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## Can the Ninth Circuit Overrule the Supreme Court on the Constitution?

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Steven Ferrey\*

## Can the Ninth Circuit Overrule the Supreme Court on the Constitution?

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“You will die but the carbon will not; its career does not end with you.”

—Jacob Bronowski

## I. WHAT HAS THE NINTH CIRCUIT DONE?

Can the Ninth Circuit reverse key analysis and opinions of the U.S. Supreme Court? Can a federal circuit court, based on environmental grounds that climate change allows the states to act as their own laboratories to try innovative programs, reorient or contradict Supreme Court precedent regarding the Commerce Clause of the Constitution? Maybe.

### A. The Ninth Circuit 2013 Constitutional Opinion

A majority panel of the Ninth Circuit Court of Appeals threw down the legal gauntlet in 2013 regarding climate change and global warming in California. The decision reversed the federal district court opinion finding the California Low Carbon Fuel Standard (LCFS) clearly unconstitutional.<sup>1</sup> The majority overturned the trial court opinion in every aspect—whether there was facial discrimination in the California LCFS, the strict scrutiny standard of review applied to the regulation, whether California’s action was impermissibly extraterritorial, and whether the regulation was unduly burdensome on interstate commerce pursuant to the Constitution’s dormant Commerce Clause.<sup>2</sup> This was a fundamental reversal.

The court of appeals, by a 2-1 opinion, entered partial summary judgment in favor of California and remanded for further proceedings on still-to-be-determined issues of federal constitutional preemption.<sup>3</sup> It did not apply strict scrutiny in analyzing the California regulation, and instructed instead that a balancing test be applied under *Pike v. Bruce Church, Inc.*<sup>4</sup> This decision appears to have fundamentally changed the Supreme Court’s calculus for permissible state regulation of carbon-emitting activities within the state and the movement of goods in interstate commerce:

- The legal rationale of the Ninth Circuit majority in this case reconfigured the application of decades of Supreme Court decisions regarding the dormant Commerce Clause as applied to environmental aspects of the interstate movement of commerce.
- This opinion creates a new, permissible fail-safe mechanism for states to block the movement of out-of-state trash into their ter-

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1. *Rocky Mountain Farmers Union v. Corey (Rocky Mountain III)*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

2. *Id.*

3. *Id.*

4. *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

ritory, despite the Supreme Court outlawing such attempts in several decisions over decades.

- This new holding makes viable corollary state regulation over methane, a global warming gas more than twenty times more powerful, molecule for molecule, than CO<sub>2</sub>,<sup>5</sup> produced by decaying trash from any location including imported out-of-state trash.<sup>6</sup>
- The primary CO<sub>2</sub>-creating anthropogenic activities are use of vehicle fuels, electricity production, and agriculture. Through incentives to in-state power production,<sup>7</sup> California or any other state can now burden consumption of out-of-state power in interstate commerce.
- Similar rationales used to limit greenhouse gases (GHG) could also be applied to burden importation into a state of agricultural products, and even impose a fee on airplane passengers who land in state.

The Ninth Circuit decision reconfigured the past half-century of Supreme Court interpretation of the dormant Commerce Clause. And that is where this Article focuses—can global warming change interpretation of the Constitution? California previously argued this unsuccessfully in a 2010 case.<sup>8</sup> What makes this recent Ninth Circuit decision intriguing:

- Two of the four federal judges who heard this case disagreed with the two-judge majority of the 9th Circuit on constitutionality,<sup>9</sup> even disregarding a state court judge who held that the LCFS violated state administrative law.<sup>10</sup>
- There are several other cases which have contested other aspects of A.B. 32, the California carbon regulation, and California has lost or settled the majority.<sup>11</sup>

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5. See STEVEN FERREY, UNLOCKING THE GLOBAL WARMING TOOLBOX 15 tbl.2-1 (2010).

6. Anna Karion, et al., *Methane Emissions Estimate from Airborne Measurements over a Western United States Natural Gas Field*, 40 GEOPHYSICAL RES. LETTERS 4393 (2013), archived at <http://perma.unl.edu/R8EY-5AU9>.

7. See FERREY, *supra* note 5, at 251–54.

8. Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047 (2010).

9. *Rocky Mountain Farmers Union v. Goldstene (Rocky Mountain II)*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011), *rev'd sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014). The original federal trial court judge in this matter issued a contrary opinion finding multiple California violations of the Commerce Clause.

10. POET, LLC v. Cal. Air Res. Bd., 218 Cal. App. 4th 681 (2013).

11. Steven Ferrey, *The Carbon Suite in the Hotel California*, 23 S. CAL. INTERDISC. L.J. 451 (2014).

- On environmental matters, the Ninth Circuit is the most reversed federal court when matters proceed to the Supreme Court.<sup>12</sup>
- Almost simultaneously, two other federal circuit courts of appeals, ruling on different state energy regulations, found that there was a violation by the state of the Commerce Clause or the Supremacy Clause of the Constitution.<sup>13</sup>

We will find out what is next. The request for a rehearing en banc to the full panel of the Ninth Circuit failed to get a majority.<sup>14</sup> The Supreme Court, in 2014, did not accept certiorari in the *Rocky Mountain* appeal. It certainly is not taught in law school textbooks that a lower court can change holdings of the Supreme Court.

There are instances where lower federal courts have exercised creativity to define key terms in environmental matters that result in effectively reversing the Supreme Court's intent in its prior opinion.<sup>15</sup> However, here, we have the elements necessary for a perfect legal storm. The case concerns one of the most controversial and contentious policy issues in the country, and perhaps the world: climate change control and regulation; and it is an environmental decision rendered by the federal circuit court which among the twelve in the nation is the circuit whose environmental decisions are most reversed or overruled by the Supreme Court.<sup>16</sup>

The case holds in its ultimate disposition the entire future of state climate change policies and actions in the United States. The federal government has not taken affirmative action on energy regulation in the electric sector in the past two decades, with minor exception.<sup>17</sup> This has left sustainable energy to the states, which have initiated a host of sustainable energy regulatory initiatives.<sup>18</sup> California was not

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12. Carol Williams, *U.S. Supreme Court looks over 9th Circuit's shoulder*, L.A. TIMES, June 29, 2009, <http://articles.latimes.com/2009/jun/29/local/me-9th-scotus29>, archived at <http://perma.unl.edu/S66K-HX8E>. In the Supreme Court session ending in 2009, including environmental matters, the Ninth Circuit was overturned in 15 of the 16 cases reviewed that term by the U.S. Supreme Court.

13. See *infra* subsections IV.A.1–2.

14. Appellees' Motion for Rehearing En Banc, *Rocky Mountain III*, 730 F.3d 1070 (9th Cir. 2013), cert. denied, 134 S. Ct. 2884 (2014) (Nos. 12-15131, 12-15135).

15. See *infra* section IV.B.

16. See Williams, *supra* note 12.

17. In the past decade, the only significant federal energy legislation, other than tax incentives, was the Energy Policy Act of 2005, 42 U.S.C. § 15801 (2012), a relatively modest statute (although it did require net metering by the states, which has not been uniformly followed in every state), and the Energy Independence & Security Act of 2007, 42 U.S.C. § 17071 (2012), which largely dealt with fuels and appliance efficiency, rather than a bill addressing electric industry operations.

18. See Steven Ferrey, *Efficiency in the Regulatory Crucible: Navigating 21st Century 'Smart' Technology and Power*, 3 GEO. WASH. J. ENERGY & ENVTL. L. 1, 18–20, 24–26 (2012).

the first state to impose carbon control—in fact it was not one of the first ten states to impose carbon control.<sup>19</sup>

Yet, California is now the important canary in the coal mine. California has been challenged for taking *ultra vires* administrative actions not authorized by either state law or the U.S. Constitution, and it has been challenged for those actions discriminating against interstate commerce.<sup>20</sup> There were plenty of signposts from those states which had gone before.<sup>21</sup> Of particular note, it is not just the regulated community that has taken legal issue with the California sustainable energy program. Rather, California is also challenged by environmental groups, by groups representing low-income consumers, and by businesses operating outside the state.<sup>22</sup>

These California challenges and recent results portend the scope of the U.S. carbon-control future and a sustainable economy. Unconstitutional actions by government have a tangible cost to taxpayers: a recent determination that a state engaged in an unconstitutional regulatory action regarding energy resulted in a trial court order holding the state liable for multiple millions of dollars for attorneys' fees and costs incurred by all parties in the case,<sup>23</sup> and plaintiffs are asking that their fees be paid in a number of other recent claims against state energy regulation in California<sup>24</sup> and in other states.<sup>25</sup>

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19. See FERREY, *supra* note 5, at 79–80, 91–92; Steven Ferrey, *Goblets of Fire: State Programs on Global Warming and the Constitution*, 35 *ECOLOGY L.Q.* 835 (2009) (noting ten states participating in the Regional Greenhouse Gas Initiatives (RGGI) program prior to California's program).

20. Ferrey, *supra* note 11.

21. Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 *VA. J.L. & TECH.* 89 (2012); Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 *DUKE ENVTL. L. & POL'Y F.* 125 (2010); Steven Ferrey, Chad Laurent & Cameron Ferrey, *FiT in the U.S.A.*, *PUB. UTIL. FORTNIGHTLY*, June 2010, <http://www.fortnightly.com/fortnightly/2010/05/fit-usa>, archived at <http://perma.unl.edu/8UJW-K7WB>; Ferrey, *supra* note 19; Steven Ferrey, *Shaping American Power: Federal Preemption and Technological Change*, 11 *VA. ENVTL. L.J.* 47 (1991); Brian Potts, *Regulating Greenhouse Gas 'Leakage': How California Can Evade the Impending Constitutional Attacks*, *ELECTRICITY J.*, June 2006, at 43–44 (“[B]ecause of these two constitutional issues, courts are likely to strike down many or all of their proposals.”).

22. Ferrey, *supra* note 11.

23. See *Energy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012), *aff'd in part, rev'd in part*, 733 F.3d 393 (2d Cir. 2013). Similar request for fees are pending for plaintiffs' constitutional challenges in cases in California, New Jersey, and Maryland.

24. See *Motion for Attorney Fees, Planning & Conservation League v. California*, No. RG 12626904 (Cal. Super. Ct. Nov. 12, 2013).

25. *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014) (field preemption and conflict preemption on wholesale power prices); *PPL Energyplus, LLC v. Hanna*, 977 F.Supp.2d 372 (D. N.J. 2013),

## B. Does This Lead Down a New Constitutional Path?

Will California or other states, now in the interest of GHG reduction, choose to burden or restrict other out-of-state commerce and products being sold in the state? The impact on other commerce based on the fact that it must be shipped into California is the most interesting, if to date unnoticed, aspect of this new decision. I explore its nuances in this Article. If a state is regulating GHGs, should it comprehensively discourage use of products and commerce created outside the state by each major CO<sub>2</sub>-emitting sector in the state—fuels, electricity, agriculture, etc.? The Ninth Circuit decision would allow this for the first time, and even opines that California “should be encouraged to continue and expand its efforts to find a workable solution to lower carbon emission.”<sup>26</sup>

As a side revenue benefit in addition to the professed goal of reducing GHGs, the states regulating carbon have also, for the first time in history,<sup>27</sup> reconfigured this environmental regulation to generate billions of dollars in revenues.<sup>28</sup> The ten Northeast Regional Greenhouse Gas Initiative (RGGI) states raised approximately \$1 billion of RGGI auction proceeds realized from their auctions in 2009–2011.<sup>29</sup> California’s A.B. 32 is expected to raise \$11–70 billion.<sup>30</sup>

At the very least, the Ninth Circuit majority decision has created a new interpretive “virtual split,” if not a split on the exact same state regulatory action on energy, among three circuit courts which in 2013 interpreted application of the Constitution to the state regulation of aspects of sustainable energy and infrastructure:

- In 2013, the 7th Circuit unanimously declared that it is a violation of the dormant Commerce Clause of the Constitution for a state to treat renewable power originating out of state differently than renewable power originating in state.<sup>31</sup>

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*aff’d sub nom.* PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014) (field preemption on wholesale power prices and rates).

26. *Rocky Mountain III*, 730 F.3d 1070, 1107 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

27. FERREY, *supra* note 5, at 82–83.

28. *Id.* at 191.

29. As determined individually by each state, 52% of RGGI funds were used for energy efficiency, 11% for renewable energy, 14% to reduce consumer rates, and 1% for other programs, as determined in an RGGI report. See RGGI INC., INVESTMENT OF PROCEEDS FROM RGGI CO<sub>2</sub> ALLOWANCES (2011), *archived at* <http://perma.unl.edu/49QX-G422>.

30. See Laura Mahoney, *Superior Court Rules Greenhouse Gas Allowance Auction Fees Are Not Taxes*, BLOOMBERG BNA ENV’T REPORTER, Nov. 22, 2013, <https://www.bloomberglaw.com/document/X3NK7KHS000000>, *archived at* <http://perma.unl.edu/K8CH-3Y7T>.

31. *Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n*, 721 F.3d 764 (7th Cir. 2013), *cert. denied sub nom. Schuette v. Fed. Energy Regulatory Comm’n*, 134 S. Ct. 12787 (2014); *Hoosier Energy Rural Elec. Coop., Inc. v. Fed. Energy Regula-*

- In 2012, a federal trial court, not overturned by the Second Circuit, held that it is unconstitutional for a state to regulate low-carbon power in a way that affects its ability to freely enter interstate commerce and cross state lines.<sup>32</sup>

These three contemporaneous 2013 federal circuit court decisions all hinge on the restrictions imposed by the Constitution's dormant Commerce Clause and Supremacy Clause on state regulation of energy. If a state can legally impose regulation creating financial burdens based on the distance travelled by out-of-state commerce to enter the state, as the Ninth Circuit majority has upheld regarding renewable fuels,<sup>33</sup> this could apply to all interstate commerce transported across states lines. A state could provide similar regulation burdening out-of-state commerce in electric power, agricultural products, food, and motor fuels—the primary sources of GHG emissions.<sup>34</sup> Under the Ninth Circuit majority holding, such regulation on environmental grounds would be legally justified, unlike, to date, under Supreme Court decisions.

The sections of this Article which follow analyze each implication of this new decision. Section II examines the California program, the federal trial court decision, the position of law professor amici, the new Ninth Circuit majority decision, and the dissent. Section III analyzes how the Ninth Circuit majority opinion alters interpretations in a half dozen regards compared to decades of Supreme Court precedent. Section IV analyzes the 2013 “virtual” split in three federal circuit courts of appeals on the application of the Constitution to state regulation of energy, and the possibility of changing critical judicial history prior to any eventual Supreme Court resolution. Section V examines the legal implications of the Ninth Circuit decision to allow

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tory Comm'n, 134 S. Ct. 1278 (2014). Judge Richard Posner, in a unanimous decision, relied on a 2012 law review article on constitutional energy jurisdiction issues authored by the Author. *Id.* at 776 (citing Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Energy*, 7 TEX. J. OIL, GAS & ENERGY L. 59, 69, 106–07 (2012)). The Seventh Circuit declared unconstitutional state regulation limiting state renewable portfolio standards to in-state generation, as a violation of the Commerce Clause: “[Michigan’s argument] trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.” *Id.*

32. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 236–39 (D. Vt. 2012), *aff'd in part, rev'd in part*, 733 F.3d 393 (2d Cir. 2013).

