
Industrial Pig Farming (credit: Wikipedia)

Today the U.S. Supreme Court will hear oral arguments in an animal welfare case from California that could have profound, negative impacts on a host of the Golden State's environmental laws and policies. The case is National Pork Producers Council v. Ross, No. 21-468.

The National Pork Producers Council litigation arises from an initiative measure–Proposition 12–that California voters passed overwhelmingly in 2018. That measure is one of a series of animal welfare laws the California electorate has enacted in recent years, Titled the "Prevention of Cruelty to Animals Act," Proposition 12 imposes new requirements on farmers and ranchers by setting minimum standards for enclosures–pens, cages, etc.–in which various farm animals–including pigs–are confined. Critically, the initiative bans the sale in California of any meat or egg products from animals whose enclosures are not in compliance with these spatial requirements, which are intended to give the confined farm animals a modicum of space and comfort.

National farm industry groups led by the National Pork Producers Council and the American Farm Bureau Federation promptly brought suit in federal court, challenging Proposition 12 as violative of the U.S. Constitution. Specifically, the trade groups claim that the California law violates so-called "dormant" Commerce Clause principles, and that compliance with California's pen standards will raise the pork industry's costs considerably.

Both the federal district court and the U.S. Court of Appeals for the Ninth Circuit rejected the industry's claim and upheld the initiative as constitutional. Undeterred, the industry sought review in the U.S. Supreme Court. The justices granted

certiorari, and the justices are hearing oral arguments in the case today.

Why should those interested in environmental law and policy care about the outcome of the National Pork Producers Council case? Because, depending on how the justices rule, their decision could undermine a host of California (and other states') environmental and energy laws.

Notably, there is no express provision in the U.S. Constitution that articulates or even mentions the dormant Commerce Clause. Instead, the doctrine has been created–out of whole cloth–in a series of Supreme Court decisions over the years. Under dormant Commerce Clause principles, state and local laws that do any of three things are invalid:

- State or local laws that discriminate against out-of-state persons or companies (as compared to in-state interests and parties) are almost always deemed to violate dormant Commerce Clause principles. (Critically, the industry challengers in National Pork Producers Council do not claim that Proposition 12 discriminates against out-of-state actors, since the law applies equally to California-based pork producers.)
- If, by contrast, a state measure is neutral on its face, federal courts apply an even-handed "balancing test," in which they inquire whether the national interests involved clearly outweigh the state or local interests that prompted enactment of the challenged legislation. Over the years, courts have rarely struck down state or local measures as violative of this *Pike* balancing test (named for the Supreme Court case that announced it).
- Finally, in recent years advocates of dormant Commerce Clause principles have advanced a third prong of the constitutional standard: that state and local governments should not be permitted to regulate "extraterritorially"–i.e., beyond their political borders. It is this "extraterritoriality" test that forms the principal basis of the farm industry's dormant Commerce Clause challenge in National Pork Producers Council (though they also assert the *Pike* balancing test as a back-up argument).

Lower federal courts have rejected similar dormant Commerce Clause-based lawsuits challenging a number of California animal welfare laws. But so too have they spurned dormant Commerce Clause challenges to a host of California's important environmental and energy laws in recent years. For example, the Ninth

Circuit Court of Appeals has ruled that California Air Resources Board (CARB) regulations limiting conventional air pollution from tanker ships sailing far offshore but whose emissions pollute within California's borders do not violate dormant Commerce Clause principles. And dormant Commerce Clause challenges have similarly failed in federal court challenges to a host of California measures designed to curb greenhouse gas emissions: CARB's low carbon fuel standard; greenhouse gas tailpipe emissions from cars and light trucks sold in California; CARB's cap-and-trade emissions program; etc. And a dormant Commerce Clause-based challenge to a 2006 California statute that prompted a transition from carbon-based to renewable energy sources similarly failed in court.

But not all states have fared as well in defending against dormant Commerce Clause-based challenges to their environmental and energy laws. In *North Dakota v. Heydinger*, for example, the U.S. Court of Appeals for the Eighth Circuit in 2016 struck down Minnesota's attempt to reduce its dependence on carbon dioxide emission-based power generated by in- and out-of-state, coal-fired power plants. The Eighth Circuit struck down the Minnesota law based on an expansive interpretation of the dormant Commerce Clause's "extraterritoriality" standard.

How broadly or narrowly the Supreme Court interprets and applies dormant Commerce Clause principles in the National Pork Producers Council case could thus have a dramatic, adverse effect on state environmental and energy laws in California and throughout the nation.

There are two important footnotes to this case. First, in past cases several justices, including the late Antonin Scalia and current Justice Clarence Thomas, have expressed skepticism about the dormant Commerce Clause principles generally, based on their "textual" reading of the Constitution and the fact that the dormant Commerce Clause is nowhere to be found in that document. So it will be interesting to see if in National Pork Producers Council several of the more conservative justices now on the Court will set aside their general support for private sector economic interests in favor of their professed "textualist," conservative judicial philosophy.

Second, the Biden Administration parted company with the State of California when, surprisingly, it filed a friend-of-the-court brief siding with the farm industry. The Solicitor General argues that California's Proposition 12 is violative of dormant Commerce Clause principles and should therefore be struck down by the Court. While it does so on narrower constitutional grounds than those advanced by

petitioners in National Pork Producers Council, the federal government's position increases the chances that the justices will invalidate the challenged California law.

If the industry challengers to Proposition 12 do prevail, and depending on the scope of the justices' ruling, a host of California's environmental, climate change and energy laws could also be imperiled.