Supreme Court Decides Important Dormant Commerce Clause Case

Written by: Amanda Karras

May 15, 2023

Last week, in a win for local governments, the Supreme Court rejected an overly expansive view of the dormant Commerce Clause in *National Pork Producers Council v. Ross.* Justice Gorsuch, writing for the majority, declined the pork producers' arguments which would have "fashion[ed] two new and more aggressive constitutional restrictions on the ability of States [and local governments] to regulate goods sold within their borders." As he pithily put it, "[w]hile the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list."

This case involves California's Proposition 12, which prevents the sale of "[w]hole pork meat" in the state unless the meat was produced in compliance with "specified sow confinement restrictions." Specifically, under the law, the breeding pigs cannot be confined in stalls so small that the pigs cannot lie down, stand up, or turn around. Proposition 12 was intended to prevent animal cruelty.

The National Pork Producers Council sued the state, claiming that Proposition 12 violates the dormant Commerce Clause. The Constitution vests Congress with the power to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. The parties all agree that Congress has the power to regulate the interstate sale of pork under the Commerce Clause. But here, Congress has been silent, so the pork producers are seeking to invoke what is known as the dormant Commerce Clause to invalidate the State law.

Specifically, the pork producers allege that the California law violated the dormant Commerce Clause by impermissibly regulating extraterritorial conduct outside of the State and that the law imposes an undue burden on interstate commerce. In support, they allege that the pork industry is highly interconnected and that "[t]o ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with Proposition 12." The result, they claim, is that all suppliers must either comply with California's law or incur additional costs to segregate their products. The plaintiffs claim the law will result in a 9.2 % increase in production cost for pork.

In a 5-4 fractured decision, the Supreme Court held that while States (and local governments) may not use their laws to "discriminate purposefully against out-of-state economic interests", in this case, the parties agreed that California's law was not discriminatory as it applied equally to in-state producers of pork, and it therefore did not violate the dormant Commerce Clause. The Court rejected what it called the pork producers' more "ambitious theories," including the "extraterritoriality doctrine." Under this doctrine, the petitioners argued that the dormant commerce clause has an "'almost per se' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State,' even when those laws do not purposely discriminate against out-of-state economic interests." The Court flatly rejected this argument, concluding its case law did not support the theory. The Court explained that antidiscrimination principles, which prevent economic protectionism, are the "very core" of its dormant Commerce Clause jurisprudence.

In rejecting the petitioner's broad extraterritoriality theory, the Court noted such an application could invalidate a host of laws in the country's "interconnected national marketplace." According to the Court, these could include state income tax laws, environmental laws, securities requirements, quarantine laws, inspection laws, franchise laws, torts laws, among others. Any of these laws can have a "considerable influence on commerce outside their borders." After rejecting a broad extraterritoriality rule, the Court turned to the petitioner's next argument: that the law should be struck down under what is known as the *Pike* balancing test, coming from *Pike v. Bruce Church*, Inc., 397 U. S. 137 (1970). Under *Pike*, if a law's burdens are "'clearly excessive in relation to the putative local benefits," then the law violates the dormant commerce clause and will be struck down. Here, the five Justice majority agreed that the California law did not violate *Pike,* but the majority splintered and offered various theories as to why. It appears three of the Justices (Justices Gorsuch, Thomas, and Barrett) would do away with *Pike* as they questioned the ability of judges to weigh competing interests like economic interests on one side and a state's moral choices on the other. Justices Sotomayor and Kagan did not join this portion of the majority; thus *Pike* remains good law. What the five Justice majority agreed on is that *Pike* may help reveal a discriminatory purpose if the law does not discriminate against interstate commerce on its face. And here, the pork producers had disavowed any discriminatory purpose and its practical effects reveal no such discrimination. While the majority may not have agreed as to why the petitioners could not state a claim under *Pike,* five Justices agreed they could not, and thus affirmed the Ninth Circuit's decision.

And while the Court may not have completely agreed on the rationale, the five Justice majority did agree with an important federalism principle: "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only "'where the infraction is clear.'"

The case split along non-ideological lines with Justices Gorsuch, Thomas, Sotomayor, Kagan, and Barrett in the majority. Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson concurred in part and dissented in part. They agreed with the majority's rejection of a broad "extraterritoriality rule," but they would have found the complaint plausibly alleged a violation under *Pike* and would have remanded the case for further consideration.

Justice Kavanaugh wrote a concurrence in part and dissent in part arguing that the majority's approach undermines federalism. According to Justice Kavanaugh, the majority's decision may usher in "a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands."

As the majority made clear, a broad extraterritoriality rule would wreak havoc on state and local laws. IMLA, the National League of Cities, the International City/County Management Association, and the US Conference of Mayors filed an amicus brief in this case making that point. In the brief, which was authored by John Korzen, the Director of the Appellate Advocacy Clinic at Wake Forest University School of Law, we argued that a broad extraterritoriality rule as proposed by the petitioners could disrupt a myriad of local ordinances, including regulations on short term rentals, graffiti, hazardous materials, and puppy mills. The Court's result reaffirmed that local governments may continue to regulate for the health, safety, and welfare of their citizenry unless such regulations discriminate against interstate commerce.

To review the amicus brief, **click here**.

To read the Supreme Court opinion, **click here**.