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Quick Take: Good News for Clean Energy from the Supreme Court, with Carrie Jenks and Ari Peskoe — June 7, 2023

- Carrie Jenks: Welcome to Clean Law from Harvard's Environmental & Energy Law Program. I'm Carrie Jenks, EELP's executive director, and I'm excited to be talking to Ari Peskoe, our electricity law initiative director. We're going to be talking about a Supreme Court case. It was a decision in the case, National Pork Producers Council v. Ross. Now this is a case about pork producers, so I'm excited to be bringing it into clean energy law, and Ari has been long focused on how the Dormant Commerce Clause works into these cases and so Ari, thanks so much for joining us today.
- Ari Peskoe: I'm excited to talk about this case.
- Carrie: All right. Maybe we should start first with why an energy law podcast is going to be talking about a pork producer's case.
- Ari: Sure. So I think the issue here for states was whether the Supreme Court was going to hog state regulatory power by basically porking up an old constitutional principle in a way that might really hamstring state authority.
- Carrie: And so how does this tie to energy?
- Ari: Well, so clean energy opponents have been using some similar arguments over the past several years against various state clean energy programs. And this is basically a good news story for state clean energy programs because the Supreme Court shot down what I think was potentially the most damaging argument for state clean energy programs.
- Carrie: All right, so what was the California law that was at issue?
- Ari: The California law was about animal cruelty. It basically said that for pork products sold in California, those pigs had to be raised pursuant to certain humane standards. And this was a law that was voted on by actually the people of California who approved it by about a two-thirds margin.
- Carrie: And so is this good for, let's start with just pigs. Is this good for the pigs in California?
- Ari: I'm not an expert here on animal welfare, but that was the idea of the law was to make sure that pigs were raised in a more, let's say, humane way, if that's possible.
- Carrie: Okay. And so sticking with the pigs, what did the Court say just about the California law?



Ari:

Sure. So the argument from the pork industry was that this law violates the Dormant Commerce Clause. So we might want to just pause and talk about what the Dormant Commerce Clause is. This is a very old constitutional principle and what's animating the Dormant Commerce Clause is a prohibition on state economic protectionism. So the idea here is that are the framers enacted the Constitution, and one of the goals was to create a national market for goods and states shouldn't be allowed to erect barriers to trade. So the classic Dormant Commerce Clause case is about a state law that benefits in-state businesses while harming out-of-state businesses. So just to give an example here in the energy space, there is a case at the Supreme Court 30 years ago about an Oklahoma law that told the electric utilities in that state that they have to buy at least 10% of their coal from Oklahoma coal companies.

And they had previously been buying all of their coal from Wyoming companies. And so this was a law that basically was going to benefit Oklahoma coal companies while disadvantaging Wyoming coal companies because it said this 10% of the market is simply not for you. So the Court struck that down as discriminatory under the Dormant Commerce Clause. That's a classic Dormant Commerce Clause case. This case is not about that principle, but I want to make clear that that principle still very much exists and we can talk about how that also can affect clean energy laws. This is about two other aspects of the Dormant Commerce Clause. One is a more fact-based test that tries to weigh the in-state benefits of the law against the law's burdens on interstate commerce. And there the justices had a lot to say and there's a lot of disagreements in this opinion about what that test means and what it allows or requires courts to do, and we can get into that, but it's very rare that a state law gets struck down solely on the basis of this balancing test.

The good news story here is really about what some clever judges have called the most dormant aspect of the Dormant Commerce Clause, which had been bubbling around in some lower courts for the past couple of decades and the Supreme Court had never explicitly weighed in on it, but basically some litigants had interpreted three Supreme Court cases to create this almost per se rule against state laws that have the practical effect of controlling commerce outside the state. So this is the extraterritorial principle is what it's called and this is really what this case I think is all about.

Carrie:

And who is on the majority opinion and where did they fall on that second issue.

