

DORMANT COMMERCE CLAUSE AND TOBACCO ENDGAME



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 A growing number of California communities are becoming interested in pursuing policies that end the sale of all commercial tobacco products.

They have clear authority to adopt these policies.¹ Commercial tobacco endgame laws will not only minimize tobacco-related death and disease, they will also limit the tobacco industry's stream of profits. Because of this potential effect on its bottom line, the tobacco industry will likely use various strategies — including litigation — to challenge endgame policies.

Our publication, *Navigating the Takings Clause While Ending the Tobacco Epidemic*, examines how the tobacco industry might use legal theories related to the Fifth Amendment's Takings Clause to challenge commercial tobacco endgame policies.² This policy brief looks at the Dormant Commerce Clause and how the tobacco industry could potentially use legal arguments based on this Clause to attempt to derail endgame initiatives in California. The tobacco industry recently raised Dormant Commerce Clause arguments to legally challenge the California law prohibiting the sale of flavored tobacco (SB-793). The industry argued that the law was invalid under the Dormant Commerce Clause because by prohibiting the sale of flavored products, it regulated how out-of-state manufacturers ought to produce their products.³ Because the industry raised this argument in the flavored tobacco sales context, it is likely to do so again in the endgame context.

This policy brief addresses whether prohibiting the sale of all tobacco products within a given locality would violate the Dormant Commerce Clause and explains why such an endgame policy would likely be constitutional.

What is the Dormant Commerce Clause?

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."⁴ In addition to this affirmative grant of power to Congress to regulate commerce, the U.S. Supreme Court also infers that the Commerce Clause gives Congress authority to limit state and local regulation of interstate commerce. This second function is known as the Dormant Commerce Clause and can be applied to find state and local regulations unconstitutional.⁵

The purpose of the Dormant Commerce Clause is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors."⁶ It restricts states from discriminating against interstate commerce by favoring in-state commerce over out-of-state commerce and by imposing excessive restraints on interstate trade. If a statute discriminates against out-of-state commerce, it is almost always invalid.⁷ In these cases, the burden is on the local government to demonstrate that no adequate nondiscriminatory alternatives exist.⁸

When, however, a law is neutral and does not discriminate against interstate trade, courts apply a more nuanced balancing test, often called the *Pike* test.⁹ This test consists of two elements: (1) determining whether the challenged law is designed to promote a legitimate local benefit, and (2) determining whether the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits."¹⁰ Because a tobacco endgame policy would treat both in-state and out-of-state tobacco retailers alike, a court would likely analyze any Dormant Commerce Clause challenge by using this balancing test.



The *Pike* test leaves it to the court’s discretion to determine what qualifies as a “clearly excessive” burden or a “local benefit.”¹¹ Courts have noted that “[m]ost statutes that impose a substantial burden on interstate commerce do so because they are discriminatory.”¹² So when a law is evenhanded and advances a legitimate local interest, a court is unlikely to find that it imposes an excessive burden on interstate commerce. Indeed, “[o]nly a small number of cases invalidating laws under the Dormant Commerce Clause have involved laws that were genuinely nondiscriminatory.”¹³

One tobacco control example of a law struck down by this balancing test involved a Massachusetts law that required warning text for all internet and national magazine tobacco advertisements that could be viewed in the state. The court ruled that the burden on out-of-state commerce — requiring content distributed nationally to include Massachusetts-specific warnings — was too great when compared to the law’s benefits.¹⁴

In applying the balancing test, courts also look to whether there is a need for national uniformity and have struck down laws involving “activities that are inherently national or require a uniform system of regulation — most typically, interstate transportation.”¹⁵

