

## Justices Ponder Broader Impacts Of Case Beyond Pork

By Juan Carlos Rodriguez

*Law360 (October 11, 2022, 4:28 PM EDT)* -- U.S. Supreme Court justices on Tuesday expressed concerns about the potential for states to weaponize their lawmaking against other states as they weighed whether to revive pork producers' challenge to a California animal care law that allegedly violates the Constitution by drastically increasing costs for out-of-state farmers.

The National Pork Producers Council and American Farm Bureau Federation are appealing a California federal court's decision to dismiss their lawsuit challenging a 2018 voter-approved ballot initiative that bans in-state sales of meat from pigs born to mothers confined in small spaces.

During oral argument Tuesday, the justices delved into the nuances of the Constitution's dormant commerce clause, which isn't spelled out in the founding document but has been interpreted as barring states from treating out-of-state and in-state companies differently.

According to the farming groups, because California imports 99% of its pork from other states, out-of-state pork producers will bear the burden of increased costs associated with the law. That violates the dormant commerce clause's extraterritoriality doctrine by impermissibly regulating "wholly out-of-state conduct" and effectively forcing out-of-state producers to comply with California's law even if their own state laws are different, the groups argued. The district court and the Ninth Circuit both found the lawsuit did not pass muster under the doctrine.

The justices appeared interested in how a ruling in this case would affect other potential situations, and peppered attorneys with hypothetical scenarios.

Justice Elena Kagan, for example, asked Michael Mongan of the California Department of Justice if his state can ban the sale of pork produced by methods the states' voters found morally objectionable, can states with different values regarding labor unions, like California and Texas, pass laws that reflect those differences and deeply affect one another?



The justices examined the nuances of the Constitution's dormant commerce clause, posing hypothetical scenarios to attorneys in oral argument on Tuesday. (Jimmy Hoover | Law360)

"I think that there is and should be a constitutional check on that, which is that state regulation of a product has to be sufficiently tied to the actual process of producing that product," Mongan replied.

Kagan laid out the stakes as she sees them in stark terms.

"You could have states doing a wide variety of things through the mechanism of saying, 'Well, unless you comply, you can't sell goods in our market,'" Justice Kagan said. "We live in a divided country, and the balkanization that the framers were concerned about is surely present today. ... Do we want to live in a world where we're constantly at each other's throats? And Texas is at war with California and California at war with Texas?"

Several justices questioned the lawyers about how much weight moral considerations, like California's values regarding the raising of pigs, should be given in relation to health and safety considerations under the high court's 1970 finding in *Pike v. Bruce Church*. Pike established that a state law is unconstitutional if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."

On this question, the parties were on opposite sides of the fence. Timothy Bishop of Mayer Brown LLP, arguing for the agricultural groups, said California's law can't be upheld because while moral considerations can certainly be legislated by a state within its own boundaries, that can't be the foundation for a law that affects another state in the way California's law does in this case.

"If they could, then the common national market would just fall apart because Texas can say you have to certify that everything was produced by lawful residents," Bishop said. "Oregon can say unless you provide particular health care ... we're not going to buy those products."

Edwin Kneeder of the Office of the U.S. Solicitor General, arguing in support of the pork producers, agreed with Bishop, while Mongan and Jeffrey Lamken of MoloLamken LLP, representing animal rights groups that support California's law, took the opposite view.

"What strikes me about this case ... is that both sides want to exclude things from the Pike analysis," Justice Kagan said to Lamken. "Mr. Bishop wants to exclude all moral interests, as does Mr. Kneeder. And you want to exclude a world of economic harms because you think that that's not really what the commerce clause is all about. And isn't Pike just saying you get to throw them all in the mix, and it's really hard, but somebody has to make the judgment? And it hasn't been made yet in this case."

Justice Kagan noted the case is only at the motion to dismiss stage, and she was joined by Justices Brett Kavanaugh and Ketanji Brown Jackson on that point; both indicated they might be open to reversing the lower court and reviving the lawsuit in order to let lower courts handle some of the tricky legal questions before perhaps taking another crack at the case in the future.

"There are a lot of far-reaching arguments in this case," Justice Kavanaugh said. "But it seems to me ... Pike is a long-standing precedent. You have a complaint that alleges a claim under Pike that's on its face sufficient. Is that the easiest way to resolve this for now? And we can deal with a lot of these far-reaching arguments down the road."

The federal government is represented by Elizabeth B. Prelogar, Edwin S. Kneeder, Michael R. Huston, Michael S. Raab, Thomas Pulham and David L. Peters of the Office of the Solicitor General.

The National Pork Producers Council and American Farm Bureau Federation are represented by Timothy S. Bishop, Brett E. Legner, Avi M. Kupfer, Dan Himmelfarb and Colleen M. Campbell of Mayer Brown LLP.

California is represented by Rob Bonta, Michael J. Mongan, Samuel T. Harbourt, Thomas S. Patterson, Nicole Welindt, R. Matthew Wise and Mark R. Beckington of the California Department of Justice.

The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA and Animal Outlook are represented by Bruce Wagman of Riley Safer Holmes & Cancila LLP. The Humane Society is also represented by Jeffrey A. Lamken, Michael G. Pattillo Jr., Caleb Hayes-Deats, Jordan Rice and Kenneth Notter of MoloLamken LLP.

The case is National Pork Producers Council et al. v. Karen Ross et al., case number 21-468, in the Supreme Court of the United States.

--Additional reporting by Dave Simpson. Editing by Alyssa Miller.

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