

1 **UNITED STATES COURT OF APPEALS**  
2 **FOR THE SECOND CIRCUIT**

3  
4 August Term, 2001

5  
6 (Argued: June 14, 2002 Decided: February 13, 2003)

7  
8 Docket Nos. 01-7806, 01-7813  
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10 BROWN & WILLIAMSON TOBACCO CORPORATION,  
11 BWTDIRECT, LLC and SANTA FE NATURAL  
12 TOBACCO CO., INC.,

13  
14 Plaintiffs-Appellees,

15  
16 -v.-

17  
18 GEORGE E. PATAKI, in his official capacity as Governor of the  
19 State of New York, ELIOT SPITZER, in his official capacity as  
20 Attorney General of the State of New York, ANTONIA C. NOVELLO,  
21 M.D., in her official capacity as Commissioner of Health of the  
22 State of New York and ARTHUR J. ROTH, individually and in his  
23 capacity as Commissioner of Taxation and Finance of the State of  
24 New York,  
25

26  
27 Defendants-Appellants,

28  
29 TERESA MASON, individually and in her capacity as Sheriff of the  
30 City of New York,  
31

32 Defendant.  
33

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34 Before: MINER, CABRANES, and POOLER, Circuit Judges.

35  
36 Appeal from a judgment in favor of plaintiffs entered in the  
37  
38 United States District Court for the Southern District of New  
39 York (Preska, J.) in an action challenging the constitutionality  
40 of a New York State statute restricting the direct shipment of  
41 cigarettes to New York consumers, the court having found that the  
42 statute discriminates against interstate commerce in violation of  
43

1 the Commerce Clause.

2 Reversed.

3  
4 Judge Cabranes dissents in part in a separate opinion.  
5

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12 New York, Deniel Smirlock, Deputy  
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24 Appellees Brown & Williamson  
25 Tobacco Corp. and BWTDirect, LLC.  
26

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32 Plaintiff-Appellee Santa Fe Natural  
33 Tobacco Co., Inc.

1 MINER, Circuit Judge:

2 Defendants-appellants the Governor of the State of New York  
3 and other State officials (the "State") appeal from a judgment  
4 entered in the United States District Court for the Southern  
5 District of New York (Preska, J.) striking down as  
6 unconstitutional section 1399-11 of New York's Public Health Law  
7 ("the Statute"), the court having found that the Statute  
8 discriminates against interstate commerce in violation of the  
9 Commerce Clause. The Statute prohibits cigarette sellers and  
10 common and contract carriers from shipping and transporting  
11 cigarettes directly to New York consumers.

12 Plaintiffs-appellees, Santa Fe Natural Tobacco Co., Inc.  
13 ("Santa Fe"), Brown & Williamson Tobacco Corporation and  
14 BWTDirect, LLC (together "B & W") filed complaints, later  
15 consolidated in the district court, challenging the  
16 constitutionality of the Statute under the Commerce Clause and  
17 seeking to enjoin its enforcement. On November 13, 2000, the  
18 district court issued a temporary restraining order prohibiting  
19 enforcement of the Statute. On April 24, 2001, the district  
20 court consolidated the hearing on a motion for preliminary  
21 injunction with a trial on the merits. Following a five-day  
22 bench trial, the district court, in an unpublished corrected  
23 opinion, declared the Statute to be an unconstitutional violation  
24 of the Commerce Clause and permanently enjoined its enforcement.

1 Santa Fe Natural Tobacco Co., Inc. v. Spitzer, Nos. 00-7274, 00-  
2 7750, 2001 WL 636441 (S.D.N.Y. June 8, 2001).

3 The court found that the Statute was subject to strict  
4 scrutiny because it discriminated against interstate commerce  
5 both on its face "by requiring that retail sales take place only  
6 in-state," id. at \*13, and in effect by "effectively bann[ing  
7 interstate direct shippers] from engaging in retail cigarette  
8 sales with New York customers," id. at \*17. In applying strict  
9 scrutiny, the court concluded that the State failed to  
10 demonstrate the absence of less discriminatory means of advancing  
11 a legitimate state interest. Id. at \*21-28. In the alternative,  
12 the court found that the Statute also failed the less stringent  
13 Pike balancing test because the marginal ability of the Statute  
14 to further its "wholly laudable goals" was outweighed by its  
15 substantial interference with interstate commerce. Id. at \*29.  
16 The State timely appealed.

17 For the reasons that follow, we reverse.

## 18 **BACKGROUND**

19 The background of this case is set forth in precise detail  
20 in the district court's opinion, familiarity with which is  
21 assumed. Only the facts necessary to our disposition are  
22 recounted here.

### 23 I. The Statute

24 On August 16, 2000, section 1399-11 of New York's Public

1 Health Law, entitled "Unlawful shipment or transport of  
2 cigarettes," was signed into law. The Statute reads in relevant  
3 part:

4 1. It shall be unlawful for any person  
5 engaged in the business of selling cigarettes  
6 to ship or cause to be shipped any cigarettes  
7 to any person in this state who is not: (a) a  
8 person licensed as a cigarette tax agent or  
9 wholesale dealer . . . ; (b) an export  
10 warehouse proprietor . . . or an operator of  
11 a customs bonded warehouse . . . ; or (c) a  
12 person who is an officer, employee or agent  
13 of the United States government, this state  
14 or a department, agency, instrumentality or  
15 political subdivision of the United States or  
16 this state, when such person is acting in  
17 accordance with his or her official duties. .

18 . .  
19 2. It shall be unlawful for any common or  
20 contract carrier to knowingly transport  
21 cigarettes to any person in this state  
22 reasonably believed by such carrier to be  
23 other than a person described in paragraph  
24 (a), (b) or (c) of subdivision one of this  
25 section. For purposes of the preceding  
26 sentence, if cigarettes are transported to a  
27 home or residence, it shall be presumed that  
28 the common or contract carrier knew that such  
29 person was not a person described in  
30 paragraph (a), (b) or (c) of subdivision one  
31 of this section. It shall be unlawful for  
32 any other person to knowingly transport  
33 cigarettes to any person in this state, other  
34 than to a person described in paragraph (a),  
35 (b) or (c) of subdivision one of this  
36 section. Nothing in this subdivision shall  
37 be construed to prohibit a person other than  
38 a common or contract carrier from  
39 transporting not more than eight hundred  
40 cigarettes at any one time to any person in  
41 this state.

42  
43 N.Y. Pub. Health Law §§ 1399-11(1)-(2). Simply put, subdivision  
44 one subjects to civil and criminal penalties cigarette sellers

1 who ship cigarettes directly to New York consumers, and  
2 subdivision two subjects to the same penalties those who  
3 transport cigarettes to New York consumers. Subdivision two  
4 specifically applies to "any common or contract carrier," or "any  
5 other person" not a common or contract carrier, that "knowingly"  
6 transports cigarettes to anyone other than a permitted recipient,  
7 as defined in subdivision one of the Statute. Id. § 1399-11(2).<sup>1</sup>  
8 Subdivision two includes a limited exception from the penalties  
9 for direct delivery of cigarettes, which permits the delivery by  
10 "a person other than a common or contract carrier" of four  
11 cartons or fewer of cigarettes to "any person in this state."