In addition, under a Dormant Commerce Clause balancing analysis, courts will assess whether a law violates the “extraterritoriality doctrine.” As the U.S. Supreme Court explained in *Healy v. Beer Institute*, “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid.”¹⁶ The tobacco industry has sought to undermine tobacco regulations in California, arguing that those regulations violate the Dormant Commerce Clause because they affect tobacco businesses outside California. For example, in the recent lawsuit challenging a California law prohibiting the sale of flavored tobacco products, the tobacco industry argued that the law violated the Dormant Commerce Clause because it dictated how tobacco manufacturers outside California should manufacture their tobacco products — i.e., without characterizing flavors.¹⁷

But courts have made clear that the reach of the extraterritoriality doctrine discussed in *Healy* is limited.¹⁸ The *Healy* case involved a Connecticut price-control statute that required beer distributors to affirm that Connecticut prices were at least as low as those in other states. The Court found that this Connecticut statute violated the Dormant Commerce Clause because it prevented distributors from pricing products independently in neighboring states.¹⁹ Recently, one court noted that *Healy* and similar cases were “not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.”²⁰ Another court stated that “even when state law has significant extraterritorial effects, it passes Commerce Clause muster when ... those effects result from the regulation of in-state conduct.”²¹ Thus, because courts have held that regulating purely in-state conduct does not violate the extraterritoriality doctrine, tobacco industry arguments relying on *Healy* against tobacco sales restrictions are unlikely to succeed.²²

Prohibiting the Sale of All Tobacco Products

Prohibiting the sale of all tobacco products — such as ordinances in effect in Beverly Hills²³ and Manhattan Beach,²⁴ for example — may be challenged by the tobacco industry under the Dormant Commerce Clause. Because state or local regulations prohibiting the sale of all tobacco products treat both in-state and out-of-state sellers alike, it is unlikely that courts would view these regulations as discriminatory in purpose or effect. So a court reviewing a Dormant Commerce Clause challenge to such regulation would apply the *Pike* balancing test.

Legitimate Public Interest

The first part of the *Pike* test is determining whether the challenged law serves a legitimate public interest.²⁵ Protecting health by regulating the sale of harmful products has long been recognized as a legitimate public interest — indeed a core component of state and local police power.²⁶ Given overwhelming evidence of the catastrophic health consequences of tobacco use, courts typically find that protecting the public from the harms of tobacco is a legitimate public interest.²⁷ Indeed, the U.S. Surgeon General has identified greater restrictions on tobacco product sales, including prohibitions of the sale of entire categories of tobacco products, as interventions that could help end the tobacco epidemic in the United States.²⁸

Substantial Burden on Interstate Commerce

The second part of the *Pike* balancing test considers whether the burden the challenged law imposes on interstate commerce is clearly excessive compared to the local benefits of the law.²⁹ This does not involve second-guessing legislatures by weighing the probable costs and benefits of the particular statute. Instead, it focuses on whether the burden on out-of-state commerce is different from the burden on intrastate commerce, such that the law might be designed to favor local interests.³⁰



Courts have typically upheld laws as legitimate under the Commerce Clause where they only regulate in-state conduct, even when those laws create significant extraterritorial effects.³¹ For example, in *Minnesota v. Clover Leaf Creamery Co.*, the U.S. Supreme Court upheld a state statute that prohibited milk retailers from selling products in plastic, nonreturnable milk containers because the statute evenhandedly regulated all milk sellers — both in-state and out-of-state.³² The Court also found there was a substantial state interest in reducing solid waste and a relatively minor impact on interstate commerce because dairies already packaged milk in multiple types of containers.³³ Just because an out-of-state business may need to change its practice does not render a law invalid under the Commerce Clause. The Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations,” and a company is not entitled to its “preferred method of operation.”³⁴

As with the Court’s reasoning in *Clover Leaf Creamery*, prohibiting the sale of all tobacco products would likely be viewed as impacting intrastate and interstate commerce similarly. Commercial tobacco endgame policies that prohibit the sale of all tobacco products — such as those that have been adopted in Manhattan Beach and Beverly Hills — do not favor in-state commercial tobacco interests over out-of-state interests. They apply even-handedly, prohibiting all sales of tobacco products within the jurisdiction no matter where seller or manufacturer is located. Thus, a state or local law prohibiting all tobacco sales is unlikely to be invalidated because it would not impose a substantial burden on interstate commerce under the *Pike* test. This conclusion is supported by rulings in several cases, discussed below, analyzing Dormant Commerce Clause challenges to comparable product ban cases.

