

## Rep Drazan

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**From:** DALE Alan  
**Sent:** Thursday, May 23, 2019 4:38 PM  
**To:** Rep Drazan  
**Cc:** Johnson Dexter; McGee Maureen  
**Subject:** RE: YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Representative Drazan,

The Commerce Clause of the United States Constitution grants to Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Article I, section 8, clause 3, United States Constitution. Although the Commerce Clause grants authority to Congress, courts have long understood the Commerce Clause to also limit a state’s authority to create laws that discriminate against or burden the flow of interstate commerce (i.e., the dormant Commerce Clause). *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994).

The strongest facial challenge to Article VIII, section 2 (1)(g), under the dormant Commerce Clause would claim that the section discriminates against interstate commerce within the meaning of the four-factor test originated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). (See *Goldberg v. Sweet*, 488 U.S. 252 (1989) for an elaboration of the four factors of the test.)

The United States Supreme Court has stated that a challenger mounting a facial challenge to a law “must establish that no set of circumstances exists under which the [law] would be valid. The fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]” *United States v. Salerno*, 481 U.S. 739, 745 (1987). It has also been observed that in “numerous cases decided both before and after Salerno, the Court has failed to apply this test.” Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236 (1994).

We believe that Article VIII, section 2 (1)(g), would survive under the *Salerno* test or a less stringent one. Even accepting the 1981 Attorney General opinion concluding that the maximum rate set forth in the second sentence applies only to Oregon-produced oil and natural gas, the section is actually silent on the treatment of foreign oil and natural gas. The Legislative Assembly could apply the maximum rate to both Oregon- and foreign-produced oil and natural gas and thus there would be a set of circumstances in which the section was not unconstitutional.

A tax law may also be challenged as applied: “An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular. . . activity, even though the law may be capable of valid application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (*quoted in In re Nat’l Sec. Letter v. Sessions*, 863 F.3d 1110, 1121 (9th Cir 2017)). Article VIII, section 2 (1)(g), is not self-implementing, that is, it dedicates certain tax revenues to the Common School Fund and sets a maximum tax rate, but doesn’t impose the tax in the first place. Thus, the as-applied analysis would focus on a law imposing a tax that is subject to Article VIII, section 2 (1)(g), such as House Bill 2020 (2019).

Generally speaking, the dormant Commerce Clause would be violated if, in sales of allowances conducted under HB 2020 at the same time, the cost per allowance associated with natural gas imported from another state exceeded the cost per allowance associated with natural gas produced in this state, or if the cost per allowance paid by out-of-state gas suppliers or importers exceeded the cost per allowance paid by Oregon suppliers or importers. The standard is parity in the rate of taxation imposed on in-state and out-of-state activities and entities. The standard applies even where, for example, a tax is the same flat rate for both in-state and out-of-state motor

carriers but the effective per-mile rate turns out to be much higher for out-of-state motor carriers. *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987).

Certain basic provisions of HB 2020 do not appear to violate the dormant Commerce Clause. For instance, natural gas suppliers and natural gas utilities are both required to purchase allowances for emissions from the combustion in Oregon of natural gas, regardless of whether the natural gas is produced in Oregon or imported, and regardless of whether the natural gas supplier or natural gas utility is located in Oregon or another state. And both in-state and out-of-state suppliers and utilities will submit bids for allowances at any quarterly auction subject to the same floor price and will purchase them at the same closing price.

If, however, the provisions of HB 2020 were adapted to Article VIII, section 2 (1)(g), by applying the maximum rate only to natural gas produced in Oregon and not to foreign-produced natural gas, then HB 2020 would almost certainly be held to violate the dormant Commerce Clause on its face.

Please let us know if you have any other questions.