Ari:

So just what the pork industry came in here and said was that because almost all of the pork products that are sold in California are actually produced in other states, what's going to happen once this law takes effect is that out-of-state pork producers are going to have to change their practices to comply. And the effect of what California is doing, even though it's technically regulating in-state sales in California of pork products, it's effectively regulating out-of-state production practices. And they argue this like per se, you can't come back from this. Once you do this there's no justification for this sort of regulatory scheme and it's just automatically invalid under the Dormant Commerce



Clause. All nine justices rejected this theory. So that's really the headline from this case. This is a 9-0 win in favor of state authority.

Carrie: And have they used that theory in state clean energy?

Ari: Yeah, this extraterritorial theory has come up in a few cases against state clean energy programs. The one that's most relevant is a challenge to Colorado's renewable portfolio standard. I'm sure many of our listeners are probably familiar with a renewable portfolio standard, but basically, the state says that the utilities serving customers in that state have to buy a certain amount of renewable energy, or usually actually in practice they buy what are called renewable energy credits, representing a certain percentage of their total sales that year. And a, I would call them a conservative think tank, but I think that's an injustice to thinkers everywhere came in and basically argued that this violates the extraterritorial principle because the effect of this will be since we have an interconnected electricity network out of state producers will be inevitably somehow affected by this law and therefore it's going to violate the Dormant Commerce Clause.

So this was they invoke this. The case eventually came to the Tenth Circuit where now Justice then, Judge Gorsuch had the case and wrote a very strong opinion absolutely rejecting this extraterritorial theory and affirming that Colorado has authority to enact this renewable portfolio standard. So now Justice Gorsuch wrote one of the opinions in this case and basically elevates his view to Supreme Court precedent that there is no basis in the constitution for the idea that because a state regulation has effects in other states, it violates some constitutional, or at least I should say it certainly doesn't violate the Dormant Commerce Clause.

Carrie: So that's really helpful about Colorado. Are there other states where this is coming up?

Ari: Yeah, so the latest iteration of renewable portfolio standards is taking them to a hundred percent by some 2040, 2050 date. Usually it's carbon free, not renewable. But anyway, Minnesota just passed one of these laws over the opposition of coal industry and government interests in North Dakota. And North Dakota was very clear as this bill was being debated in Minnesota that they were going to file a lawsuit in federal court. They were never quite clear on what the legal argument was going to be, but it seemed like they hinted that this was going to be the argument and they were just going to do it better than the litigants in Colorado did. The Supreme Court case here really closes that door for this sort of extraterritorial argument. And so they'll have to come up with a new theory and some of the opinions here again, there's five separate opinions here in this case and some of them give them some homework that they might want to do.

Carrie: So before we get to that, though, I think many people were worried about what the Court was going to say on this issue given that they took it up. Is there a conflict that they were trying to resolve or why do you think they took the case if it related to this one issue?



Ari: Yeah, so it's always fun to speculate on why the Supreme Court takes this sort of action because they don't really explain why they take a case. And I think it only takes four justices to agree to hear a case. And my best theory here now that we've seen the result is that there were four votes at the time to be very clear that this extraterritorial doctrine that had been being batting around in the lower courts simply that should end, that this extraterritorial doctrine is simply not a threat to state regulation.

Carrie: So then shifting to where they don't agree or where they're providing less clarity, we have five different opinions on that issue.

Ari: Yes. So we have this discrimination aspect of the Dormant Commerce Clause that is untouched here. And then there is this balancing test, which is really almost like a cost-benefit analysis looking at the in-state benefits of the law compared to their burdens on interstate commerce. Now Gorsuch joined by Thomas said, "Look, in this particular case, the cost and benefits are not comparable because the benefits here are animal welfare and that really reflects the policy preferences of the people of California. And the costs are largely business costs that they might face in complying with this law and we simply... That's not the Court's role to compare these two incommensurable costs and benefits." And so they said they would've simply dismissed the case. Justice Barrett comes in and says, "Well, I agree with that general principle that these benefits and costs really shouldn't be compared, but I think they've alleged enough, they would probably send it back to the lower court to do more factual finding."

