

Summary: Due to federal constitutional concerns, this memo recommends avoiding drafting any statutory language that would favor Maine-based over out-of-state companies in regard to distributed generation.

L.D. 936 charges the Governor's Energy Office to submit by January 1, 2022, an interim report to the Joint Standing Committee on Energy, Utilities and Technology "that identifies issues that need further consideration or require additional resources including funding to complete and that includes recommendations and any proposed legislation to implement those recommendations that are supported by a majority of stakeholders regarding" matters including ". . . **D. How to support the successful development of distributed generation by small companies based in the State.**"

Legislation supporting small, Maine-based companies would be open to constitutional challenge under what is known as the "dormant Commerce Clause."

Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power to "regulate commerce . . . among the several states." Courts have inferred from this language a principle referred to as the dormant Commerce Clause: Because Congress regulates interstate commerce, in the absence of congressional intervention individual states cannot discriminate against or otherwise unduly burden interstate commerce. The idea is to prevent protectionist state laws that impede free trade.

Courts apply different legal standards depending on how a law is drafted:

- If a state law **discriminates on its face against interstate commerce**→the courts review it strictly. For the law to survive, there must be a legitimate local objective that cannot be served by other reasonable, non-discriminatory means. Economic protectionism is not a legitimate local objective. If a law were written to favor "Maine-owned solar businesses," a court would apply strict scrutiny and strike it down, unless there was (1) a compelling reason—other than economic protectionism—to favor Maine-based companies over others and (2) the State could show that other avenues for achieving the same purpose were not possible. This test is difficult to pass.¹
- If a state law **does not discriminate on its face but indirectly burdens interstate commerce**→ courts apply a balancing test ("Pike balancing"), considering whether the burdens on interstate commerce outweigh the local benefits of the law. Again, local economic protectionism is not a legitimate benefit for constitutional purposes, so legitimate local benefits would need to exist that outweighed any burden on interstate commerce. This balancing test might apply, for instance, if the law limited distributed generation to "small companies," and that limitation incidentally favored a higher proportion of companies based in Maine than elsewhere.²

¹ See Maine v. Taylor, 477 U.S. 31 (1986) for a rare example of a discriminatory law passing this test. In that case, the U.S. Supreme Court held that Maine's law prohibiting the importation of live baitfish survived a dormant Commerce Clause challenge because the State had a strong legitimate interest in protecting its fisheries from the introduction of parasites and that purpose could not adequately be achieved other ways.

² In the energy context, the Second Circuit has held that Connecticut's RPS program categorizing New England RECs more favorably those from elsewhere did not violate the dormant Commerce Clause, concluding that the local benefits outweighed the burden on interstate commerce. See Allco Fin. Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017).

There is a defense the government can make in response to a dormant commerce Clause challenge known as the **market participant exception**. In essence, if the government is acting as a market participant rather than as a regulator, it can favor its own. Example: In a 1976 U.S. Supreme Court case, the Court upheld a Maryland law designed to rid the state of abandoned cars by having the state pay for the destruction of inoperable cars; the state required more proof from out-of-state than in-state scrap processors, but that was permissible because the state was acting as a market participant. It is not clear if/how that principle could apply to Maine's net energy billing program.³ Energy cases analyzing the dormant Commerce Clause have primarily concerned RPS standards and RECs.

Other points to consider: How would a potential law define "small companies"? How would the law define companies "based in [Maine]"—a percentage ownership, etc.?

Dormant Commerce Clause in the news: Recently, the dormant Commerce Clause has made headlines because of lawsuits in the marijuana industry. For instance, in 2020 the Maine Attorney General's Office advised that Maine's *recreational* marijuana law requiring dispensaries selling recreational marijuana to be majority-owned by people who were Maine residents for the past four years, was likely unconstitutional and so the State declined to enforce it. Similarly, the U.S. District Court recently held that Maine's *medical* marijuana law, which required "[a]ll officers or directors of a dispensary" to be Maine residents, was unconstitutional under the dormant Commerce Clause.⁴

³ In the energy context, one U.S. District Court suggested that New York's Zero-Emission Credit (ZEC) program, which ensured that New York's nuclear generators could continue to contribute to New York's electric generation mix, satisfied the market participant exception. See Coalition for Competitive Elec. v. Zibelman, 272 F. Supp. 3d 554, 583-86 (S.D.N.Y. 2017). That case was affirmed on appeal, but the appellate court did not reach the dormant Commerce Clause issue for lack of standing. See Coalition for Competitive Elec. v. Zibelman, 906 F.3d 41, 57-58 (2d Cir. 2018).

⁴ See Northeast Patients Grp. V. Me. Dep't of Admin. & Fin. Servs., No. 1:20-cv-468-NT, 2021 U.S. Dist. LEXIS 151027 (D. Me. Aug. 11, 2021). This decision is being appealed to the First Circuit.