Fueling Responsibility: Rocky Mountain Farmers Union v. Corey

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Fueling Responsibility: *Rocky Mountain Farmers Union v. Corey*

**INTRODUCTION**

In *Rocky Mountain Farmers Union v. Corey*, the Ninth Circuit considered whether California’s Low Carbon Fuel Standard (LCFS), a regulatory scheme designed to combat climate change by targeting lifecycle carbon emissions, is constitutional under the Commerce Clause of the U.S. Constitution. In three main holdings, the court first vacated the district court’s preliminary injunction, finding the LCFS did not violate the dormant Commerce Clause. Instead, it fell within a California-specific Clean Air Act (CAA) exemption, under which the LCFS acceptably incorporated calculations that included emissions from electricity sources and transportation. Second, the court held that the ethanol provisions of the LCFS were not facially discriminatory, and on remand, ordered the district court to consider whether the LCFS discriminates against out-of-state commerce in purpose or effect. The court held that if the ethanol provisions do discriminate, the district court should apply strict scrutiny. If they do not, the district court must apply the *Pike v. Bruce Church* balancing test. Finally, the court found the 2011 crude oil provisions did not discriminate against out-of-state crude oil producers, so the district court must apply the *Pike* balancing test to those provisions. This ruling, and its embrace of the *Pike* balancing test, marks one step toward acceptance of emerging regulations countering climate change, although further mobilization will require Congress to amend the CAA to allow other states to follow California’s example.

**I. BACKGROUND**

**A. Legislation and the LCFS**

Congress designated California a “laboratory for innovation” in air quality standards: under a preemption waiver in the CAA, no state but California may go beyond federal standards to regulate motor vehicle emissions to protect
public health and welfare.\textsuperscript{8} In accordance with this exemption, California’s legislature enacted Assembly Bill 32, the 2006 Global Warming Solutions Act.\textsuperscript{9} The law concerns climate change’s impacts on the economy, public health, and the environment.\textsuperscript{10} The bill requires the California Air Resources Board (CARB) to design measures to reduce the state’s greenhouse gas (GHG) emissions to their 1990 levels by 2020,\textsuperscript{11} and to establish regulations aimed at reducing transportation-sector GHG emissions.\textsuperscript{12} At 40 percent, transportation constitutes the state’s largest single source of emissions.\textsuperscript{13}

Pursuant to Assembly Bill 32 and a supporting Executive Order from Governor Arnold Schwarzenegger,\textsuperscript{14} CARB adopted tailpipe\textsuperscript{15} and “vehicle miles traveled” standards targeting the demand side of emissions generation,\textsuperscript{16} as well as the LCFS at issue here, directed at the supply side. The LCFS aims to reduce the quantity of GHGs embedded in the production of transportation fuels burned in California.\textsuperscript{17} By focusing on the lifecycle of transportation fuels, the LCFS acknowledges that all GHG emissions impact climate change regardless of their geographic origin.\textsuperscript{18} CARB designed the LCFS to account for emissions generated from the production, refining, and transportation of fuel, aiming to reduce all GHG emissions from well to wheel.\textsuperscript{19}

The LCFS regulates nearly all transportation fuels consumed in California.\textsuperscript{20} In 2011, it initiated a declining annual cap on the average carbon intensity of California’s transportation-fuel market.\textsuperscript{21} CARB intended to spur the innovation and production of low-carbon fuels through predictable emissions reductions.\textsuperscript{22} Under the LCFS, fuel blenders or distributors’ average carbon intensity volume must not exceed the LCFS’s prescribed annual limit.\textsuperscript{23} However, blenders may buy or sell credits to offset current or future deficits.\textsuperscript{24}

Regulated parties may comply with the LCFS’s requirements for reporting the carbon intensity of fuel in three ways. First, a regulated party may rely on carbon-intensity calculations based on average, default well-to-wheel pathways

