

105TH CONGRESS
2D SESSION

S. 2250

To protect the rights of the States and the people from abuse by the Federal Government, to strengthen the partnership and the intergovernmental relationship between State and Federal Governments, to restrain Federal agencies from exceeding their authority, to enforce the Tenth Amendment of the United States Constitution, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 26, 1998

Mr. COVERDELL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect the rights of the States and the people from abuse by the Federal Government, to strengthen the partnership and the intergovernmental relationship between State and Federal Governments, to restrain Federal agencies from exceeding their authority, to enforce the Tenth Amendment of the United States Constitution, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Tenth Amendment En-
5 forcement Act of 1998”.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) in most areas of governmental concern,
4 State governments possess both the constitutional
5 authority and the competence to discern the needs
6 and the desires of the people and to govern accord-
7 ingly;

8 (2) Federal laws and agency regulations, which
9 have interfered with State powers in areas of State
10 jurisdiction, should be restricted to powers delegated
11 to the Federal Government by the United States
12 Constitution;

13 (3) the framers of the United States Constitu-
14 tion intended to bestow upon the Federal Govern-
15 ment only limited authority over the States and the
16 people;

17 (4) under the Tenth Amendment of the United
18 States Constitution, the powers not delegated to the
19 United States by the Constitution, nor prohibited by
20 it to the States, are reserved to the States respec-
21 tively, or to the people; and

22 (5) the courts, which have in general construed
23 the Tenth Amendment not to restrain the Federal
24 Government's power to act in areas of State jurisdic-
25 tion, should be directed to strictly construe Federal
26 laws and regulations which interfere with State pow-

1 ers with a presumption in favor of State authority
2 and against Federal preemption.

3 **SEC. 3. CONGRESSIONAL DECLARATION.**

4 (a) IN GENERAL.—On or after January 1, 1999, any
5 statute enacted by Congress shall include a declaration—

6 (1) that authority to govern in the area ad-
7 dressed by the statute is delegated to Congress by
8 the United States Constitution, including a citation
9 to the specific constitutional authority relied upon;

10 (2) that Congress specifically finds that Con-
11 gress has a greater degree of competence than the
12 States to govern in the area addressed by the stat-
13 ute; and

14 (3) if the statute interferes with State powers
15 or preempts any State or local government law, reg-
16 ulation or ordinance, that Congress specifically in-
17 tends to interfere with State powers or preempt
18 State or local government law, regulation, or ordi-
19 nance, and that such preemption is necessary.

20 (b) FINDINGS.—Congress shall make specific factual
21 findings in support of the declarations described under
22 this section.

23 **SEC. 4. POINT OF ORDER.**

24 (a) IN GENERAL.—It shall not be in order in either
25 the Senate or House of Representatives to consider any

1 bill, joint resolution, or amendment that does not include
 2 a declaration of congressional intent as required under
 3 section 3.

4 (b) RULEMAKING.—This section is enacted—

5 (1) as an exercise of the rulemaking power of
 6 the Senate and House of Representatives, and as
 7 such, it is deemed a part of the rules of the Senate
 8 and House of Representatives, but is applicable only
 9 with respect to the matters described in section 3
 10 and subsection (a) of this section and supersedes
 11 other rules of the Senate or House of Representa-
 12 tives only to the extent that such sections are incon-
 13 sistent with such rules; and

14 (2) with full recognition of the constitutional
 15 right of the Senate or House of Representatives to
 16 change such rules at any time, in the same manner
 17 as in the case of any rule of the Senate or House
 18 of Representatives.

19 **SEC. 5. EXECUTIVE PREEMPTION OF STATE LAW.**

20 (a) IN GENERAL.—Chapter 5 of title 5, United
 21 States Code, is amended by inserting after section 559 the
 22 following new section:

23 **“§ 559a. Preemption of State law**

24 “(a) No agency shall construe any statutory author-
 25 ization to issue rules as authorizing preemption of State

1 law or local ordinance by rulemaking or other agency ac-
2 tion unless—

3 “(1) the statute expressly authorizes issuance of
4 preemptive rules; and

5 “(2) the agency concludes that the exercise of
6 State power directly conflicts with the exercise of
7 Federal power under the Federal statute, such that
8 the State statutes and the Federal rule promulgated
9 under the Federal statute cannot be reconciled or
10 consistently stand together.

11 “(b) Any regulatory preemption of State law shall—

12 “(1) be narrowly written to achieve the objec-
13 tives of the statute under which the rules are pro-
14 mulgated; and

15 “(2) explicitly describe the scope of preemption.