33. *Rocky Mountain III*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

34. *See Carbon Pollution Standards*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/carbon-pollution-standards> (last visited Feb. 7, 2015), *archived at* <http://perma.unl.edu/443R-88NH>.

states to burden out-of-state commerce in the pursuit of climate moderation.

## II. THE MULTIBILLION DOLLAR NINTH CIRCUIT QUESTION IN CALIFORNIA

### A. The California Low Carbon Fuel Standard

California is the twelfth largest greenhouse gas (GHG) producer in the world.<sup>35</sup> California is larger in its carbon emissions than two-thirds of the Annex I developed nations regulated under the Kyoto Protocol. A.B. 32, the California Global Warming Solutions Act of 2006 (GWSA), requires the California Air Resources Board (CARB) to develop a comprehensive plan to reduce GHG emissions in the state to its historic 1990 levels by the year 2020.<sup>36</sup> This equates to an eventual estimated 25%–29% reduction from business-as-usual GHG emission levels.<sup>37</sup>

The program establishes a declining limit on approximately 85% of the state's total GHG emissions, declining over time to reach its goal. “Covered sources” must surrender “compliance instruments” to CARB that are equal to their GHG emissions.<sup>38</sup> California's comprehensive cap-and-trade program, prior to lawsuits which delayed it,<sup>39</sup> was to commence in 2012.

As part of this program, the purpose of the LCFS is “to implement a low carbon fuel standard, which will reduce GHG emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel used in California.”<sup>40</sup> The LCFS was “designed to reduce California's dependence on petroleum” and “to stimulate the production and use of

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35. CAL. ENERGY COMM'N & CAL. PUB. UTIL. COMM'N, PROPOSED FINAL OPINION SUMMARY ON GREENHOUSE GAS REGULATORY STRATEGIES 2 (2008)

36. CAL. HEALTH & SAFETY CODE § 38550 (West 2007).

37. CAL. ENERGY COMM'N & CAL. PUB. UTIL. COMM'N, *supra* note 35, at 1; *Climate Change Briefing: California Global Warming Solutions Act of 2006*, M.J. BRADLEY & ASSOCS., LLC (2006), <https://web.archive.org/web/20070208230748/http://www.mjbradley.com/briefingspecialab32.html>, archived at <http://perma.unl.edu/DFR9-5YCE>. The GWSA sets a target of reducing statewide emissions to 427 million metric tons of carbon dioxide equivalent (MMTCO<sub>2</sub>E) of greenhouse gasses by the year 2020, and highlights reduction measures that were adopted in 2011 to meet this goal. California's goal was based on projections that it was on pace to emit 507 or more MMTCO<sub>2</sub>E by 2020. See CAL. ENVTL. PROTECTION AGENCY AIR RES. BD., STATUS OF SCOPING PLAN RECOMMENDED MEASURES (2008), archived at <http://perma.unl.edu/T9ZV-557W> for reduction measures for the GWSA.

38. CAL. AIR RES. BD., WHAT ARE THE REQUIREMENTS FOR OFFSET CREDITS AND HOW ARE THEY USED? (2012), archived at <http://perma.unl.edu/2H3E-P2JJ>.

39. *Ass'n of Irrigated Residents v. Cal. Air Res. Bd.*, 143 Cal. Rptr. 3d 65 (2012).

40. CAL. CODE REGS. tit. 17, § 95480 (2010).

alternative, low-carbon fuels in California.”<sup>41</sup> The LCFS rule is to reduce the carbon content of transportation fuels sold in California by 10% by the year 2020 from the year 2010 baseline<sup>42</sup> through a “set of regulations to govern the marketing of gasoline-ethanol blends sold in California.”<sup>43</sup>

It requires providers of gasoline and diesel fuels to calculate the carbon intensity (CI) of each fuel component, report such calculations to CARB, and make reductions in order to meet the carbon intensity standards,<sup>44</sup> a metric designed to assess “the amount of lifecycle greenhouse gas emissions, per unit of energy of fuel delivered, expressed in grams of carbon dioxide per megajoule.”<sup>45</sup> The LCFS regulates transportation fuels that are “sold, supplied, or offered for sale in California.”<sup>46</sup> Carbon intensity is not limited to only how much carbon the fuel contains, but also includes the amount of carbon released in the full fuel cycle. CARB’s LCFS rule includes the lifecycle GHG emissions of fuel, including emissions produced during production and transportation of fuels to California. The LCFS refers to this inclusive concept as the “lifecycle greenhouse gas emissions,” which is defined as:

aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Executive Officer, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.<sup>47</sup>

To lower their carbon intensity scores, providers may blend low-carbon ethanol into gasoline.<sup>48</sup> However, the location of the origination of commerce in fuels is a significant factor in one’s score. For example, corn-derived ethanol produced in the Midwest is assigned a higher carbon intensity score than chemically similar corn-derived ethanol produced anywhere in California, regardless of its transportation within California.<sup>49</sup> Thus, a chemically identical ethanol im-

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41. CAL. ENVTL. PROTECTION AGENCY AIR RES. BD., FINAL STATEMENT OF REASONS 457 (2009).

42. CAL. ENVTL. PROTECTION AGENCY AIR RES. BD., FINAL REGULATION ORDER (2009), archived at <https://perma.unl.edu/7NKB-AH2X>.

43. *Rocky Mountain Farmers Union v. Goldstene (Rocky Mountain I)*, 719 F. Supp. 2d 1170, 1177 (E.D. Cal. 2010).

44. *Id.*

45. *Id.*

46. *Id.*

47. CAL. CODE REGS. tit. 17, § 95481(a)(28) (2010).

48. *Rocky Mountain I*, 719 F. Supp. 2d at 1177. Providers may also buy credits generated from another fuel provider that has credits in order to meet LFCS standards. *Id.*

49. *Id.* at 1177–78.

ported from the Midwest can receive a higher carbon intensity score than ethanol produced anywhere in California, ultimately rendering the Midwest product disadvantaged and more expensive for fuel providers seeking to meet the California fuel standard requirements.

The CI calculation does not account for *intrastate* shipping within the state, notwithstanding that California is the third largest U.S. state geographically. California's 770 miles in length is greater than the distance from points in ten other states to California. Thus, all fuel, wherever produced in California and wherever consumed, does not incur a higher carbon transportation factor for purposes of this regulation. The state of Oregon adopted its own low carbon fuel standard for transportation fuel,<sup>50</sup> similar but not identical to LCFS in California, and supported California by filing an amicus brief in the *Rocky Mountain* case.<sup>51</sup> This raises the specter of different fuel standards, which producers will need to satisfy in different states.

## B. The State Law Challenge to the LCFS

There were two legal challenges to the LCFS: one in state court raising state administrative and environmental law claims, and the second in federal court raising Constitutional issues.<sup>52</sup> The largest ethanol producer in the United States challenged the LCFS rule in California state court, alleging a failure to comply with the California Environmental Quality Act (CEQA).<sup>53</sup> CARB's proposed regulations were required to meet procedural requirements for rulemaking in California's Administrative Procedures Act (APA) and substantive and procedural requirements in CEQA.

Plaintiff POET, LLC challenged the LCFS regulations on the grounds that CARB violated the APA and CEQA during the adoption process. It contended that CARB violated the APA by excluding certain emails from consultants from the rulemaking file made available

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50. THE OREGON DEP'T OF ENERGY, CLIMATE CHANGE INTEGRATION GROUP, FINAL REPORT TO THE GOVERNOR (2008), *archived at* <http://perma.unl.edu/BZP4-XZY5>.

51. Brief of the States of Oregon, Maryland, Massachusetts, Rhode Island, Vermont, and Washington as Amici Curiae in Support of Appellants, *Rocky Mountain III*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014) (Nos. 12-15131, 12-15135), 2012 WL 2376702.

52. *See infra* sections II.C–F.

53. POET, LLC v. Cal. Air Res. Bd., 218 Cal. App. 4th 681 (2013). POET argued that CARB failed to respond to numerous public comments, that it omitted documents from the rulemaking file, and that the LCFS will lead to increased GHG emissions, not the reductions it promises. POET alleged that CARB's LCFS rule exceeds the scope of authority delegated to it by the legislature. *Id.*

to the public.<sup>54</sup> Ethanol is the only biofuel given an increased carbon rating based on land-use changes.<sup>55</sup>

The state trial court in this state law challenge found against the challengers, but subsequently was reversed on appeal.<sup>56</sup> The appellate court held that California had, in fact, violated CEQA and the California APA by approving the regulation before the required review of the environmental implications under CEQA of the environmental implications.<sup>57</sup> The court also found that CARB had improperly deferred formulating required mitigation measures.<sup>58</sup> However, after ruling against the state, the court refrained from enjoining the regulation under state law.<sup>59</sup> The parties were directed to submit comments about remedies for these violations.<sup>60</sup>

### C. The Federal Trial Court Constitutional Challenge

The LCFS rule was challenged in a second court case alleging it violated federal constitutional law, separate from the suit raising California state law claims.<sup>61</sup> *Rocky Mountain Farmers Union v. Goldstene* challenged the LCFS rule as violating the dormant Commerce Clause of the Constitution.<sup>62</sup> The plaintiffs alleged that CARB discriminated against interstate commerce and fuels produced out of state.<sup>63</sup>

Specifically, the LCFS regulation incorporates into its calculations the differences between indirectly associated carbon emissions from transportation, the farming methods used to raise the agricultural produce, and the fuel used to produce the electricity in the state and used where the agricultural product is converted to ethanol.<sup>64</sup> In order to meet such standards, out-of-state competitors somehow would need to spend more on the production and transportation of the ethanol to California to reduce the resultant carbon intensity scores equivalent to those of California's in-state producers.

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54. *Id.* The emails spoke of the computer model that CARB used to calculate the indirect carbon emissions attributable to ethanol due to land-use changes caused by the increased demand for the crops used to produce ethanol.

55. *Id.* Assigning ethanol a higher carbon content based on indirect land-use change is controversial because many uncertainties affect the estimates for the land-use changes and the carbon emissions resulting from those changes.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See *Rocky Mountain II*, 843 F. Supp. 2d 1071, 1078 (E.D. Cal. 2011), *rev'd sub nom.* *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

62. *Id.*

63. *Id.*

64. *Id.* at 1088.

The plaintiffs submitted that, in fact, their out-of-state ethanol products are chemically identical to comparable ethanol products manufactured in California, yet CARB assigned the Midwestern low-carbon fuel a higher carbon intensity value, making it ultimately cost-disadvantaged and less desirable to California consumers.<sup>65</sup> The plaintiffs contended that California fuel consumers seeking to meet emissions obligations will seek in-state fuels with lower CI values at a premium, inflating the cost of in-state fuels at the expense of out-of-state producers.<sup>66</sup> CARB's defense focused on illustrating that the market for Midwestern low-carbon fuel was robust, rather than disproving the California regulation's differential burdens based on the geographic origin of the commerce.<sup>67</sup> The suit contested violation under the dormant Commerce Clause of the Constitution and the Supremacy Clause of the Constitution.<sup>68</sup>

### 1. *Discrimination Against Out-of-State Commerce*

In December 2011, the U.S. District Court for the Eastern District of California upheld the plaintiffs' argument, invalidating certain parts of the LCFS rule and enjoining the rule's enforcement, as it "discriminates against out-of-state corn-derived ethanol while favoring in-state corn ethanol and impermissibly regulates extraterritorial conduct."<sup>69</sup> The court held that the LCFS differentiates based on place of

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65. Plaintiffs argued that Midwestern ethanol fuels were over 10% higher in carbon intensity than chemically identical California counterparts. *Id.* at 1087.

66. *Id.* at 1085–87; see Plaintiff's Memorandum in Support of Motion for Summary Judgment at 7–9, *Rocky Mountain II*, 843 F. Supp. 2d 1071 (No. 1:09-CV-02234-LJO-DLB), 2010 WL 5882459.

67. The state's memorandum to the court included a subsection titled "Investment Activity in the Midwest Ethanol Industry is Robust." Defendant and Defendant-Intervenor's Supplemental Memorandum of Points and Authorities in Opposition to RMFU's Motion for Summary Judgment at 8, *Rocky Mountain II*, 843 F. Supp. 2d 1071 (Nos. 1:09-CV-02234-LJO-DLB, 1:10-CV00163-LJO-DLB), 2011 WL 1233984. The science used by CARB for the LCFS was found to rely too heavily on factors of origin to pass the federal trial court's facial discrimination test. *Id.* at 1087. Although the same scientific methods are applied to all fuel sources in the LCFS Table 6, the court found that "the variables within the formula favor California ethanol producers by assigning lower CI scores based on location" and thus favor California producers over out-of-state producers. *Id.* at 1087–88. Some international fuels using different organic sources actually had lower CI scores than U.S. fuels using other feedstocks. Sugarcane-based ethanol, imported from South America, was awarded lower CI value than in-state California corn-derived ethanol because of the fuel's chemical composition, production, and refinement, although this does not affect interstate commerce burdens. *Id.* at 1089.

68. *Id.* at 1078.

69. *Id.* at 1081. CARB attributed the difference in carbon intensity values to multiple scientific factors in addition to geographic location factors (emissions related to shipping or transportation of fuel). *Id.* at 1087–88. The court relied upon a table of Carbon Intensity values generated by CARB. *Id.* at 1087.

origin of the commerce and concluded that the LCFS discriminates on its face against out-of-state, corn-derived ethanol.<sup>70</sup> “Regulating out-of-state conduct” is not the only test applied under the dormant Commerce Clause; the broader definition of discrimination “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>71</sup>

The court found that the LCFS serves a legitimate local purpose;<sup>72</sup> however, defendants had not met their burden to show that a nondiscriminatory means to adequately serve their objective was unavailable.<sup>73</sup> The Supreme Court precedent in *Dean Milk Co. v. City of Madison*<sup>74</sup> requires a state to choose the least discriminatory or intrusive-on-interstate-commerce means to regulate, and also prohibits a state from impermissibly controlling conduct outside its borders.<sup>75</sup> The court found that CARB had several other means to address the State’s purpose to reduce GHGs without discriminating against out-of-state fuel products.<sup>76</sup>

The court held that the LCFS “may not impose a barrier to interstate commerce based on the distance that the product must travel in interstate commerce.”<sup>77</sup> The district court reached this conclusion by relying on *Dean Milk* and *West Lynn Creamery v. Healy*.<sup>78</sup> Although the LCFS had administrative procedures that allow for out-of-state producers to amend their CI rankings, the court saw these administrative procedures as amplifying the discriminatory impact of the reg-

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70. *Id.*

71. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994). Under the *Pike* test, courts will uphold a nonfacially discriminatory statute “unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

72. *Rocky Mountain II*, 843 F. Supp. 2d at 1093. The Rocky Mountain plaintiffs argued that the LCFS serves no local purpose, but rather California is attempting to solve the national and international problem of climate change. The defendant State cited *Massachusetts v. EPA*, 549 U.S. 497 (2007), where the Supreme Court affirmed “a state has a local and legitimate interest in reducing global warming.” *Rocky Mountain II*, 843 F. Supp. 2d at 1093.