\textsuperscript{8} Id. at 1078–79; Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1111 (D.C. Cir. 1979); see 42 U.S.C. § 7543(a), (b) (2006).
\textsuperscript{9} Rocky Mountain, 730 F.3d at 1079; see CAL. HEALTH & SAFETY CODE § 38501(a), (b) (West 2014).
\textsuperscript{10} HEALTH & SAFETY § 38501(a), (b); Rocky Mountain, 730 F.3d at 1079.
\textsuperscript{11} HEALTH & SAFETY § 38501(e), (g); Rocky Mountain, 730 F.3d at 1079.
\textsuperscript{12} HEALTH & SAFETY § 38562(a); CAL. CODE REGS. tit. 13, § 1961.1 (2014).
\textsuperscript{15} CAL. CODE REGS. tit. 13, § 1961.1; Rocky Mountain, 730 F.3d at 1079.
\textsuperscript{16} See CAL. GOV’T CODE § 65080 (West 2014); Rocky Mountain, 730 F.3d at 1079.
\textsuperscript{17} See CAL CODE REGS. tit. 17, §§ 95480–95490 (2014); Rocky Mountain, 730 F.3d at 1079.
\textsuperscript{18} Rocky Mountain, 730 F.3d at 1081.
\textsuperscript{19} Id.; tit. 17, § 95481(a)(38).
\textsuperscript{20} tit. 17, § 95480(1)(a).
\textsuperscript{21} Id § 95482(b).
\textsuperscript{22} Id § 95482(a), (b).
\textsuperscript{23} Id § 95485(a).
\textsuperscript{24} Rocky Mountain, 730 F.3d at 1080.
provided in “Table 6,” a CARB-created chart evaluating fuels anticipated in the California market.\textsuperscript{25} Second, a regulated party may depend on a default pathway in part, while also proposing a replacement for one or more of the pathway’s average values, such as plant efficiency.\textsuperscript{26} Finally, a regulated party may propose a new and individualized pathway.\textsuperscript{27}

In addition to ethanol, the LCFS regulates crude oil and its derivatives.\textsuperscript{28} Unlike ethanol, crude oil extraction and refinement does not include the offsetting, carbon-dioxide-absorbing process of growing ethanol-producing plants.\textsuperscript{29} Under the 2011 provisions at issue, crude oil cannot be assessed at a carbon intensity below the market average. By design, this system requires regulated parties to meet the LCFS’s reduction targets by supplying alternative fuels or buying credits,\textsuperscript{30} rather than simply “fuel shuffling” high carbon intensity crude oils to other markets. Because future extraction of crude oil cannot meet CARB’s goals of reducing carbon-intense emissions, CARB’s 2011 provisions overall aim to promote the development of alternative fuels.\textsuperscript{31}

\subsection*{B. The Dormant Commerce Clause, the Clean Air Act, and Pike}

Under the Commerce Clause, “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”\textsuperscript{32} The dormant Commerce Clause denies states the power to burden or discriminate unjustifiably against interstate commerce.\textsuperscript{33} This includes economic protectionism—regulation aiming to benefit in-state economic interests and burden out-of-state competitors,\textsuperscript{34}—and differential treatment of substantially similar entities based on statehood.\textsuperscript{35} A statute is unconstitutional if it discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, unless it serves some legitimate local purpose that nondiscriminatory means cannot serve.\textsuperscript{36} However, local autonomy sometimes outweighs concerns of the national market.\textsuperscript{37} Therefore, a “courageous state may . . . serve as a laboratory” to test novel economic and social experiments for the benefit of the rest of the country, such as California’s preemption waiver under the CAA.\textsuperscript{38}

In \textit{Pike}, the U.S. Supreme Court held that if there were no discrimination, it would uphold

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.} at 1082; tit. 17, § 95486(b).
  \item \textsuperscript{26} \textit{Rocky Mountain}, 730 F.3d at 1082; tit. 17, § 95486(c).
  \item \textsuperscript{27} \textit{Rocky Mountain}, 730 F.3d at 1082; tit. 17, § 95486(d).
  \item \textsuperscript{28} \textit{Rocky Mountain}, 730 F.3d at 1084.
  \item \textsuperscript{29} \textit{Id.}.
  \item \textsuperscript{30} \textit{Id.} at 1085.
  \item \textsuperscript{31} \textit{Id.} at 1084–85.
  \item \textsuperscript{32} U.S. CONST. art. I, § 8, cl. 3.
  \item \textsuperscript{33} Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 98 (1994).
  \item \textsuperscript{35} See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997); Or. Waste Sys., 511 U.S. at 99; \textit{Rocky Mountain}, 730 F.3d at 1087.
  \item \textsuperscript{36} Maine v. Taylor, 477 U.S. 131, 138 (1986); \textit{Rocky Mountain}, 730 F.3d at 1087.
  \item \textsuperscript{37} See \textit{Davis}, 553 U.S. at 338.
  \item \textsuperscript{38} New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting).\
\end{itemize}
the law “unless the burden imposed on [interstate] commerce [was] clearly excessive in relation to the putative local benefits.”\textsuperscript{39} Under the dormant Commerce Clause, distinctions benefiting in-state producers cannot be based on state boundaries. However, a regulation is not facially discriminatory just because it impacts in-state and out-of-state interests differently. There must be a reason aside from origin to treat the state-based interests differently.\textsuperscript{40}

