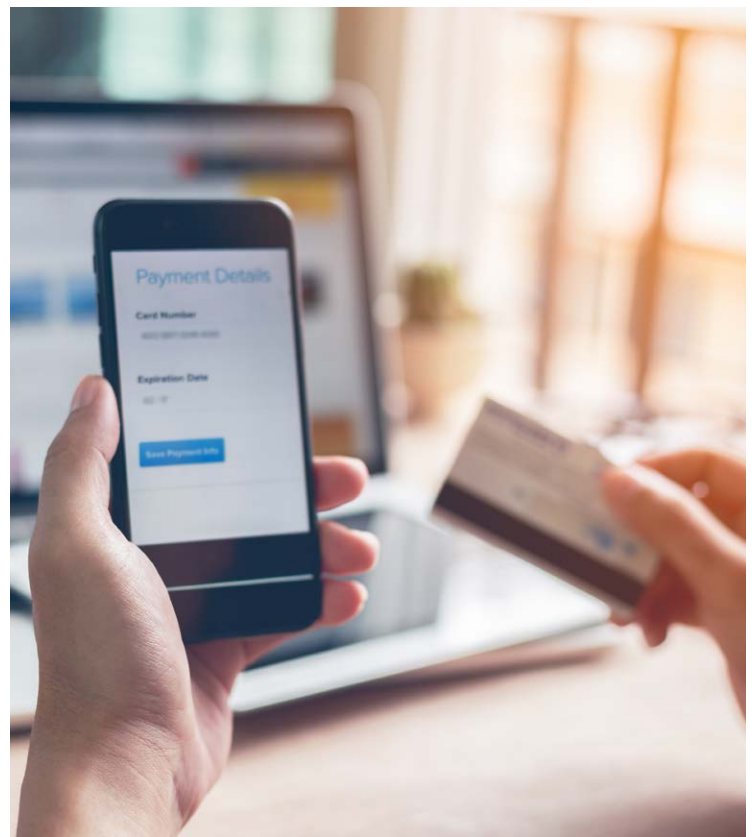


ONLINE SALES BANS & THE DORMANT COMMERCE CLAUSE

 Californian communities are increasingly banning online sales and direct-to-consumer shipments of commercial tobacco products.¹

Online sales are more difficult to track and to regulate than in-person sales, making it easier for retailers to circumvent state and local flavor restrictions and other point-of-sale restrictions like age-verification requirements. Local jurisdictions and states have the authority to ban online sales and direct-to-consumer shipping of commercial tobacco products, but litigation risk may increase depending on how the language is crafted.

The tobacco industry is litigious and has often sued to block policies that impact its bottom line. One potential line of attack it may employ against online sales bans is to raise “Dormant Commerce Clause” or “inter-state commerce” claims. This resource explains what the Dormant



Commerce Clause is, how it relates to online sales bans, and what jurisdictions can do to ensure their policies do not run afoul of it.

The Dormant Commerce Clause

Background

The Commerce Clause of the United States Constitution states: “The Congress shall have power to regulate commerce ... among the several states, and with Indian tribes.”² Although the Commerce Clause explicitly grants power to Congress, the Supreme Court has ruled that it also implicitly restricts state and local powers:

Reading between the Constitution’s lines, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also contains a further, negative command, one effectively forbidding the enforcement of certain state economic regulations even when Congress has failed to legislate on the subject.³

This implicit, “negative command” derives from a historical and structural understanding of the Constitution. As the Supreme Court has explained, “removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods.”⁴ The Constitution was designed and ratified, in part, to eliminate state protectionism and to create a national market.⁵ “In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism,” and thus far the Court has identified “no provision other than the Commerce Clause” that can “do the job.”⁶ And so this judge-made rule — the “Dormant Commerce Clause” — acts to restrict a state or local government’s ability to discriminate against or impede interstate commerce.

Dormant Commerce Clause Tests

The Court has crafted multiple tests or approaches to determine if a state law violates the Dormant Commerce Clause. Two of these tests are relevant for online sales bans: the test used for laws that facially discriminate against interstate commerce, and the test used for laws that are facially neutral but that incidentally burden interstate commerce.