73. *Id.* The court did recognize that lifecycle analysis is a widely accepted national and international approach to reduce carbon emissions, but this does not mean there is not a nondiscriminatory means to achieve this goal on a local level. *Id.* The Rocky Mountain plaintiffs offered many nondiscriminatory alternatives including a tax on fossil fuels or solely regulating tailpipe emissions. *Id.*

74. 340 U.S. 349 (1951).

75. *Rocky Mountain II*, 843 F. Supp. 2d at 1093.

76. *See, e.g., Dean Milk*, 340 U.S. 349.

77. *Rocky Mountain II*, 843 F. Supp. 2d at 1089.

78. *Id.* (citing *Dean Milk*, 340 U.S. 349 (invalidating a local ordinance requiring milk sold in the city be pasteurized within five miles of the city); *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (holding that a differential burden placed at any point in the stream of commerce on out-of-state producers is constitutionally invalid)).

ulations.<sup>79</sup> Even though the LCFS benefited some other out-of-state producers or burdened some in-state producers, the trial court held that this did not absolve the LCFS from a finding that it discriminates on its face:<sup>80</sup> “[L]egislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification.”<sup>81</sup>

## 2. *California Regulation Beyond State Borders*

The *Rocky Mountain* plaintiffs alternatively asserted that strict scrutiny still applied because under the Commerce Clause, one state’s laws cannot “control conduct beyond the boundary of the state.”<sup>82</sup> The defendants countered that the only effects the LCFS had on out-of-state producers were indirect and therefore did not directly regulate outside California’s boundaries.<sup>83</sup> The court found for plaintiffs, identifying the issue as “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”<sup>84</sup>

The LCFS required all commercial providers, whether within the state or outside, to detail the entire geographic pathway of the fuel during its lifetime so that CARB may assign it a carbon intensity score. The court held that “this type of regulation ‘forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another,’ causing the LCFS to ‘directly regulate[] interstate commerce.’”<sup>85</sup> The court pointed out that although the products may be ultimately sold in California, the Commerce Clause prevents CARB and the LCFS from regulating those portions of the lifecycle of these products outside of the state. Under the Commerce Clause, states

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79. *Id.* at 1090. It is at the sole discretion of CARB to amend Table 6 and the carbon intensity rankings. CARB can further the discrimination by amending in-state producer’s ranking while denying an out-of-state producer’s similar request without reason. *Id.*

80. *Id.* at 1089. For example, Brazilian sugarcane ethanol has a lower intensity score than some Californian corn ethanol and in-state producers of corn ethanol are penalized when importing corn from out-of-state. *Id.*

81. *Id.* at 1089 (quoting *Daghlian v. DeVry Univ.*, 582 F. Supp. 2d 1231, 1243 (C.D. Cal. 2007) (internal quotation marks omitted)).

82. *Id.* at 1090 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989)). The *Rocky Mountain* plaintiffs cited such examples as the LCFS regulating land use in the Midwest and deforestation in South America rather than solely regulating ethanol carbon emissions within the borders of California. *Id.* at 1091–92.

83. *Id.* at 1091.

84. *Id.* (quoting *Healy*, 491 U.S. at 336).

85. *Id.* at 1092. If a provider changes its part of the fuels lifecycle, such as changing its transportation mechanism to California, this change must be submitted to CARB. *Id.*

cannot place restrictions on imports “in order to control commerce in other states.”<sup>86</sup>

### 3. *Preemption of California Regulation*

The plaintiffs alternatively argued that CARB’s LCFS regulations were preempted by federal environmental law.<sup>87</sup> The plaintiffs asserted that the LCFS closed off California to those federally grandfathered biorefineries which would need either to not participate in the California ethanol fuel market or reduce their carbon emissions, although not so required by federal law.<sup>88</sup> The defendants opposed the plaintiffs’ preemption claim not on the merits, but on procedural defenses based on lack of standing to bring the claim and lack of causation.<sup>89</sup> The court held that while individual plaintiffs did not provide evidence of individual standing, at least one of the industry plaintiffs’ members suffered an actual injury which established associational standing.<sup>90</sup>

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86. *Id.*

87. The petitioners asserted that the 2007 amendment to the Clean Air Act and the Energy Independence & Security Act of 2007 precluded CARB from its state-level LCFS program. California retorted that regulating emissions is within traditional state police power to protect the health, safety, and welfare of citizens, and “[a]ir pollution prevention falls under the broad police powers of the states . . . . Environmental regulation traditionally has been a matter of state authority.” Appellants’ Opening Brief at 9, *Rocky Mountain III*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014) (Nos. 12-15131, 12-15135), 2012 WL 2338857 (quoting *Exxon Mobil Corp. v. EPA*, 217 F.3d 1245, 1255 (9th Cir. 2000)). There is a “savings clause” for states in the Clean Air Act (“nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce [any pollution standard] . . . except that such State . . . may not adopt or enforce any standard which is less stringent than the [federal] standard . . . .” 42 U.S.C. § 7416 (2012)).

88. *Rocky Mountain II*, 843 F. Supp. 2d at 1095. The plaintiffs asserted that these federal objectives included reducing the United States’ greenhouse emissions, enhancing energy independence and protecting preexisting investment in renewable energy. Plaintiffs argued that Congress struck a balance by not mandating preexisting biorefineries to reduce their lifecycle carbon emissions as outlined in the statute. *Id.* at 1094–95.

89. *Id.* at 1095. Under standing requirements, a plaintiff must show “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that there injury will be redressed by a favorable decision.” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

90. *Id.* at 1099–1100. The court pointed to two affidavits that named specific plants that would be harmed by the LCFS and alleged injuries that had been suffered, which led it to find that the first prong was satisfied. *Id.* Growth Energy had previously submitted evidence that satisfied this prong. *Id.* at 1100. Plaintiffs had to meet the following requirements in order to establish association standing: “its members would otherwise have standing to sue in their own right; the inter-

Having already found the LCFS illegal, the federal district court did not resolve the preemption claim, holding that petitioners lacked standing to raise it. The doctrine of conflict preemption is triggered when a state law actually conflicts with a federal law and therefore a party cannot comply with both the state and federal law.<sup>91</sup> Because the state opposed an as-applied preemption challenge while the plaintiffs opposed a facial challenge, the court required future briefing on these different issues and the standards of review that should be used,<sup>92</sup> and denied “without prejudice the Rocky Mountain plaintiffs’ summary judgment motion related to its preemption claim.”<sup>93</sup> The Ninth Circuit stayed the district court’s injunction in April 2012, pending appeal.<sup>94</sup>

#### D. The Ninth Circuit Majority

The Ninth Circuit reversed the federal trial court on the unconstitutionality of the California LCFS.<sup>95</sup> The trial court decision was overturned as to the standard of review to apply to the regulation, whether the regulation was facially discriminatory and violated the Constitution’s dormant Commerce Clause, and whether the California action was impermissibly extraterritorial.<sup>96</sup> With a dissent, the 2–1 Circuit majority did not apply strict scrutiny to the California regulation, and instructed on remand that a balancing test be applied pursuant to *Pike v. Bruce Church, Inc.*<sup>97</sup>

In contrast to some precedent, the *Rocky Mountain* majority decision stated that it is not unconstitutional for a state to impose a regulation whose effect is for only out-of-state commerce to purchase additional credits and pay additional fees: “California may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale in California.”<sup>98</sup> Because goods were transported using fossil fuels, by definition, a state can regulate to disfavor such goods originating and

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ests it seeks to protect are germane to the organization’s purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 1109. The court disagreed with CARB regarding the first prong of the associational standing test, finding that at least one of the industry plaintiffs’ members suffered an actual injury and would have the right to sue on its own. *Id.* at 1109–10.

91. *Id.* at 1101.

92. *Id.* at 1102–03.

93. *Id.* at 1103.

94. *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234-LJOGSA (E.D. Cal. Apr. 27, 2012).

95. *Rocky Mountain III*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

96. *Id.*

97. *Id.*

98. *Id.* at 1104.

travelling from out-of-state. This discriminated, by its design, on the distance goods travel in interstate commerce, which is geographic discrimination based on the point of origin of the commerce.<sup>99</sup> The court stated, “The dormant Commerce Clause does not require California to ignore the real differences in carbon intensity among out-of-state” product pathways to California, including the type of electricity consumed in the region of production and the distance of travel of the product to California.<sup>100</sup>

The majority decided that California has discretion to construct the different zones for attribution of different amounts of GHG emissions, including zones for categorizing commerce along state boundaries.<sup>101</sup> They also concluded that “[p]erfection in making the necessary classification is neither possible nor necessary.”<sup>102</sup> The Ninth Circuit held that precision can be sacrificed for “the need to reduce the compliance costs of the system.”<sup>103</sup> This applied both to categories for transportation GHG emissions from longer distances and generalized GHG emissions assigned to regional electricity production: “[a]s with transportation, drawing the regional categories otherwise might only make CARB’s assessment less accurate to the detriment of the public.”<sup>104</sup>

The majority held that “Midwest producers’ use of coal-fired electricity also does not merit respect under *Hunt*.”<sup>105</sup> The court concluded that the Supreme Court’s precedent in *Hunt v. Washington State Apple Advertising Commission*<sup>106</sup> did not apply to ethanol. This shifted the analysis from examination of an arbitrary discriminatory value, imposed in the *Oregon Waste*<sup>107</sup> and *Hunt* cases, to a more scientifically derived discriminatory index imposed on out-of-state commerce. However, despite what the majority stated, it also shifted a primary element of discrimination back to the distance of travel of articles in interstate commerce. Thus, there was geographic discriminatory effect based on the point of origin of the commerce before it traveled the distance to California.

### E. Professors as Friends of the Court

A small group of environmental law professors filed an amicus brief as a “friend of the court,” taking a position to support California’s

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99. *See infra* section III.A.

100. *Rocky Mountain III*, 730 F.3d at 1093.

101. *Id.* at 1093.

102. *Id.* at 1094 (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)) (internal quotation marks omitted).

103. *Id.* at 1095.

104. *Id.* at 1096.

105. *Id.* at 1092.

106. 432 U.S. 333, 351 (1977).

107. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994).

statute.<sup>108</sup> This amicus brief spent the initial three-quarters of the brief talking about how the affected plaintiffs—appellees should fail because they did not meet their required burden of proof against the State,<sup>109</sup> and how California is free to be a laboratory and implement innovative programs.<sup>110</sup>

Public policy innovations like the Standard represent the genius of federalism. They are the products of the states acting as “laboratories of democracy,” a phenomenon noted 80 years ago in a famous dissent by Justice Louis Brandeis. To fulfill this role, the states must have room to experiment with new solutions to new problems.”<sup>111</sup>

The states should have this latitude “through a period of ferment and experimentation in confronting the multifaceted challenges of climate change” even if it runs into Constitutional limitations.<sup>112</sup>

This amicus brief cited the experimental laboratory of California as qualifying for the opening suggested, but not specifically enumerated or sanctioned, in *City of Philadelphia v. New Jersey*, where “there is some reason, apart from their origin, to treat [fuels] differently.”<sup>113</sup> The *Philadelphia* opinion suggested in dicta that there must be some other reason, without specifying which, that would also satisfy Constitutionally legitimacy. Trash is largely without distinguishing characteristics from one batch to another, the *Philadelphia* court hypothesized, without there being any basis to distinguish another reason for the regulation of imported waste. Similarly, CO<sub>2</sub> and GHG emissions from one molecule of chemically identical ethanol to the next also are without distinction, regardless of where they are released.<sup>114</sup> However, in subsequent opinions on the dormant Commerce Clause, the Supreme Court opinions went further, and explicitly stated that no environmental rationale for regulation ex-

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108. Brief of Amici Curiae Professors of Environmental Law in Support of Appellants, *Rocky Mountain III*, 730 F. 3d 1070 (Nos. 12–15131, 12–15135), 2012 WL 2376704.

109. *Id.* at 24. “Instead, a plaintiff must prove that the challenged regulation will ‘cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market.’” *Id.* at 26 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 n.16 (1978)).

110. *Id.* at 14. Not until page 28 of the brief’s 36 pages are Constitutional issues of law directly addressed. *Id.* at 28–36.

111. *Id.* at 1 (citing *New State Ice v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)).

112. *Id.* at 8.

113. *Id.* at 24 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)).

114. See *Energy Source Comparison*, ENERGY4ME, <http://energy4me.org/all-about-energy/what-is-energy/energy-sources/> (last visited Jan. 9, 2015), archived at <http://perma.unl.edu/L5YG-QZMX> (stating simply that burning ethanol creates carbon dioxide without making a distinction between ethanol burning sources in different geographic locations).

cused constitutional violations based on the geographic place of origin of the commerce.<sup>115</sup>

Ultimately, the legal issue presented is less an issue of environmental law and more an issue of constitutional law applied to an environmental statute. Another group of law professors filed an amicus brief supporting the plaintiffs, which noted that:

CARB argues that Congress bestowed “plenary authority” on California to regulate the production and use of transportation fuels, even in other states. But CARB points to no clear statutory statement of congressional intent authorizing this remarkable assertion of state power. Indeed, it has not identified *any* instance where Congress has bestowed “plenary authority” on one state.<sup>116</sup>

There also is judicial deference to agency decisions. In a recent opinion, a federal court of appeals noted the great deference due to an administrative agency in charge of implementing a standard, and stressed that the agency had broad leeway in deciding how much of a scientific margin of safety was sufficient.<sup>117</sup> The court disclaimed any role in refereeing disputes among experts, and had discretion to reassess evidence based on its own judgment.<sup>118</sup> However, where there is scientific evidence as a critical part of the record, such as from an advisory committee, if the agency disagrees with its advisory committee, it “must give a sound scientific reason for its disagreement.”<sup>119</sup> As to whether the rationale to encourage state laboratories of environmental experimentation are exempt from constitutional prohibitions on geographic discrimination burdening the origin of commerce embodied

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115. *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386, 393 (1994) (holding the “well-settled principles of [ ] Commerce Clause jurisprudence” could not justify the challenged legislation “as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town’s police power beyond its jurisdictional boundaries.”).

116. Brief of Amici Curiae Law Professors in Support of Rocky Mountain Farmers Union Appellees at 2–3, *Rocky Mountain III*, 730 F. 3d 1070 (No. 12–15131, 12–15135), 2012 WL 3594433.

117. *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013). In 2008, EPA set both the primary and secondary ozone standards at 75 parts per billion, averaged over an 8-hour period. *Id.* at 1341. EPA also issued a secondary air quality standard for ozone (designed to protect public welfare), which was the same as the primary standard. *Id.* The court also stated that EPA did not have to show that old standards were wrong due to errors or new evidence, in order to modify them. *Id.* at 1347. The court said that EPA had failed to give a clear enough explanation for making the secondary standard equal to the primary standard, and had failed to state explicitly “what level of protection was ‘requisite to protect the public welfare.’” *Id.* at 1361–62.

118. *Id.* at 1361–62.