16 “(c)(1) When an agency proposes to act through rule-
17 making or other agency action to preempt State law, the
18 agency shall provide all affected States notice and an op-
19 portunity for comment by duly elected or appointed State
20 and local government officials or their designated rep-
21 resentatives in the proceedings.

22 “(2) The notice of proposed rulemaking shall be for-
23 warded to the Governor, the Attorney General and the pre-
24 siding officer of each chamber of the Legislature of each

1 State setting forth the extent and purpose of the preemp-
2 tion.

3 “(3) In the table of contents of each Federal Reg-
4 ister, there shall be a separate list of preemptive rules con-
5 tained within that Register.

6 “(d) Unless a final agency rule contains an explicit
7 provision declaring the Federal Government’s intent to
8 preempt State or local government powers and an explicit
9 description of the extent and purpose of that preemption,
10 the rule shall not be construed to preempt any State or
11 local government law, ordinance or regulation.

12 “(e)(1) Each agency shall publish in the Federal Reg-
13 ister a plan for periodic review of the rules issued by the
14 agency that preempt, in whole or in part, State or local
15 government powers. Such plan may be amended by the
16 agency at any time by publishing a revision in the Federal
17 Register.

18 “(2) The purpose of the review under this subsection
19 shall be to determine whether and to what extent such
20 rules are to continue without change, consistent with the
21 stated objectives of the applicable statutes, or are to be
22 altered or repealed to minimize the effect of the rules on
23 State or local government powers.”.

24 (b) NONBINDING REGULATIONS.—Any Federal rule
25 or regulation promulgated after January 1, 1999, that is

1 promulgated in a manner inconsistent with section 559a
2 of title 5, United States Code (as added by this section),
3 shall not be binding on any State or local government, and
4 shall not preempt any State or local government law, ordi-
5 nance, or regulation.

6 (c) CONFORMING AMENDMENT.—The table of sec-
7 tions for chapter 5 of title 5, United States Code, is
8 amended by adding after the item relating to section 559
9 the following:

“559a. Preemption of State law.”.

10 **SEC. 6. RULES OF CONSTRUCTION.**

11 (a) IN GENERAL.—No statute enacted after the date
12 of enactment of this Act (or rule promulgated under such
13 statute), shall be construed by courts or other adjudicative
14 entities to preempt, in whole or in part, any State or local
15 government law, ordinance or regulation unless—

16 (1) the statute, or rule promulgated under such
17 statute, contains an explicit declaration of intent to
18 preempt; or

19 (2) there is a direct conflict between such stat-
20 ute and a State or local government law, ordinance,
21 or regulation, such that the two cannot be reconciled
22 or consistently stand together.

23 (b) FAVORABLE CONSTRUCTION.—Notwithstanding
24 any other provision of law, any ambiguities in this Act,
25 or in any other law of the United States, shall be con-

1 strued in favor of preserving the authority of the States
2 and the people.

3 (c) SEVERABILITY.—If any provision of this Act, or
4 the application thereof to any person or circumstance, is
5 held invalid, the validity of the remainder of the Act and
6 the application of such provision to other persons and cir-
7 cumstances shall not be affected thereby.

8 **SEC. 7. APPROPRIATION BY STATE LEGISLATURES.**

9 Any funds received by a State under Federal law
10 shall be subject to appropriation by the State legislature,
11 consistent with the terms and conditions required under
12 such applicable provisions of law.

13 **SEC. 8. ANNUAL REPORT ON STATUTORY PREEMPTION.**

14 (a) REPORT.—Not later than 90 days after each Con-
15 gress adjourns sine die, the Congressional Research Serv-
16 ice shall prepare and make available to the public a report
17 on the extent of Federal statutory preemption of State and
18 local government powers enacted into law during the pre-
19 ceding Congress or adopted through judicial interpretation
20 of Federal statutes.

21 (b) CONTENTS.—The report shall contain—

22 (1) a cumulative list of the Federal statutes
23 preempting, in whole or in part, State and local gov-
24 ernment powers;

1 (2) a summary of Federal legislation enacted
2 during the previous Congress preempting, in whole
3 or in part, State and local government powers;

4 (3) an overview of recent court cases addressing
5 Federal preemption issues; and

6 (4) other information the Director of the Con-
7 gressional Research Service determines appropriate.

8 (c) SUBMITTAL.—Copies of the report shall be sub-
9 mitted to the President and the chairman of the appro-
10 priate committees in the Senate and House of Representa-
11 tives.

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