



January 30, 2024

The Honorable Joanne J. Ferrary
New Mexico State Representative
6000 Moonrise Avenue
Las Cruces, NM 87012

Re: Opinion Request – Dormant Commerce Clause Theory’s application to proposed House Bill 230

Dear Representative, Ferrary:

You requested our advice concerning the constitutionality of NMSA 1978, Section 7-17-5 (2019) and possible legal consequences of enacting House Bill 230 (2023). Section 7-17-5 imposes a liquor excise tax on wholesalers that sell alcoholic beverages, and the Bill seeks to unify liquor excise tax rates on alcoholic beverages sold. In particular, you ask:

1. Does imposing a lower alcohol tax rate on wholesale distribution of alcoholic beverages produced by “craft distillers” violate the dormant Commerce Clause of the United States Constitution?
2. What are the legal consequences of enacting proposed House Bill 230 (2023), which seeks to raise the basic alcohol tax rates imposed by NMSA 1978 Section 7-17-5?

As discussed in more detail below, based on our review of the applicable law and information provided and available to us at this time, we conclude:

1. No, the lower tax rate imposed on wholesale distribution of alcoholic beverages produced by “craft distillers” does not implicate or violate the dormant Commerce Clause of the United States Constitution.
2. There are no anticipated constitutional concerns presented by House Bill 230 (2023) because the proposed bill does not distinguish between in- and out-of-state economic interests on its face and does not discriminate against interstate commerce in its effects.

The Dormant Commerce Clause’s History and Application

Article I, Section 8, Clause 3 of the U.S. Constitution provides:

Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

This “Commerce Clause,” as it is commonly known, is, in pertinent part, a positive grant of power to Congress to regulate interstate commerce without explicitly limiting the authority of a state to also regulate commerce. Nevertheless, the U.S. Supreme Court has interpreted the Commerce Clause to preclude state laws that unduly restrict interstate commerce, even where Congress has not purported to regulate, or has been “dormant” on an issue. *See Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1135-36 (10th Cir. 2016).

This inverse view of Congressional authority over commerce addresses concern about economic protectionism and prevents states from protecting in-state interests while burdening out-of-state interests. *See id.*; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268, 271 (1984). A court will generally invalidate state legislation that constitutes economic protectionism if the law has discriminatory purpose or discriminatory effect on interstate commerce. *See Brohl*, 814 F.3d at 1135-36.

The analysis and decision in *Dias* illustrate application of dormant Commerce Clause principles in a related context.¹ That case considered the constitutionality of a Hawaiian law that exempted locally produced okolehao and pineapple wine from its liquor tax for a specified and limited number of years, to encourage and promote the establishment of these new industries. 468 U.S. at 265. The United States Supreme Court held that the tax exemptions violated the dormant Commerce Clause because the law clearly discriminated against interstate commerce by bestowing a commercial advantage to local products. *Id.* at 272-73. Despite the legitimate goal of stimulating local economic development, the Court noted that “the Commerce Clause . . . limit[s] . . . the means by which a state can constitutionally seek to achieve that goal.” *Id.* at 271.

In contrast, a Tenth Circuit Court of Appeals decision illustrates when a law that potentially impacts interstate commerce does not offend the dormant Commerce Clause. The law at issue in *Brohl* imposed reporting and notice obligations on retailers. 814 F.3d at 1132-33.² Specifically, the law required retailers that did not collect sales taxes to send notice to purchasers, advising that they may be subject to Colorado use taxes. *Id.* Effectively, this meant only out-of-state retailers had reporting and notice requirements. *See id.* at 1133. The court acknowledged the differential treatment of in-state and out-of-state retailers but concluded that the reporting obligations did not give in-state retailers a competitive advantage and therefore did not run afoul of the dormant Commerce Clause. *See id.* at 1141, 1143.

