

U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on Courts and Competition Policy

James C. Ho  
Solicitor General of Texas

Hearing on: Legal Issues Concerning State Alcohol Regulation

Thursday, March 18, 2010, 1 p.m.  
2141 Rayburn House Office Building

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Mr. Chairman and Members:

Thank you for the opportunity to appear before the subcommittee today. My name is Jim Ho. I currently serve as the Solicitor General for the State of Texas, under the leadership of Texas Attorney General Greg Abbott. But I appear today solely in my personal capacity—and not on behalf of the State of Texas or any of its officials or agencies.

It is my understanding that the subcommittee may soon consider legislation to clarify the authority of states to regulate commercial activities involving alcoholic beverages.

I am not here to express any views on the merits of any such legislation. But I have been involved in litigation in this area, and am happy to discuss my experiences accordingly.

As the subcommittee well knows, the power of states to regulate commerce in alcohol has been the subject of hotly contested litigation in numerous courts across the country in recent years. Our office has handled a number of such matters on behalf of the State of Texas, but there are similar cases being fought in communities across the nation.

The U.S. Supreme Court addressed many of these issues just a few years ago in *Granholm v. Heald*, 544 U.S. 460 (2005). And now, courts and litigants across the country—including the State of Texas—are working to determine the proper meaning and limits of the *Granholm* ruling.

This is a heavily litigated area of the law. But make no mistake: It is heavily litigated, because there is a heated debate about the meaning of previous acts of Congress—including various federal statutes, as well as the 21st Amendment to the U.S. Constitution.

These cases involve constitutional objections to state laws. But make no mistake: This is a unique area of constitutional litigation—because Congress can step in and resolve the litigation itself, at any time.

In most areas of constitutional litigation, a party objects to a federal, state, or local law—a court determines whether or not that law is constitutional—and that word is final, subject only to review by a higher court, or reversal by a constitutional amendment.

In this unique area, however, Congress can seize the reins, and decide for itself whether a constitutional challenge should succeed or fail, simply by passing a federal statute.

That is because these cases involve a doctrine known as the “dormant Commerce Clause.”

Under Article I, Section 8, clause 3 of the Constitution, Congress has the “power . . . [t]o regulate commerce . . . among the several states.”

Courts have consistently construed this provision to have two components. First, it contains an affirmative grant of power to Congress to regulate interstate commerce. Second, it also contains a silent but implicit, or negative, limit on the power of states to regulate commerce.

It is this second prong that is known as the “dormant Commerce Clause.”

This doctrine can be used to invalidate state laws that purport to regulate commerce—an area that Congress has the constitutional power to reserve for its own regulatory authority.

But there is a catch. Courts invoke the dormant Commerce Clause as a constitutional limit on state power. But they do so only because they are *presuming* that Congress would prefer that states stay out of certain areas of regulation.

This judicial presumption has important implications for our discussion today—because it is only a *presumption* about what Congress wants. Congress can make its actual views known to the courts. And if Congress does so, courts will follow.

This principle applies with equal—if not special—force here. Litigation over state power to regulate alcohol is indeed hotly contested. But that is only because different judges have different judgments about what they *think* Congress wants in this area. If Congress were to state its views with vivid clarity, that would go a long way toward ending litigation—ending what the *New York Times* once called the “wine wars.”

What’s more, Congressional action in this area would only reinforce important constitutional values. After all, alcohol is the only consumer product to receive special constitutional status—in the form of special recognition of the importance of state authority to regulate alcohol under the 21st Amendment.

I want to close by making this one point: The views I express here are not remotely controversial within the community of constitutional lawyers. To the contrary, courts across the country have repeatedly acknowledged that, if Congress speaks clearly, it can eliminate constitutional challenges to state laws under the dormant Commerce Clause.<sup>1</sup>

After all, the entire point of dormant Commerce Clause litigation is to allow courts to step in and fill in the gaps—*only* when Congress has failed to speak.

But if Congress does choose to speak, the courts will listen.