National Uniformity

Besides the *Pike* balancing test, courts have struck down laws under the Dormant Commerce Clause where they have found a need for national uniformity. The U.S. Supreme Court has rarely held that the Commerce Clause preempts an entire policy area from state regulation; it has done so “only when a lack of national uniformity would impede the flow of interstate goods.”³⁵ Classic examples of laws that have been found to implicate national uniformity are those that impose significant burdens on interstate transportation³⁶ or on national sports leagues.³⁷

Laws prohibiting the sale of all tobacco products are unlikely to implicate concerns about national uniformity, even if most states chose to adopt such regulations. The U.S. Supreme Court has noted that the concern about national uniformity does not arise simply because several — or even all — states may adopt the same approach to regulation.³⁸ This would in fact be a move toward and not away from uniformity. Therefore, it would be unavailing to argue that prohibitions on the sale of tobacco products would be burdensome to interstate commerce because other states may choose to adopt them.



Moreover, Congress’s intent is central in determining the necessity of national regulatory uniformity. Because Congress has the sole power to regulate interstate commerce, it may “permit the states to regulate the commerce in a manner which would otherwise not be permissible.”³⁹ In the context of tobacco product sales bans, Congress expressly preserved states’ authority to prohibit the sale of tobacco products when it enacted the Tobacco Control Act.⁴⁰

Product Sales Prohibition Cases

Below are descriptions of several cases upholding laws prohibiting the sale of various products — including space heaters, shark fins, and certain meat products — both under the *Pike* balancing test and under national uniformity analysis. These cases are instructive for analyzing how a court would likely view a Dormant Commerce Clause challenge of law prohibiting the sale of all tobacco products.

Space Heaters. *National Kerosene Heater Ass’n, Inc. v. Massachusetts* involved a Massachusetts law that banned the sale and use of unvented liquid-fired space heaters. The challengers argued that the law violated the Dormant Commerce Clause because it unduly burdened interstate commerce. The court rejected the challenge because the statute’s purpose was within the state’s police powers, and the statute was not discriminatory.⁴¹ According to the court, because promoting fire safety was at the heart of Massachusetts’ police powers, the law would be invalidated only if it either discriminated against interstate commerce or it impeded necessary uniformity.⁴² In the court’s view, the Massachusetts law was not an example of

“simple economic protectionism” because it was nondiscriminatory, banning the sale of all unvented space heaters, wherever manufactured.⁴³ The court also rejected the challengers’ argument that the law was discriminatory in effect because it only impacted out-of-state manufacturers since there were no in-state manufacturers of unvented kerosene space heaters. As noted by the court, the core of the discrimination analysis is whether an in-state manufacturer is benefiting at the expense of an out-of-state company.⁴⁴

Finally, the court considered whether the Massachusetts ban impeded any required national uniformity, and concluded that the law effected minimal disruption, if any, on uniformity. The court reasoned:

A total ban certainly [disrupts uniformity] to a lesser extent than a regulation which imposes certain manufacturing standards which conflict with manufacturing standards imposed by other states. Under the ban, kerosene heaters can manufacture the same unvented heater nationwide; they simply may not sell it in Massachusetts.⁴⁵

This case is highly instructive for how a court would evaluate a comparable prohibition of the sale of all tobacco products. A prohibition on the sale of tobacco products would likely not be viewed as discriminatory because it would apply evenhandedly to all tobacco product manufacturers or sellers — both in-state and out-of-state. Further, consistent with the court’s reasoning here, a tobacco sales prohibition would likely not significantly impact national uniformity since it would not regulate tobacco manufacturing standards. Out-of-state manufacturers would not have to make any changes to their manufacturing standards because of the law.