119. *Id.* at 1355. An independent health panel created under the Clean Air Act recommended that a more protective ozone health standard was justified. *Id.* at 1356. EPA need not always be as health-protective as its scientists recommend. *Id.* at 1358.

in the Commerce Clause, the professors in support of plaintiffs–appellees noted:

In light of “the important role the Commerce Clause plays in protecting the free flow of interstate trade, th[e] Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been ‘unmistakably clear.’” “[W]hen Congress has not ‘expressly stated its intent and policy’ to sustain state legislation from attack under the Commerce Clause,” the Court has held that the judiciary “ha[s] no authority to rewrite its legislation based on mere speculation as to what Congress ‘probably had in mind.’”<sup>120</sup>

The amicus brief of the Environmental Law Professors in support of CARB and the State, appealing to discretion for California’s “genius” and “laboratories,” ultimately was on the side of the successful parties on appeal. The Ninth Circuit majority was persuaded by California’s history of being able to experiment with regulation as a leader among states and respecting “local autonomy,”<sup>121</sup> observing, “[o]ur conclusion is reinforced by the grave need in this context for state experimentation.”<sup>122</sup> The court held that the State’s acting as an experimental laboratory justified regulation that burdened interstate commerce.<sup>123</sup>

The decision reconfigured the thread of Supreme Court interpretation of the dormant Commerce Clause.<sup>124</sup> According to the court, a

120. Brief of Amici Curiae Law Professors in Support of Rocky Mountain Farmers Union Appellees, *supra* note 116, at 25 (quoting *Maine v. Taylor*, 477 U.S. 131, 138–39 (1986) (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)).

121. *Rocky Mountain III*, 730 F. 3d at 1087.

122. *Id.* at 1097. The majority concluded by citing a dissent by Justice Brandeis to an older Supreme Court decision which notes that states can be laboratories. *Id.* at 1087 (quoting *New State Ice Co v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J. dissenting)). The majority of the Supreme Court did not issue this statement. *Id.*

123. *Id.*

124. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994) (“[O]rdinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (invalidating equal fee imposed on in-state and out-of-state commerce, the distribution of which favored in-state commerce); *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93 (1994) (invalidating Oregon’s increased per-ton surcharge on waste generated in other states); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353 (1992) (invalidating the provisions of Michigan’s Solid Waste Management Act that restricted landfill’s ability to accept out-of-state waste); *Chem. Waste Mgmt, Inc. v. Hunt*, 504 U.S. 334 (1992) (invalidating Alabama’s imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978) (holding that states cannot discriminate against articles of commerce originating in other states unless there is a “reason, apart from their *origin*, to treat them differently”); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977) (invalidating North Carolina law prohibiting display of Washington State apple grades); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349 (1951) (requiring states to choose the least

state environmental purpose to reduce GHGs emitted in the state justified imposing restrictive regulation, burdens, and costs on interstate commerce entering the state.<sup>125</sup> The majority opinion determined that carbon emission control is such an exception, when based on science.<sup>126</sup> This reconfigured the legal calculus for state regulation of carbon-emitting interstate commerce: the Supreme Court, however, has held that the Constitution does not allow an environmental purpose to justify discrimination that otherwise burdens interstate commerce.<sup>127</sup> And regardless of how and when the Supreme Court next speaks on these issues in some future case,<sup>128</sup> the implications for state regulation are of note:

- Primary human-caused CO<sub>2</sub>-emitting activities are vehicle fuels, electricity production, and agriculture,<sup>129</sup> to which similar state GHG limitations can also be applied to favor in-state agricultural products, electricity, gasoline or regulation of plane travel from or to the state.
- There was a dissenting opinion: of four federal judges who ruled on this case at the trial and appellate levels, two found it unconstitutional, while two did not.

#### F. The Dissent in the Ninth Circuit

The dissenting opinion in the Ninth Circuit decision found there was facial discrimination.<sup>130</sup> Any geographic discrimination by a state, whether along state or other geographic lines, is suspect to strict scrutiny by the court.<sup>131</sup> The burden is on California to demonstrate that no less burdensome regulatory incentives were available to control GHGs, and the dissent notes that at oral argument, California admitted that there were less burdensome alternatives on interstate commerce than “to use lifecycle analysis to reduce GHG emissions.”<sup>132</sup>

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discriminatory or intrusive means to regulate interstate commerce, when balancing local purpose against a statute which either discriminates on its face or impermissibly controls conduct outside its borders).

125. *Rocky Mountain III*, 730 F.3d at 1097.

126. *Id.* at 1097–1100.

127. *West Lynn Creamery*, 512 U.S. 186; *C & A Carbone*, 511 U.S. 383.

128. See *infra* subsections IV.A.1–2 (discussing alternative holdings on state energy regulation of two other federal circuit courts of appeals in the same year of the Ninth Circuit decision).

129. See *infra* figure accompanying note 337.

130. *Rocky Mountain III*, 730 F.3d at 1107 (Murguia, J., dissenting) (relying on Supreme Court decision in *Chem. Waste Mgmt, Inc. v. Hunt*, 504 U.S. 334, 342 (1994) (noting that the “additional fee [on imported commerce] facially discriminates”)).

131. See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).

132. *Id.* at 1109.

Even where a state statute is drafted in a fashion which is facially neutral rather than expressly discriminatory, a court applies a strict scrutiny standard where the state law has a discriminatory effect.<sup>133</sup> Justice Scalia, concurring in the majority prior opinion in *West Lynn Creamery*, noted that “subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court’s guiding principle” for dormant Commerce Clause cases.<sup>134</sup> Fees imposed on out-of-state commerce have an identical effect to subsidies for in-state industry. When a court evaluates such a statute using strict scrutiny, the result is almost always that the state action is found unconstitutional.<sup>135</sup>

Below, this Article contrasts the majority and dissenting opinions in the Ninth Circuit Court of Appeals *Rocky Mountain*<sup>136</sup> decision, which unravels the traditional threads of constitutional jurisprudence.

### III. CAN THE NINTH CIRCUIT RECONFIGURE THE SUPREME COURT’S CONSTITUTIONAL PRECEDENT?

The Ninth Circuit majority opinion regarding California carbon regulation unravels several threads of Supreme Court precedent interpreting the dormant Commerce Clause of the Constitution. These altered threads will be intriguing strands of the weave as other federal circuit courts are now reaching contrarily woven decisions.<sup>137</sup> A half-dozen of these unraveled threads are examined below.

#### A. Geographic Discrimination Is Any Geographic Distinction, Not Only State-Versus-State Economic Protectionism

Even where a particular state energy regulation is within state authority to enact, its substantive provisions still must be applied within the constraints of the dormant Commerce Clause, so as not to unduly burden interstate commerce between the states, pursuant to Article I of the Constitution.<sup>138</sup> The dormant Commerce Clause prohibits actions which are either facially discriminatory against, or unduly bur-

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133. *C & A Carbone*, 511 U.S. at 391 (“[O]rdinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977); *see also* *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (holding that statute treating out-of-county waste the same as waste from other states was still discriminatory).

134. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 208 (Scalia, J., concurring).

135. STEVEN FERREY, *EXAMPLES & EXPLANATIONS: ENVIRONMENTAL LAW* 158 (6th ed. 2012).

136. *Rocky Mountain III*, 730 F. 3d 1070.

137. *See infra* subsections IV.A.1–2.

138. U.S. CONST. art. I, § 8, cl. 3.

den, interstate commerce.<sup>139</sup> This requires a dual inquiry of what is “facial” and whether the effect is a burden which is undue.

A court first determines whether regulation or legislation is facially discriminatory against interstate commerce, and will only uphold that law if a legitimate local purpose can be found.<sup>140</sup> The dormant Commerce Clause precedent is “driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”<sup>141</sup> State statutes or regulation found to discriminate against out-of-state interests based on geography or favoring local interests are found to be per se invalid.<sup>142</sup> If the statute is geographically even-handed, the courts apply the *Pike* balancing test to determine whether the state’s interest justifies the incidental discriminatory effect of the regulatory mechanism as applied.<sup>143</sup>

However, while it is most common that state action benefits commerce originating in that regulating state, unlawful discrimination need not do so to benefit the regulating state. Geographically-based state restrictions on interstate commerce, whether discriminating for or against local commerce, raise identical constitutional dormant Commerce Clause concerns.<sup>144</sup> Even a small discriminatory impact can be stricken under a strict scrutiny standard of review, and the magnitude of impermissible discriminatory impact can be minor.<sup>145</sup> A discriminatory Oklahoma statute—involving regulation of energy fuels similar to the LCFS regulation—was overturned pursuant to the dormant Commerce Clause even though it resulted in only a relatively minor 3%–7% allocation of the market to in-state producers.<sup>146</sup>

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139. See *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (citing *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994)).

140. See *Davis*, 553 U.S. at 338.

141. *Id.* at 337–38 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)); see *Or. Waste Sys.*, 511 U.S. at 99.

142. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (noting that if a statute is facially discriminatory, it is virtually per se invalid); see also Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVTL. & ENERGY L. & POL’Y J. 33, 59 (2009) (mentioning history of the dormant Commerce Clause).

143. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental”).

144. U.S. CONST. art. I, § 8, cl. 3.

145. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 272 (1984) (finding that a tax exemption for certain locally produced alcoholic beverages violated the dormant Commerce Clause even though the state’s asserted purpose for the tax was otherwise). “A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose, or discriminatory effect.” *Id.* at 270 (citation omitted).

146. *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992). As a result of the statute, the market changed in response from use of almost all out-of-state coal to “the utili-

The Supreme Court has held that statutes which establish regional barriers (not necessarily just a one-state barrier) and discriminate only against some states rather than all states, violate the Commerce Clause.<sup>147</sup> Any regulation which distinguishes on any place of origin of the commerce is subject to strict scrutiny under the dormant Commerce Clause. Subsidies of in-state commerce or businesses, even if the burdens to achieve the subsidies are imposed on all commerce regardless of its origin, are stricken under strict scrutiny review.<sup>148</sup>

Even where a statute is drafted in a fashion which is facially neutral rather than expressly discriminatory, a court applies a strict scrutiny standard where the state law has a discriminatory purpose or effect.<sup>149</sup> The majority opinion of the Ninth Circuit only engages in an examination of whether one state elects to regulate in a way which discriminates against another state. The Supreme Court has repeatedly held that state regulation does not need to “be drafted explicitly along state lines in order to demonstrate its discriminatory design.”<sup>150</sup> Any geographic discrimination by a state, whether along state or other geographic lines, is subject to strict scrutiny by the courts, which the Ninth Circuit dissent noted.<sup>151</sup>

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ties purchased [in-state] Oklahoma coal in amounts ranging from 3.4% to 7.4% of their annual needs, with a necessarily corresponding reduction in purchases of Wyoming coal.” *Id.*; see also *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (finding that even though the statute did not compel use of Illinois coal or forbid use of out-of-state coal, by encouraging use of Illinois coal it “discriminate[d] against western coal by making it a less viable compliance option for Illinois generating plants”).

147. See *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).
148. *Alliance for Clean Coal*, 44 F.3d at 595–96 (noting the importance of “the need to use coal mined in Illinois” and “the need to maintain and preserve as a valuable State resource the mining of coal in Illinois”) and concluding that the Illinois Coal Act, like the . . . order in *West Lynn*, has the same effect as a “tariff or customs duty—neutralizing the advantage possessed by lower cost out of state producers”); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).
149. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (“[O]rdinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *Hunt*, 432 U.S. at 352–53; see also *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (“In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case.”).
150. *Rocky Mountain III*, 730 F.3d 1070, 1097 (9th Cir. 2013) (quoting *Amerada Hess Corp. v. N.J. Dept. of Treasury*, 490 U.S. 66, 76 (1989)), *cert. denied*, 134 S. Ct. 2884 (2014). See also *Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 353 (striking ordinance banning disposal of out-of-county waste); *C & A Carbone, Inc.*, 511 U.S. at 391 (1984) (striking local trash processing requirement); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (striking ordinance requiring milk to be processed within five miles of town).
151. *Rocky Mountain III*, 730 F.3d at 1108 (Murguia, J. dissenting) (quoting *Or. Waste Sys., Inc. v. Dep’t Env’t. Quality of Env’tl Quality*, 511 U.S. 93, 100 (1994)).

An additional requirement imposed by Supreme Court precedent is a determination of whether the state has met an obligation to choose the least burdensome option in its regulation.

### **B. The Least Burdensome State Regulatory Choice?**

The Supreme Court held that an agency of government cannot discriminate against interstate commerce “if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.”<sup>152</sup> For such a statute or regulation to be upheld, the state usually must sustain a burden of establishing that there is a compelling state interest for which the statute is the least intrusive means to achieve that interest.<sup>153</sup> The State must demonstrate that no less burdensome regulatory options were available to control GHGs. The dissent in *Rocky Mountain* noted that California admitted that means less burdensome on interstate commerce existed “to use lifecycle analysis to reduce GHG emissions,” and California had not taken them.<sup>154</sup>

### **C. The Lack of Local Impact of GHG Emissions**

The Ninth Circuit majority opinion held that a scientific basis establishing GHG impact on climate changed the constitutional analysis for the court.<sup>155</sup> Repeatedly, the court majority relied on the finding that California has an interest in limiting the effects on California of GHGs associated with products consumed in California, regardless of their origin. The Ninth Circuit majority in *Rocky Mountain* held that the impact *in the state* justified state regulation and did not examine the impact of CO<sub>2</sub> or methane emissions on the state citizenry compared to any other citizens in the U.S. “[W]e . . . allow California to protect its land and citizens based on a realistic assessment of threats.”<sup>156</sup>

However, global warming and climate change emissions in California have no particularized or distinct impact in or on California or its particular citizens.<sup>157</sup> Ethanol is chemically identical regardless of the state in which it is produced.<sup>158</sup> If one is to elevate the role of science to justify a particular judicial result, all aspects of that science are relevant. The location of GHG emission has no additional net impact on climate change in that particular location. A molecule of GHG

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152. *Dean Milk*, 340 U.S. at 354.

153. Stiles, *supra* note 142, at 58–59.

154. *Rocky Mountain III*, 730 F.3d at 1109 (Murguia, J., dissenting) (referring to hearing transcript).

155. *Id.*

156. *Id.* at 1097.