12 Id.

13 The legislative findings made in support of the Statute

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1 <sup>1</sup> The penalty provision of section 1399-11 reads in full:

2  
3 Any person who violates the provisions of  
4 subdivision one or two of this section shall  
5 be guilty of a class A misdemeanor and for a  
6 second or subsequent violation shall be  
7 guilty of a class E felony. In addition to  
8 the criminal penalty, the commissioner may  
9 impose a civil fine not to exceed five  
10 thousand dollars for each such violation on  
11 any person who violates subdivision one or  
12 two of this section. The commissioner may  
13 impose a civil fine not to exceed five  
14 thousand dollars for each violation of  
15 subdivision three of this section on any  
16 person engaged in the business of selling  
17 cigarettes who ships or causes to be shipped  
18 any such cigarettes to any person in this  
19 state.

20  
21 N.Y. Pub. Health Law §§ 1399-11(5).

1 "declare[] that the shipment of cigarettes sold via the internet  
2 or by telephone or by mail order to residents of this state poses  
3 a serious threat to public health, safety, and welfare, to the  
4 funding of health care . . . , and to the economy of the state."

5 Id. ch. 262, § 1. The legislature also found that cigarette  
6 sales accomplished through direct shipment made the verification  
7 of the purchaser's age difficult and that existing penalties for  
8 cigarette bootlegging were inadequate. Id.

9 II. The District Court's Opinion

10 A. The District Court's Finding That the Statute  
11 Discriminates Facially and in Effect

12  
13 The district court applied strict scrutiny analysis based on  
14 its determination that the Statute discriminated against  
15 interstate commerce both on its face and in effect. Id. at \*13,  
16 \*17. The court found that the Statute was facially  
17 discriminatory for two reasons. First, the court concluded that  
18 although the Statute's prohibitions apply to both in-state and  
19 out-of-state direct cigarette sellers,

20 the law, on its face, discriminates against  
21 interstate commerce by requiring that retail  
22 sales take place only in-state.  
23 Specifically, subdivision 1 prohibits the  
24 direct shipment of cigarettes to any person  
25 in New York who is not a licensed tax agent  
26 or wholesaler, export warehouse proprietor,  
27 operator of a customs bonded warehouse, or  
28 government official. Therefore, the only way  
29 to effect a retail sale to a New York  
30 consumer is by an in-state, face-to-face  
31 transaction. Thus, subdivision 1 shifts the  
32 interstate retail market to instate

1 brick-and-mortar retailers.  
2

3 Id. at \*13. Second, the court found facially discriminatory the  
4 so-called delivery exception embodied in the last sentence of  
5 subdivision two. N.Y. Pub. Health Law § 1399-11(2). The court  
6 rejected the State's argument that the exception "only permits  
7 consumers[, rather than brick-and-mortar retailers with home-  
8 delivery services,] to transport up to four cartons of cigarettes  
9 to their homes or to other individuals." Santa Fe, 2001 WL  
10 636441, at \*14.

11 The court found instead that "[a]s the statute is drafted,  
12 out-of-state retailers that depend on common or contract carriers  
13 are prohibited from directly selling and delivering cigarettes to  
14 consumers, while in-state brick-and-mortar outlets that have  
15 their own delivery services are not." Id. The court concluded  
16 that because of this "local benefit," the Statute "discriminates  
17 on its face against interstate commerce by providing a delivery  
18 exemption for New York brick-and-mortar businesses with their own  
19 delivery services." Id.

20 For similar reasons, the court found that the Statute  
21 discriminates against interstate commerce in effect. Id. at \*16-  
22 17. First, the court stated that "[t]he only way an out-of-state  
23 seller could legally sell retail cigarettes to New York consumers  
24 under [the Statute] is to establish a brick-and-mortar outlet in  
25 New York." Id. at \*16. The court credited testimony that this

1 option was "unworkable" and "uneconomic" for the Plaintiffs and  
2 that, as a result, "the effect of [the Statute] is to eliminate  
3 out-of-state direct sales retailers from the market by requiring  
4 face-to-face, in-state retail sales only." Id. Citing the  
5 Supreme Court's decision in Halliburton Oil Well Cementing Co. v.  
6 Reily, 373 U.S. 64, 72 (1963), the district court found the  
7 Statute's effect discriminatory because "[a] state may not  
8 require an out-of-state operator 'to become a resident in order  
9 to compete on equal terms.'" Santa Fe, 2001 WL 636441, at \*16.

10 Second, the court concluded that the delivery exception also  
11 discriminated against interstate commerce in effect based on the  
12 finding that "it is not economically feasible for interstate  
13 businesses to make deliveries to New York customers using their  
14 own trucks." Id. According to the court, the delivery exception  
15 therefore demonstrates another way in which "interstate direct  
16 sellers are effectively banned from engaging in retail cigarette  
17 sales with New York consumers." Id. at \*17.

18 B. The District Court's Rejection of the Justifications  
19 Offered in Support of the Statute  
20

21 Having found that the Statute discriminates against  
22 interstate commerce, the court then sought to determine whether  
23 the State had satisfied its burden of "'justify[ing] it both in  
24 terms of the local benefits flowing from the statute and the  
25 unavailability of nondiscriminatory alternatives adequate to  
26 preserve the local interests at stake.'" Id. at \*11 (quoting

1 Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). The State  
2 asserted two local benefits in its effort to survive strict  
3 scrutiny: (1) the prevention of cigarette sales to minors, and  
4 (2) the prevention of untaxed cigarette sales. Id. at \*18.

5 1. Direct Sales of Cigarettes to Minors

6 The State argued to the district court that the Statute  
7 would reduce cigarette sales to minors because it requires face-  
8 to-face transactions in which sellers can verify the purchaser's  
9 age. The court rejected this assertion, finding that the State  
10 did not demonstrate "(1) that minors use direct sales channels to  
11 a significant degree to acquire cigarettes and, thus, that any  
12 material benefit will accrue from the statute; or (2) that the  
13 State has no less discriminatory means available to reduce  
14 smoking among minors." Id. at \*18. In concluding that the  
15 Statute would not meaningfully address the problem of underage  
16 smoking, the court emphasized "loopholes" in the Statute that it  
17 found "fatal to its effectiveness." Id. at \*20. The court  
18 identified these loopholes as: (1) the four-carton delivery  
19 exception; (2) sales made by Indian nations; and (3) shipments  
20 made by the United States Postal Service.

21 As noted above, the district court interpreted the delivery  
22 exemption to permit local businesses to deliver cigarettes to New  
23 York consumers while prohibiting out-of-state sellers from doing  
24 the same. The district court construed this to be a loophole

1 because, under its interpretation of the exemption's language and  
2 effect, minors still would be able to purchase cigarettes for  
3 home delivery – and avoid the age verification of a face-to-face  
4 transaction – by ordering cigarettes from local brick-and-mortar  
5 vendors utilizing their own delivery services.

6 As to sales by Indian nations, the court stated that they  
7 represent a “de facto exemption” because “Indians living on-  
8 reservation are not subject to New York excise or sales taxes,  
9 and New York does not require retailers on Indian reservations to  
10 collect and remit to the State excise and sales taxes owed by  
11 such retailers’ non-Indian customers.” Id. at \*7. As a result,  
12 the court was “persuaded that no enforcement efforts under [the  
13 Statute] will be directed to direct sellers on Indian  
14 reservations.” Id. at \*8.

15 With respect to cigarette shipments by the United States  
16 Postal Service, the court observed that “the Postal Service, not  
17 the states, has exclusive authority to designate what can and  
18 cannot be sent through the mails.” Id. at \*9. The court was  
19 therefore similarly “persuaded that the Postal Service will not  
20 and cannot assist in enforcement of [the Statute].” Id. n.17.  
21 The district court concluded that, absent the ability to restrict  
22 deliveries by the Postal Service, the Statute would be  
23 ineffective in preventing deliveries of cigarettes to minors.  
24 Id.

