

SUPREME COURT

Commerce clause ruling packs punch for state energy policy

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The Supreme Court invoked the dormant commerce clause -- a legal doctrine with implications for state energy policy -- in its ruling against Tennessee's residency requirements for liquor distributors. NCinDC/Flickr

A Supreme Court ruling on liquor distribution in Tennessee carries a message for states weighing ambitious climate and energy policies: The dormant commerce clause is still going strong.

In a 7-2 ruling in *Tennessee Wine & Spirits Association v. Thomas*, the justices affirmed a lower court's finding that a minimum residency period for individuals and companies that want to run liquor stores in the state violates constitutional protections against discrimination in interstate and international commerce.

"Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional," the court, led by Justice Samuel Alito, wrote in an [opinion](#) issued yesterday.

Dormant commerce clause disputes have driven extensive litigation over pipeline construction and coal exports.

The Supreme Court has previously rejected such challenges over nuclear subsidies in New York and Illinois and low-carbon fuel programs in California and Oregon ([Energywire](#), April 16; [Greenwire](#), May 13).

"A lot of people had assumed the dormant commerce clause is receding, and that obviously matters for climate policy in California and Oregon and the like," said Case Western Reserve University law professor Jonathan Adler. "This decision certainly makes clear that at least as far as overtly discriminatory or overtly protectionist measures are concerned, the dormant commerce clause is alive and well."

"That certainly means that states that are adopting arguably discriminatory climate policies will have to pay attention to this concern," he said.

But a dissent by conservative Justices Neil Gorsuch and Clarence Thomas arguing that Congress — not the courts — holds power over interstate commerce might dampen industry hopes that the Supreme Court could flex its muscle against strong state energy and climate policies.

"Under its banner, this Court has sometimes asserted the power to strike down state laws that discriminate against nonresidents on the ground that they usurp the authority to regulate interstate commerce that the Constitution assigns in Article I to Congress," Gorsuch wrote.

"But precisely because the Constitution assigns Congress the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents," he wrote.

The Supreme Court only hears challenges that have the vote of at least four justices and ends up taking about 1% of the cases it receives.

Unless industry interests can convince the liberal justices to step in and narrow state climate and energy standards they might otherwise support — or persuade Gorsuch or Thomas that a state has gone too far — petitions targeting such policies will likely fail, said Southern Methodist University law professor James Coleman.

"They can let a lot go," he said.

While the ruling doesn't break new ground on dormant commerce clause issues, it does indicate that any decisions on future environmental challenges in this realm are unlikely to be decided along traditional ideological lines, said Pacific Legal Foundation attorney Jonathan Wood.

"This makes it really difficult to determine what an outcome might look like," he said.

Reporter Ellen M. Gilmer contributed.

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