- **Facially Discriminatory Laws:** Generally speaking, “state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁷ Any law that facially discriminates against out-of-state commerce is “virtually per se invalid” and “will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁸
- **Nondiscriminatory Laws that Burden Interstate Commerce (referred to as the “Pike Test”):** Some laws, in contrast, are facially neutral — they don’t make any obvious distinction between

in-state and out-of-state commerce — but they nonetheless impose an incidental burden on interstate commerce. Under the *Pike* Test, these laws survive judicial scrutiny provided they (1) pursue a “legitimate local public interest” and provided that (2) “the burden imposed” on interstate commerce is not “clearly excessive in relation to the putative local benefits.”⁹

Online Sales Bans

Jurisdictions can hypothetically pass a variety of laws or regulations banning online sales, not all of which would be upheld under a Dormant Commerce Clause challenge. Below are several types of online sales bans that jurisdictions could pass, starting with those most likely to survive a Dormant Commerce Clause challenge and moving on to those least likely to survive a challenge.

Online Sales Bans vs. Product Bans

Note that, for Dormant Commerce Clause purposes, laws banning online sales are slightly different than laws banning the sale of tobacco products altogether. The Public Health Law Center has published a resource on the [Dormant Commerce Clause and Tobacco Endgame](#) but, there, a Dormant Commerce Clause challenge would be based on the effects that a sales ban has on out-of-state manufacturers. The industry might argue, for example, that a state’s flavor ban creates a de facto rule for how out-of-state companies must manufacture their products, exceeding the state’s constitutional authority to regulate only those matters happening within its border. With an online sales ban, however, the industry’s Dormant Clause challenge would be more straightforward: by prohibiting online sales, the argument goes, the enacting jurisdiction is discriminating against out-of-state retailers who cannot otherwise enter the California market.

Banning All Online Sales and Direct-to-Consumer Shipments

Provided the restriction applies equally to *all* retailers, jurisdictions should be able to ban online sales and direct-to-consumer shipments without incurring significant risk from a Dormant Commerce Clause challenge. Such a restriction is facially neutral — it does not make any distinction between in- and out-of-state retailers — and thus could only be challenged under the *Pike* Test. And under that deferential balancing test, a defending jurisdiction could persuasively argue that the law advances legitimate public purposes like protecting public health by, for example, better enforcing flavor bans and protecting against youth access. A reviewing court is likely to agree that those benefits are not “clearly excessive in relation” to the burdens the law imposes on interstate commerce.



To be sure, industry could push back on such restrictions, arguing that, in practice, they significantly burden out-of-state retailers relative to in-state retailers. After all, if tobacco sales must be made in person, that gives an obvious advantage to brick-and-mortar stores within California.¹⁰ But those arguments are unlikely to prevail, especially because the burden of showing impermissible discrimination is on the challenger.¹¹

To better understand how these arguments might play out, it's helpful to think about the purpose behind the *Pike* Test. The premise of the test is that, if a law has the practical effect of burdening out-of-state businesses, that might reveal an impermissible, discriminatory motive. It reflects the “commonsense principle: Where there’s smoke, there’s fire.”¹² But with a straightforward online sales ban, there is neither. Such bans produce substantial public health benefits and treat in- and out-of-state companies the same, as both are prohibited from engaging in online sales. Indeed, it would be easier for many Nevada-based brick-and-mortar retailers to make in-person sales to Southern Californians than for Sacramento-based retailers, demonstrating that the burden is shared by both in- and out-of-state businesses.¹³ Certainly, an online sales prohibition might marginally benefit in-state retailers overall, but a “nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry.”¹⁴



Banning Online Sales but Permitting Direct-to-Consumer Shipments for In-Person Purchases

Litigation risk may increase if a jurisdiction were to enact a rule prohibiting online sales but permitting direct-to-consumer shipments for products that were purchased in person. While this is not a common policy in commercial tobacco control, it is a policy that has been observed for other retail products, like alcohol. A jurisdiction might take this approach as a compromise: it would provide some shopping flexibility by permitting, for example, subscription deliveries that were originated through an in-store purchase, but it would retain the benefits of in-person age verifications.