1           These loopholes, coupled with the court's finding that the  
2 State failed to show that minors purchased cigarettes to any  
3 significant degree by direct shipment, led the court to conclude  
4 that the Statute was not sufficiently tailored to achieve the  
5 goal of reducing direct cigarette sales to minors. Id. at \*20.  
6 The court also concluded that the State had not demonstrated that  
7 less discriminatory means were unavailable because "there [was]  
8 no evidence in the record that New York has developed or tried  
9 any alternative less discriminatory means of preventing minors  
10 from obtaining cigarettes through direct sales channels rather  
11 than completely banning these sales." Id. at \*21.

## 12           2.   Sale of Untaxed Cigarettes

13           The State also argued to the district court that one of the  
14 Statute's purposes is to require purchasers, by virtue of the  
15 face-to-face transaction, to pay the state excise tax. The State  
16 claims that the high excise tax decreases demand for cigarettes  
17 and thereby protects the health of New York consumers. The  
18 district court credited the State's argument, finding that the  
19 evidence "demonstrated that an increase in the price of  
20 cigarettes will lead to a decrease in the demand for cigarettes."  
21 Id. at \*25. The court concluded, however, that the State failed  
22 to show that the Statute would advance this "worthy goal" or that  
23 no less discriminatory means were available. Id. at \*25. Citing  
24 the loopholes discussed above, the court concluded that the State

1 did not satisfy its "burden of demonstrating that [the Statute]  
2 will effect the benefit of reducing smoking through the  
3 maintenance of high cigarette prices" because "Indian retailers  
4 can and will continue to sell cigarettes by direct sales to New  
5 York consumers," and because the Statute "cannot be enforced  
6 against the U.S. Postal Service." Id. at \*26.

7 The court also found that the Statute failed strict scrutiny  
8 because the State did not demonstrate a lack of less  
9 discriminatory means for collecting the cigarette excise tax.  
10 Id. The court explained that the New York State Department of  
11 Taxation and Finance "has chosen not to make any effort to  
12 collect taxes on cigarettes sold from out-of-state to New York  
13 consumers by telephone, mail and Internet." Id. As an example  
14 of available alternative means for collecting cigarette excise  
15 taxes, the court described the scheme adopted in California for  
16 the collection of taxes and concluded that "[t]he evidence shows  
17 that there are other nondiscriminatory alternatives to a complete  
18 ban on the direct sale of cigarettes." Id. at \*28. The court  
19 then declared that the Statute fails strict scrutiny and  
20 permanently enjoined its enforcement. Id.

### 21 III. The Pike Balancing Test

22 After concluding that the Statute discriminates on its face  
23 and in effect, and thus fails strict scrutiny, the district court  
24 also evaluated the Statute under the more permissive balancing

1 test we apply to nondiscriminatory statutes that "regulate[]  
2 even-handedly to effectuate a legitimate local public interest,"  
3 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under this  
4 test, discussed in full below, a nondiscriminatory statute that  
5 regulates even-handedly to effectuate a legitimate local concern  
6 "will be upheld unless the burden [it] impose[s] on such commerce  
7 is clearly excessive in relation to the putative local benefits."  
8 Id. Referring to its analysis under strict scrutiny, the court  
9 restated its earlier conclusion that the State "ha[s] not proved  
10 that [the Statute] will effect [its] wholly laudable goals," and  
11 determined that "[o]n balance, then, although 'designed for a  
12 salutary purpose,' [the Statute] 'furthers the purpose so  
13 marginally, and interferes with commerce so substantially, as to  
14 be invalid under the Commerce Clause.'" Id. (quoting Kassel v.  
15 Consolidated Freightways Corp., 450 U.S. 662, 670 (1981)). The  
16 court therefore concluded that the Statute also fails the Pike  
17 balancing test.

18 This timely appeal followed.

## 19 DISCUSSION

### 20 I. Legal Standard

21 The Commerce Clause grants to Congress the power "[t]o  
22 regulate Commerce with foreign Nations, and among the several  
23 States, and with the Indian Tribes." U.S. Const. Art. I, § 8,  
24 cl.3. The Clause "has long been recognized as a self-executing

1 limitation on the power of the States to enact laws imposing  
2 substantial burdens on [interstate] commerce." South-Central  
3 Timber Dev., Inc., v. Wunnicke, 467 U.S. 82, 87 (1984); see also  
4 Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 349-50  
5 (1977). Thus, although the Clause is phrased as an affirmative  
6 grant of congressional power, it is well established that it  
7 contains a negative or "dormant" aspect that "denies the States  
8 the power unjustifiably to discriminate against or burden the  
9 interstate flow of articles of commerce." Oregon Waste Sys.,  
10 Inc. v. Dep't of Env't'l Quality, 511 U.S. 93, 98 (1994). The  
11 fundamental objective of the dormant Commerce Clause is to  
12 "preserv[e] a national market for competition undisturbed by  
13 preferential advantages conferred by a State upon its residents  
14 or resident competitors." Gen. Motors Corp. v. Tracy, 519 U.S.  
15 278, 299 (1997).

16 In reviewing whether a statute violates the dormant Commerce  
17 Clause, the "threshold" question we consider is "whether a state  
18 or local government is 'regulating.'" United Haulers Ass'n, Inc.  
19 v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 254 (2d  
20 Cir. 2001) (citing C&A Carbone, Inc. v. Town of Clarkstown, 511  
21 U.S. 383, 389 (1994)), cert. denied, 534 U.S. 1082 (2002). If a  
22 statute "regulates," then the second question we examine is  
23 whether the statute, in "regulating," "affects interstate  
24 commerce." United Haulers, 261 F.3d at 254. Finally, if a state

1 regulation "affects" interstate commerce, we must determine  
2 "whether the regulation discriminates against interstate commerce  
3 or regulates evenhandedly with incidental effects on interstate  
4 commerce." Id. at 255 (internal citations omitted).

5 "[A] state regulates when it exercises governmental powers  
6 that are unavailable to private parties," such as the imposition  
7 of civil or criminal penalties to compel behavior. United  
8 Haulers, 261 F.3d at 255. Many forms of regulation have economic  
9 effects that extend beyond the regulating state; a state  
10 regulates interstate commerce for Commerce Clause purposes only  
11 when the regulation "affects interstate commerce," id. at 254, in  
12 a manner either that (i) discriminates against interstate  
13 commerce, or (ii) imposes burdens on interstate commerce that are  
14 incommensurate with putative local gains.

15 Legislation that causes certain out-of-state companies to  
16 cease selling in a particular state will not violate the dormant  
17 Commerce Clause as long as other out-of-state suppliers 'will . .  
18 . promptly replace[]' the goods that would have been sold by the  
19 companies that cease selling in state." Exxon Corp. v. Maryland,  
20 437 U.S. 117, 127 (1978). Accord Tracy, 519 U.S. at 299 (stating  
21 that the purpose of the dormant Commerce Clause is to "preserv[e]  
22 a national market for competition"). Discrimination against  
23 commerce itself occurs when a statute (i) shifts the costs of  
24 regulation onto other states, permitting in-state lawmakers to

1 avoid the costs of their political decisions, Nat'l Elec. Mfrs'  
2 Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001); accord United  
3 Haulers, 261 F.3d at 261 (stating that a statute "discriminates"  
4 when it "hoards local resources in a manner that favors local  
5 businesses"), (ii) has the practical effect of requiring out-of-  
6 state commerce to be conducted at the regulating state's  
7 direction, Sorrell, 272 F.3d at 110, or (iii) alters the  
8 interstate flow of the goods in question, as distinct from the  
9 impact on companies trading in those goods, Exxon, 437 U.S. at  
10 127.

