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CLIENT ALERT

Supreme Court Limits Challenges to State Laws and Regulatory Authority Under Dormant Commerce Clause Doctrine

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KEY TAKEAWAYS

- The Supreme Court affirmed the broad regulatory authority of the individual states, rejecting two expansive theories of the federal government's exclusive power under the dormant Commerce Clause doctrine.
- Regulated entities should note that the dormant Commerce Clause doctrine generally will not bar enforcement of state laws and regulations unless they are "designed to benefit in-state economic interests by burdening out-of-state competitors."
- Regulated entities seeking to challenge state laws that are not motivated by "economic protectionism" should consider alternative arguments, including arguments arising under the Import-Export Clause, Privileges and Immunities Clause, and Full Faith and Credit Clause.

National attention often focuses on federal law. But businesses engaged in interstate commerce must also consider the laws of multiple states—sometimes including states with which they have only indirect contact. This reality is underscored by the Supreme Court's recent decision in *National Pork Producers Council v. Ross*. Although the federal government has authority to regulate interstate commerce, the Court's opinion makes clear that the states retain substantial authority to regulate where federal law is silent. Even state laws that have significant effects on out-of-state economic activity and that federal courts might consider unwise are unlikely to offend federal authority unless they are purposefully discriminatory instruments of "economic protectionism."

EXCLUSIVE FEDERAL AUTHORITY UNDER THE DORMANT COMMERCE CLAUSE

Under the Constitution's Commerce Clause, Congress may enact laws that "regulate Commerce . . . among the several States." Under the Constitution's Supremacy Clause, federal laws preempt, or prevail over, conflicting state laws. "Reading between the Constitution's lines," the Supreme Court has interpreted the Constitution's grant of regulatory authority to Congress as implicitly forbidding enforcement of "certain state [economic regulations] even

when Congress has failed to legislate on the subject." This "dormant Commerce Clause" doctrine creates a sphere of exclusive federal authority where state regulations are unenforceable.

Thus, the balance of state and federal power depends in significant part on the scope of the dormant Commerce Clause doctrine. At the "very core" of the doctrine lies an "antidiscrimination principle" that bars enforcement of state laws "designed to benefit in-state economic interests by burdening out-of-state competitors." A "small number" of cases have gone beyond the doctrine's "heartland," especially when evaluating "regulations on instrumentalities of interstate transportation—trucks, trains, and the like." But the Supreme Court in *National Pork Producers Council* hewed close to the antidiscrimination principle and warned that courts should exercise "extreme caution" before barring enforcement of state laws under the dormant Commerce Clause doctrine.

THE SUPREME COURT'S EVALUATION OF CALIFORNIA'S PORK-PRODUCTION LAW

Proposition 12, the state law at issue in *National Pork Producers Council*, prohibited the in-state sale of whole pork meat from breeding pigs that are "confined in a cruel manner" or from their immediate offspring. Opponents disputed the proposed definition of cruel confinement, arguing that compliance with Proposition 12 would not only be costly but also reduce animal welfare and increase risks to consumer health. However, the ballot initiative passed with the support of about 63% of participating voters and became law.

The National Pork Producers Council and the American Farm Bureau challenged the law, arguing that it imposed burdens on interstate commerce that violated the dormant Commerce Clause doctrine. But they expressly conceded that the doctrine's "bar on protectionist state statutes that discriminate against interstate commerce" was not at issue, because Proposition 12 imposes the same burdens on in-state and out-of-state pork producers. Instead of bringing a discrimination-based claim, the petitioners proffered two more-expansive theories of the federal government's exclusive power under dormant Commerce Clause doctrine. Those arguments failed in the district court, in the Ninth Circuit, and, finally, at the Supreme Court.

First, the Court unanimously rejected the petitioners' interpretation of its dormant Commerce Clause precedents as establishing an "almost *per se*" rule against state laws with the "practical effect of controlling commerce outside the State." Although the Court acknowledged that some truly extraterritorial state laws may be contrary to our federal system of government, it rooted this principle outside of the Commerce Clause. The Court also observed, "In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." Thus, the petitioners' proposed rule was not supported by the Commerce Clause and, if adopted, "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers."