157. See FERREY, *supra* note 5, at 6.

158. *Rocky Mountain III*, 730 F.3d at 1088.

released anywhere in the world has an identical impact on climate change, as pointed out by experts in their brief to the Ninth Circuit.<sup>159</sup>

#### D. Elevating Environmental Rationale to Sanction Geographic Discrimination

The Ninth Circuit majority held that it is defensible to discriminate through in-state regulation based on (1) the average carbon intensity of electricity generation in the region where the good is produced and (2) the distance that the good travels from its place of origin to its use in state.<sup>160</sup> Therefore, where goods must be transported using fossil fuels, a state can choose to regulate GHG emissions in a manner that burdens out-of-state goods because of their distance of transportation in interstate commerce. The majority also allowed state discrimination regarding identical finished goods or commodities because of the carbon intensity of regional electricity that must be used to produce an item and the transportation fuel used to move commerce from one state to the next.<sup>161</sup>

The court construed *Philadelphia v. New Jersey*,<sup>162</sup> the touchstone Supreme Court decision striking down discriminatory treatment of out-of-state commerce in waste commodities based on their out-of-state origin, to now allow a distinction based on the length of interstate travel from the point of origin to consumers in California. The Ninth Circuit majority found indirect support implied in the Supreme Court opinions in *Oregon Waste*<sup>163</sup> and *Chemical Waste Management, Inc. v. Hunt*<sup>164</sup> to allow license where there is imposition of “higher costs” on the receiving state.<sup>165</sup> However, as set forth immediately above, there is no distinct local impact with any GHG emissions,<sup>166</sup> and as discussed in detail below, this rationale would alter Supreme Court precedent regarding the Commerce Clause.<sup>167</sup>

There is no more impact on climate change from commerce arriving in California or commerce arriving in a nearby state.<sup>168</sup> However,

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159. See Brief of Amici Curiae Ken Caldeira, Ph.D., et al. in Support of Defendants-Appellants at 27, *Rocky Mountain III*, 730 F.3d 1070 (Nos. 12-15131, 12-15135), 2012 WL 2376705 (“Greenhouse gas emissions contribute to the problem of global climate change wherever they are emitted.”). The majority opinion of the Ninth Circuit concedes that “[o]ne ton of carbon dioxide emitted when fuel is produced in Iowa or Brazil harms Californians as much as one emitted when fuel is consumed in Sacramento.” *Rocky Mountain III*, 730 F.3d at 1081.

160. *Rocky Mountain III*, 730 F.3d 1070.

161. *Id.* at 1091–92.

162. *Philadelphia v. New Jersey*, 437 U.S. 617, 626–28 (1978).

163. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994).

164. 504 U.S. 334 (1992).

165. *Rocky Mountain III*, 730 F.3d at 1089–90.

166. See *supra* section III.C.

167. See discussion *infra* Part V.

168. See *supra* section III.C.

the Ninth Circuit majority focused on the electricity inputs needed to produce the ethanol and the transportation inputs needed to move that commerce across state lines in order to distinguish its regulatory treatment of identical fuels. “[I]f an out-of-state ethanol pathway does impose higher costs on California by virtue of its greater [transportation] GHG emissions, there is a nondiscriminatory reason for its higher carbon intensity value. . . . [B]ecause they use dirtier electricity . . . CARB can base its regulatory treatment on these [upstream, out-of-California] emissions.”<sup>169</sup>

The majority decision makes interstate transportation of any good in commerce a negative factor on climate change and thereby justifies state regulation of any and all interstate commerce.<sup>170</sup> The Supreme Court, applying the dormant Commerce Clause, has never reached such a conclusion. The scope of commerce among the states for purposes of a dormant Commerce Clause analysis is broadly defined,<sup>171</sup> and all objects of interstate trade merit Commerce Clause protection.<sup>172</sup> There is no indication in any Supreme Court precedent that environmental issues are an avenue to negate application of the dormant Commerce Clause. The Supreme Court has noted: “even if environmental preservation were the central purpose of the pricing order, that would not be sufficient to uphold a discriminatory regulation.”<sup>173</sup> The Ninth Circuit majority sidestepped the Supreme Court’s precedent in *West Lynn*.<sup>174</sup>

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169. *Rocky Mountain III*, 730 F.3d at 1089–90.

170. See discussion *infra* Part V (applying this legal rationale to waste, electricity, food, and airline travel).

171. See *Or. Waste Sys., Inc. v. Or. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994) (invalidating Oregon’s increased per-ton surcharge on waste generated in other states); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t. of Natural Res.*, 504 U.S. 353 (1992) (invalidating the provisions of Michigan’s Solid Waste Management Act that restricted landfill’s ability to accept out-of-state waste); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992) (invalidating Alabama’s imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621–22 (1978) (holding that a state cannot discriminate against articles of commerce originating in other states unless there is a “reason, apart from their *origin*, to treat them differently” (emphasis added)).

172. See cases cited *supra* note 171. See also *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 16 (2002) (finding transmissions on the interconnected national grids constitute transmissions in interstate commerce).

173. *West Lynn Creamery v. Healy*, 512 U.S. 186, 204 & n.20 (1994).

174. *Id.*

### E. Prior California Precedent on Environmental Rationale Is Ignored

In recently defending another new sustainable-energy program,<sup>175</sup> California made an argument analogous to one it made before the Ninth Circuit in *Rocky Mountain*: past constitutional precedent no longer applies if California is addressing global warming. After enacting a feed-in tariff requiring California state utilities to make wholesale power purchases at well in excess of wholesale rates for power and in excess of allowed “avoided costs” under the PURPA Amendments to the Federal Power Act,<sup>176</sup> California raised the same “environmental purpose” justification that it argued again in the Ninth Circuit LCFS dispute before the Federal Energy Regulatory Commission (FERC): that an environmental regulatory purpose should make California exempt from past interpretations of constitutional precedent.<sup>177</sup>

The plaintiffs in this 2010–2011 energy regulatory matter countered that federal law does not allow state regulations to violate the Constitution in order to achieve state environmental goals.<sup>178</sup> FERC rejected all of California’s arguments regarding generic environmental rationales for exemption.<sup>179</sup> FERC found that a new GHG environmental motive for California’s regulation did not alter precedent interpreting the law.<sup>180</sup>

There are multiple federal precedents in the last two decades construing California energy regulation. In *Independent Energy Producers Association*,<sup>181</sup> the Ninth Circuit found California’s authority over energy in commerce preempted.<sup>182</sup> In *Southern California Edison Company*,<sup>183</sup> FERC blocked California action conflicting with federal decisions on energy commerce. The Supreme Court held that Congress meant to draw a “bright line,” easily ascertained and not requiring case-by-case analysis, between California and federal jurisdiction.<sup>184</sup> When a transaction is subject to exclusive federal

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175. Cal. Pub. Utils. Comm’n, 132 FERC ¶ 61,047 (2010) (Order on Petitions for Declaratory Order).

176. 16 U.S.C. § 824a (2012).

177. Cal. Pub. Utils. Comm’n, 132 FERC ¶ 61,047.

178. *Id.*

179. *Id.* at ¶ 61,337 (“The Commission’s authority under the [Federal Power Act] includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.”). FERC granted a request for clarification: Cal. Pub. Utils. Comm’n., 133 FERC ¶ 61,059 (2010) (Order Granting Clarification and Dismissing Rehearing).

180. *See* Cal. Pub. Utils. Comm’n., 133 FERC ¶ 61,059.

181. *Indep. Energy Producers Ass’n, Inc. v. Cal. Pub. Utils. Comm’n*, 36 F.3d 848 (9th Cir. 1994).

182. *Id.* at 853.

183. *S. Cal. Edison Co.*, 70 FERC ¶ 61,215 (1995).

184. *Fed. Power Comm’n v. S. California Edison Co.*, 376 U.S. 205, 215–16 (1964).

FERC jurisdiction, state regulation is preempted as a matter of federal law and the Constitution's Supremacy Clause, according to a long-standing and consistent line of rulings by the Supreme Court.<sup>185</sup>

When states do not observe these constitutional limitations, state taxpayers can be left paying for challengers' multiple millions of dollars of legal costs of successful challenge.<sup>186</sup> The Supreme Court in 1986,<sup>187</sup> and again in 1988,<sup>188</sup> 2003,<sup>189</sup> and 2008,<sup>190</sup> reaffirmed and enforced restrictions on state decisions that changed the price of energy in interstate commerce. Of note, the most recent of these four cases came out of the Ninth Circuit.<sup>191</sup> While this decision proceeded on appeal to the Supreme Court<sup>192</sup> and thereafter was remanded to FERC for more clarification,<sup>193</sup> this ruling against California's market

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185. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission that restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state. It held this to be an impermissible violation of the dormant Commerce Clause and the Federal Power Act. "Our cases consistently have held that the Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.* at 338. *See also* *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 50 (2003) (LPSC's "second-guessing of the classification of ERS units is pre-empted"); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (concluding proceedings by a state commission are pre-empted by FERC); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (holding that the North Carolina Utilities Commission's allocation of entitlement is pre-empted by federal law); *Montana-Dakota Co. v. Pub. Serv. Comm'n*, 341 U.S. 246, 251 (1951) ("[T]he prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.").
186. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012) (Order on the merits of complaint, reversed on appeal), *aff'd in part, rev'd in part*, 733 F.3d 393 (2d Cir. 2013). Similar request for fees are pending for plaintiffs' constitutional challenges in cases in California, New Jersey, and Maryland. *See* *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014) (field preemption and conflict preemption on wholesale power prices); *PPL Energyplus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd*, *PPL Energyplus, LLC v. Solomon*, 2014 WL 4454999 (3d Cir. 2014) (field preemption on wholesale power prices and rates); *Planning and Conservation League v. California*, No. RG 12626904 (Cal. Super. Ct. Nov. 12, 2013) (Motion for attorney fees).
187. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).
188. *Miss. Power & Light Co.*, 487 U.S. 354.
189. *Entergy La.*, 539 U.S. 39.
190. *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008).
191. *Pub. Util. Dist. No. 1 v. Fed. Energy Regulatory Comm'n*, 471 F.3d 1053 (9th Cir. 2006).
192. *See Morgan Stanley Capital Grp.*, 554 U.S. at 527.
193. *P.U.D. No. 1* and *Morgan Stanley* remanded the case to the FERC. *See Morgan Stanley Capital Grp.*, 554 U.S. at 527; *P.U.D. No. 1*, 471 F.3d at 1053.

regulation rendered by the Ninth Circuit was not substantively overturned when before the Supreme Court.<sup>194</sup>

## F. No Facial Discrimination?

### 1. *What Is Facial*

The Ninth Circuit majority in the LCFS matter concluded that “California’s regulatory experiment seeking to decrease GHG emissions and create a market that recognizes the harmful costs of products with a high carbon intensity does not facially discriminate against out-of-state ethanol.”<sup>195</sup> The dissent in the Ninth Circuit case found facial discrimination, relying on Supreme Court precedent in *Chemical Waste Management, Inc. v. Hunt*.<sup>196</sup> “The State’s burden of justification is so heavy that ‘facial discrimination by itself may be a fatal defect.’”<sup>197</sup> A challenge is facial, as opposed to as applied, “when the ‘claim and the relief that would follow . . . reach beyond the particular circumstances’ of the plaintiffs.”<sup>198</sup> And with GHG emissions, there is no doubt that the “claim and the relief that would follow . . . reach beyond the particular circumstances of the plaintiffs”<sup>199</sup> and affects a broad group.

If the statute is geographically evenhanded, the courts apply the *Pike* balancing test, rather than strict scrutiny, to determine whether the State’s interest justifies the incidental discriminatory effect of the regulatory mechanism as applied.<sup>200</sup> And even without facial discrimination or any geographic purpose or effect, certain regulations will still fail even the balancing test.

A facially neutral statute that imposes an incidental “burden on interstate commerce incommensurate with the local benefits secured”<sup>201</sup> would fail the balancing test articulated by the Supreme

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194. *See* Fed. Power Comm’n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964).

195. *Rocky Mountain III*, 730 F.3d 1070, 1097 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

196. *Id.* at 1108 (“[T]he ‘additional fee [on imported commerce] facially discriminates.’” (quoting *Chem. Waste Mgmt. Inc. v. Hunt* 504 U.S. 334, at 334 (1994))).

197. *Id.* at 1109 (quoting *Or. Waste Sys., Inc. v. Or. Dep’t of Env’tl. Quality*, 511 U.S. 93, 101 (1994)).

198. *Rocky Mountain II*, 843 F. Supp. 2d 1071, 1102 (E.D. Cal. 2011) (quoting *Doe v. Reed*, 561 U.S. 186, 187), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, *cert. denied*, 134 S. Ct. 2884 (2014).

199. *Id.*

200. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (When a statute “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

201. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2013).

Court in *Pike*.<sup>202</sup> A statute or regulation would discriminate against commerce itself when the statute:

- (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods.<sup>203</sup>

While states have broad authority under their inherent police powers, a dormant Commerce Clause violation “is not to be avoided by ‘simply invoking the convenient apologetics of the police power.’”<sup>204</sup> A geographically discriminatory impact does not require express mention of geography in the regulation, and a regulation may appear neutral but have a geographically direct or indirect impact on commerce. “Such a [contrary] view, we have noted, ‘would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.’”<sup>205</sup>

State statutes or regulations found to discriminate against out-of-state interests based on geography or favoring local interests, are *per se* invalid.<sup>206</sup> Subsidy of in-state businesses, even if the taxes to raise the subsidies are imposed on all commerce, can be stricken under strict scrutiny.<sup>207</sup> A limited exception occurs when a state participates directly in the market as a purchaser, seller, or producer of articles of commerce.<sup>208</sup> However, this exception does not apply to state regulation of private companies, as is present with California carbon regulation in A.B. 32.

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202. *Pike*, 397 U.S. at 142.

203. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208–09 (2d Cir. 2003)) (internal quotation mark omitted).

204. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 780 (1945) (quoting *Kan. City S. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75 (1914); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925)).

205. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)).

206. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (noting that if a statute is facially discriminatory, it is virtually *per se* invalid); *Stiles*, *supra* note 142, at 60–61.

207. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (“[T]he Illinois Coal Act, like the . . . order in *West Lynn*, has the same effect as a ‘tariff or customs duty—neutralizing the advantage possessed by lower cost out of state producers.’” (quoting *West Lynn*, 512 U.S. at 194)).

208. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

## 2. *Discriminatory Effect Without Express Language*

The Ninth Circuit *Rocky Mountain* dissent noted that where there is facial discrimination, Supreme Court precedent does not permit a court to look at the “purpose of, or justification for, a law,” and a court looks only at differential treatment of economic interests.<sup>209</sup> However, even when there is no obvious or overt facial discrimination against out-of-state or other geographically based interests, where the effect or purpose is to discriminate the ultimate impact is enough to make the regulation unconstitutional.<sup>210</sup> Even where a statute is drafted in a fashion that is facially neutral rather than expressly discriminatory, a court can apply a strict scrutiny standard where the purpose or effect of a state law has a discriminatory effect.<sup>211</sup> For example, if a statute does not mention, or in any other way distinguish, the geographic location of the commerce, but uses terms that result in a geographic preference, a court can apply a strict scrutiny standard. The trial court in the *Rocky Mountain* case noted that a regulation need not facially mention discriminatory provisions against out-of-state entrants to be held in violation of the dormant Commerce Clause.<sup>212</sup> A regulation that “evinces” discriminatory purpose against interstate commerce “or unambiguously discriminates in its effect . . . almost always is ‘invalid per se.’”<sup>213</sup>

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209. *Rocky Mountain III*, 730 F.3d 1070, 1108 (9th Cir. 2013) (Murguia, J., dissenting) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99–100 (1994)), *cert. denied*, 134 S. Ct. 2884 (2014).

210. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).

211. *C & A Carbone*, 511 U.S. at 391 (“[O]rdinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (“[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.” (quoting *Pike*, 397 U.S. at 143)); *Hunt*, 432 U.S. at 352–53; *see also* *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (concluding that because Michigan failed to identify a reason “why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case”).