11 Regulations may discriminate unconstitutionally against  
12 interstate commerce on their face and in their effect. If a  
13 regulation "evince[s]" its discriminatory purposes, or  
14 unambiguously discriminates in its effect, it almost always is  
15 "invalid per se." Sorrell, 272 F.3d at 108. Statutes that  
16 "evince" discrimination are scrutinized strictly, i.e., the  
17 burden falls on the State to justify [the discrimination] both in  
18 terms of the local benefits flowing from the statute and the  
19 unavailability of nondiscriminatory alternatives adequate to  
20 preserve the local interests at stake." Hunt, 432 U.S. at 353.  
21 The party challenging the validity of a statute bears the burden  
22 of showing that it is discriminatory and if "discrimination  
23 against commerce . . . is demonstrated, the burden falls on the  
24 State to justify it both in terms of the local benefits flowing

1 from the statute and the unavailability of nondiscriminatory  
2 alternatives adequate to preserve the local interests at stake.”

3 Id.

4 A statute that does not on its face discriminate also may  
5 run afoul of the dormant Commerce Clause if, in advancing a  
6 legitimate local purpose, it imposes burdens on interstate  
7 commerce greater than the local benefits secured. Significantly  
8 incommensurate burdens on interstate commerce for the putative  
9 local purpose sought to be advanced raise a suspicion of local  
10 preference. Such statutes, although not strictly scrutinized,  
11 are evaluated under the balancing test articulated in Pike. The  
12 Pike test evaluates whether the statute’s burdens on interstate  
13 commerce are “clearly excessive in relation to the putative local  
14 benefits.” Pike, 397 U.S. at 142.

15 This balancing test, however, does not invite courts to  
16 second-guess legislatures by estimating the probable costs and  
17 benefits of the statute, nor is it within the competency of  
18 courts to do so. An “excessive” burden “in relation to” putative  
19 benefits, we elaborated in Sorrell, is a burden on interstate  
20 commerce that is “different from” the burden imposed on  
21 intrastate commerce. 272 F.3d at 109 (stating that, “to run  
22 afoul of the Pike standard, the statute . . . must impose a  
23 burden on interstate commerce that is qualitatively or  
24 quantitatively different from that imposed on intrastate

1 commerce"). Under Sorrell, a burden that seems incommensurate to  
2 the statute's gains survives Pike as long as it affects  
3 intrastate and interstate interests similarly – the similar  
4 effect on interstate and intrastate interests assuaging the  
5 concern that the statute is designed to favor local interests.

6 We review de novo whether a statute as a matter of law  
7 discriminates on its face or in its effect. Whether a statute  
8 discriminates impermissibly against interstate commerce is a  
9 mixed question of law and fact that we also review de novo.  
10 Scribner v. Summers, 84 F.3d 554, 557 (2d Cir. 1996) (stating  
11 that "the de novo standard is equally applicable to so called  
12 mixed questions of law and fact").

## 13 II. Analysis of the Statute

### 14 A. Facial Discrimination

15 The State argues that the district court erred in finding  
16 that the Statute facially discriminates against interstate  
17 commerce. We agree.

18 The court articulated two bases for its finding of facial  
19 discrimination: that the Statute (1) limits retail cigarette  
20 sales to in-state, face-to-face transactions, and (2) permits in-  
21 state brick-and-mortar businesses to circumvent the Statute's  
22 prohibition on delivering cigarettes to residences, causing the  
23 Statute's burdens to fall almost exclusively on out-of-state  
24 cigarette sellers. As we explain below, however, neither the

1 Statute's closure of a sales channel for retail cigarette sales  
2 nor the Statute's delivery exemption discriminates against  
3 interstate commerce, facially or otherwise.

4 1. Limiting Sales to In-State, Face-to-Face  
5 Transactions  
6

7 The district court stated that although the Statute's  
8 "prohibitions apply to all direct sellers, the law, on its face,  
9 discriminates against interstate commerce by requiring that  
10 retail sales take place only in-state." Santa Fe, 2001 WL  
11 636441, at \*13. This determination is flawed in two respects.  
12 First, the district court erred in finding "facial"  
13 discrimination based upon its interpretation of the Statute's  
14 effects. Second, the district court concluded that the Statute  
15 is invalid in large part based upon its analogy to a  
16 significantly different statute in an inapposite case, C&A  
17 Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

18 First, the district court conducted a "facial" analysis by  
19 examining the Statute's effects, thereby conflating two of the  
20 three inquiries relevant to determining whether a challenged  
21 statute or regulation discriminates against interstate commerce.  
22 The court stated that the Statute "requir[es] that retail sales  
23 take place only in-state," Santa Fe, 2001 WL 636441, at \*13. The  
24 Statute by its terms, however, does not impose such a  
25 requirement; it merely prohibits cigarette sellers from shipping,  
26 and common and contract carriers and others from transporting,

1 cigarettes directly to New York consumers. Therefore, the  
2 court's determination that the Statute forces all retail sales of  
3 cigarettes to occur in the state can only be the result of its  
4 interpretation of the Statute's operation, or effect, rather than  
5 its terms.

6 Second, in reaching its conclusion the court relied solely  
7 on C & A Carbone, 511 U.S. 383. This reliance was misplaced  
8 because Carbone is easily distinguishable from the case at bar.  
9 Carbone involved a local ordinance that by its terms required all  
10 solid waste leaving the municipality to be processed at a single  
11 designated facility in the town. Id. at 386-87. This  
12 requirement applied to all other solid waste processing  
13 facilities regardless of their location, i.e., all solid waste  
14 leaving the municipality had to be processed at the designated  
15 in-town facility whether it came from out-of-state facilities,  
16 in-state facilities, or even other in-town facilities. Id. at  
17 390. The stated purpose of the ordinance was to finance the \$1.4  
18 million it cost to construct the facility. Id. at 386-87. This  
19 brief recitation of Carbone's facts demonstrates its  
20 inapplicability to our case.

21 The ordinance in Carbone discriminated on its face against  
22 commerce because, although it applied to all other solid waste  
23 processing facilities, it favored, in a blatantly protectionist  
24 manner, one particular local facility to the detriment of all

1 others. Id. at 391 (“The flow control ordinance discriminates,  
2 for it allows only the favored operator to process waste that is  
3 within the limits of the town.”). Thus, the ordinance did not  
4 regulate all processing facilities evenhandedly because it  
5 singled out for preferential treatment one local facility. That  
6 distinction demonstrated its facial discrimination. In contrast,  
7 the Statute at issue here does not by its terms make any such  
8 distinction; it does not on its face prefer either a particular  
9 in-state direct shipper of cigarettes or in-state direct shippers  
10 generally. Rather, by its terms, the Statute regulates  
11 evenhandedly the sale of cigarettes to New York consumers by all  
12 direct shippers and transporters regardless of where they are  
13 located.

14 The court cited Carbone for the proposition that “a law may  
15 be discriminatory even though it limits activities of in-state as  
16 well as out-of-state business.” Santa Fe, 2001 WL 636441, at  
17 \*13. While the Court in Carbone did note that “[t]he ordinance  
18 is no less discriminatory because in-state or in-town processors  
19 are also covered by the prohibition,” 511 U.S. at 391, the  
20 district court here failed to recognize that this statement was  
21 made within the context of the Court’s analysis of the  
22 ordinance’s discriminatory effects. Id. at 390-91.