Second, the Court rejected the petitioners' argument that Proposition 12 violates the dormant Commerce Clause doctrine because it imposes burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." However, the Justices' divided views on this argument did not conclusively "shut the door" on future dormant Commerce Clause claims that involve neither discrimination nor an instrumentality of interstate commerce.

A majority of the Justices agreed that the petitioners' argument "overstate[d] the extent to which [certain precedents] depart from the antidiscrimination principle that lies at the core" of the dormant Commerce Clause doctrine. Although some cases evaluated the costs and benefits of a challenged state law, "no clear line" separated these cases from the cases focused on discrimination. Rather, these cases looked to costs and benefits because "a law's practical effects may . . . disclose the presence of a discriminatory purpose" behind a facially non-discriminatory law.

Three of the Justices would have gone further. Justice Gorsuch—joined by Justices Thomas and Barrett—warned that a "freewheeling" judicial power to evaluate a law's costs and benefits would turn the Commerce Clause into "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." They argued that courts are not equipped to balance disputed moral and public-health interests against economic interests and that choices among such incommensurable goods are policy choices that, "[i]n a functioning

democracy . . . usually belong to the people and their elected representatives." Justice Barret wrote a partial concurrence further underscoring that "California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians."

Justice Gorsuch also wrote, alternatively, that the petitioners' argument failed even on its own terms: "As they read it, [the Court's precedent] requires a plaintiff to plead facts plausibly showing that a challenged law imposes 'substantial burdens' on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other." Three other Justices—Thomas, Sotomayor, and Kagan—agreed with him that the petitioners' complaint merely alleged harm "to some producers' favored 'methods of operation,'" without adequately alleging a "substantial harm to interstate commerce." In a separate opinion joined by Justice Kagan, Justice Sotomayor added that she believes courts can and should evaluate the relative costs and benefits of state laws under the dormant Commerce Clause doctrine.

Four of the Justices disagreed with both of Justice Gorsuch's grounds for rejecting the petitioners' argument about Proposition 12's relative costs and benefits. Chief Justice Roberts—joined by Justices Alito, Kavanaugh, and Jackson—would have determined that the petitioners' complaint adequately alleged a substantial harm to interstate commerce in the form of "sweeping extraterritorial effects." They disagreed with the petitioners' "almost *per se*" extraterritoriality rule but believed the petitioners adequately alleged a "broad" extraterritorial impact that required "compliance even by producers who do not wish to sell in the regulated market." Thus, the Chief Justice disagreed with Justice Sotomayor's evaluation of the petitioners' complaint but emphasized that both their opinions—subscribed to by a majority of the Court—agreed in principle that the dormant Commerce Clause doctrine can require courts to engage in cost-benefit analysis of state laws.

Justice Kavanaugh wrote separately to suggest that state laws with extraterritorial commercial impacts could raise constitutional questions under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause. However, he took no position on whether a challenge under any of these clauses would ultimately succeed, and he acknowledged that an Import-Export Clause challenge would require revisiting Supreme Court precedent.

WHAT THIS MEANS

After *National Pork Producers Council*, courts will exercise "extreme caution" before denying enforcement of state laws under the dormant Commerce Clause doctrine. Although a divided majority left the door open for cost-benefit evaluation of some nondiscriminatory laws that lie outside the doctrine's "heartland," there was no majority consensus about what a regulated entity must plead to obtain such review. That question remains open for further development by the lower courts. But their answers will likely be shaped by the opinion's immediate lesson, which is that the Court does not welcome expansive theories of the federal government's exclusive power under the dormant Commerce Clause doctrine. Regulated entities can continue to challenge nondiscriminatory state laws under this doctrine but should also consider developing alternative arguments under other clauses of the U.S. Constitution.

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