Shark Fins. In another recent case — *Chinatown Neighborhood Ass’n v. Harris* — the court upheld a ban on the sale, possession, or trade of shark fins in California under the Commerce Clause. The court found that the law’s extraterritorial effects were permissible under the Dormant Commerce Clause because those effects resulted from regulation of in-state conduct.⁴⁶ The court also found in applying the *Pike* balancing test that the shark fin ban served legitimate purposes by preserving the environment and protecting wildlife and public health.⁴⁷

Like the shark fin ban in *Chinatown Neighborhood*, ending the sale of tobacco products serves legitimate purposes by minimizing death and disease associated with the sale of tobacco products. Also, even if prohibiting tobacco product sales has extraterritorial effects, this would not be impermissible under the Dormant Commerce Clause because these effects would result from regulating in-state tobacco sales.

The court also noted that the ban did not interfere with a uniform system of regulation because ocean fishery management was an “inherently cooperative endeavor” between state and federal governments, contemplating state and federal cooperation.⁴⁸ A court might also



draw parallels between fisheries management and the cooperative management of tobacco products, where Congress has delegated specific authority to the states.⁴⁹

Meat Production. Two cases recently upheld California's Proposition 12, which limits sale of cruelly produced veal and pork, against Dormant Commerce Clause challenge. In July 2021, the Ninth Circuit found in *National Pork Producers Council v. Ross* that laws regulating only in-state conduct — even if they require out-of-state producers to meet burdensome requirements to sell in-state — do not violate the Dormant Commerce Clause.⁵⁰ Proposition 12 did not regulate wholly out of state conduct because it controls only the types of products sold, regardless of whether it is manufactured in California or elsewhere.⁵¹ Also, there was no impermissible burden under the *Pike* balancing test because: "laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce."⁵²

In *North American Meat Institute v. Becerra*, out-of-state meat producers also lost a challenge to Proposition 12, with the court finding that since the prohibition of selling certain meat products applied only to in-state conduct — and was not regulating conduct taking place wholly outside California — it did not violate the extraterritoriality principle.⁵³ The court also found the law did not substantially burden interstate commerce because it was directed to *how* the meat was produced, not the location *where* it was produced.⁵⁴

Another case, *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, dealt with a ban on the sale of products produced by force feeding birds, targeting foie gras. Like the veal and pork products laws, the court found that the foie gras law was not aimed at out-of-state producers because it applied evenly to sales by out-of-state and California entities.⁵⁵ Nor was there any demonstration that national uniformity was required for foie gras production, since federal poultry inspection laws were silent on force-feeding.⁵⁶

There are clear parallels with the meat production cases and how a court would consider tobacco product sales restrictions, where impacts on out-of-state manufacturing would be permissible so long as the law is not discriminatory.

Conclusion

The legal decisions above strongly suggest that prohibiting the sale of tobacco products would survive a Dormant Commerce Clause challenge. Such a prohibition would likely not be viewed as discriminatory in purpose or effect and so would be analyzed under the *Pike* balancing test.

Because regulating commercial tobacco products is a core public health function that unquestionably furthers a legitimate public interest, a commercial tobacco sales prohibition would likely satisfy the first prong of the *Pike* test. A tobacco product sales restriction would likely also satisfy the substantial burden prong of the *Pike* test, as courts have often upheld even laws that burden interstate commerce if they are focused entirely on in-state conduct.

Finally, a complete tobacco sales prohibition likely would not be invalidated under a national uniformity analysis. Courts have upheld regulation both in matters contemplating state and federal cooperation and where Congress has delegated authority to states. Because both are true for the tobacco regulatory context, a court is unlikely to find that national uniformity is implicated.