An out-of-state retailer might argue that such a policy more clearly discriminates against interstate commerce, as in-state retailers can more easily make direct-to-consumer shipments than out-of-state retailers. But a defending jurisdiction would have strong arguments that are similar to those for an outright online sales ban. The policy treats “similarly situated”¹⁵ retailers the same: all retailers, whether in- or out-of-state, can make direct-to-consumer shipments provided the purchases are originally made in-person. On balance that might give an advantage to in-state retailers, but it is not facially discriminatory, meaning it is reviewed under the *Pike* Test. And under that test, the defending jurisdiction could persuasively argue that the burdens on interstate commerce are well justified by substantial policy interests.¹⁶ Those policy interests

are somewhat attenuated, however, because the option for direct-to-consumer shipments makes it easier for consumers and retailers to get around minimum age rules and other tobacco laws. This sort of approach thus comes with slightly higher litigation risks and lower public health benefits than an outright online sales ban.

Restricting Online Sales or Direct-to-Consumer Shipping to Only In-State Retailers

A state or local jurisdiction could also prohibit all online sales and direct-to-consumer shipments *except* for those fulfilled by local or in-state retailers. Such a policy, however, would carry significant litigation risk, as it facially discriminates against interstate commerce. It would only survive judicial scrutiny if the defending jurisdiction could establish that its policy goals — like enforcing age or product restrictions — could not be “adequately served by reasonable nondiscriminatory alternatives.”¹⁷ Because there are reasonable, nondiscriminatory alternatives (like banning all online sales and direct-to-consumer shipments), such a policy is unlikely to survive judicial scrutiny.¹⁸

Conclusion

States and local jurisdictions can ban or restrict online sales and direct-to-consumer shipping of tobacco products to the extent the policy is genuinely designed to advance legitimate public health interests like ensuring proper age verification and the efficient enforcement of product restrictions. But if jurisdictions enact policies that are intended and designed to privilege local businesses against out-of-state online retailers, they may face risk from Dormant Commerce Clause claims.

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In contrast, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcml.org>. When the word “tobacco” is used throughout this publication, a commercial context is implied and intended.
- 2 U.S. Const. art. I, § 8, cl. 3.

- 3 *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023).
- 4 *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019)
- 5 *Tennessee Wine*, 139 S. Ct. at 2460-61.
- 6 *Id.*
- 7 *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)).
- 8 *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal citations and quotation marks omitted).
- 9 *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court recently tackled how, exactly, the *Pike* Test works in a fractured opinion featuring four concurrences. See *Nat'l Pork Producers Council v. Ross*, 598 U.S. at 356.
- 10 See, e.g., *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008)] (concluding that "Kentucky's in-person requirement makes it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries").
- 11 *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).
- 12 *Nat'l Pork Producers Council*, 598 U.S. at 393 (Barrett, J., concurring in part); see also *id.* at 389 n.4.
- 13 See *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 38 (1st Cir. 2007) ("Distance is not congruent with state lines, and the effects of geography alone do not constitute impermissible discrimination. An effect is not discriminatory, in violation of the dormant commerce clause, if it results from natural conditions.").
- 14 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (emphasis added). See also *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) (upholding a "city ordinance prohibiting vacation rentals unless primary resident remained in dwelling," in part, because it impacted in- and out-of-state property owners the same) *Freeman v. Corzine*, 629 F.3d 146, 163 (3d Cir. 2010) (upholding New Jersey's ban on direct shipments of any winery and explaining that the "Commerce Clause does not place New Jersey under an obligation to cater to the preferred marketing practices of out-of-state businesses"); *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008) (ruling that a Tennessee law banning direct-to-consumer shipments of wine does not violate Dormant Commerce Clause).
- 15 *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (explaining that, for constitutional purposes, what matters is whether companies are "similarly situated").
- 16 See *supra* notes 13-14 and accompanying text. See also, e.g., *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010) (upholding an Arizona law that permits small wineries — both in- and out-of-state — to ship to consumers if purchases are made in-person); *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 461 (7th Cir. 2012) (upholding an Indiana law that permits wineries to ship to consumers if verifying the consumer's age in person despite its incidental burden on out-of-state wineries); but see *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008) (concluding that a Kentucky ordinance prohibiting direct-to-consumer shipments of wine unless the consumer visits the winery in person violates the Dormant Commerce Clause).
- 17 *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal citations and quotation marks omitted).
- 18 See, e.g., *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847, 852 (7th Cir. 2018) (concluding that an Illinois law that permits in-state liquor retailers to ship products within the state but prohibits out-of-state retailers from doing the same violates the Dormant Commerce Clause); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 223 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567, 214 L. Ed. 2d 336 (2023) (same for North Carolina law).