What Justices' Pork Ruling Means For Interstate Cannabis

By **Tommy Tobin and Andrew Kline** (August 9, 2023)

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In May, the U.S. Supreme Court added a new wrinkle in dormant commerce clause jurisprudence in National Pork Producers Council v. Ross.[1]

The divided opinion comes as the nation's federal courts grapple with a novel paradox raised by the illegality of marijuana at the federal level amid state legalization: If there cannot legally be interstate commerce in cannabis, does the dormant commerce clause still apply?[2]

Notwithstanding federal illegality, is there currently interstate commerce in the federally illegal, but state-regulated marketplace sufficient to warrant constitutional protection through the dormant commerce clause?

Pending appellate cases this year may shed additional light on the answers, especially after National Pork.

What is the dormant commerce clause?

The commerce clause of the U.S. Constitution gives Congress exclusive authority "[t]o regulate Commerce ... among the several States."[3]

Courts have long recognized that this power not only entitles Congress to affirmatively regulate interstate commerce, but also implicitly prohibits states from enacting regulations that interfere with interstate commerce.[4]

Enter the dormant commerce clause, sometimes called the negative commerce clause.

There are two general flavors of dormant commerce clause cases. The first is more straightforward: state regulations that facially discriminate against interstate commerce.

Courts apply strict scrutiny to such cases, with the Supreme Court noting that "a virtually per se rule of invalidity has been erected" against this form of "economic protectionism" by the states.[5]

State laws might also violate the dormant commerce clause when they discriminate against out-of-staters via the law's practical effect.[6]

The second string of cases is more complicated: cases involving more neutral state mandates. In these cases, courts apply the Pike balancing test — from the Supreme Court's Pike v. Bruce Church decision in 1970 — asking whether the state mandate places undue burdens on interstate commerce.

Under Pike, state mandates are presumptively allowed "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[7]

What happened in National Pork?

National Pork Producers Council v. Ross,[8] decided this May, is the most substantial dormant commerce clause opinion from the court since 2019. More accurately, it is a set of opinions — the court issued a highly fractured decision, with no clear majority rule.[9]

National Pork considered the constitutionality of a California mandate that banned the sale of pork unless it complied with certain animal welfare standards.[10]

Technically, the regulation was nondiscriminatory, applying with equal force to pork produced in-state. But in practice, it mainly burdened out-of-state producers, since California imports nearly all its pork; plaintiffs therefore argued that the rule impermissibly burdened interstate commerce under Pike.[11]

One significant aspect of the case concerned the exterritorial application of the California state mandate. A majority of the court agreed that there was not an "'almost per se' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State.'"

Such an overbroad rule, the court reasoned, would implicate many, if not most, existing state regulations.[12]

The court also agreed that the California rule was not discriminatory on its face or in its practical effect, and so the looser Pike balancing standard applied.[13] But when it came time to apply the Pike balancing test, the court splintered.

Justices Neil Gorsuch, Clarence Thomas and Amy Coney Barrett asserted that Pike balancing could not be used to weigh noneconomic benefits against economic harms — such subjective value judgments are the proper role of the political branches.[14]

The other justices did not take issue with this aspect,[15] but they could not agree on whether the plaintiffs had actually alleged a substantial burden on interstate commerce — five justices concluded they had, four held they had not.[16]

The effect of these overlapping opinions was to uphold California's pork regulation, although the court did not speak with one voice as to its rationale.

What does pork have to do with cannabis?

Marijuana remains a Schedule I controlled substance and is thus federally illegal. Meanwhile, a supermajority of states have legalized it for sale, whether in medicinal or adult recreational-use marketplaces.

In no small part because the interstate distribution of cannabis would raise federal legal concerns, state-legal cannabis markets have adopted a range of regulations that facially or effectively discriminate against out-of-state commerce.[17]

For example, some states have enacted residency requirements, which favor residents over out-of-staters in the ownership of licensed cannabis businesses.[18]

Because the sale of cannabis across state lines is unlawful, is there interstate commerce in cannabis sufficient for courts to apply the dormant commerce clause?

It is clear that there is an interstate market in illicit cannabis, and in hemp and hemp-derived products that were descheduled in the 2018 Farm Bill. But it is ambiguous whether interstate commerce exists in the state-legal cannabis marketplace, notwithstanding the fact that no interstate sales are allowable.

In fact, every state with a regulated marijuana program requires that cannabis sold within the state must be grown and produced in-state.

Therefore, although logic necessitates that there is an illegal diversion of state-legal products, there is no sanctioned interstate market in cannabis.

Even so, most courts to consider the question have determined that the dormant commerce clause still applies to cannabis.

In Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine, the U.S. Court of Appeals for the First Circuit — the only appellate court to rule on the question — struck down Maine's residency requirement last year on the grounds that "marijuana is a 'fungible commodity for which there is an established, albeit illegal, interstate market.'"[19]

The court reasoned that Congress' decision to criminalize marijuana does not necessarily mean that it "consent[ed] to this kind of rank protectionism. ... [I]t can hardly be said that a state effort to protect a market in medical marijuana from out-of-state competition necessarily advances Congress's evident goal in the [Controlled Substances Act] of preventing entry into that market," since protectionism benefits resident cannabis distributors and encourages local cannabis trade.[20]

Most district courts to consider the dormant commerce clause implications of cannabis regulation have similarly held that the dormant commerce clause applies to cannabis.[21]

However, in Brinkmeyer v. Washington State Liquor & Cannabis Board,[22] the U.S. District Court for the Western District of Washington concluded in February that a residency requirement did not violate the dormant commerce clause.

Unlike the First Circuit, the Washington federal court had "no doubt that Congress intended to restrict all commerce in cannabis by adding it to Schedule I of the CSA," and held that Congress did not intend for there to be an interstate market for cannabis.[23]

The plaintiffs voluntarily dismissed their appeal in April.[24]

The nation's federal appellate courts are considering questions related to the dormant commerce clause and cannabis.

The U.S. Court of Appeals for the Ninth Circuit is currently considering two cases relevant to dormant commerce clause cannabis questions:

- Peridot Tree Inc. v. City of Sacramento concerns Sacramento's social equity program, which favors underrepresented residents affected by the war on drugs in cannabis licensing.[25]

- Shelton v. Washington State Liquor and Cannabis Board, though not explicitly about the dormant commerce clause, considers the related question of whether federal courts may "order activity that remains federally illegal."[26]

The U.S. Court of Appeals for the Seventh Circuit is also considering Finch v. Treto, an appeal of the U.S. District Court for the Northern District of Illinois' decision regarding Illinois' system of preferentially allocating cannabis licenses to in-state applicants, especially those from so-called disproportionately impacted areas in the state.[27]

The district court determined that "because [the cannabis] industry has been legalized by Illinois (and many other states), it is likely to affect interstate commerce, no matter its federal status," and therefore falls within the dormant commerce clause's scope.[28]

What's next?

The National Pork case demonstrates that dormant commerce clause jurisprudence is a live area, and a contentious one at that.

The case centers on Pike balancing, which has not generally been applied in cannabis litigation.[29] Nevertheless, National Pork is an important reminder of the continued salience of the dormant commerce clause in litigation assessing the effects of state mandates on out-of-state residents and related burdens on interstate commerce.

It also reveals the deep divisions and strong opinions among the justices regarding the dormant commerce clause; if a dormant commerce clause cannabis case reaches the Supreme Court, the court will not be operating from a blank slate.

Specifically, National Pork exemplifies the court's recent trend toward a narrower dormant commerce clause, which gives greater leeway to states.[30]

In the cannabis context, this is fortuitous. States are currently trapped between a rock and a hard place: Either they do nothing to restrict interstate cannabis trade, and risk running afoul of the federal Controlled Substances Act, or they do restrict interstate commerce and butt into the dormant commerce clause.

Courts would do well to follow the example of Brinkmeyer, which correctly observed that "the dormant Commerce Clause exists to 'preserve[] a national market,'" and "citizens do not have a legal interest in participating in a federally illegal market."[31]

In any case, cannabis regulation remains one of the latest frontiers of dormant commerce clause doctrine. The Ninth and Seventh Circuits are currently contemplating whether certain state cannabis mandates might run afoul of the dormant commerce clause.

Cannabis businesses should closely watch these cases to see whether they align with the First Circuit, and an emerging majority view, in concluding that the dormant commerce clause applies to cannabis.

As states ready themselves for the potential federal rescheduling of marijuana,[32] they should keep this developing area of constitutional law in mind.

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[1] 143 S. Ct. 1142 (2023).

[2] See generally Tommy Tobin & Andrew Kline, A Sleeping Giant: How the Dormant Commerce Clause Looms over the Cannabis Marketplace, Yale L. & Pol'y Rev. Inter Alia (Jan.3, 2022), https://yalelawandpolicy.org/inter_alia/sleeping-giant-how-dormant-commerce-clause-looms-over-cannabis-marketplace.

[3] Art. I, § 8, cl. 3.

[4] See Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).

[5] United Haulers Ass'n, Inc.v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

[6] Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1230 (9th Cir. 2010).

[7] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[8] 143 S. Ct. 1142 (2023).