¹ *See Dias*, 468 U.S. at 265-75 (1984) (holding tax exemption violates Commerce Clause). Hawai‘i enacted its liquor tax in 1939. *Id.* at 265. In 1971, the Hawaiian legislature sought to encourage the development of the Hawaiian liquor industry by enacting an exemption for okolehao and fruit wine. *Id.* Locally produced sake and fruit liqueurs were not exempted from the liquor tax. *Id.*

² Because Colorado could not compel out-of-state retailers with no physical presence in the state to collect sales tax, it passed a law requiring retailers that did not collect sales tax to send notice to purchasers that they may be subject to Colorado’s use tax. *Id.* The law also required those out-of-state retailers to send: (1) annual purchase summaries to Colorado purchasers buying goods from the retailers; and (2) annual customer information reports to the Department of Revenue. *Id.*

Section 7-17-5 Does Not Implicate or Violate the Dormant Commerce Clause

The current New Mexico statute imposing liquor excise taxes on wholesalers does not violate the dormant Commerce Clause because it does not differentiate between in- and out-of-state craft distillers or give in-state craft distillers a competitive advantage. Section 7-17-5 imposes a liquor excise tax on wholesalers that sell alcoholic beverages. The excise tax rates vary based upon the type of alcohol sold. Wholesalers that sell spiritous liquors are taxed at a rate of \$1.60 per liter, whereas spiritous liquors manufactured or produced by a craft distiller are taxed at more favorable rates.

NMSA 1978, Section 60-6A-6.1 (2021) outlines the requirements to apply for and receive a craft distiller's license in New Mexico. That statute allows both in-state and out-of-state distillers to obtain such a license and does so on equal terms.

Unlike the unconstitutional Hawaii statute in *Dias*, the New Mexico excise tax imposed on wholesalers incentivizes them to sell all spiritous liquors—whether manufactured or produced in- or out-of-state by craft distillers. Compare § 7-17-5(A)(5) (providing for the liquor excise tax on “beer manufactured or produced by a microbrewer *and sold* in this state,” but not limiting such tax to beer *manufactured or produced* in this state (emphasis added)), with *Dias*, 468 U.S. at 265 (noting that the Hawaiian tax exempted only in-state producers of okolehao and pineapple wine). Section 7-17-5(A)(5)'s purpose and effect are not discriminatory or protectionist and do not implicate the dormant Commerce Clause.

In other words, because the dormant Commerce Clause is only concerned with burdens on interstate commerce, this limitation on state regulatory authority would not be implicated to in-state craft distillers marketing or selling out-of-state. Section 7-17-5(A)(5) does not subject out-of-state craft distillers to higher excise tax rates. Both in-state craft distillers and out-of-state craft distillers may apply for a New Mexico license to receive the favorable tax rate. Moreover, the fact that the tax only applies to craft distillers *selling* beer in the state provides no basis for concluding otherwise—New Mexico has no authority to tax beer sold in other states. Again, the dormant Commerce Clause is simply not implicated. Section 7-17-5(A)(5) does not discriminate against out-of-state craft distillers and as a result, does not offend the dormant Commerce Clause.

Proposed Legislation – House Bill 230

The proposed bill seeking, in part, to unify liquor excise tax rates on alcoholic beverages sold would similarly not implicate or violate the dormant Commerce Clause. As discussed above, the dormant Commerce Clause limits state regulation of interstate commerce and is primarily concerned with preventing economic protectionism by states. State regulation that discriminates against interstate commerce will survive constitutional challenge if the state can show that the law advances a legitimate local purpose that could not be advanced by reasonable nondiscriminatory alternatives. A statute may be invalidated only where the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

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As with Section 7-17-5(A)(5), the proposed bill does not distinguish between in- and out-of-state economic interests on its face and does not discriminate against interstate commerce in its effects. House Bill 230 seeks to unify excise tax rates for all spiritous liquors, whether the wholesaler selling the alcoholic beverage sells products produced in- or out-of-state. Similarly, in the same manner as analyzed above, the proposed bill does not place a burden on interstate commerce. Because House Bill 230 does not treat in- and out-of-state economic interests differently, distinguish between the two, or place a burden on interstate commerce, it does not implicate the dormant Commerce Clause.

Conclusion

In accordance with our analysis and interpretation of the statutes identified, the taxation of craft distillers under Section 7-17-5 and proposed changes to liquor excise taxes in House Bill 230 do not violate or implicate the dormant Commerce Clause. Where there is no discriminatory purpose or impact and no undue burden on interstate commerce, there is no way to run afoul of the dormant Commerce Clause.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

A handwritten signature in black ink that reads "Kristin Hovie". The signature is written in a cursive, flowing style.

Kristin E. Hovie

Assistant Attorney General