## 23 2. The Delivery Exception

24 The district court’s second basis for finding facial

1 discrimination is the so-called delivery exception of subdivision  
2 two. Santa Fe, 2001 WL 636441, at \*13. Again, the court erred  
3 because it relied on the exception's effect, rather than its  
4 terms, in reaching its conclusion. The court found that "the  
5 statute discriminates on its face against interstate commerce by  
6 providing a delivery exemption for New York brick-and-mortar  
7 businesses with their own delivery services." Id. at \*14. The  
8 exception, on its face, does no such thing. Instead, it permits  
9 any person, other than a common or contract carrier, to transport  
10 up to four cartons of cigarettes at any one time to any one  
11 person in New York State. N.Y. Pub. Health Law § 1399-11(2).  
12 Whether the district court is correct regarding which businesses  
13 would and would not be able to take advantage of the exception,  
14 and therefore whether it discriminates against interstate  
15 commerce, is also a question of the exception's effect.

16 Santa Fe claims that "the cases finding facial  
17 discrimination do not depend on formalisms such as the particular  
18 language a statute uses to work its discrimination." Santa Fe is  
19 mistaken. The cases cited by Plaintiffs undermine their  
20 contention because all do, in fact, rely on "the particular  
21 language" of the statute or regulation at issue. In South-  
22 Central Timber, the statute, as characterized by B & W,  
23 "require[d] that timber taken from state lands be processed  
24 within the state." (emphasis added). Thus, the "particular

1 language" of the statute demonstrated its facial discrimination  
2 because by its very terms it made a geographical distinction in  
3 favor of in-state businesses by requiring that a commercial  
4 activity be conducted within the state. The same is true with  
5 the remaining cases cited by the Plaintiffs. See SSC Corp. v.  
6 Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) (finding facial  
7 discrimination where flow ordinance required all town waste be  
8 directed to a single local disposal facility); Stephen D. DeVito,  
9 Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.,  
10 770 F. Supp. 775, 783 (D.R.I.) (finding facial discrimination  
11 where regulation required that all waste collected in the state  
12 be processed by in-state facilities), aff'd, 947 F.2d 1004 (1st  
13 Cir. 1991).

14 The Statute at issue in this case does not on its face limit  
15 any commercial activity to in-state or local transactions.  
16 Instead, by its terms, the Statute prohibits all direct shipments  
17 of cigarettes to New York consumers, whether the direct shippers  
18 be located within or without the state, with the limited  
19 exception that any person, again whether located within or  
20 without the state, may transport to a New York consumer up to  
21 four cartons of cigarettes by means other than that of a common  
22 or contract carrier. We decline to look beyond the "particular  
23 language" of the Statute in determining whether it is facially  
24 discriminatory because to do so would collapse the facial and

1 effects analyses into one inquiry. We conclude that no reading  
2 of the language of the Statute supports the conclusion that it  
3 discriminates against interstate commerce on its face.

4 B. Discrimination in Effect

5 A statute or regulation may also be subject to strict  
6 scrutiny if it discriminates against interstate commerce in  
7 effect. Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992). The  
8 district court concluded that in addition to facial  
9 discrimination, the Statute also discriminates against interstate  
10 commerce in effect. Santa Fe, 2001 WL 636441, at \*16-17. We  
11 disagree.

12 The court articulated the same two bases for its conclusion  
13 that the Statute in effect is discriminatory: (1) the retail  
14 cigarette market is effectively limited to in-state businesses,  
15 and (2) the delivery exception is likewise effectively limited to  
16 in-state brick-and-mortar outlets.

17 1. Limiting Sales to In-State, Face-to-Face  
18 Transactions

19 Following its citation to the Statute, the district court  
20 observed that “[t]he only way an out-of-state seller could  
21 legally sell retail cigarettes to New York consumers under [the  
22 Statute] is to establish a brick-and-mortar outlet in New York.  
23 Id. at \*16. The district court then credited the Plaintiffs’  
24 testimony that “establishing in-state brick-and-mortar outlets by  
25 plaintiffs would be ‘unworkable’ and ‘uneconomic,’” and therefore

1 the court concluded that "the effect of [the Statute] is to  
2 eliminate out-of-state direct sales retailers from the market by  
3 requiring face-to-face, in-state retail sales only." Id.  
4 (internal citation omitted). Both the court's reasoning and  
5 conclusion are flawed in a number of respects.

6 First, even assuming the district court is correct that  
7 "[t]he only way an out-of-state seller could legally sell retail  
8 cigarettes to New York consumers . . . is to establish a brick-  
9 and-mortar outlet in New York," id., the same is true for in-  
10 state direct shippers. Thus, that consequence applies  
11 evenhandedly to both out-of-state and in-state direct cigarette  
12 shippers and therefore does not discriminate against those  
13 located outside New York State.

14 Second, even if the Plaintiffs' evidence did demonstrate  
15 that it would be "unworkable" and "uneconomic" for them to  
16 establish brick-and-mortar outlets in New York, that is  
17 insufficient to establish a discriminatory effect. See Exxon,  
18 437 U.S. at 127 (finding that evidence which showed that at least  
19 three companies would be unable to continue doing business in the  
20 state as a result of the statute at issue did not constitute an  
21 impermissible burden on interstate commerce). "The fact that the  
22 burden of a state regulation falls on some interstate companies  
23 does not, by itself, establish a claim of discrimination against  
24 interstate commerce." Id. at 126.

1           Moreover, nothing in the record suggests that any alleged  
2 hardship would be borne disproportionately by out-of-state direct  
3 cigarette shippers. In other words, an in-state direct shipper  
4 of cigarettes may well face the same difficulties as the out-of-  
5 state shipper. For instance, an individual or business operating  
6 an Internet, phone, or mail order direct cigarette sale business  
7 in New York State would also be required to establish a brick-  
8 and-mortar outlet in order to sell retail cigarettes directly to  
9 consumers. The Plaintiffs, who bear the burden of showing a  
10 discriminatory effect, have not shown that establishment of a  
11 brick-and-mortar outlet would not also be "unworkable" and  
12 "uneconomic" for an in-state direct shipper. Rather, they simply  
13 rely on evidence demonstrating that they themselves would face  
14 significant difficulties in establishing a retail outlet in New  
15 York.

16           The fact that these particular Plaintiffs may be priced out  
17 of the retail cigarette market does not establish a  
18 discriminatory effect. As the Exxon Court noted, "[t]he source  
19 of the consumers' supply [of petroleum] may switch from [one  
20 group of suppliers to another], but interstate commerce is not  
21 subjected to an impermissible burden simply because an otherwise  
22 valid regulation causes some business to shift from one  
23 interstate supplier to another." Id. at 127. This is so because  
24 "the Clause protects the interstate market, not particular

1 interstate firms, from prohibitive or burdensome regulations.”

2 Id. at 127-28.

3 Third, the district court’s conclusion that “the effect of  
4 [the Statute] is to eliminate out-of-state direct sales retailers  
5 from the market by requiring face-to-face, in-state retail sales  
6 only,” Santa Fe, 2001 WL 636441, at \*16, is only partially  
7 accurate: the effect of the Statute is to eliminate all sales of  
8 cigarettes to New York consumers that do not involve face-to-face  
9 sales or the transportation of fewer than four cartons of  
10 cigarettes to any one consumer. Indeed, that is the goal of the  
11 Statute. Thus, the Statute merely prohibits one manner in which  
12 cigarettes could otherwise be sold to New York consumers, namely  
13 through direct shipments. “We cannot . . . accept [Plaintiffs’]  
14 underlying notion that the Commerce Clause protects the  
15 particular structure or methods of operation in a retail market.”  
16 Exxon, 437 U.S. at 127.