II. Case Summary

A collection of out-of-state fuel producers and their supporters argued that the LCFS discriminates against out-of-state commerce and unconstitutionally regulates extraterritorial activity, and that the CAA’s Renewable Fuel Standard (RFS) preempts the LCFS.\textsuperscript{41} In 2011, the U.S. District Court for the Eastern District of California held that the LCFS violated the dormant Commerce Clause by (1) facially discriminating against ethanol not from California, (2) engaging in impermissible extraterritorial regulation of ethanol production, and (3) discriminating in purpose and effect against out-of-state crude oil.\textsuperscript{42} The court also found that the LCFS did not qualify for California’s “laboratory” preemption waiver under the CAA.\textsuperscript{43}

The Ninth Circuit stayed the district court’s judgments pending appeal and reviewed the three rulings de novo.\textsuperscript{44} The court held that the LCFS’s ethanol provisions are not facially discriminatory because lifecycle analysis accounts for the true cost of GHG emissions, the results often favor out-of-state producers,\textsuperscript{45} and the unequal results occur for nondiscriminatory reasons.\textsuperscript{46}

Lifecycle analysis accounts for the total cost of GHG emissions and minimizes displacing carbon emissions from California to other places.\textsuperscript{47} CARB correctly differentiated the carbon intensity of lifecycle pathways of

\begin{itemize}
\item \textsuperscript{39} Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Rocky Mountain, 730 F.3d at 1087–88.
\item \textsuperscript{40} Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978); see Or. Waste Sys., 511 U.S. at 101 n.5 (“If out-of-state waste did impose higher costs on Oregon than instate waste, Oregon could recover the increased cost through a differential charge on out-of-state waste.”). In \textit{Oregon Waste Systems and Hunt}, the Court explained that a disposal fee calibrated to the actual risk imposed by hazardous waste, whether imported or domestic, would have been appropriate. See \textit{Rocky Mountain}, 730 F.3d at 1089.
\item \textsuperscript{42} See \textit{Rocky Mountain}, 730 F.3d at 1077–78; \textit{Rocky Mountain Ethanol}, 843 F. Supp. 2d at 1090, 1093; \textit{Rocky Mountain Preemption}, 843 F. Supp. 2d at 1070; \textit{Rocky Mountain Crude}, 2011 WL 6936368, at *12–14.
\item \textsuperscript{43} See \textit{Rocky Mountain}, 730 F.3d at 1077–78; \textit{Rocky Mountain Ethanol}, 843 F. Supp. 2d at 1090, 1093; \textit{Rocky Mountain Preemption}, 843 F. Supp. 2d at 1070; \textit{Rocky Mountain Crude}, 2011 WL 6936368, at *12–14.
\item \textsuperscript{44} See \textit{Rocky Mountain}, 730 F.3d at 1077–78.
\item \textsuperscript{45} See \textit{id. at} 1090; CAL. CODE REGS. tit. 17, § 95486(b)(1) (2014).
\item \textsuperscript{46} \textit{Rocky Mountain}, 730 F.3d at 1089.
\item \textsuperscript{47} W. Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994); \textit{Rocky Mountain}, 730 F.3d at 1092.
\end{itemize}
ethanol sources based on data regarding electricity sources used for production, refining, plant functions, and transportation, regardless of state origin.48

The LCFS used regional categories to organize Table 6 because this minimized ethanol producers’ cumbersome cost of determining individual pathway values.49 Using a nonregional category would produce less accurate carbon intensity values, while regional categorization constituted the kind of policy-driven, expert regulatory judgment the court expected.50 Indeed, the LCFS does not artificially encourage California-based fuel production. Incidentally, the Midwest ethanol’s carbon intensity values were both the highest and lowest, and Brazilian ethanol’s default lifecycle pathway produced the least emissions.51 Further, CARB’s analysis encourages businesses to perform operations such as refinement outside of California because transporting lighter, refined fuels emits fewer GHGs.52

The ethanol provisions are not discriminatory because they are not based on origin, isolationist preferences, or local hostility to trade: any intertwining with geographic origin has to do with GHG emissions, whose reduction directly correlates with the purpose of the regulation.53 Midwestern ethanol producers could switch from using carbon-intensive, coal-fired electricity generation to “cleaner” forms, and some have.54 The plaintiffs challenged regional categories and average values in Table 6, which form the LCFS’s default pathways. However, CARB averages each default pathway the same within each regional category, so the LCFS and any inaccuracies are even-handed under the Commerce Clause.55 Further, the LCFS allows individual assessments when producers sufficiently show that their methods differ from the average, regardless of location.56 As a result, the LCFS does not discriminate, because it benefits all who produce fuel with low-carbon-intensity processes.