212. *Rocky Mountain II*, 843 F. Supp. 2d 1071, 1089 (E.D. Cal. 2011) (“[L]egislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification.” (quoting *Daghlian v. DeVry Univ.*, 582 F. Supp. 2d 1231, 1243 (C.D. Cal. 2007)) (internal quotation marks omitted)), *rev’d sub nom.* *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, *cert. denied*, 134 S. Ct. 2884 (2014).

213. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001)).

Note here, that this standard is in the disjunctive: Either discriminatory purpose *or* discriminatory effect is subject to strict scrutiny, rendering such regulations very unlikely to survive constitutional scrutiny. The amount of discriminatory effect does not matter: Even a small or incidental discriminatory impact can be stricken under strict scrutiny constitutional review.<sup>214</sup>

Even where a statute is drafted in a fashion that is facially neutral rather than expressly discriminatory, a court applies a strict scrutiny standard where the state law has a discriminatory effect.<sup>215</sup> A state cannot regulate to favor, or require use of, its own in-state energy resources,<sup>216</sup> nor can it, by regulation, harbor energy-related resources originating in the state.<sup>217</sup> In-state fuels cannot be required to be used by a state even for the rationale of satisfying federal Clean Air Act requirements.<sup>218</sup> Income tax credits cannot be given by a state only to in-state producers of fuel additives.<sup>219</sup> The Supreme Court consistently has required that the regulation of power by the states must not discriminate regarding the origin of power or the ultimate impact, which may discourage its flow in interstate commerce:

[We] consistently have held that the Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. . . . [A] “State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.”<sup>220</sup>

Recent federal court opinions construing state energy regulation have scrupulously followed this doctrine.<sup>221</sup>

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214. *See Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (“A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose . . . or discriminatory effect.”).

215. *C & A Carbone*, 511 U.S. at 391 (“[O]rdinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *Fort Gratiot*, 504 U.S. at 361; *Hunt*, 432 U.S. at 352–53.

216. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–56 (1992); *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554, 560 (N.D. Ill. 1993), *aff’d sub nom. Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995).

217. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

218. *Alliance for Clean Coal*, 44 F.3d at 596–97.

219. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271, 278–80 (1988).

220. *New England Power Co.*, 455 U.S. at 338 (1982) (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)) (overturning as a violation of the dormant Commerce Clause an order of the state Public Utilities Commission that restrained renewable power produced within the state within the state for the financial advantage of in-state ratepayers).

221. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012), *aff’d in part, rev’d in part*, 733 F.3d 393 (2d Cir. 2013).

### 3. *Or Discriminatory Legislative Purpose*

A geographically discriminatory purpose also is impermissible. A regulation need not facially mention discrimination against out-of-state entrants to violate the dormant Commerce Clause.<sup>222</sup> A regulation which evinces discriminatory purpose against interstate commerce, “or unambiguously discriminates in its effect . . . almost always is ‘invalid per se.’”<sup>223</sup> Even where a statute is drafted in a fashion that is facially neutral rather than expressly discriminatory, for example by not mentioning the geographic location of the commerce but otherwise using other terms that result in a geographic preference, a court can apply a strict scrutiny standard where the state law has a discriminatory effect.<sup>224</sup>

CARB explicitly stated that one of its goals is to “ensure that a significant portion of the biofuels used in the LCFS are produced in California” so as to keep money in the state.<sup>225</sup> The Ninth Circuit majority did not find this dispositive:<sup>226</sup> “We will ‘assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to con-

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222. See discussion *supra* subsection III.F.1. See also *Rocky Mountain III*, 843 F. Supp. 2d 1071, 1089 (E.D. Cal. 2011) (“[L]egislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification.” (quoting *Daghlian v. DeVry Univ.*, 582 F. Supp. 2d 1231, 1243 (C.D. Cal. 2007)) (internal quotation marks omitted)), *rev’d sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

223. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) (emphasis omitted) (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001)).

224. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *S.–Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 145 (1984) (“[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.” (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970)); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977); see also *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (concluding that because Michigan failed to identify a reason “why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case”).

225. Brief of Amici Curiae Law Professors in Support of Rocky Mountain Farmers Union Appellees, *supra* note 116, at 24 n.4 (noting that the anticipated “[d]isplacement of imported transportation fuels with biofuels produced in the State keeps more money in the State”).

226. *Rocky Mountain III*, 730 F.3d 1070.

clude that they could not have been a goal of the legislation.”<sup>227</sup> The majority was sheltered in a Supreme Court holding thirty years ago in a prior California matter regarding energy, which found that the stated purpose of a state law or regulation is taken by the court *verbatim* as the true purpose, without parsing further into actual evidence of real purpose.<sup>228</sup>

Under such a *PG&E* as-written-only test, the role of state counsel instructing state officials to be careful in what they say can determine which side prevails in a challenge. This purpose can be critical in determining whether *Philadelphia* strict scrutiny applies in court review, or whether a *Pike* balancing test applies. Strict scrutiny is virtually always fatal to justification of the state regulation;<sup>229</sup> a balancing approach is not.<sup>230</sup> Are state declarations of legislative purpose taken *verbatim* by the courts as the true purpose, or do courts determine the actual purpose from a more complete examination of the record and evidence?

A closer examination of how the Supreme Court and other federal courts have regarded the *PG&E* precedent is illuminating. In the three decades after its issuance in 1983 through 2012, the Supreme Court’s precedent in *PG&E* was cited 929 times by federal courts and agencies, including in twenty-eight cases by the Supreme Court, in 235 cases by federal circuit courts of appeals, in 537 cases by federal trial courts, and in twelve administrative determinations by FERC.<sup>231</sup> However, the critical holding regarding how to determine legislative purpose has not been primarily cited or relied on by the federal judiciary. Of the total 929 federal opinions over three decades citing the 1983 *PG&E* opinion, only fifty-five—approximately 5%—have cited this particular legislative purpose holding at all, including in three subsequent cases by the Supreme Court, twenty-one cases by federal circuit courts, and thirty-one cases by federal trial courts. Of these fifty-five citations, most cite this holding either in dicta or only as a very general reference to the mechanics of the preemption doctrine.<sup>232</sup>

Of the remaining few opinions which construe this “legislative purpose” holding at any level of depth or application, many examine facts behind the stated purpose in the preamble of the construed legisla-

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227. *Id.* at 1097–98 (quoting *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463 n.7 (1981)).

228. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983).

229. FERREY, *supra* note 135.

230. *Clover Leaf Creamery*, 449 U.S. 456; FERREY, *supra* note 135, at 158–61.

231. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 80 (1990); *Pennsylvania v. Lockheed Martin Corp.*, 684 F. Supp. 2d 564, 584 (M.D. Pa. 2010).

232. *See, e.g.*, *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1134 n.22 (9th Cir. 2003); *Crystal Bay Marina v. Sweeden*, 939 F. Supp. 839, 841 (N.D. Okla. 1996); *Snow v. Bechtel Constr. Inc.*, 647 F. Supp. 1514, 1517, 1519 (C.D. Cal. 1986).

tion, the effect it has on Congress' ability to carry out its objectives,<sup>233</sup> and whether the stated purpose is "merely a cover-up" for prohibited state actions.<sup>234</sup> Very few subsequent federal court decisions have invoked or followed the holding from the 1983 Supreme Court decision in *PG&E* to the effect that the language in a piece of legislation is the final authority as to ascertaining the actual purpose of that legislation.<sup>235</sup> The Supreme Court has cited this particular part of its holding from the *PG&E* opinion three times in the past three decades, and in the most recent case, the Court took a contrary position and refused to rely solely on the stated purpose in legislation to determine whether a state action was preempted.<sup>236</sup>

In a similar issue in a Vermont case recently decided by the Second Circuit, the Vermont attorney general cited the Supreme Court *PG&E* precedent:<sup>237</sup> "Therefore, we accept California's avowed economic purpose as the rationale for enacting [the moratorium]."<sup>238</sup> However, the federal trial court agreed with the challenger's assertion that true purposes must always be deduced from all of the evidence and not just legislative preambles to regulation or law, which may be manipulated for legislative purposes<sup>239</sup>:

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233. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990) (concluding that a state legislative action was preempted by federal law because it had "the actual effect of frustrating Congress' intent" even though "the professed motivation" for the state's action was "the economic and environmental effects of nuclear waste disposal").
234. *Drnek v. Chicago*, 192 F. Supp. 2d 835, 844–45 (N.D. Ill. 2002) (distinguishing the applicability of the holding in *PG&E* to the Atomic Energy Act with the Age Discrimination in Employment Act).
235. *See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001) (discriminatory purpose based on the legislative history of statute and statements of those involved), *cert. denied sub nom. Murphy v. Waste Mgmt. Holdings*, 535 U.S. 904 (2002); *Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989).
236. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."); *English v. Gen. Elec. Co.*, 496 U.S. 72, 73 (1990) (holding that field pre-emption did not apply to the state tort law at issue because that law was not motivated by safety concerns and the actual effect of the law on Congress' objectives was "not sufficiently direct and substantial"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984) (finding that the federal pre-emption of state regulation of the safety aspects of nuclear energy does not extend to a state-authorized award of punitive damages for conduct related to radiation hazards).
237. Olga Peters, *Entergy v. Vermont Trial Concludes*, VTDIGGER (Sept. 15, 2011, 10:00 PM), <http://vtdigger.org/2011/09/15/entergy-v-vermont-trial-concludes>, <http://vtdigger.org/2011/09/15/entergy-v-vermont-trial-concludes/>, archived at <http://perma.unl.edu/EMR2-3BAE>.
238. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983).
239. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 224 (D. Vt. 2012), *aff'd in part, rev'd in part*, 733 F.3d 393 (2d Cir. 2013).

The Second Circuit has held that courts cannot “blindly accept” a challenged statute’s “articulated purpose,” because doing so would enable legislatures to “nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.”<sup>240</sup>

On appeal, the Second Circuit recently upheld this decision of the trial court to examine the entire record, rather than only the state defendant’s stated purpose.<sup>241</sup> The dissent by Judge Murguia, among the judges hearing the Ninth Circuit case, found that the district judge was correct that the California LCFS facially discriminated against interstate commerce.<sup>242</sup>

#### 4. *Extraterritorial Reach of One State’s Regulatory Power*

The Ninth Circuit also reversed the trial court holding that California had acted to influence commerce beyond state boundaries.<sup>243</sup>

##### a. *Beyond the Police Power*

States cannot regulate in ways where the practical effect is to control conduct in other states.<sup>244</sup> States are prohibited from attaching restrictions to any goods that they import from other states: “States and localities may not attach restrictions to . . . imports in order to control commerce in other States.”<sup>245</sup> Where a state statute provided a tax exemption for sales of two types of wine, both produced from products produced in the state, even though not needing to mention the state by name, the effect was practically state-specific discrimination, and it was found to be discriminatory and a violation of the dormant Commerce Clause.<sup>246</sup> A state cannot regulate to favor or

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240. *Id.* (quoting *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999)); *accord* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977) (zoning and the Constitution’s Equal Protection Clause); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1247–48 (10th Cir. 2004) (discussing state regulation of nuclear materials).

241. *Entergy Nuclear Vt. Yankee*, 733 F.3d 393.

242. *Rocky Mountain III*, 730 F.3d 1070, 1108 (9th Cir. 2013) (Murguia, J. dissenting), *cert. denied*, 134 S. Ct. 2884 (2014).

243. *Id.* at 1107.

244. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1984).

245. *C & A Carbone*, 511 U.S. at 393.

246. *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263 (1984); *see also C & A Carbone*, 511 U.S. at 393 (states cannot regulate outside their own jurisdiction, even if only indirect impacts are imposed, because of limits on local police powers beyond their jurisdiction).

require use of its own in-state energy resources,<sup>247</sup> nor can it, by regulation, harbor energy-related resources originating in the state.<sup>248</sup>

“While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess.”<sup>249</sup> Income tax credits cannot be given by a state only to in-state producers of fuel additives.<sup>250</sup> In-state fuels cannot be required to be used by a state even for the rationale of satisfying federal Clean Air Act requirements.<sup>251</sup> A state cannot steer commerce—even its own commerce—in a particular directions for environmental purposes, as “[t]o do so would extend the town’s police power beyond its jurisdictional bounds.”<sup>252</sup>

*b. Balkanization*

Widespread state adoption of similar regulation of GHGs based on individual state preferences or idiosyncrasies would impermissibly burden, or in its varying standards would interfere with, interstate trade. “If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.”<sup>253</sup> The trial court held that allowing California’s regulation would encourage other states to enact their own idiosyncratic legislation resulting in economic “Balkanization.”<sup>254</sup> The majority of the Ninth Circuit did not directly contradict this, but instead held that it did not have to assume such a result unless another state had taken such action or the threat was imminent: “Plaintiffs must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent.”<sup>255</sup>

Today, there is no other state regulating all GHG emissions for all major sectors, as is California. The RGI carbon regulatory system

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247. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–56 (1992); *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554, 560 (N.D. Ill. 1993), *aff’d sub nom.* *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995).

248. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

249. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986); *see also* *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (holding that one state “has no power to project its legislation into [another state] by regulating the price to be paid in that state for [products] acquired there”).

250. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271, 278–80 (1988).

251. *Alliance for Clean Coal*, 44 F.3d at 596–97.

252. *C & A Carbone v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994).

253. *American Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 284 (1987).

254. *Rocky Mountain II*, 843 F.Supp.2d 1071, 1092–93 (E.D. Cal. 2011), *rev’d sub nom.* *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1105 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

255. *Rocky Mountain III*, 730 F.3d at 1105 (9th Cir. 2013) (quoting *S.D. Myers v. City of San Francisco*, 253 F.3d 461, 469–70 (9th Cir. 2001)).

only regulates CO<sub>2</sub> and only from larger power generation facilities.<sup>256</sup> Efforts to regulate carbon in western states and separate efforts to do so in the Midwest have been abandoned.<sup>257</sup> However, the dissent in the Ninth Circuit opinion noted that Oregon is already moving ahead on LCFS regulation, without paralleling the regulatory scheme in California.<sup>258</sup> “States and localities may not attach restrictions to exports or imports in order to control commerce in other States.”<sup>259</sup>

The Ninth Circuit majority found that fuel standards or regulations based on another basis than mere state boundaries, and regulating only the commodity traded within the regulating state, based on precedent from state regulation of ATM fees, rendered the in-state preference a “neutral factor in economic decision making” and were exempt from consideration as Balkanizing.<sup>260</sup> “Here, California properly based its regulation on the harmful properties of fuel.”<sup>261</sup> The court allowed California to “assume legal and political responsibility for emissions of carbon resulting from the production and transport, regardless of location,” of products used in California.<sup>262</sup> The appellate court majority in *Rocky Mountain* stated that “[t]he Commerce Clause does not protect Plaintiffs’ ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines.”<sup>263</sup>

In sum, regardless of the cleverness of how discrimination is achieved or whether it is obvious or latent, “[t]he commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”<sup>264</sup>

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256. FERREY, *supra* note 5, at 80.

257. *Id.* at 104–106.

258. THE GOVERNOR’S CLIMATE CHANGE INTEGRATION GRP., FINAL REPORT TO THE GOVERNOR: A FRAMEWORK FOR ADDRESSING RAPID CLIMATE CHANGE (2008), *archived at* <http://perma.unl.edu/BZP4-XZY5>.

259. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 511 (1935)).

260. *Rocky Mountain III*, 730 F.3d at 1105.

261. *Id.* at 1104.

262. *Id.* at 1105.

263. *Id.* at 1106.

264. *Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 455–56 (1940).

IV. SUPREME COURT PRECEDENT-CHANGING  
IMPLICATIONS OF THE NINTH CIRCUIT  
DECISION GOING FORWARD

A. A ‘Virtual’ Split in the Circuits?

There is a fascinating split of opinion among three different federal circuit courts of appeals, all rendering decisions at the same point in mid-2013, and each adjudicating different cases involving state-versus-federal authority to regulate aspects of energy. While the nuances of each decision are examined below, the split in these circuits is of particular note not only for the energy issues presented, but for the rules of decision applied and whether or not there was dissent either to the circuit court decision or a contrary decision in the federal trial court:

- In 2013, the Seventh Circuit unanimously declared that it is a violation of the dormant Commerce Clause for a state to treat or subsidize renewable power originating in state more favorably or differently than out-of-state renewable power.<sup>265</sup>
- In 2013, the Second Circuit unanimously agreed that it is unconstitutional for a state to regulate low-carbon power in a manner restricting its ability to freely enter interstate commerce across state lines, affirming the federal trial court in substantial part.<sup>266</sup>
- In 2013, the Ninth Circuit upheld California’s differential treatment of renewable energy fuels based on the distance of travel and the type of nonrenewable electricity used in its out-of-state creation, with a dissent as well as a contrary opinion in the trial court.<sup>267</sup>

These three contemporaneous 2013 circuit court decisions, while not deciding identical issues, all construe either the dormant Commerce Clause, Supremacy Clause, or both, with respect to state regulation of sustainable energy investments or infrastructure. While the states and their statutes are distinct, the constitutional principles applied are identical. And thus, they create a significant difference, or “virtual split,” in interpretation of constitutional federalism on the regulation of energy.

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265. Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n, 721 F.3d 764 (7th Cir. 2013), *cert. denied sub nom.* Schuette v. Fed. Energy Regulatory Comm’n, 134 S. Ct. 1277 (2014); Hoosier Energy Rural Elec. Coop., Inc. v. Fed. Energy Regulatory Comm’n, 134 S. Ct. 1278 (2014).

266. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2d Cir. 2013).

267. *Rocky Mountain III*, 730 F.3d 1070.

1. *The Seventh Circuit's Unanimous Decision on Unconstitutional State Energy Discrimination Against Out-of-State Energy*

Let's start with the Seventh Circuit. Regarding credits afforded to and applied to in-state renewable power and denied to out-of-state renewable power sold in commerce in the state, the Seventh Circuit held that such state preferences or restrictions favoring in-state power were unconstitutional.<sup>268</sup> Judge Richard Posner, speaking for the Seventh Circuit Court of Appeals in a unanimous decision, affirmed the Federal Energy Regulatory Commission's approval of the Midwest Independent Service Operator's (MISO)<sup>269</sup> proportionate customer allocation of transmission costs for high-voltage transmission lines to move renewable wind power to populated areas.<sup>270</sup> For authority for its holding on the respective jurisdiction of state and federal regulate electricity, the opinion relied on a 2013 law review article on constitutional energy issues written by the Author.<sup>271</sup> The Seventh Circuit declared unconstitutional state regulation limiting state renewable portfolio standards to in-state generation as a violation of the Commerce Clause: "[it] trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."<sup>272</sup>

The Seventh Circuit opinion involved Michigan's discriminating against out-of-state renewable energy for no reason other than that the law did so, while California's LCFS in A.B. 32 accomplished the same out-of-state discrimination, but based it on reflecting lifecycle GHG emissions. Neither the Seventh Circuit,<sup>273</sup> the Second Circuit,<sup>274</sup> or the Supreme Court<sup>275</sup> have made this next major step. Jus-

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268. *Ill. Commerce Comm'n.*, 721 F.3d at 776.

269. MISO's service area extends from the Canadian border, east to Michigan and parts of Indiana, south to northern Missouri, and west to eastern areas of Montana. *Id.* at 769–70 fig.1.

270. *Id.* at 776. MISO allocated the costs of the transmission projects among all of the utilities that drew power from the MISO grid in proportion to each utilities' overall volume of usage; FERC approved MISO's rate design, which led some states to initiate court appeal. *Id.*

271. *Id.*

272. *Id.* Michigan actually initiated the issue of in-state electric power discrimination in its RPS program as an argument that out-of-state power transmitted to it was not recognized as of the same value as in-state electricity, therefore Michigan should not pay a share of power line tariffs transmitting power from out of state that did not have in-state equal recognition and benefit. Instead of supporting its position, this assertion caused the Seventh Circuit to respond to this argument, even though it was not at the core of the tariff issue before the Court. *Id.*

273. *Id.*

274. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

275. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

tice Scalia, concurring in the majority opinion in *West Lynn Creamery*, submitted that “subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court’s guiding principle” for dormant Commerce Clause cases.<sup>276</sup>

2. *The Second Circuit Holding of Unconstitutional State Regulation of Energy in Interstate Commerce*

In 2012, a federal district court found state attempts to regulate wholesale power pricing and to discriminate in the preference for in-state regulation of power moving in interstate commerce were preempted and violated the dormant Commerce Clause.<sup>277</sup> The district court ruled in the plaintiffs’ favor against state regulation of energy in the state on a federal preemption claim and a dormant Commerce Clause claim, and found that a second preemption claim was not yet ripe for determination.<sup>278</sup> On appeal by the State, in 2013 the Second Circuit affirmed the unconstitutionality of the state regulation of energy under the Supremacy Clause, and found other claims not yet ripe for review without overruling the trial court’s substantive rulings:<sup>279</sup>

We also do not have a factual record concerning incidental effects of such an agreement on interstate commerce . . . . This case therefore does not present a “concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III,” and is therefore not “ripe within the constitutional sense.”<sup>280</sup>

The difference between the federal trial court and the Second Circuit opinions in this matter is one of slight distinction on the procedural posture of whether certain claims were yet ripe for decision procedurally or first needed to be decided by FERC before coming to federal court, but the Second Circuit opinion did not disagree on the substance of any trial court determinations<sup>281</sup>: “An agreement requir-

276. *Id.* at 208 (Scalia, J., concurring).

277. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 236–39 (D. Vt. 2012), *aff’d in part, rev’d in part*, 733 F.3d 393.

278. *Id.*

279. *Entergy Nuclear Vt. Yankee*, 733 F.3d 393.

280. *Id.* at 430–31 (quoting *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 546 (2d Cir.2007)).

281. Under the Supremacy Clause, the Filed Rate doctrine and the Federal Power Act,

The [trial] court then held that even if Entergy were to be forced to enter into a new PPA [power purchase agreement] in violation of the market-based tariff, its recourse would be to have the agreement reviewed by FERC. However, the court concluded that ‘it is not clear what preemptive effect the [Federal Power Act] has to prevent [Vermont] from refusing to consider continued operation without such an agreement,’ as there would be no such agreement to review. The court thus declined to enjoin the defendants on the basis of Entergy’s Federal Power Act claim.

*Id.* at 407 (citations omitted). Both courts agreed that this issue was not yet ripe for review since FERC review had not yet occurred prior to court action. *Id.* at 433. “The [trial] court found unconstitutional and issued an injunction ‘enjoining Defendants from conditioning Vermont Yankee’s continued operation on the exist-

ing Vermont Yankee to allot a certain percentage of its output to satisfy local demand would also likely violate the dormant Commerce Clause.”<sup>282</sup> In a footnote, the court added, “Agreements of this nature would be “scrutinized strictly, i.e., ‘the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.’”<sup>283</sup>

### 3. *Recent Federal Trial Court Constitutional Energy Decisions*

There are other cases before federal district courts and not yet at the appellate level that are also contesting the constitutionality of energy regulation, several of which have found state actions unconstitutional. In 2014, the U.S. District Court for the District of Minnesota struck down Minnesota’s carbon emissions statute, finding that the statute impermissibly regulated extraterritorial commerce in violation of the dormant Commerce Clause.<sup>284</sup> The statute at issue, Minnesota’s Next Generation Energy Act (NGEA), sought to limit increases in “statewide power sector carbon dioxide emissions.”<sup>285</sup> The statute prohibits any “person” from importing or committing to import power from a new large energy facility<sup>286</sup> or entering into a new long-term power purchase agreement that would contribute to statewide power sector carbon dioxide emissions.<sup>287</sup> North Dakota, along with several coal-dependent utilities and power plants, brought a lawsuit against Minnesota, alleging the statute violated the Commerce Clause.<sup>288</sup>

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tence of a below-market PPA with Vermont utilities.” *Id.* at 408. The Second Circuit did not disagree with the substantive decision on the dormant Commerce Clause, but ruled on procedural grounds, holding that this issue was not ripe for review until plaintiffs actually entered such a forced PPA with the state. *Id.* at 433. “Accordingly, the analysis required under the dormant Commerce Clause may not be performed, and so Entergy’s claim is unripe at this time.” *Id.* at 431.

282. *Id.*

283. *Id.* at 431, n.36 (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003)).

284. *North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014).

285. *See id.* at 898 (citing MINN. STAT. § 216H.03(2) (2014)). “Statewide power sector carbon dioxide emissions” are defined as “the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota.” *Id.*

286. MINN. STAT. § 216H.03(2).

287. *Id.* § 216H.03(3)(3).

288. *Heydinger*, 15 F. Supp. 3d 891. Plaintiffs also claimed the statute violates the Supremacy Clause because it is preempted by the Clean Air Act and the Federal Power Act, the Privileges and Immunities Clause, and the Due Process Clause of the Fourteenth Amendment. The plaintiffs also sought declaratory judgment that the Federal Power Act preempts the statute. In 2012, the court granted partial judgment on counts four and six in favor of the defendants. *Id.* at 908. In

The court held that a statute's plain meaning could not be disregarded where its language is clear and unambiguous.<sup>289</sup> It found that the plain language of the statute violated the extraterritoriality doctrine when it "require[d] people or businesses to conduct their out-of-state commerce in a certain way" regardless of legislative intent or whether it had effects within the state, and was therefore per se invalid.<sup>290</sup> "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."<sup>291</sup> A statute's practical effect is evaluated not only by looking at its consequential effects, but also at how it would interact with the legitimate regulatory schemes of other states, and what the effect there would be if many States adopted similar legislation.<sup>292</sup>

In addition to regulating wholly out-of-state activity, the court determined that the NGEA also improperly required out-of-state merchants to seek regulatory approval before transacting with other non-Minnesota entities.<sup>293</sup> According to the court, if multiple states were to adopt similar legislation, entities involved in an interconnected multistate system like MISO could potentially be subject to several state laws regardless of whether they were transacting commerce in those states: "[T]he current marketplace for electricity would come to a grinding halt."<sup>294</sup> The NGEA constituted extraterritorial legislation and was per se invalid under the dormant Commerce Clause.<sup>295</sup> Although plaintiffs' Amended Complaint sought an award of costs and expenses incurred in the litigation, they did not raise the issue of attorneys' fees in their summary judgment motion papers.<sup>296</sup>

This finding of a violation of the dormant clause is consistent with the trial court determination in *Rocky Mountain* and the dissenting opinion when it was reversed by the Ninth Circuit. Except for the distinction that *Rocky Mountain* deals with storable liquid fuels, while *Heydinger* deals with electricity which is not storable and moves in interstate commerce, these cases are similar in purpose and extraterritorial impact. *Heydinger* involved the state regulating the sale in the state of certain interstate power transactions, and in this regard is more similar to the California LCFS than, and is distinguished on

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2014, having found for the Plaintiffs on Count one (the dormant Commerce Clause), the Court denied the remaining counts as moot. *Id.*

289. *Id.* at 909 (citing *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792 (8th Cir. 1995)).

290. *Id.* at 911 (quoting *Cotto Waxo Co.*, 46 F.3d at 793). Because the Court found that the NGEA violates the extraterritoriality doctrine, it did not address whether the statute is discriminatory or survives the *Pike* balancing test. *Id.*

291. *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

292. *Id.*

293. *Id.* at 918–19.

294. *Id.*

295. *Id.*

296. *Id.* at 919.

these facts applied to the dormant Commerce Clause from, two other 2013 federal trial court decisions. Those two decisions include a Maryland case, in which the federal trial court applied the *Pike* balancing test, and determined that because Maryland only provided incentives for location of facilities in the state but did not restrict whether the output of these facilities was sold in state or out of state, it did not burden interstate commerce.<sup>297</sup> The statute was found to restrict the location of power facilities but not restrict either facially or in its practical effect their commercial sales in commerce, and thus was subject only to the balancing test of *Pike*,<sup>298</sup> which the plaintiffs could not satisfy.<sup>299</sup> The state regulation was held to be unconstitutional, nonetheless, under the Supremacy Clause, and the prevailing plaintiffs submitted applications to recover their attorneys' fees.<sup>300</sup> A similar determination of unconstitutionality of state energy regulation based on the Supremacy Clause, rather than the Commerce Clause, also was reached by a federal district court in New Jersey and upheld by the Third Circuit on similar facts of state regulation of location, but not sales in commerce. Attorneys' fees were also sought by the successful plaintiffs.<sup>301</sup>

The Supreme Court has found states to have impermissibly favored in-state economic interests over out-of-state economic interests by providing tax credits only for in-state sales of products actually produced in state,<sup>302</sup> precluding out-of-state producers from shipping products directly to in-state consumers,<sup>303</sup> and providing property tax exemptions to in-state entities that primarily serve state residents but not to in-state entities which principally serve interstate clientele.<sup>304</sup> California does not regulate physical locational preferences as did New Jersey and Maryland in the matters above. The LCFS does not employ tax credits or exemption, or bar shipping of interstate commerce, but it does regulate interstate commerce at the state level. With LCFS, California, by state regulation, is incentivizing the actual sale of commodities based on GHG lifecycle emissions keyed to the location of the origin of the commerce. California regulates interstate

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297. PPL Energyplus, LLC. v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013) (concerning field preemption and conflict preemption on wholesale power prices), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

298. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

299. *Nazarian*, 974 F. Supp. 2d at 854.

300. *Id.*

301. PPL Energyplus, LLC. v. Hanna, 977 F. Supp. 2d 372 (D. N.J. 2013) (concerning field preemption on wholesale power prices and rates), *aff'd sub nom.* PPL Energyplus, LLC. v. Solomon, 753 F.3d 467 (3d Cir. 2014).

302. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271 (1988).

303. *Granholt v. Heald*, 544 U.S. 460, 473–74 (2005).

304. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576–77 (1997).

commerce, which is suspect, but does so based on scientific and quantitative mechanisms, which adds a second dimension.

#### 4. *The Circuits' "Virtual Split"*

What comparison of these three simultaneous circuit court decisions tells one is that in the one instance where the state regulation was upheld, California had engaged in an elaborate effort to quantify the actual GHG emissions associated with long-distance travel and the use of coal-fired power in the Midwest production of renewable ethanol commerce. While still discriminating to a degree against out-of-state commerce, in the California matter there was a scientific basis for the state regulation. This scientific rationale was not present in the statute addressed by the Seventh Circuit or the Second Circuit. Quantitative rigor matters when addressing a market in electricity or the scientific aspects of environmental impact.