17 Fourth, the district court’s citations to Halliburton Oil,  
18 373 U.S. at 72, and South-Central Timber, 467 U.S. at 100, for  
19 the proposition that “[a] state may not require an out-of-state  
20 operator ‘to become a resident in order to compete on equal  
21 terms,’” are misplaced. Santa Fe, 2001 WL 636441, at \*16.  
22 Halliburton involved a Louisiana statute that imposed a greater  
23 tax burden on out-of-state businesses than similarly situated in-  
24 state businesses. Id. at 70-71. The Supreme Court observed that

1 "[i]f Louisiana were the only State to impose an additional tax  
2 burden for such out-of-state operations, the disparate treatment  
3 would be an incentive to locate within Louisiana . . . in order  
4 to compete on equal terms." Id. at 72. The statute challenged  
5 in Halliburton, unlike the Statute at issue here, imposed a tax  
6 burden on out-of-state businesses but not on their in-state  
7 counterparts. Thus, it was discriminatory on its face. In our  
8 case, in-state direct shippers would also be required to  
9 establish brick-and-mortar outlets in order to sell cigarettes to  
10 New York consumers and the Statute therefore is not  
11 discriminatory against out-of-state direct sellers.

12 In South-Central Timber, the Court stated that it "view[s]  
13 with particular suspicion state statutes requiring business  
14 operations to be performed in the home State that could more  
15 efficiently be performed elsewhere." 467 U.S. at 100 (quoting  
16 Pike, 397 U.S. at 145). In that case, Alaska imposed a  
17 requirement that all timber taken from lands within the state be  
18 processed in the state prior to exportation. Id. at 84. The  
19 Court in South-Central Timber characterized the regulation as "a  
20 naked restraint on export of unprocessed logs." Id. at 99. The  
21 Statute challenged here is not analogous to the regulation in  
22 South-Central Timber because (1) it does not mandate that out-of-  
23 state businesses conduct a given commercial activity within New  
24 York State; (2) it does not restrain the flow of goods into New

1 York; and (3) it does not distinguish between out-of-state and  
2 in-state direct shippers. It merely requires that cigarettes  
3 sales to New York consumers be conducted in such a way that age  
4 can be verified and tax collected, a requirement that applies to  
5 all direct shippers of cigarettes wherever they may be located.

6 Finally, and perhaps most importantly, the Statute at issue  
7 neither impedes nor obstructs the flow of cigarettes in  
8 interstate commerce. Cigarettes will continue to flow into New  
9 York State in the same manner they always have. The Statute does  
10 not prohibit New York consumers' access to cigarettes; again, it  
11 merely requires that they purchase cigarettes in a manner that  
12 allows the seller to verify the buyer's age and to collect the  
13 state excise tax. As in Exxon, "[t]he crux of [Plaintiffs']  
14 claim is that, regardless of whether the State has interfered  
15 with the movement of goods in interstate commerce, it has  
16 interfered 'with the natural functioning of the interstate market  
17 either through prohibition or through burdensome regulation.'" 437  
18 U.S. at 127 (quoting Hughes v. Alexandria Scrap Corp., 426  
19 U.S. 794, 806 (1976)). The Supreme Court in Exxon rejected that  
20 argument, as do we here.

## 21 2. Delivery Exception

22 The district court also found that the delivery exception  
23 has a discriminatory effect. Santa Fe, 2001 WL 636441, at \*16.  
24 We disagree with this conclusion as well. The State reiterates

1 on appeal its argument that the exception only permits individual  
2 consumers, rather than brick-and-mortar retailers, to transport  
3 up to four cartons of cigarettes. We reject this restrictive  
4 interpretation and agree with the district court that the  
5 delivery exception applies to all transporters of cigarettes,  
6 except common or contract carriers. In reaching this conclusion,  
7 we adopt the district court's observation that there "is nothing  
8 in the language of the statute that limits [the exemption] to  
9 consumers. If the Legislature had wanted to restrict the  
10 exemption [only] to individual consumers . . . , it could easily  
11 have defined the exemption accordingly." Santa Fe, 2001 WL  
12 636441, at \*14.

13 Subdivision two prohibits the "transport" of cigarettes by  
14 common or contract carriers to anyone in New York other than  
15 licensed cigarette tax agents, licensed dealers, export warehouse  
16 proprietors, customs bonded warehouses, or state and federal  
17 officials acting in furtherance of their duties. This  
18 subdivision also prohibits the "transport" of cigarettes by "any  
19 other person" to anyone other than persons in the permitted  
20 categories set out in the previous sentence. However, with  
21 respect to "any other person," subdivision two creates an  
22 exception for the "transporting" of "not more than eight hundred  
23 cigarettes at any one time to any person in this state."  
24 Subdivision one prohibits "any person engaged in the business of

1 selling cigarettes" from "ship[ping] or caus[ing] to be shipped"  
2 any quantity of cigarettes to "any person" in New York who is not  
3 included in one of the permitted categories.

4 Judge Cabranes posits that subdivision one, which prohibits  
5 shipping, somehow limits the reach of subdivision two's  
6 "transporting" exception to individual purchasers of cigarettes.  
7 He does so despite the apparently broad applicability of  
8 subdivision two to any person other than a common or contract  
9 carrier by distorting the commonly accepted meaning of "ship," so  
10 that it means the same thing as "transport." The first two  
11 definitions of "ship" listed in a commonly accepted dictionary  
12 are "to place or receive on board of a ship for transportation by  
13 water . . ." and "to cause to be transported." Webster's Third  
14 New International Dictionary 2096 (1993). Both definitions  
15 connote one actor causing another to transport something. The  
16 action of a retailer who drives her delivery van to a long-term  
17 customer's house does not fall comfortably within either  
18 definition. We would not say of this retailer, "she shipped 800  
19 cigarettes to Mr. Jones in her delivery van." Instead we would  
20 say that the retailer transported or carried the cigarettes to  
21 her customer. See id. at 2430 (listing "carry" as a synonym for  
22 "transport").

23 Because Section 1399-11 is a penal statute, one should not  
24 read "ship" in such a distorted fashion. Judge Cabranes' reading

1 would subject to criminal liability, see N.Y. Pub. Heath L. §  
2 1399-11(5), small retailers who, in reliance on the common sense  
3 meaning of "ship" as it is used in subdivision one and in  
4 subdivision two's exception, carry small quantities of cigarettes  
5 to customers in their own delivery vans.

6 The district court found, and we agree, that the  
7 organization representing grocery stores in New York supported  
8 Section 1399-11 based, in part, on its understanding that a de  
9 minimis exception existed for the transportation of small  
10 quantities of cigarettes by cigarette sellers. See Santa Fe,  
11 2001 WL 63441, at \*14 & n.25 (citing letter dated July 18, 2000,  
12 from Michael Rosen, Vice President and General Counsel of the  
13 Food Industry Alliance, to James M. McGuire, Counsel to the  
14 Governor, Pl. Ex. 211, Tab 32). Thus, it is probable that  
15 individual grocers would adopt our understanding of the statute  
16 and, under Judge Cabranes' interpretation, be subject to  
17 prosecution. Finding no basis for the State's interpretation of  
18 the subdivision two exception, we reject that interpretation.