The Ninth Circuit concluded that the grave need for state experimentation in this context reinforced its holding.57 Congress expressly authorized this “laboratory” role for California, given the vulnerability of its coastline and industries to climate change.58 The court remanded to the district court to determine whether the ethanol provisions discriminate in purpose and effect,

48. Rocky Mountain, 730 F.3d at 1088–89; Rocky Mountain Ethanol, 843 F. Supp. 2d at 1087.
49. Rocky Mountain, 730 F.3d at 1093.
50. Id. at 1096.
51. See Healy, 512 U.S. at 193; Rocky Mountain, 730 F.3d at 1092.
52. Rocky Mountain, 730 F.3d at 1091.
53. Id.
55. Rocky Mountain, 730 F.3d at 1094.
56. Id. at 1093.
57. See id. at 1096.
58. Id.
directing the court to apply strict scrutiny if the provisions do discriminate and the Pike balancing test if they do not.  

Regarding crude oil, the Ninth Circuit agreed that the 2011 provisions were facially neutral, but found they did not discriminate against out-of-state crude oil in purpose and effect. The purposes of CARB’s 2011 provisions were: “(1) to prevent an increase in the carbon intensity of California’s crude oil market; (2) to avoid fuel shuffling; and (3) to direct innovation toward the development of alternative fuels rather than the search for more efficient methods of crude-oil extraction.” While some Californian crude oils fared better than out-of-state sources, other Californian crude oils faced greater burdens based on their carbon intensity. The Ninth Circuit found no protectionist aim to insulate California firms from out-of-state competition, and the plaintiffs did not present sufficient evidence of an actual discriminatory effect to warrant strict scrutiny, which would have shifted the burden of proof to the state. As a result, the Ninth Circuit reversed the district court’s conclusion and remanded for consideration of whether the provisions unduly burden interstate commerce under Pike.

The dormant Commerce Clause requires examination of whether a statute attempts to control commerce outside a state’s borders. The Ninth Circuit considered the direct consequences of the LCFS, how the statute might interact with regulatory regimes of other states, and the impact that would result if many states adopted similar legislation. Unlike the district court’s findings, the Ninth Circuit held that the LCFS only regulates the California market. Firms anywhere may choose to respond to incentives the LCFS provides if they want to access California’s market. The LCFS requires no company to meet any particular carbon intensity standard and no jurisdiction to adopt any specific regulatory standard. The Ninth Circuit therefore reversed the district court’s finding that the LCFS is an impermissible extraterritorial regulation.

The Ninth Circuit affirmed the district court’s conclusion that California’s CAA preemption waiver does not insulate California from dormant Commerce

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59. See id. at 1107.
60. See id. at 1097; see also W. Lynn Creamery v. Healy, 512 U.S. 186, 201 (1994) (holding that courts must apply a “case-by-case analysis of purposes and effects” where a statute is facially neutral); Rocky Mountain Crude, 2011 WL 6936368, at *13 (finding that the LCFS is facially neutral).
61. Rocky Mountain, 730 F.3d at 1098.
63. Rocky Mountain, 730 F.3d at 1107.
64. Id. at 1100-01 (citing Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1232 (9th Cir. 2010)).
65. Id. at 1101.
67. See Rocky Mountain, 730 F.3d at 1101.
68. Id.
69. Id. at 1107.
Clause scrutiny, but found the preliminary injunction against the LCFS should be lifted if CARB prevails on the merits of the dormant Commerce Clause.\footnote{See id. The Ninth Circuit did not decide whether the RFS preempts the LCFS or whether the 2007 Energy Independence and Security Act’s savings clause precludes implied preemption by the RFS, as CARB argued. See id.; see also Clean Air Act, 42 U.S.C. § 7545(c)(4)(B) (2006) (the savings clause).}