I want to thank the subcommittee again for the opportunity to testify here today. I am happy to answer any questions the subcommittee may have.

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<sup>1</sup> See, e.g., *Ne. Bancorp, Inc. v. Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”); *Liberty Mut. Ins. Co. v. La. Dep’t of Ins.*, 62 F.3d 115, 118 (5th Cir. 1995) (“[B]y the McCarran-Ferguson Act, Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance. The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act.”) (citation and quotations omitted). Congress exercised this authority again just a few years ago, by enacting the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act. See Pub. L. No. 109-13.

**JAMES C. HO**  
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Jim is the Solicitor General of Texas. As the State's chief appellate lawyer, he leads an office of 22 attorneys responsible for litigating and counseling officials on the most significant legal issues facing the State. Appointed by Attorney General Greg Abbott, he is the first Asian American to hold the office.

An experienced appellate, constitutional, and business litigator, Jim has personally handled over 40 matters as lead counsel, prevailing in over 90% of cases decided to date. He has litigated successfully in federal and state courts nationwide—including the United States Supreme Court and Courts of Appeals, various state supreme courts, and federal and state district courts throughout Texas—and is the only state solicitor general to be invited by the U.S. Supreme Court to express the views of a state. Jim has also crafted successful legal strategies for clients in other adversarial settings—including persuading government regulators not to prosecute and testifying for and against pending legislation. His past clients include numerous Fortune 500 companies and federal and state officials and agencies.

Jim has nearly a decade of government experience—including service in all three branches of the federal government. He served on the Senate Judiciary Committee staff as chief counsel to U.S. Senator John Cornyn, the Subcommittee on the Constitution, and the Subcommittee on Immigration. He worked at the U.S. Department of Justice in the Office of Legal Counsel and the Civil Rights Division. He also served as law clerk to Justice Clarence Thomas of the U.S. Supreme Court and Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit. Before law school, he was a legislative aide to California State Senator Quentin L. Kopp of San Francisco.

His record of public service also includes appointments to the Federal Judicial Evaluation Committee, which advises Senators Kay Bailey Hutchison and John Cornyn on judicial and U.S. Attorney appointments in Texas; the U.S. Magistrate Judge Merit Selection Panel for the Northern District of Texas; the Continuity of Government Commission, established in the wake of the September 11, 2001 attacks to recommend structural reforms to the federal government; and the United States delegation to the United Nations Committee on the Elimination of Racial Discrimination.

In private practice, Jim was a member of the national Appellate and Constitutional Law practice group of Gibson, Dunn & Crutcher LLP, one of the world's most respected law firms. A frequent writer and lecturer, Jim has previously served as an Adjunct Professor of Law at the University of Texas Law School, where he taught U.S. Supreme Court Litigation, and as a Senior Editor of *The Green Bag*. He has delivered over a hundred speeches, authored dozens of law review articles and op-eds, and served in a variety of legal, educational, and leadership organizations.

Jim has been recognized as a "Rising Star" in appellate and constitutional law by *Texas Monthly* and *Law & Politics*, one of 25 "Extraordinary Minorities in Texas Law" by *Texas Lawyer*, one of the "Best Lawyers under 40" by the National Asian Pacific American Bar Association, and one of the best 35 Congressional aides under 35 by *The Hill*. He has received the Best Brief Award for excellence in U.S. Supreme Court brief writing from the National Association of Attorneys General, the Exceptional Civilian Service Award for his work at the Justice Department, and the Frank Wheat Award for Outstanding Achievements in Pro Bono. He has also been honored with the Presidential Award for outstanding service by the National Asian Pacific American Bar Association, and has been recognized for outstanding contributions to the Asian community and the legal profession by both the Conference on Asian Pacific American Leadership and the Greater Dallas Asian American Chamber of Commerce.

Taiwanese by birth and Texan by marriage, Jim graduated from Stanford University with honors and a B.A. in Public Policy, and the University of Chicago Law School with high honors. Most importantly, he is married to Allyson Ho, a partner at Morgan, Lewis & Bockius LLP. They live in Dallas.