A Supreme Split over Breakfast: What National Pork Producers Could Mean as Massachusetts Law Moves Toward Implementation

Introduction

This week, in federal court in Massachusetts, a number of out-of-state pig farmers filed a motion seeking to prevent enforcement of a Massachusetts law, originally enacted by ballot initiative, that prohibits the sale of certain agricultural products produced from animals confined in a "cruel manner." ☒This lawsuit follows closely on the heels of the Supreme Court's May ruling in *National Pork Producers v. Ross*, 598 U.S. ___ (2023), which addressed a nearly identical California law (Proposition 12) and whether that law violated the Dormant Commerce Clause. In a splintered decision, the Supreme Court ultimately found that it did not and upheld the law.

The Dormant Commerce Clause

National Pork Producers centers on a doctrine called the Dormant Commerce Clause (DCC). Because the Constitution grants Congress the power to "regulate Commerce . . . among the several States[,]" Art. I, §8, cl. 3., the Court has long reasoned that, by implication, it prohibits states from doing the same. In other words, states may not discriminate against out-of-state economic interests by affording protections or competitive advantages to in-state interests, nor may they unduly burden interstate commerce.

The SCOTUS decision

In *National Pork Producers*, a group of organizations involved in the pork industry challenged Proposition 12 as violating the DCC in two ways. First, although they conceded that the DCC's anti-discrimination principle was not violated (since the new rules applied to pork producers *in* California as well as those out-of-state), they argued that the "practical effect" of controlling commerce outside of the state was nonetheless unlawful. Second, they claimed that the burden imposed on interstate commerce was "clearly excessive in relation to the putative local benefits."

The Supreme Court disagreed on both counts. On the first count, the Court unanimously rejected the claim that an "almost *per se*" rule exists restricting states from enacting regulations with "extraterritorial effects." While the petitioners here—the pork producers challenging Proposition 12—cited several cases to support their claim, the Court found that those cases hinged on the fact that the challenged laws deliberately prevented out-of-state commerce outside their borders. In other words, while those laws were not discriminatory on their face, their application nonetheless revealed purposeful discrimination. Because the petitioners in this *National Pork Producers* conceded that Proposition 12 is not discriminatory, the Court held that their "practical effects" claim must fail.

On the petitioners' second claim—that the burden imposed on interstate commerce was "clearly excessive in relation to the putative local benefits"—the Court was split. In the view of Justices Gorsuch, Thomas, and Barrett, no state law should be deemed to violate the DCC because of a clearly excessive burden as compared to its benefit. These three justices were skeptical of the balancing test itself, questioning the feasibility of weighing economic and noneconomic interests against each other, and finding no court to be equipped for the task. The remaining six justices who would retain the balancing test were divided on the question of whether the allegations here were sufficient to establish a substantial burden on interstate commerce: Justices Sotomayor and Kagan found the allegations insufficient, while Justices Roberts, Alito, Kavanaugh, and Jackson found that there were substantial burdens, and would have found Proposition 12 unconstitutional. However, the three justices who would reject the balancing test, plus the two justices who found it satisfied, were sufficient to cobble together a five-vote majority to uphold the California law.

What it means for Massachusetts (and more broadly)

While the California law at issue in *National Pork Producers* and the Massachusetts law being challenged here are nearly identical, their practical impacts on the pork industry could be very different.☒As Justice Kavanaugh noted in his opinion, concurring in part and dissenting in part, California's 13% share of the consumer pork market "makes it economically infeasible" for many pig farmers and pork producers to opt out of the California market. But the Massachusetts market is much smaller.☒ Is this difference in size meaningful for the purposes of dormant commerce clause challenges?☒The splintered opinion leaves open the possibility that smaller states, which will by nature have a smaller impact on interstate commerce, might have more room to regulate without creating a substantial burden on interstate commerce.☒

Justice Gorsuch, in a portion of his opinion joined by only two other justices, voiced his concern with this possibility:☒"But if [California's market size] makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate instate sales than voters in States with larger markets. So much for the Constitution's 'fundamental principal of *equal* sovereignty among the States." Massachusetts, which has a long history of nation-leading legislation in a variety of areas, may very well be the forum in

which this debate unfolds. An earlier lawsuit challenging the same Massachusetts law has been stayed until 2024, with no substantive proceedings taking place. If the court conducts a hearing on the motion for preliminary injunction in this new case, this will mark the first opportunity to develop a factual record regarding the impacts of the Massachusetts law.

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