Then you have Sotomayor and Kagan who say, "We don't want to touch this test at all. We're fine comparing costs and benefits. We think courts do that in a number of different contexts. It's a delicate exercise, we're not going to be cavalier about it, but we agree that in this particular case they didn't allege sufficient burden to move forward with the case, so it should be dismissed." Then you have the chief judge joined by everybody who I haven't mentioned already, basically saying, "We think they actually have alleged sufficient burdens in this case and we think the case should move forward in the lower court and hold a trial and do fact-finding and actually measure these costs and benefits." And here I'm a little bit concerned that while they're getting rid of this extraterritorial doctrine, they may be trying to pork up this Pike test, which is the name of this balancing test, because there's a quote from the chief justice who writes this opinion that really suggests that some of these extraterritorial effects should be considered as part of this balancing test.

Carrie: So who was on the opinion with the chief justice?

Ari: So it's Alito, the chief judge, Jackson, and Kavanaugh.

Carrie: Okay.



Ari: That's the lineup here. They're basically saying that there are sufficient facts alleged in the complaint by the pork industry that the case shouldn't be dismissed at this point. And they basically come forward and not only try to defend this balancing test, but I think really say these extraterritorial effects should be considered. Now I'm not too concerned about state regulations falling under this test because, and as I think I said before that it's very rare that a court will strike down a state law just based solely on this sort of balancing test. And there's enough language and various opinions including these opinions that says courts should be really careful in how they approach this sort of balancing.

Carrie: And then Kavanaugh?

Ari: Kavanaugh had his own opinion. He basically said, "We can't let California get away with this." So he said, "If we don't do anything now, we're going to see a lot of copycat laws like this." And the idea would be that to quote from his opinion, "California has tried to do something unusual. It has attempted in essence to unilaterally impose its moral and policy preferences on the rest of the nation." And so he's concerned that we'll see some sort of copycat law. And so he suggests other constitutional provisions that maybe in some future case they were not argued here but maybe could be used against these similar types of laws. But he sort of says in each case, "Not actually endorsing this, there's no precedent to support this right now, but maybe this is a project for courts to work on over the next several years."

So those clauses are the import-export clause, which prohibits any state from imposing imposts or duties on imports or exports. The other one is the privileges and immunities clause, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. And finally, the full faith and credit clause requires each state to afford full faith and credit to the public acts of every other state. So North Dakota was considering this legal challenge to Minnesota's clean energy law. Maybe they'll be the first to make an effort to write new law essentially for one or two or three of these constitutional clauses in a way that's going to ultimately hamstring clean energy. But we're just not there yet. We need a lot of judges to come and make new law before this is a real threat to state regulatory authority.

Carrie: So one point that I found interesting in the opinion was that they talk about California because of the size of the economy and its imports of pork products can have an outsized impact on the national market. Given that the energy grid is obviously interstate, do you think that that's an area of concern for clean energy laws that states are trying to implement?

Ari: So I think if a litigant raises that issue it's going to be part of that fact-based balancing test. And again, that hasn't really been a stumbling block for state clean energy laws. There's also some disagreement with the point that you're raising. Kavanaugh really raises it because he says, "Look, it's going to allow a big state like California to dictate



national policy." Gorsuch's response as well, "All states are equal. So if we're going to scrutinize California more heavily, then we don't have 50 equal states." So he really rejects that argument. But you could imagine that the facts being relevant here to this balancing test and really the harm that courts are supposed to investigate under this test is not to particular businesses and the compliance costs they might face, but actually the harm to the interstate market itself. So you'd have to figure out a way to talk about how California's preferences somehow affect the Western energy market generally, not just the fact that certain firms are going to pay more.

Carrie: What do you expect in the near term. You see these arguments coming up? Are there any portions of this opinion that will start to get traction?