[9] See generally Juan Carlos Rodriguez, Justices Say Calif. Pork Law Withstands Commerce Concerns, Law360 (May11, 2023), https://www.law360.com/articles/1568210/justices-say-calif-pork-law-withstands-commerce-concerns (summarizing the overlapping holdings in the case).

[10] Nat'l Pork, 143 S. Ct. at 1150-51.

[11] Id. at 1151-52.

[12] Id. at 1153-56. But cf. Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.").

[13] Nat'l Pork, 143 S. Ct. at 1153.

[14] See id. at 1159-60 ("Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation...."); id. at 1167 (Barrett, J., concurring in part) ("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... making the kind of policy decisions reserved for politicians.").

[15] See id. at 1166 (Sotomayor, J., concurring in part) ("[C]ourts generally are able to weigh disparate burdens and benefits against each other...."); id. at 1168-69 (Roberts, C.J., concurring in part) ("[S]ometimes there is no avoiding the need to weigh seemingly incommensurable values.").

[16] Rodriguez, supra note 9; see Nat'l Pork, 143 S. Ct. at 1167 (Barrett, J., concurring in part) ("I disagree with my colleagues who would hold that petitioners have failed to allege a substantial burden on interstate commerce."); id. at 1170-71 (Roberts, C.J., concurring in part) ("In my view, petitioners plausibly allege a substantial burden against interstate commerce."); id. at 1172 (Kavanaugh, J., concurring in part) ("The plurality reasons that the plaintiffs' complaint did not sufficiently allege... a substantial burden on interstate commerce under Pike. I respectfully disagree... ."). But see id. at 1161-63 ("Pike requires a plaintiff to plead facts plausibly showing that a challenged law imposes 'substantial burdens'.... [T]he complaint before us fails to clear even that bar."); id. at 1165 (Sotomayor, J., concurring in part) ("[P]etitioners fail to allege a substantial burden on interstate commerce....").

[17] Tobin & Kline, supra note 2; Tommy Tobin & Andrew Kline, Dormant Commerce Clause Issues Are Evolving in Cannabis, Law360 (Mar.27, 2023), https://www.law360.com/articles/1589960.

[18] Tobin & Kline, supra note2.

[19] 45 F.4th 542, 547 (1st Cir. 2022) (quoting Gonzales v. Raich, 545 U.S. 1, 5 (2005)).

[20] Ne. Patients Grp., 45 F.4th at 554.

[21] See Tobin & Kline, supra note 17.

[22] No. C20-5661 BHS, 2023 WL 1798173, at *12 (W.D. Wash. Feb.7, 2023).

[23] Id.

[24] Brinkmeyer v. Wa. State Liquor & Cannabis Bd., No. 23-35162, 2023 WL 3884102 (9th Cir. Apr.11, 2023).

[25] See No. 2:22-CV-00289-KJM-DB, 2022 WL 10629241 (E.D. Cal. Oct.18, 2022); Peridot Tree, Inc. v. City of Sacramento, No.22-16783 (9thCir. filed Nov.17, 2022).

[26] No. C22-5135 BHS, 2022 WL 2651617, at *5 (W.D. Wash. July 8, 2022); Shelton v. Liquor & Cannabis Bd., No.22-35647 (9thCir. filed Aug.12, 2022).

[27] Finch v. Treto, 606 F. Supp. 3d 811, 818-19 (N.D. Ill. 2022); Finch v. Treto, No.22-2050 (7th Cir. filed June 14, 2022).

[28] Finch, 606 F. Supp. 3d at 833.

[29] When courts have considered whether cannabis regulations violate the DCC, they have applied the test for facial or effective discrimination, not Pike balancing. See, e.g., Variscite, Inc. v. City of Los Angeles, No. 2:22-CV-08685-SPG-SK, 2022 WL 18397510, at *7-8 (C.D. Cal. Dec. 8, 2022); Ne. Patients Grp. v. Maine Dep't of Admin. & Fin. Servs., 554 F. Supp. 3d 177, 185 (D. Me. 2021); Attitude Wellness, LLC v. Vill. of Pinckney, 606 F. Supp. 3d 624,

631 (E.D. Mich. 2022); Finch v. Treto, 606 F. Supp. 3d 811, 830-31 (N.D. Ill. 2022).

[30] See Nathan Townsend, Dormant Commerce Clause Whittled Further After Pork Producer Case, Bloomberg L. (May 15, 2023), https://news.bloomberglaw.com/us-law-week/dormant-commerce-clause-whittled-further-after-pork-producer-case.

[31] 2023 WL 1798173, at *10-11.

[32] See, e.g., S.B.5069, 2023 68th Sess. (Wa. 2023) (organizing an interstate compact for cannabis once it becomes federally permissible).