As the Ninth Circuit recently noted: “While the dormant Commerce Clause is not yet a dead letter, it is moving in that direction.”⁵⁷ The circumstances under which a California law would violate the Dormant Commerce Clause are narrow and would not likely be implicated by a tobacco sales prohibition.

Endnotes

- 1 Joelle Lester & Mark Meaney, *Not For Sale: State Authority to End Cigarette Sales*, 44 MITCHELL HAMLINE L. REV. 68 (2018), <https://mitchellhamline.edu/law-review/2018/08/02/joelle-lester-mark-meaney-not-for-sale-state-authority-to-end-cigarette-sales>.
- 2 Andrew Twinamatsiko, *Navigating the Takings Clause While Ending the Tobacco Epidemic*, Law & Policy Partnership to End the Commercial Tobacco Epidemic (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/Endgame-Policy-Brief.pdf>.
- 3 Complaint at 18, R.J. Reynolds v. Becerra (S.D. Cal., filed Oct. 9, 2020) (No. 20CV1990). Interestingly, the plaintiffs did not include the Dormant Commerce Clause argument in their motion for preliminary injunction, perhaps viewing it as weaker than their other claims (Motion for Preliminary Injunction, R.J. Reynolds v. Becerra (S.D. Cal., filed Oct. 9, 2020) (No. 20CV1990)).
- 4 U.S. CONST. art. I, § 8, cl. 3.
- 5 Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).
- 6 Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997).
- 7 Granholm v. Heald, 544 U.S. 460, 476 (2005); see also *Nat'l Elec. Mfrs' Ass'n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001).
- 8 See *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003).
- 9 *Id.*
- 10 *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also *Just Puppies, Inc. v. Frosh*, 438 F. Supp. 3d 448, 495 (D. Md., February 7, 2020) (comparing the *Pike* analysis to the rational basis test used by courts in other contexts).
- 11 See *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 596 (1997) (Scalia, J. dissenting; joined by Rehnquist, C.J., Thomas, J., and Ginsburg, J.) (“Our cases have struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States’ police powers, each exercise of which no doubt has some effect on the commerce of the Nation.... The rules that we currently use can be simply stated, if not simply applied....”).
- 12 *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013).
- 13 *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015).
- 14 *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000).
- 15 *Chinatown Neighborhood Ass’n*, 794 F.3d at 1146.
- 16 *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).
- 17 See Complaint at 19, R.J. Reynolds v. Becerra, (S.D. Cal. 2020) (No. 3:20-cv-1990).
- 18 See *Nat'l Pork Producers Council v. Ross*, 2021 WL 3179247, *3 (9th Cir. 2021) (noting that the broad extraterritoriality statements in *Healy* “cannot mean what they appear to say”).
- 19 *Healy*, 491 U.S. at 327.
- 20 *Eleveurs*, 729 F.3d at 951; see also *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (“The Supreme Court has since indicated that the extraterritoriality doctrine’s application is essentially limited to cases involving the sorts of price-setting statutes that those cases addressed”) (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)); see also *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 953 (9th Cir. 2019) (citing Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979, 998-99 (2013) that an “expansive view of the Healy doctrine ‘could have become a significant restriction on state regulatory power’ if the Court had adopted it”).