19 Although we agree with the district court's interpretation  
20 of the delivery exception, for the reasons discussed below, we  
21 find that the exception does not in effect discriminate against  
22 interstate commerce. The district court credited the testimony  
23 of Robin Sommers, the President and Chief Executive Officer of  
24 Santa Fe, who, according to the district court, testified "that

1 it is not economically feasible for interstate companies to make  
2 deliveries to New York customers using their own trucks.” Id.  
3 The court also credited the testimony of an expert for the  
4 Plaintiffs who explained that

5 doing the delivery themselves just means that  
6 they are becoming a common carrier [and]  
7 economically they have to have the same  
8 [cost]-structure as a common carrier in order  
9 to compete in-state. If for some reason or  
10 another they can't deliver in the state at a  
11 cost that is similar to the common carrier,  
12 if they have to have a courier come from the  
13 retailer who is employed by the retailer,  
14 then make a face-to-face transaction at the  
15 house, that is the same as a ban because  
16 that's going to be cost-prohibitive. That's  
17 going to be, you can always get the same  
18 effect as a ban by making something so costly  
19 that nobody is going to do it.

20  
21 Id. The court then stated, quoting Hunt, 432 U.S. at 350-51,  
22 that “the statute’s consequence of raising the costs of doing  
23 business in the New York market for interstate sellers, while  
24 leaving those of their New York counterparts unaffected, . . .  
25 has the practical effect of not only burdening interstate sales .  
26 . . but discriminating against them.” Santa Fe, 2001 WL 636441,  
27 at \*17 (alterations omitted). The district court’s conclusion is  
28 erroneous.

29 First, the exercise of the delivery exception does not leave  
30 “unaffected” the Plaintiffs’ New York counterparts. The  
31 Plaintiffs’ in-state counterparts are not New York brick-and-  
32 mortar retail outlets that sell cigarettes; rather, they are non-

1 brick-and-mortar sellers who ship cigarettes directly to New York  
2 consumers following purchases made by Internet, telephone, or  
3 mail order. See Ford Motor Co. v. Texas Dep't of Transp., 264  
4 F.3d 493, 500 (5th Cir. 2001) ("The [Supreme] Court's  
5 jurisprudence finds discrimination only when a State  
6 discriminates among similarly situated in-state and out-of-state  
7 interests.").

8 Second, in order to show a discriminatory effect on  
9 interstate commerce, the Plaintiffs must demonstrate that the  
10 Statute confers on their in-state counterparts a competitive  
11 advantage. The Plaintiffs cannot satisfy this burden merely by  
12 showing the difficulties they themselves would face in their  
13 efforts to continue selling cigarettes directly to New York  
14 consumers under the terms of the delivery exception. In other  
15 words, it may also not be economically viable for in-state direct  
16 shippers to "make deliveries to New York customers using their  
17 own trucks." Id. at \*16.

18 A similarly situated in-state direct shipper who, for  
19 instance, currently receives cigarette orders on his website and  
20 then ships cigarettes directly to the buyer's residence, would  
21 also be required under the exception to maintain his own fleet of  
22 delivery trucks, employ drivers, and undertake any other  
23 necessary investment just as would the out-of-state direct  
24 shipper. The Plaintiffs have not demonstrated how or in what

1 manner such an undertaking would be less onerous for their in-  
2 state counterparts. Even if the Plaintiffs' in-state  
3 counterparts include brick-and-mortar retail outlets, the  
4 delivery exception would only benefit those that already have a  
5 delivery system in place. The Plaintiffs have not introduced  
6 evidence indicating what portion of brick-and-mortar retail  
7 cigarette sellers currently offer delivery services. Thus, we  
8 are unable to conduct a comparative analysis of the advantages  
9 and disadvantages of the delivery exception to in-state as  
10 opposed to out-of-state sellers even were we to consider in-state  
11 brick-and-mortar outlets to be counterparts to the Plaintiffs.  
12 One can surely imagine, however, that of all in-state retail  
13 cigarette sellers, only a small percentage offer delivery service  
14 to their customers.

15 In any event, to the extent that, for instance, a grocery  
16 store that currently delivers goods to its customers is permitted  
17 to include in a delivery up to four cartons of cigarettes, we  
18 find that de minimis advantage to in-state brick-and-mortar  
19 retail sellers insufficient to establish a discriminatory effect.  
20 See Hunt, 432 U.S. at 349 (“[N]ot every exercise of state  
21 authority imposing some burden on the free flow of commerce is  
22 invalid.”).

23 Where a state restriction affecting commerce applies  
24 evenhandedly to both in-state and out-of-state businesses and

1 does not impede the flow of goods in interstate commerce, the  
2 restriction neither discriminates against out-of-state entities  
3 nor unjustifiably burdens interstate commerce. For the reasons  
4 stated above, we conclude that the Statute is not discriminatory  
5 either on its face or in effect but instead has only incidental  
6 effects on interstate commerce. We therefore analyze its  
7 constitutionality under the test established in Pike v. Bruce  
8 Church, Inc., 397 U.S. 137 (1970).

9 III. The Pike Balancing Test

10 Pike instructs that “[w]here the statute regulates even-  
11 handedly to effectuate a legitimate local public interest, and  
12 its effects on interstate commerce are only incidental, it will  
13 be upheld unless the burden imposed on such commerce is clearly  
14 excessive in relation to the putative local benefits.” 397 U.S.  
15 at 142. The Statute at issue passes constitutional muster under  
16 Pike because the regulation of the importation and sale of  
17 cigarettes, even if this regulation discourages the importation  
18 of cigarettes, was recognized by the Supreme Court in Austin v.  
19 Tennessee, 179 U.S. 343, 348-49 (1900), as a legitimate exercise  
20 of state power in the public interest, id., and because the  
21 Statute’s burdens on interstate commerce are not excessive  
22 relative to its local benefits.

23 The district court’s conclusion that the Statute violates  
24 the Commerce Clause under Pike scrutiny was based on its

1 determination that the Statute "directly and substantially  
2 burdens interstate commerce and isolates New York from the  
3 national cigarette market." Santa Fe, 2001 WL 636441, at \*29.  
4 We have concluded that these determinations are erroneous. As  
5 discussed above, the Statute, at most, incidentally affects  
6 interstate commerce by prohibiting one method for selling  
7 cigarettes to New York consumers. Moreover, the Statute in no  
8 way isolates New York from the national cigarette market because  
9 it does not obstruct or impede the flow of cigarettes into New  
10 York State. Because the Statute's effects on interstate commerce  
11 are de minimis, we find that they are not "clearly excessive in  
12 relation to the putative local benefits." Pike, 397 U.S. at 142.

13 The parties do not dispute the district court's finding that  
14 the State has a legitimate interest in "reduc[ing] minors' access  
15 to cigarettes through direct sales channels and . . . reduc[ing]  
16 cigarette consumption by requiring consumers to pay New York's  
17 high excise taxes." Id. at \*29. The district court cited  
18 evidence submitted by a Plaintiffs' expert showing that in 1999  
19 "1.9% of all surveyed youth smokers who purchased cigarettes did  
20 so through the mail." Id. at \*18. Although the court cited this  
21 evidence in support of its conclusion that the State failed to  
22 demonstrate "that minors use direct sales channels to a  
23 significant degree," id., we find that because the Statute has  
24 only de minimis effects on interstate commerce, the prevention of

1 even this small percentage of cigarette sales to minors  
2 constitutes a putative local benefit that is sufficient to  
3 survive the Pike balancing test. See Ford, 264 F.3d at 503  
4 (“Consistent with the use of the term ‘putative’ in the Pike  
5 balancing, this Court will not ‘second guess the empirical  
6 judgment of lawmakers concerning the utility of legislation.’”  
7 (quoting CTS Corp. v. Dynamics Corp., 481 U.S. 69, 92 (1987)).  
8 Moreover, we are particularly persuaded that this evidence tips  
9 the balance in the State’s favor in light of the pernicious  
10 effects of cigarette smoking and the possibility that purchasers  
11 of any age may supply youthful smokers who do not themselves  
12 purchase through direct channels.