Alan Dale  
Senior Deputy Legislative Counsel  
(503) 986-1243

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**From:** Rep Drazan  
**Sent:** Friday, May 17, 2019 10:57 AM  
**To:** Johnson Dexter <Dexter.Johnson@oregonlegislature.gov>  
**Cc:** DALE Alan <Alan.DALE@oregonlegislature.gov>  
**Subject:** RE: YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Dexter and Alan,  
Thank you for your quick response. I have one follow-up question:  
Based on your conclusion to the second question in the May 15<sup>th</sup> memo, would it violate the Commerce Clause of the Federal Constitution if the cost of allowances associated with gas imported from another state exceeded "six percent of the market value of all oil and natural gas produced or salvaged from the earth or waters of this state as and when owned or produced"

Thank you for your assistance.

Sincerely,  
Christine Drazan  
State Representative  
House District 39

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**From:** Johnson Dexter  
**Sent:** Monday, May 13, 2019 11:52 AM  
**To:** Rep Drazan <Rep.ChristineDrazan@oregonlegislature.gov>  
**Cc:** DALE Alan <Alan.DALE@oregonlegislature.gov>  
**Subject:** RE: YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Hi Representative,

Alan Dale of our office is working on this and will be able to give you a written opinion by Wednesday evening.

Best,

Dexter

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**From:** Rep Drazan  
**Sent:** Monday, May 13, 2019 11:14 AM  
**To:** Johnson Dexter <[Dexter.Johnson@oregonlegislature.gov](mailto:Dexter.Johnson@oregonlegislature.gov)>  
**Subject:** Re: YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Hi Dexter,  
Do you have an estimated response timeline?

Thank you

Sincerely,  
Christine Drazan  
State Representative  
House District 39

On May 9, 2019, at 2:41 PM, Johnson Dexter <[Dexter.Johnson@oregonlegislature.gov](mailto:Dexter.Johnson@oregonlegislature.gov)> wrote:

Thanks Representative. We will look into this promptly.

Best,

Dexter

Dexter A. Johnson  
Legislative Counsel  
S-101 State Capitol  
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**From:** Rep Drazan  
**Sent:** Thursday, May 9, 2019 2:39 PM  
**To:** Johnson Dexter <[Dexter.Johnson@oregonlegislature.gov](mailto:Dexter.Johnson@oregonlegislature.gov)>  
**Subject:** FW: YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Dexter,  
Thanks for the voice mail. You were right, this was not yet sent!

Thank you for the legislative opinion, I have a follow-up question, given recent discussions related to the taxation of natural gas, which I did not cover in my original request for your legal opinion regarding HB2020.

#1. You state on page 4: *"Because the court has interpreted the term "tax" broadly for purposes of Article IX, section 3a, we conclude that the court would likely hold that proceeds the state receives from its sale at auction of allowances related to motor vehicle fuel constitute "revenue from . . . [a] tax . . . with respect to, or measured by the . . . use . . . of motor vehicle fuel" for purposes of Article IX, section 3a (1)."*

Is it consistent to conclude that proceeds the state receives from its sale at auction of allowances related to natural gas would constitute revenue from a tax with respect to or measured by the storage, use, sale, or distribution of natural gas for the purposes of Article VIII, section 2(g)?

Do the proceeds have to be dedicated to the Common School Fund the same way as proceeds from a tax on the use of motor vehicle fuel must be dedicated the Highway Trust Fund?

#2. In light of Section 2(g) of Article 8 of the Constitution, does the further language also result in a ceiling or cap on the rate of such taxes being no more than 6% of the market value of natural gas produced in from the land or waters of Oregon?

Thank you for your timely response to these follow-up questions.

Sincerely,  
Christine Drazan  
State Representative  
House District 39

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**From:** LC Delivery  
**Sent:** Wednesday, March 20, 2019 4:49 PM  
**To:** Rep Drazan <[Rep.ChristineDrazan@oregonlegislature.gov](mailto:Rep.ChristineDrazan@oregonlegislature.gov)>  
**Subject:** YOUR LEGISLATIVE COUNSEL REQUEST - LC4294

Attached is your Opinion or Research request. If you have any questions upon reviewing your response, please contact our office at 503-986-1243 or via email at [lc.request@state.or.us](mailto:lc.request@state.or.us).

Thank you,  
Legislative Counsel