitutional question by applying the federal law in a way that allowed the utility district to “bail out” from pre-clearance requirements under section 5.

In each of these cases, the Court sided with states in federalism disputes with the federal government.

**Q:** Will the Health Care Freedom Act affect future state legislation regarding health insurance?

**A:** Yes. If it is passed as a constitutional amendment, it would prevent any future legislation that infringes upon the rights protected by the amendment.

**Q:** Won't this be really expensive for the states to defend in court?

**A:** The Goldwater Institute has offered to defend the constitutionality of the Health Care Freedom Act at no cost to any state. Because legal challenges would involve purely constitutional issues and would not require expensive trials, to the extent that states become involved in litigation, they should be able to do so within existing Attorney General litigation budgets. Moreover, depending on the details of national health insurance legislation, the cost of federal mandates is likely to far exceed the cost of litigation.

**Q:** Even if the states and individuals did not prevail in a challenge to intrusive federal health insurance legislation, would there be reasons to support the Health Care Freedom Act?

**A:** Yes. First, if these rights are given additional protection under state constitutions, they will create an absolute barrier to future state legislation that violates those rights. Moreover, efforts to enact the Health Care Freedom Act send a powerful message to our nation's capitol that people at the grassroots take these rights very seriously and intend to protect them.

**Q:** Does the Health Care Freedom Act impair drug laws?

**A:** Absolutely not. It protects the right to purchase or provide "lawful" medical services. It does not limit the power of any government to determine what constitutes lawful medical services.

**Q:** Does the Health Care Freedom Act affect the issue of abortion?

**A:** No. Again, to the extent that states may regulate abortion under applicable constitutional doctrine and state or federal law, this measure would not alter that power in any way. The Health Care Freedom Act does, however, prevent the government from forcing individuals into health care systems against their will, and matters of conscience may influence such individual decisions.

**Q:** Does the Health Care Freedom Act affect Veterans' Administration programs, workers' compensation, Medicare, Medicaid, or state health-care systems?

**A:** Generally, no. The Health Care Freedom Act leaves intact any rules and regulations that were in place as of January 1, 2009. The only way such programs could be affected is if they are changed in the future in ways that violate the freedom of choice protected by the Health Care Freedom Act.

**Q:** Will this restrict the government from limiting the choice of providers or imposing other limits for the people who do opt-in to a government health care system?

**A:** No and yes, respectively. If a person voluntarily joins a government health care system, the government may set the terms and conditions, including choice of providers. However, the government cannot prevent a person from purchasing, or a health care professional from providing, lawful medical services outside that system.

**Q:** Is the Health Care Freedom Act supported financially by insurance companies?

**A:** No. Many insurance companies support an individual mandate (requiring individuals to buy health insurance or face government fines), which the Health Care Freedom Act would prohibit. An individual mandate guarantees a customer base to the insurance industry. It is present in some legislative proposals as a means to subsidize health insurance for others. If insurance companies play a role in the battle over the Health Care Freedom Act, we expect they will oppose it, possibly with significant resources.

**Q:** Are there other ways in which freedom advocates can use state constitutions to protect their liberties?

**A:** Absolutely. State constitutions are full of provisions unknown to the U.S. Constitution that are designed to protect individual liberty and limit the power of government, such as the line-item veto, anti-monopoly provisions, prohibitions against corporate subsidies ("gift clauses"), constraints against earmarks ("special law clauses"), and the like. Citizens and legislatures can amend their state constitutions to add additional protections; and taxpayers can enforce their state constitutional rights in state courts. State constitutions were intended to be the first line of defense in protecting the freedoms of the people. As the power of government grows at every level, we need to use whatever tools are available to us to safeguard our rights. For more on how state constitutions can protect liberty, see the recent Goldwater Institute report, "**50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government.**"