III. Analysis

The final decision likely will rest on applying the \textit{Pike} balancing test. Under \textit{Pike}, the fuel producers and their supporters will have to show that the LCFS’s provisions impose a burden on interstate commerce “clearly excessive” in relation to local benefits.\footnote{Cf. Tetra Techs., Inc. v. Harter, 823 F. Supp. 1116 (S.D.N.Y. 1993) (holding that requiring an engineering contractor to get a New York engineering license, even though a local licensed engineer supervised him, offended the commerce clause).} Judges skeptical of climate change may find local benefits marginal in comparison to impacts on interstate commerce under the \textit{Pike} balancing test.\footnote{See Rocky Mountain, 730 F.3d at 1107.} However, because fuel producers and jurisdictions need not meet particular carbon intensity standards, the burden on interstate commerce does not appear “excessive.”\footnote{See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471–74 (1981) (finding that the “substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems” outweighed any burdens on interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959) (legitimate state interest in highway safety measures).} California chose to assume responsibility for environmental protection, and the Ninth Circuit encouraged the state to lower carbon emissions to mitigate climate change, promote innovation in alternative fuels, and provide an example for other states.\footnote{Massachusetts v. EPA, 549 U.S. 497, 1443–44 (2007); Maine v. Taylor, 477 U.S. 131, 148 (1986).} \textit{Pike} “rational basis” scrutiny is minimal for regulations designed to serve legitimate state interests such as public health.\footnote{See Rocky Mountain, 730 F.3d at 1107.} Reducing GHG emissions benefits local and global interests, so the LCFS likely will survive \textit{Pike} balancing.

Taking more than just money into account, the Ninth Circuit addressed the public cost of hidden GHG emissions, allowing the LCFS to impose real costs on producers. This is particularly meaningful in the field of environmental regulation, where market externalities are prevalent. \textit{Rocky Mountain} follows \textit{Maine v. Taylor} and \textit{Massachusetts v. Environmental Protection Agency} in holding that states have a “legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.”\footnote{See, e.g. \textit{Minnesota v. Clover Leaf Creamery Co.}, 449 U.S. 456, 471–74 (1981) (finding that the “substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems” outweighed any burdens on interstate commerce); \textit{Bibb v. Navajo Freight Lines, Inc.}, 359 U.S. 520, 524 (1959) (legitimate state interest in highway safety measures).} This is exciting news for Californians who wish to consume fuels conscientiously, and for those everywhere who breathe.

California has taken responsibility for countering climate change and incentivizing innovation of cleaner energy production and use. However, a victory for California marks a minor triumph in comparison to the scale of GHG emissions nationally and globally. Under the dormant Commerce Clause, California must show its LCFS regulations do not clearly and excessively
burden interstate commerce in relation to local benefits. California may only be allowed to implement regulations such as the LCFS because of its CAA exemption. Elsewhere, the CAA preempts state laws that regulate any component or characteristic of a fuel or fuel additive for purposes of regulating motor vehicle emissions.\textsuperscript{77} Importantly, for innovative emission regulations like the LCFS to become more widespread, Congress will have to amend the CAA to allow other states to tackle transportation-based carbon emissions.\textsuperscript{78}

**CONCLUSION**

*Rocky Mountain* held that the LCFS does not violate the dormant Commerce Clause.\textsuperscript{79} Its ethanol provisions are not facially discriminatory.\textsuperscript{80} If the ethanol provisions do discriminate in practice, then the district court will apply strict scrutiny, and if they do not, the district court must apply the *Pike* balancing test.\textsuperscript{81} Since the court found the 2011 provisions did not discriminate against out-of-state crude oil, the district court must now apply the *Pike* balancing test to those provisions. The Ninth Circuit’s ruling further pushes California and the United States toward long-awaited regulations that embody accountability for global climate change.\textsuperscript{82}

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\textsuperscript{77} See 42 U.S.C. § 7545(c)(4)(A) (2006); Davis v. EPA, 348 F.3d 772, 786 (9th Cir. 2003) (“[T]he sole purpose of [section 211(c)(4)(B)] is to waive for California the express preemption provision found in § 7545(c)(4)(A).”); *Rocky Mountain Preemption*, 843 F. Supp. 2d at 1061 (citing 42 U.S.C. § 7545(c)(4)(B)); see also *Rocky Mountain*, 730 F.3d at 1106; Oxygenated Fuels Ass’n Inc. v. Davis, 331 F.3d 665, 670 (9th Cir. 2003) (holding “the two provisions are precisely coextensive”).

\textsuperscript{78} See 42 U.S.C. § 7543(a), (b); *Rocky Mountain*, 730 F.3d at 1078–79; Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1109 (D.C. Cir. 1979).

\textsuperscript{79} See *Rocky Mountain*, 730 F.3d at 1078.

\textsuperscript{80} Id.

\textsuperscript{81} See id.

\textsuperscript{82} See id. at 1107.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.