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The Supreme Court Decision Relating to the "Dormant" Commerce Clause

By: Evan Z. Reid

The question of whether and how courts will deal with legal issues associated with advances in technology is a perennial one, with courts always seeming to lag well behind the pace of innovation. In twin May 18th opinions, the Supreme Court avoided potentially thorny issues of technology and immunity in the two cases of *Twitter, Inc. v. Taamneh* and *Gonzalez v. Google LLC*. Arising from instances of international terrorism and the use of Twitter and Google by terrorists committing those crimes, the cases had originally been expected to scrutinize Section 230 of the Communications Decency Act, which immunizes internet platforms from liability for content posted by users. Instead of considering whether the platforms were immune for claims arising from videos posted by terrorists, the opinion in the lead case, *Taamneh*, focused on whether the plaintiffs had stated a claim under 18 U.S.C. § 2333(d), which permits lawsuits against "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."

A unanimous Court concluded that no "aiding and abetting" claim had been stated in *Taamneh* because no "substantial assistance" had been pled, affirming its dismissal by the lower court. The Court separately sent *Gonzalez* back to the Ninth Circuit for reconsideration in light of *Taamneh*, while stating its doubts that the *Gonzalez* plaintiffs had successfully stated an aiding and abetting claim. At oral arguments, some Justices had expressed the opinion that any reconsideration of the reach of Section 230 was properly in the domain of Congress and, in the end, the sometimes-controversial law was not addressed in either of the opinions.

The Commerce Clause gives Congress broad power to regulate interstate commerce. The "Dormant" Commerce Clause refers to the implicit prohibition against states passing legislation that discriminates against or excessively burdens interstate commerce. The future of the "Dormant" Commerce Clause is an important one for businesses that sell and compete in multiple states, particularly as various states expand their lawmaking and regulations to meet the particular demands of their voters. Intentional discrimination by one state against the commerce of another is almost always out-of-bounds, but how far can a state go in setting limits on the sale of goods within its own borders before running afoul of the "Dormant" Commerce Clause of the Constitution because of effects felt in other states? On May 11th, a divided Supreme Court failed to give a clear answer in *National Pork Producers Council v. Ross*, which denied a challenge to a 2018 California proposition that imposed a ban on selling pork within the state that does not comply with breeding requirements intended to improve the lives of sows.

While Justice Gorsuch wrote for a majority that rejected the pork producers' argument that the "Dormant" Commerce Clause created an "almost *per se* rule" against any state law that affects the manner and cost of business conducted in other states, he could not command a majority for his

explanation for why the plaintiffs' case had failed or for his vision of a much narrower "dormant" Commerce Clause. Instead, a majority of Justices, writing in a plethora of separate opinions, appeared to agree that the Court's ruling in *Pike v. Bruce Church, Inc.* continued to allow the federal courts to invalidate state laws that create indirect burdens on interstate commerce where those burdens outweigh the benefits that are expected to arise from the challenged law. But the path to a successful *Pike* challenge to a nondiscriminatory state law is narrow—the Court will have to be able to reliably weigh and compare the costs and benefits of the law in question, something that several Justices believed was impossible with respect to the California law. The future of the "Dormant" Commerce Clause and the "*Pike* Doctrine" remain very much up in the air and—at least for now—businesses are left guessing as to what future state law might actually be found to violate the Clause.