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Supreme Court Holds That California Pork Regulations Do Not Violate the Dormant Commerce Clause

On May 11, 2023, the Supreme Court held in *National Pork Producers Council* v. *Ross* that California's Proposition 12, which regulates the standards for pigs that are raised to be sold as food in California, does not violate the dormant Commerce Clause. The Court's opinion reflected deep divisions among the Justices regarding the appropriate approach for determining whether a state's law impermissibly burdens interstate commerce.

Background

Under the Commerce Clause of the United States Constitution, Congress may "regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. This case involves the so-called dormant Commerce Clause, which has arisen from the Court's case law holding that the Commerce Clause "also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject.'"

The core of the dormant Commerce Clause as it exists today is a principle of non-discrimination: state laws violate the dormant Commerce Clause where they are designed to benefit in-state operations at the expense of out-of-state competitors. *See Department of Revenue of Kentucky* v. *Davis*, 553 U.S. 328, 337-338 (2008). The dormant Commerce Clause applies to laws that have a discriminatory effect on out-of-state market participants, as well as laws that are discriminatory on their face. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145-146 (1970).

California's Proposition 12 passed in November 2018 with 63% of the vote. It contains standards for the in-state sale of pork, eggs, and veal. In particular, it requires that all pork products sold in California come from pigs kept in conditions that allow them to lie down, stand up, fully extend their limbs, and freely turn around. Many existing farms do not comply with those conditions.

The National Pork Producers Council and the American Farm Bureau Federation—whose members raise and process pigs—challenged the law in federal court. Their complaint alleged that Proposition 12 impermissibly burdens interstate commerce, in violation of the dormant Commerce Clause. They argued that "compliance with Proposition 12 will increase production costs by 9.2%," and that because California imports the vast majority of its pork products, "the majority of Proposition 12's compliance costs will be initially borne by out-of-state firms."

The district court dismissed the case, concluding that the challengers failed to state a claim on which relief could be granted. The challengers appealed to the Ninth Circuit, which affirmed. The Supreme Court granted review to determine whether the challengers had stated a claim that Proposition 12 violated the dormant Commerce Clause.

The Supreme Court's Decision

In a fractured opinion written by Justice Gorsuch, the Supreme Court affirmed the Ninth Circuit. The challengers raised two arguments: *first*, that the dormant Commerce Clause suggests an "almost *per se* rule" against state laws that have "extraterritorial" practical effects on commerce outside the state; and *second*, that *Pike* v. *Bruce Church* requires a court to compare the relative burdens of a state law on interstate commerce against its putative benefits.

In addressing the first argument, a majority of the Court held that there is no such "almost *per se* rule." The challengers cited three cases in support of their position: *Healy* v. *Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986); and *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). The Court determined that each of those cases "typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests," which the challengers conceded was not present. The Court expressed concerns with the practical effects of the challengers' proposed rule, noting that "[i]n our interconnected national marketplace," many state laws that have long been recognized as valid would be called into question under such an "almost *per se* rule."

The challengers' second theory sowed more discord among the members of the Court. Petitioners asserted that *Pike* requires a court to weigh the benefit of a state's law against the burden of such law on interstate commerce. Justice Gorsuch, joined by Justices Thomas and Barrett, concluded that the balancing test is not authorized by the Court's dormant Commerce Clause precedents. Justice Gorsuch's opinion expressed concern that the determination was "a task no court is equipped to undertake." Those three Justices also expressed concern that a broad reading of *Pike* would grant judges too much power to enjoin state laws and run counter to federalist principles.

A different plurality of Justices Gorsuch, Thomas, Sotomayor, and Kagan concluded that, before a court may engage with the *Pike* balancing test, it must first determine that the plaintiff has sufficiently demonstrated "substantial burdens" on interstate commerce imposed by the law at issue. Those four Justices concluded that the challengers did not meet that standard because any substantial burden on interstate commerce is speculative and the challengers' claim failed without a need to conduct any balancing.

Justice Sotomayor, joined by Justice Kagan, concurred in part. That concurrence emphasized that the challengers had failed to allege a claim of substantial burden on interstate commerce, as required by *Pike*, but it declined to engage in any "reworking of that doctrine." Justice Sotomayor also disagreed with the plurality's criticism of the *Pike* balancing test, noting that judges often engage in means-end tailoring.

Justice Barrett filed a separate opinion concurring in part that provided the deciding vote. She took issue with the opposite side of the plurality's *Pike* analysis. She concluded that Proposition 12's economic impact on interstate commerce is not "capable of judicial balancing" against the "moral judgments" and "policy decisions" that led to its passage.

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson, wrote an opinion concurring in part and dissenting in part. He concluded that the challengers sufficiently alleged a substantial burden on interstate commerce such that the case should have been remanded for the Ninth Circuit to balance the relative burden on interstate commerce against the putative benefits of Proposition 12. The Chief Justice noted that a majority of the Court agreed that *Pike* could extend beyond discriminatory laws and that a court could perform the balancing test.

Justice Kavanaugh filed an opinion concurring in part and dissenting in part. He pointed out that California represents a significant percentage of the pork market, but little pork production happens in California. He then suggested that constitutional provisions other than the Commerce Clause may be relevant in future cases of a similar nature, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

Implications

The decision in *National Pork Producers Council* highlights the Court's continued divisions on the scope of the dormant Commerce Clause. The opinion for the Court emphasized that any invalidation of a state law under the dormant Commerce Clause should be undertaken with "extreme delicacy." A plurality of the Court further indicated that it saw Congress, not the courts, as the proper branch to address concerns with one state effectively setting nationwide standards.

As the Chief Justice noted in dissent, however, a majority of the Court reaffirmed the applicability of the *Pike* balancing test. And Justice Kavanaugh expressed serious concern that, without a more muscular dormant Commerce Clause, a large state could effectively require other states to abide by its laws.

The dormant Commerce Clause has long been the subject of criticism by some jurists and scholars, and some have considered it increasingly irrelevant. But at least for now, in the words of the Chief Justice, the Court has declined to "pull the plug" on the doctrine.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Justin Anderson
+1-202-223-7321
janderson@paulweiss.com

Walter Brown
+1-628-432-5111
wbrown@paulweiss.com

Meredith R. Dearborn
+1-650-208-2788
mdearborn@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Melinda Haag
+1-628-432-5110
mhaag@paulweiss.com

Jessica E. Phillips
+1-202-223-7338
jphillips@paulweiss.com

Kannon K. Shanmugam
+1-202-223-7325
kshanmugam@paulweiss.com

Daniel J. Toal
+1-212-373-3869
dtoal@paulweiss.com

Associates Brian Lipshutz and Elizabeth Norford contributed to this Client Memorandum.