Ari: Again, I think this is really primarily a good news story for clean energy because this extraterritorial argument that had been used in California as well for an earlier Minnesota law, it's over for this and that's good because what they were really arguing for was a per se rule of invalidity. That once there are these out-of-state effects, it's just over. That argument is dead. I don't see any imminent threat. I think there's more of this long-term lurking threat that's both in the chief justice's opinion articulating how this balancing test could be used down the line as well as Kavanaugh's long-term FedSoc research project about how we might transform our understanding of these three Constitutional clauses.

Carrie: So if you were a state and trying to enact policies that affected your in-state resources, what are some of the considerations that you would imagine states need to think about?

Ari: So there definitely still is this discrimination aspect and that still does come up with state clean energy laws. So states have in the past wanted to or even tried to require their utilities to purchase energy from in-state generators. That's still problematic. That aspect of the Dormant Commerce Clause, there is a get out of jail card courts rarely affirm it, but it's basically if you want to achieve some policy goal and there's no less discriminatory means of achieving it, then you can actually discriminate. So this came up in one Supreme Court case where the state of Maine prohibited bait fish from being used from other states and Maine justified this on the basis of concerns about invasive species. And the Court said, "Fine, you can discriminate. That's a legitimate concern." So in the energy space you might have issues about reliability, local air quality, things like that that if the state can adequately justify could be a basis for an in-state requirement. But it's definitely an area that states need to continue to be very careful about.

Carrie: Are there other concerns that you have based on this opinion or do you feel like this is a good news story? The press has sort of focused on the fact that the Pike balancing test gets raised, but I'm really hearing from you that you thought this was a good outcome.



- Ari: Right. This has been characterized as a fractured opinion because there are these five opinions, but again, it's 9-0 on what I think is the most important issue here, which is extraterritoriality under the Dormant Commerce Clause is dead.
- Carrie: So this has been really helpful to unpack who was where on the court cases. Are there any other pieces of advice that you would have states think through as they're thinking through whether it's clean energy laws or I know this has come up in clean fuel standards as well.
- Ari: So one of the defense to these extraterritorial claims that states have raised over the years was that they were within bounds of state authority because the only actors being regulated were in-state businesses and the only transactions that were being regulated were in-state transactions. So I think that's still an important principle that states have to keep in mind, even if that's not out of bound under the Dormant Commerce Clause, I think courts will find it troubling if states try to regulate wholly out-of-state actors or out-of-state transactions.
- Carrie: Are there other cases that you think are going to get to the Supreme Court on these issues?
- Ari: So there is a petition before the Supreme Court about a Texas transmission law that basically says only utilities in Texas get to build transmission in Texas. The Supreme Court has asked the US solicitor general for her opinion on whether to take this case so I would expect the brief to be in by the end of the summer, early fall, and we'll see what she says. These laws are popping up all over the middle of the country as utilities look to protect themselves from competition in transmission development. Right now the Eighth Circuit said these laws are okay, the Fifth Circuit said they're not, and so we'll see if the Supreme Court wants to settle this issue. They might have decided they've set enough on the Dormant Commerce Clause for now, even though this is a different aspect of it, or they may want to feel like there's something else to clarify on this other aspect of the Dormant Commerce Clause.
- Carrie: Okay. Well we'll be watching for that decision on what they want to do about that case. I really want to thank you for explaining this case to us. I know it's been an issue, Dormant Commerce Clause has been an issue of long-tracked and watched.
- Ari: Yeah, it's one we've been tracking for a long time. So I also run statepowerproject.org and we've been tracking Dormant Commerce Clause cases about state clean energy programs now for almost 10 years, as well as cases that are about the Federal Power Act and how it affects state regulatory authority. So we'll continue to do that. It could be that part of our Dormant Commerce Clause work has come to an end and I guess at least it's on a good news note here and we'll certainly keep track of that Texas case and let people know as soon as the Supreme Court makes a decision on that.



Carrie:

Good. Well, we'll put the link in the show notes and thanks so much.

Ari:

Thanks.