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Supreme Court Rejects Dormant Commerce Clause Challenge To California Law Restricting Sale Of Pork Based On Conditions In Which Pigs Are Raised

Client Alert | May 11, 2023

Decided May 11, 2023 ***National Pork Producers Council v. Ross,*** **No. 21-468 Today, the Supreme Court held in a fractured decision that California's ban on the sale of pork that comes from pigs that were raised in a "cruel manner," regardless of where the pigs are raised, does not violate the dormant Commerce Clause.**
Background: In 2018, California voters approved Proposition 12, which prohibits selling pork in California if the pigs were housed in a "manner that prevents the animal from lying down, standing up, fully extending [its] limbs, or turning around freely." The National Pork Producers Council and the American Farm Bureau Federation sued, alleging that Proposition 12 violates the dormant Commerce Clause, which they argued bars state legislation that (i) discriminates against out-of-state interests, (ii) has impermissible extraterritorial effects, or (iii) imposes a clearly excessive burden on interstate commerce when compared to the putative local benefits. The plaintiffs did not argue that Proposition 12 discriminated against out-of-state interests. Instead, they relied exclusively on its extraterritorial effects and its burden on interstate commerce. The district court dismissed the complaint and the Ninth Circuit affirmed. The Ninth Circuit held a state law has impermissible extraterritorial effects only if it "dictate[s] the price of a product" or "tie[s] the price of in-state products to out-of-state prices"—which Proposition 12 did not do. Acknowledging that the Supreme Court has "not provided a clear methodology for comparing in-state benefits and out-of-state burdens" to assess a law's burden on interstate commerce, the Ninth Circuit nevertheless held that Proposition 12's alleged increase in costs to businesses and consumers was not a constitutionally significant burden on interstate commerce. **Issue:** Whether plaintiffs stated a plausible claim that Proposition 12 violates the dormant Commerce Clause because it has impermissible extraterritorial effects or places an undue burden on interstate commerce. **Court's Holding:** No. The Court's core dormant Commerce Clause precedents focus on state laws that discriminate against out-of-state commerce, which a law banning the sale in California of pork that was raised in a "cruel manner" does not do, and the plaintiffs failed to allege a plausible claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> *"While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list."*

Justice Gorsuch, writing for the Court **What It Means:**

- The Court's majority opinion underscores that the focus of the dormant Commerce Clause is on those state laws that discriminate against out-of-state commerce.
- The Court's decision was highly fractured, as parts of Justice Gorsuch's opinion discussing *Pike* were joined only by a plurality of the Court, and multiple justices

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wrote separate opinions. Justice Kavanaugh's opinion attempts to outline the controlling rule, and suggests "that properly pled dormant Commerce Clause challenges under *Pike* to laws like California's Proposition 12 (or even to Proposition 12 itself) could succeed in the future—or at least survive past the motion-to-dismiss stage."

- The Court intimated that several other constitutional provisions may provide a stronger basis for challenging state laws that affect out-of-state commerce, including the Full Faith and Credit Clause, the Import-Export Clause, the Privileges and Immunities Clause, and the "principle inher[ing] in the very structure of the Constitution, which 'was framed upon the theory that the peoples of the several states must sink or swim together.'"

The Court's opinion is available here. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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