- 21 Chinatown Neighborhood Ass'n, 794 F.3d at 1145.
- 22 See, e.g., *Eleveurs*, 729 F.3d at 951; *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146 (rejecting the extraterritoriality argument as not applicable to California's Shark Fin law because it did not regulate prices in other states or attempt to regulate transactions conducted wholly out of state).
- 23 BEVERLY HILLS, CAL., Code § 4-2-2115(C) (2021) (prohibiting the renewal of any tobacco retailer licenses after December 31, 2020).
- 24 MANHATTAN BEACH, CAL., ORDINANCE No. 20-0007 (2020).
- 25 *Pike*, 397 U.S. at 142.
- 26 See *Rocky Mountain Farmers Union*, 913 F.3d at 955 (finding a state's "ability to control its internal markets and combat local harms is squarely within its traditional police power"); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) ("under our constitutional scheme, the States retain broad power to legislate protection for their citizens in matters of local concern such as public health"); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960) (noting that the Constitution "when conferring upon Congress the regulation of commerce ... never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country").
- 27 See *Consolidated Cigar Corp.*, 218 F.3d at 56 ("informing consumers of the health risks associated with cigar consumption is unquestionably a legitimate local public interest").
- 28 U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT: THE HEALTH CONSEQUENCES OF SMOKING — 50 YEARS OF PROGRESS 858 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.
- 29 *Pike*, 397 U.S. at 142.
- 30 See *Brown & Williamson Tobacco Corp.*, 320 F.3d at 209.
- 31 See *Chinatown Neighborhood Ass'n*, 794 F.3d at 1145; see also *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952 (9th Cir. 2019) (rejecting a challenge to California's low carbon fuel standard because "subjecting both in and out-of-jurisdiction entities to the same regulatory scheme to make sure that out-of-jurisdiction entities are subject to consistent environmental standards is a traditional use of the State's police power.")
- 32 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981).
- 33 *Id.*
- 34 See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (noting the Dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations"); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151 (9th Cir. 2012) (citing *Exxon Corp.* in upholding a law prohibiting prescription eyewear from being sold at a location where eye exams are conducted).
- 35 *Exxon Corp.*, 437 U.S. at 128.
- 36 See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997); *Kassel v. Consolidated Freightways Corp*, 450 U.S. 662 (1981) (finding that Iowa's ban of trucks over 60 feet had a disproportionate burden on out-of-state businesses and an insufficient safety interest).
- 37 See *Eleveurs*, 729 F.3d at 952 (observing that "examples of 'courts finding uniformity necessary' fall into the categories of 'transportation' or 'professional sports leagues' ")
- 38 *Exxon Corp.*, 437 U.S. at 128.
- 39 *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)).
- 40 21 U.S.C. § 387p(a)(1) (2021).

41 Nat'l Kerosene Heater Ass'n, Inc. v. Massachusetts, 653 F. Supp. 1079, 1092 (D. Mass. 1986).

42 *Id.* at 1093.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 1145.

47 Chinatown Neighborhood Ass'n, 794 F.3d at 1147.

48 *Id.*

49 21 U.S.C. § 387p(a)(1) (2021).

50 Nat'l Pork Producers Council, 2021 WL 3179247 at *4.

51 *Id.* at *6.

52 *Id.* at *7.

53 N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1031 (C.D. Cal. 2019); see also *Int'l Fur Trade Fed'n v. City and County of San Francisco*, 472 F. Supp. 3d 696, 702 (N.D. CAL. 2020) (noting that a San Francisco ban on fur sales did "not apply to fur products that are manufactured and sold wholly out of state").

54 N. Am. Meat Inst. at 1034 (also noting that the "cost of complying" is not a sufficient interest for *Pike* balancing).

55 *Eleveurs*, 729 F.3d at 949. The court in *Eleveurs* did note that the law did not constitute a "complete import and sales ban" because there may be other ways to produce foie gras than the prohibited force-feeding. In *Int'l Fur Trade Federation* as well, the court cited *Eleveurs* to draw a distinction between laws that preclude a preferred method of operation and those that are complete bans, stating that the "latter impose a substantial burden on interstate commerce; the former do not." 472 F. Supp. 3d at 702. But neither case concluded that a complete sales prohibition would be impermissible under the Dormant Commerce Clause and both support that tobacco sales prohibitions, which like those on fur and foie gras apply to in-state conduct, would not be an impermissible burden on commerce taking place entirely out of the state.

56 *Eleveurs*, 729 F.3d at 950.

57 Nat'l Pork Producers Council, 2021 WL 3179247 at *8.