13 The district court also concluded that the State  
14 “demonstrated that an increase in the price of cigarettes will  
15 lead to a decrease in the demand of cigarettes.” Id. at \*25.  
16 This local benefit, consisting of lower consumption with  
17 concomitant benefits to health, is certainly not outweighed by  
18 the Statute’s de minimis effect on interstate commerce.

19 With respect to both of these “wholly laudable goals,” id.  
20 at \*29, the district court concluded that neither would be  
21 “meaningfully address[ed]” by the Statute because of “loopholes  
22 which are fatal to its effectiveness.” Id. at \*20. We disagree  
23 with the weight the court afforded these supposed “loopholes” and  
24 find that, to the extent they exist, they are not significant

1 enough to undercut the Statute's effectiveness.

2 A. The Statute's Alleged "Loopholes"

3 1. The Delivery Exception

4 The district court cited the delivery exception in its  
5 discussion of the loopholes that would permit minors to continue  
6 purchasing cigarettes "without an in-store, face-to-face  
7 transaction." Id. The court did not expressly indicate in what  
8 way or to what extent minors would take advantage of this so-  
9 called exception nor did it cite any evidence showing that minors  
10 currently avoid face-to-face transactions by making such  
11 purchases. We need not make such determinations, however,  
12 because we find that even if minors were to purchase cigarettes  
13 in this manner, this exception nonetheless furthers one of the  
14 Statute's two goals: to reduce demand for cigarettes by requiring  
15 that purchasers pay New York's high cigarette excise tax.<sup>2</sup>

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<sup>2</sup> Judge Cabranes contends that if subdivision two allows retailers to deliver small quantities of cigarettes to individual consumers, it cannot survive Pike balancing because the exception actually undermines rather than serves the statute's goals. Even assuming, and we do not, that the exception undermines the goals of reducing consumption of cigarettes to minors, it serves the goal of reducing general demand for cigarettes by collection of New York's high excise tax as well as does an in-store sale. Ordinary retailers, whether they sell in the store or by delivery to a home, are required to collect the applicable cigarette taxes. It is much more difficult to collect taxes from consumers who order on the Internet or by telephone.

1                   2.   Sales by Indian Nations

2                   The district court also concluded that the Statute's goals  
3 would be undermined by cigarette sales by Indian nations. Id. at  
4 \*20, \*26. The court found that "no enforcement efforts under  
5 [the Statute] will be directed to direct sellers on Indian  
6 reservations." Santa Fe, 2001 WL 636441, at \*8. The court based  
7 this determination on a failed attempt by the state to collect  
8 excise and sales taxes from on-reservation cigarette sales in  
9 1997, and assertions made by Indian nations upon passage of the  
10 Statute at issue that they "would continue to sell and deliver  
11 tax-free cigarettes without interference." Id. We find the  
12 district court's conclusion both speculative and contradicted by  
13 the evidence.

14                  As enforcement of the Statute was preliminarily enjoined,  
15 the State's resolve to enforce its prohibitions has not yet been  
16 tested. Further, the State submitted evidence that, because of  
17 Indian sovereignty, the Statute would not apply to "[s]ales and  
18 shipments of cigarettes to . . . [1] recognized Indian nations or  
19 tribes, [2] Indian-run businesses on reservations in New York  
20 State, or [3] Indian consumers residing on reservations in New  
21 York State." The State did explain, "[h]owever, [that the  
22 Statute] do[es] apply to shipments of cigarettes by Indian  
23 nations, tribes, and businesses to any person other than  
24 recognized Indian nations or tribes, Indian-run businesses on

1 reservations or Indian consumers residing on reservations in New  
2 York State.” (emphases added).

3 Thus, the State retains significant enforcement powers with  
4 respect to Indian-related sales despite the fact that it is  
5 prohibited from enforcing the Statute against Indian sellers in  
6 the three circumstances noted above. We do not view these narrow  
7 limitations on the State’s enforcement power as constituting a  
8 “loophole” in the Statute so significant as to be “fatal to its  
9 effectiveness.” Id. at \*20. The State argues that it intends to  
10 enforce the Statute’s provisions against Indian sellers to the  
11 extent it is legally able to do so, and we see no reason to doubt  
12 the veracity of this contention before the State has had an  
13 opportunity to attempt such enforcement. Cf. ILGWU v. Donovan,  
14 722 F.2d 795, 821 (D.C. Cir. 1983) (“[C]ourt[s] must be  
15 particularly deferential when reviewing an agency’s predictive  
16 judgments about areas that are within the agency’s field of  
17 discretion and expertise.”).

18 Furthermore, because subdivision two of the Statute  
19 penalizes independently entities that deliver cigarettes directly  
20 to New York consumers, even if the State chose not to enforce the  
21 Statute against Indian sellers themselves, it could without  
22 limitation enforce that provision against carriers that transport  
23 cigarettes from Indian reservations to New York consumers,  
24 thereby effectively cutting off the usefulness of this potential

1 "loophole."

2 3. Deliveries by the United States Postal Service

3 The district court also found that because the State is  
4 without authority to dictate what the United States Postal  
5 Service may or may not ship, this fact likewise "make[s] the law  
6 ineffective in stopping minors from accessing cigarettes," id. at  
7 \*20, and "prevent[ing] smokers from obtaining lower-priced  
8 cigarettes," id. at \*26. This conclusion is based on a  
9 misinterpretation of the Statute.

10 Subdivision one prohibits "any person" from "ship[ping] or  
11 caus[ing] to be shipped" cigarettes to New York consumers  
12 directly. N.Y. Pub. Health Law § 1399-11(1). This means that  
13 direct shippers are subject to the Statute's civil and criminal  
14 penalties regardless of what means of transport they use to  
15 deliver the cigarettes. Subdivision two imposes the same  
16 penalties on those entities that transport cigarettes directly to  
17 New York consumers. To the extent that the State cannot enforce  
18 the Statute against the United States Postal Service, it is only  
19 without authority to penalize it for violations of subdivision  
20 two. In other words, while the State cannot prosecute the Postal  
21 Service itself for transporting cigarettes directly to New York  
22 consumers under subdivision two, it can prosecute direct shippers  
23 for shipping cigarettes to New York consumers through the Postal  
24 Service under subdivision one. Thus, under a proper reading of

1 the Statute, this alleged loophole is not "fatal to its  
2 effectiveness," id. at \*20, because it is, in practice,  
3 nonexistent.

4 For these reasons, we conclude that the Statute's de minimis  
5 burden on interstate commerce is not "clearly excessive in  
6 relation to the local putative benefits," Pike, 397 U.S. at 142,  
7 and that the Statute therefore survives Pike scrutiny.

#### 8 **CONCLUSION**

9 We find that the Statute does not discriminate against  
10 interstate commerce and therefore is not subject to strict  
11 scrutiny. To the extent that the Statute burdens interstate  
12 commerce, that burden is significantly outweighed by the  
13 Statute's putative local benefits and therefore does not violate  
14 the Commerce Clause. Thus, the judgment of the district court is  
15 reversed, with directions to enter judgment for the State.