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The Supreme Court ends a looming legal threat to state clean energy laws

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A [unanimous Supreme Court](#) rejected the pork industry’s argument that the dormant Commerce Clause doctrine includes an “‘almost *per se*’ rule against laws that have the ‘practical effect’ of ‘controlling’ extraterritorial commerce.” Although no court has struck down a state clean energy law based on this extraterritoriality test, clean energy opponents continue to argue that state programs violate this supposed prohibition. The Court’s recent decision in *National Pork Producers Council v. Ross* should thwart future such claims. However, four Justices would have remanded the case so a lower court could determine whether the “cross-border effects” of the law at issue were “clearly excessive in relation to the putative local benefits” under the dormant Commerce Clause’s *Pike* balancing test. Finally, Justice Kavanaugh issued a separate opinion that suggests other constitutional provisions might prevent states from “shuttering their markets to goods produced in a way that offends their moral or policy preferences.”

The California law at issue forbids in-state sales of pork that come from pigs “confined in a cruel manner.” Because the law applies equally to all pork products, regardless of their state of origin, the complainant pork trade group did not claim that the law violates the dormant Commerce Clause’s prohibition of state laws that discriminate against out-of-state businesses. Instead, the pork council emphasized that the dormant Commerce Clause doctrine aims to preserve a national market by prohibiting state interference in interstate trade. It alleged that California’s law fails that test because it has the unconstitutional “effect of controlling commerce outside the state” by imposing substantial costs on the out-of-state companies that produce nearly all pork sold in California.

This extraterritorial aspect of the dormant Commerce Clause has been recognized by nearly every federal appeals court, although it has rarely been the basis for striking down a state law. In 2013 and again in 2018, the Ninth Circuit rejected an extraterritorial claim about low-carbon fuel standards implemented by [California](#) and [Oregon](#). In 2015, the Tenth Circuit rejected similar arguments that [Colorado’s](#) renewable portfolio standard impermissibly regulates out-of-state producers. Writing for the Tenth Circuit, then-Judge Gorsuch found that plaintiffs’ extraterritoriality theory had no limiting principle that might prevent courts from striking down myriad state health and safety laws. He declined their “audacious invitation” to embark on this “novel lawmaking project” created from “the most dormant doctrine in dormant commerce clause jurisprudence.”

Today’s opinion elevates Gorsuch’s views to Supreme Court precedent. Joined by four Justices, Gorsuch writes in the majority opinion that petitioners’ “‘almost *per se*’ rule against laws that have the ‘practical effect’ of ‘controlling’ extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States’ constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results.” The opinion

emphasizes that plaintiffs espousing the extraterritorial theory had misread the case law and that today's decision does not overturn Supreme Court precedent. The Chief Justice's partial dissent, joined by three Justices, explicitly "agrees with the Court's conclusion that our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."

The Justices could not find consensus about the *Pike* balancing test. Formulated in a 1970 case about a cantaloupe packaging law, the Court held that nondiscriminatory laws could be susceptible to a dormant Commerce Clause challenge. Under the *Pike* test, when a nondiscriminatory state law has "only incidental" effects on interstate commerce, it will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

In part of the opinion joined only by Justices Thomas and Barrett, Justice Gorsuch limits *Pike* "as another way to test for purposeful discrimination against out-of-state economic interests" or "protect the instrumentalities of interstate transportation." Gorsuch rejects a broader reading that would authorize courts to weigh "incommensurable" costs and benefits because that task is "insusceptible to resolution by reference to any juridical principle." Justices Sotomayor and Kagan acknowledge that *Pike* inquiries are "difficult," and courts should proceed "with caution," but they support the "means-ends tailoring analysis that *Pike* incorporates," which "does not raise the asserted incommensurability problems that trouble Justice Gorsuch." All five justices affirmed the Ninth Circuit's dismissal of the pork industry's *Pike* claims.

In dissent, the Chief Justice—joined by Justices Alito, Kavanaugh, and Jackson—would remand the case for the lower court to decide whether petitioners have stated a claim under *Pike*. The Ninth Circuit found that the plaintiffs "plausibly alleged" that the California law "will require pervasive changes to the pork production industry nationwide," but held that these compliance costs were insufficient to sustain a *Pike* claim. The Chief Justice, however, concluded that the allegations "amount to economic harms against the interstate market, not just particular interstate firms." Plaintiffs claimed that California's law would require "compliance even by producers who do not wish to sell in the regulated market." "Such sweeping extraterritorial effects," according to the dissent, "even if not considered as a *per se* invalidation, [are] pertinent in applying *Pike*."

Today's decision complicates future extraterritorial challenges to state clean energy laws. Earlier this year, Minnesota passed a 100 percent clean electricity law over the objections of North Dakota interests who argued that the law regulates extraterritorially and [threatened to sue](#). If they litigate, they will not be able to rely on a *per se* rule of invalidity but will instead have to rest their case on *Pike*, as understood by today's dissent. No court has struck down a state clean energy law solely on *Pike*, and it seems unlikely that the North Dakota litigants can marshal sufficient facts in their favor. Minnesota's law does not require "compliance even by producers who do not wish to sell in the regulated [Minnesota] market."

Finally, Justice Kavanaugh's solo opinion provides future plaintiffs with alternative litigation strategies. Justice Kavanaugh claims that the pork law at issue reflects a "California knows best economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States." He is concerned that "California's novel and far-reaching

regulation could provide a blueprint for other States” and may “foreshadow a new era where States . . . effectively force other States to regulate in accordance with those idiosyncratic state demands.” Justice Kavanaugh says that the Import-Export Clause, Privileges and Immunities Clause, and Full Faith and Credit Clause all “deserve further examination” in a future case against this type of law.