

## Legal Authority of City to Ban Car Alarms: Commerce Clause Issues

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Mateo Taussig\*

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### INTRODUCTION

This memorandum discusses whether the Commerce Clause prohibits the City Council from banning the sale, installation or use of audible car alarms in the City of New York. It concludes that the City Council may act to ban car alarms, as the ban would not discriminate against non-state entities, does not isolate the State or City from national or regional problem, and is not an undue burden on interstate commerce.<sup>1</sup>

### DISCUSSION

The Commerce Clause grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art I, § 8, cl. 3. State and local police powers are circumscribed by the Commerce Clause, but in most cases in “the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.” *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35-36 (1980). Regulation pursuant to the state and local police power is “presumptively valid” whereas regulatory regimes that are “protectionist in nature” are subject to a high level of scrutiny. *Jamaica Ash & Rubbish Removal Co. Inc. v. Ferguson*, 85 F. Supp. 2d 174 (E.D.N.Y. 2000) (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

Absent specific Congressional action (as is presumably the case with aftermarket car alarms) the Commerce Clause contains a “dormant” aspect that “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d. Cir. 2003) (internal citation and quotation omitted). As the Second Circuit explained in

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\* J.D.; consultant to Transportation Alternatives.

<sup>1</sup> The overall regulatory structure governing noise regulation, the principles governing state and local relations, and objections to a ban on alarms, are discussed in an earlier Transportation Alternatives memorandum, available as Appendix B (“App. B”) to the report *Alarmingly Useless: The Case for Banning Car Alarms in New York City*. For background context, please make reference to that memorandum.

*Brown & Williamson*, the purpose of the dormant commerce clause is to “preserve[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.” *Id.* at 208 (internal citations and quotations omitted).

Regulation that has economic effects outside the regulating state does not automatically “affect interstate commerce” in violation of the Commerce Clause. Rather, the regulation must also “(i) discriminate[] against interstate commerce, or (ii) impose[] burdens on interstate commerce that are incommensurate with putative local gains.” *Brown & Williamson*, *supra*, at 208. The proposed bans on the sale, installation or use of aftermarket car alarms do not, by either of these two measures, affect interstate commerce.

First, the proposed bans do not discriminate against out of state or out of municipality entities, nor do they shift the costs of regulation onto other states, “permitting in-state lawmakers to avoid the costs of their political decisions.” *Brown & Williamson*, *supra* at 209 (citing *Nat’l Elec. Mfr’s Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d. Cir. 2001)). Nor do they seek to isolate the state or the municipality from a common problem. *Clean Air Markets Corp. v. Pataki*, 194 F. Supp. 2d 147 (N.D.N.Y. 2002) (state air pollution program served to isolate state from common environmental problem). Rather the proposed bans restrict the activity of residents in selling and utilizing annoying and disruptive devices in a manner that has no apparent detrimental affects on other areas, states or regions.

However, in testimony to the City Council committee in June 2003, Directed Electronics stated that the proposed bills discriminate against out of state aftermarket installers because they do not attempt to regulate out of state auto manufacturers in an equal manner.<sup>2</sup> This complaint is not informed by Commerce Clause jurisprudence as the proposed bills do not discriminate *in favor* of aftermarket entities residing in New York City *or against* ones outside of the City—which would be the correct test of discrimination. National manufacturers are themselves likely out of state. Moreover, the auto manufacturer and the aftermarket entities are different industries with only one point of overlap—and there are rational reasons for exempting national manufacturers.

With respect to the proposed ban on the *use* of audible car alarms, Directed Electronics discrimination concerns do not apply as these apply uniformly to all alarms wherever and by whomever they are sold and installed—whether by aftermarket or by manufacturers. There is no right under the Commerce Clause to use every feature of one’s vehicle in New York City as the City retains the right under explicit state grant and traditional home rule principles to set base-line rules for parking the use of its streets. *See App. B.*

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<sup>2</sup> Testimony of Directed Electronics, Inc, June 11, 2003 (“DE Test.”) (“exempt[] vehicle manufacturers that install security systems in their vehicle at the factory; however, the law imposes criminal penalties for aftermarket manufacturers regarding the same conduct, thus there is discrimination of out of state aftermarket manufacturers”).

Secondly, the alternative criteria for determining whether local regulation affects interstate commerce is whether it “impose[s] burdens on interstate commerce that are incommensurate with putative local gains.” *Brown & Williamson*, supra, at 208. Under the *Pike* test, courts are to evaluate whether “the statute’s burdens on interstate commerce are ‘clearly excessive in relation to the putative local benefits.’” *Id.* at 209 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Even where it may appear to a court that the benefits are outweighed by the burdens, however, courts are not invited “second-guess legislatures.” *Brown & Williamson*, supra, at 209. Even where “a burden...seems incommensurate to the statute’s gains [the statute] survives *Pike* so long as it affects intrastate and interstate interests similarly—the similar effect on interstate and intrastate interests assuaging the concern that the statute is designed to favor local interests.” *Brown & Williamson*, supra, at 208.

The proposed bans on audible car alarms, based on these criteria, are not undue burdens on interstate commerce. The gains to the City are substantial in terms of improving quality of life and encouraging auto owners to use effective anti-crime devices. The actual burden on interstate commerce is not described by Directed Electronics, although they reason that “citizens of NYC will simply go to New Jersey to have a security system installed and then drive back into the City.” DE Test. Whether or not this is a desirable outcome, it is not a burden on interstate commerce—in fact it seems to stimulate it. The burden on the ban falls on City residents and visitors and does not imply an effort by the City to isolate itself from a national problem, *Clean Air Markets Corp. v. Pataki*, 194 F. Supp. 2d 147 (N.D.N.Y. 2002), but rather falls squarely within traditional police power regulation. Based on this analysis, the Commerce Clause does not impede the City Council’s efforts to regulate audible car alarms.