However, the Ninth Circuit opinion had a strong dissent, whereas the Seventh Circuit and Second Circuit opinions were unanimous. In terms of the court positions, there is at least a "virtual split" of interpretation of the Constitution. The Ninth Circuit majority position is in the minority of these three simultaneous decisions.

The high court historically reverses the majority of all cases it reviews.<sup>305</sup> The Ninth Circuit's opinions have competed for being the most overturned by the Supreme Court,<sup>306</sup> and the Ninth Circuit has been overturned more than other circuits by the Supreme Court when it makes decisions on environmental matters.<sup>307</sup> In the Supreme Court term ending in 2009, including environmental matters, the Ninth Circuit was overturned in fifteen of the sixteen cases reviewed and in five out of five of its environmental opinions: "Experts, including former law clerks, say the Supreme Court justices are more inclined to look over the shoulders of the 9th Circuit judges they suspect of favoring the underdog."<sup>308</sup> In 2013, the Ninth Circuit was unani-

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305. Williams, *supra* note 12.

306. See CONSTANCE E. BAGELY & DIANE W. SAVAGE, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY 64 (Jack W. Calhoun et al. eds., 6th ed. 2010).

307. Jonathan H. Adler, *Is the Ninth Circuit Due for Environmental Correction?*, VOLOKH CONSPIRACY (June 20, 2012, 10:05 AM), <http://www.volokh.com/2012/06/20/is-the-ninth-circuit-due-for-environmental-correction/>, archived at <http://perma.unl.edu/9ZJL-N5GB>. In 2008–2009, the Supreme Court heard six environmental cases—five of which were from the Ninth Circuit. In those cases, the Ninth Circuit ruled in favored of the environmental groups, but the Supreme Court reversed them all. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Winter v. NRDC*, 555 U.S. 7 (2008).

308. Williams, *supra* note 12.

mously overturned by the Supreme Court on an environmental matter.<sup>309</sup>

Several separate challenges to state energy regulation on dormant Commerce Clause claims were either quickly settled by the government in favor or the claimant,<sup>310</sup> were unsuccessfully defended by the state,<sup>311</sup> have split-outcome decisions at the trial and appellate levels,<sup>312</sup> are still pending,<sup>313</sup> or were side-tracked by procedural issues which do not reach the merits of the constitutionality of the challenged provision.<sup>314</sup> A suit alleging that Massachusetts's renewable energy incentives violated the dormant Commerce Clause was set-

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309. *L.A. Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710 (2013). The court unanimously ruled to overturn a Ninth Circuit decision, supporting Los Angeles County's view that water flowing between natural and channelized sections is simply a transfer of the same water and should not be seen as a permitted discharge. *Id.* at 711. "[The Court] granted certiorari on the following question: Under the [Clean Water Act], does a 'discharge of pollutants' occur when polluted water 'flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river?'" *Id.* at 712. The Court held "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the [Clean Water Act]." *Id.* at 713.
310. *See, e.g.*, *Stipulation of Dismissal, TransCanada Power Mktg. Ltd. v. Bowles*, No. 4:10-cv-40070-TSH (D. Mass. May 28, 2013); *Order Accepting Proposed Tariff Revisions, Subject to Conditions, and Addressing Related Complaint, PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (April 12, 2011) (No. ER11-2875-000), 2011 WL 1383624.
311. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Ill. Commerce Comm'n v. Federal Energy Regulatory Comm'n*, 721 F.3d 764 (7th Cir. 2013), *cert. denied sub nom. Schuette v. Fed. Energy Regulatory Comm'n*, 134 S. Ct. 1277 (2014); *Hoosier Energy Rural Elec. Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 134 S. Ct. 1278 (2014); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596-97 (7th Cir. 1995); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (D. Vt. 2012), *aff'd in part, rev'd in part*, 733 F.3d 393 (2d Cir. 2013); *Rocky Mountain II*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011), *rev'd sub nom. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014); *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554, 560 (N.D. Ill. 1993), *aff'd sub nom. Alliance for Clean Coal*, 44 F.3d 591.
312. *See Missouri ex rel. Mo. Energy Dev. Assoc. v. Mo. Pub. Serv. Comm'n*, 386 S.W.3d 165 (Mo. Ct. App. 2012) (reversing circuit court decision on state energy regulation).
313. *See PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013) (finding field preemption on wholesale power prices and rates), *aff'd sub nom. PPL EnergyPlus, LLC v. Solomon*, No. 13-4330, 13-4501, 2014 WL 4454999 (3d Cir. Sept. 11, 2014) *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013) (finding field preemption and conflict preemption on wholesale power prices), *aff'd*, 753 F.3d 467 (4th Cir. 2014).
314. *Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1236 (D. Colo. 2012) (finding the Eleventh Amendment protected Colorado from suit).

tled.<sup>315</sup> The supremacy of federal control over climate change issues was also evidenced recently when the D.C. Circuit Court of Appeals upheld EPA's imposition of federal Clean Air Act implementation plans for states that failed to require Prevention of Significant Deterioration of Air Quality permits for stationary sources that emit greenhouse gases.<sup>316</sup> While the challenge was dismissed on standing, it distinguished the environmental regulation from the higher concern of federal coercion of the states, as identified in the prior Supreme Court decision on the Affordable Care Act.<sup>317</sup>

In 2013, the Supreme Court held that California's largest city was preempted by federal law from imposing additional regulation on diesel truck emissions for those trucks that accessed its port.<sup>318</sup> While addressing state and local environmental regulation, the Supreme Court held that federal law preempts state and local law.<sup>319</sup> In late 2013, New Jersey's in-state energy facility location preferences for new power generation were found unconstitutional,<sup>320</sup> as was Maryland's similar regulation.<sup>321</sup>

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315. TransCanada, an independent power company with a wind project in Maine, challenged the constitutionality of Massachusetts's renewable portfolio standard program, given that under previous Massachusetts law, out-of-state generators were allowed to bid to supply power. Complaint at 1, *TransCanada Power Mktg. Ltd.*, No. 4-10-cv-40070-FDS (D. Mass. Apr. 16, 2010), archived at <http://perma.unl.edu/QH5K-Y5GE>. TransCanada alleged dormant Commerce Clause violations in the requirement that state utilities enter long-term contracts with in-state new renewable energy projects, and that solar renewable energy credits be earned only by in-state solar photovoltaic power projects, regardless of where the power generation creating the renewable energy credits were sold. Erin Ailworth, *State Looking to Settle Suit Over Law on Clean Energy*, BOSTON GLOBE, May 27, 2010, archived at <http://perma.unl.edu/EV9C-C4EG>. Rather than risk having its programs exposed to constitutional scrutiny by the federal courts, Massachusetts immediately settled this lawsuit, re-opened the request for bidding, allowed out-of-state as well as in-state competitors to bid and gave TransCanada renewable credits for contracts that did not otherwise qualify under the statute. Partial Settlement Agreement at 1–4, *TransCanada Power Mktg. Ltd.*, No. 4-10-cv-40070-FDS (D. Mass. May 2010), archived at <http://perma.unl.edu/GY9G-9C84>.

316. See *Texas v. EPA*, 726 F.3d 180, 188 (D.C. Cir. 2013).

317. *Id.* at 197.

318. *Am. Trucking Ass'ns v. City of Los Angeles*, 133 U.S. 2096, 2099 (2013).

319. *Id.*

320. *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013) (finding New Jersey's Long Term Capacity Agreement Pilot Program Act to violate the United States Constitution's Supremacy Clause because it was preempted by the Federal Power Act by both field and conflict preemption), *aff'd sub nom.* *PPL EnergyPlus, LLC v. Solomon*, No. 13-4330, 2014 WL 4454999 (3d Cir. Sept. 11, 2014). In 2011, New Jersey enacted legislation to encourage the acquisition by utilities of the output of 2,000 Mw of new in-state power projects. *Hanna*, 977 F. Supp. 2d at 393. Power generators in the North Atlantic region filed a complaint with FERC alleging discrimination against New Jersey's statute ordering utilities to sign long-term contracts only with in-state generation facilities that bid to receive re-

## B. Can the Ninth Circuit Change Many Decades of Supreme Court Interpretation of the Constitution?

Appellate courts cannot directly negate Supreme Court precedent when applying the law. However, it is not quite so straightforward. Here, the Ninth Circuit majority was not so much overruling or contradicting the Supreme Court, as it was creating an alternative judicial rationale for a different result.

In fact, lower federal courts have charted alternative paths in response to recent Supreme Court decisions. As one example, in *United States v. Atlantic Research Corp.*, the Supreme Court noted that costs incurred “voluntarily” can only be allocated by recourse to § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), without defining what is “voluntary,” other than stating that reimbursing others’ costs does not qualify: “a [potential responsible party (PRP)] that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution.”<sup>322</sup> “But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a).”<sup>323</sup>

Without precisely negating the Supreme Court decision on this environmental matter, lower federal courts can, with wide discretion, interpret whether costs incurred were “voluntary” or not. Several circuit courts of appeals have creatively and inconsistently defined when an action is or is not “voluntary,” and frustrated the impact of a unanimous Supreme Court holding, which invalidated the prior deci-

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gional multistate PJM independent system operator (“ISO”) capacity payments. Mary Powers, *PJM Generators File Complaint with FERC Seeking Relief from NJ In-State Generation Law*, ELECTRIC UTIL. WK., Feb. 7, 2011, at 11, 13. In response, in 2011, FERC amended the PJM ISO rules to prevent New Jersey state law from attempting to encourage construction of in-state power generation by, in part, causing them to bid power into the PJM system at suppressed prices in order to win capacity auctions. Mary Powers, *Rebuffed by FERC Ruling, New Jersey BPU Plans to Look Again at How to Attract New Generation*, ELECTRIC UTIL. WK., May 23, 2011, at 4, 6 (stating that FERC, on April 12, 2011 eliminated a PJM rule that allowed a prior exemption for projects to make minimum offer prices when tempered by state energy programs). A lawsuit regarding New Jersey energy regulation by several existing independent power generators asserted that the New Jersey state law is in violation of the dormant Commerce Clause because it is predicated on in-state “favoritism,” and the New Jersey act is a “blatant and explicit effort to promote the construction of new generation facilities in New Jersey.” *Id.*

321. *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 796 (D. Md. 2013) (finding Maryland’s regulation to violate the Supremacy Clause by field preemption but not to violate the dormant Commerce Clause), *aff’d*, 753 F.3d 467 (4th Cir. 2014).

322. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007) (describing proper allocation of voluntary costs under CERCLA).

323. *Id.* at 139.

sions of eleven circuit courts of appeals.<sup>324</sup> In so doing, circuit courts have realized the same result in individual cases, that the Supreme Court unanimously struck as a general principle of interpretation of federal law.<sup>325</sup>

#### V. CAN ANY CLIMATE-INTERESTED STATE NOW DISCRIMINATE AGAINST INTERSTATE COMMERCE IRRESPECTIVE OF SUPREME COURT PRECEDENT?

Following the Ninth Circuit majority decision, the distance of travel, alone, becomes a factor for a state to discriminate against anything produced outside the state. And the decision allows states to create different zones at the state boundary and impose costs based on GHG associated with commerce travelling across these zones established at state lines.<sup>326</sup>

#### A. Trash-Talking at the Appellate Level Vis-à-Vis the Supreme Court

Justice Scalia, concurring in the prior Supreme Court opinion in *West Lynn Creamery*, noted that “subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court’s guiding principle” for dormant Commerce Clause cases.<sup>327</sup> In contrast, A.B. 32 in California and its regulations impose a carbon credit or fee requirement associated with products made with out-of-state electricity or travelling greater distances into the state.

Under the breadth of the Ninth Circuit majority decision, states can and may now resume their prior practice of blocking the importation and disposal of out-of-state trash into their states, under a new GHG emission rationale. Until now, in more than a dozen cases that

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324. See Steven Ferrey, *Toxic “Plain Meaning” and “Moonshadow”: Supreme Court Unanimity and Unexpected Consequences*, 24 VILL. ENVTL. L. REV. 1 (2013); Steven Ferrey, *The Superfund Cost Allocation Liability Conflicts Among the Federal Courts*, 11 VT. J. ENVTL. L. 249 (2009).

325. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 118 (2d Cir. 2010) (finding state settlement only allowed a § 103 action, not § 107 action, where the settling party, instead, wrote the check to the government, which then in turn used the money to retain and pay the remediation contractor); *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007) (discussing proper remedy for PRPs and court’s struggles in finding appropriate remedy); *Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007) (holding § 107 applied because Metropolitan Water voluntarily financed and performed cleanup); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005) (concluding Third Circuit precedent precludes PRPs from bringing § 107 claim).

326. *Rocky Mountain II*, 720 F.3d 1070 (2013), *cert. denied*, 134 S. Ct. 2884 (2014).

327. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 208 (1994) (Scalia, J., concurring) (emphasis omitted).

proceeded to the Supreme Court, states have unsuccessfully attempted to do this for decades.<sup>328</sup>

### 1. Methane CH<sub>4</sub>

Trash impacts the environment. Because waste is composed of a high percentage of organic materials—paper, food scraps, and yard waste—over time, bacterial decomposition of organic material, the volatilization of certain wastes, and chemical reactions within the landfill create copious quantities of gas.<sup>329</sup> About two-thirds of the total volume of waste is organic matter that will degrade to release methane under anaerobic conditions.<sup>330</sup> This landfill gas is comprised primarily of carbon dioxide, CO<sub>2</sub>, and 45%–60% methane, CH<sub>4</sub>, while containing smaller amounts of nonmethane organic compounds (NMOCs)<sup>331</sup> and some other trace organic elements. The chemical destiny of the bulk of municipal solid wastes is degradation to methane molecules.<sup>332</sup>

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328. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

329. *Landfill Gas Primer – Chapter 2: Landfill Gas Basics*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (November 2001), <http://www.atsdr.cdc.gov/HAC/landfill/html/ch2.html>, archived at <http://perma.unl.edu/RWL4-AQXQ>.

330. *Municipal Solid Waste*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/epawaste/nonhaz/municipal/index.htm> (last updated Feb. 28, 2014), archived at <http://perma.unl.edu/GP7V-AYXP>. The composition of typical municipal solid waste is 27.4% paper; 13.5% yard waste; 14.5% food waste; 6.3% wood; 12.7% plastics; 8.7% textiles, leather and rubber; and the remainder comprised of metals, glass and other materials. *Id.*

331. ENERGY INFO. ADMIN., RENEWABLE ENERGY ANNUAL 1996 at 99–100 (1997), archived at <http://perma.unl.edu/G7RR-WQTY>.

332. Bacteria that adapt to relatively oxygen-free environments—including the intestinal tracts of animals, bogs, marshes, rice paddies, arctic permafrost, and garbage dumps—produce methane. STEPHEN H. SCHNEIDER, GLOBAL WARMING 101 (1989). Methane is different from other greenhouse gases due to its immediate impact on the atmosphere and its short atmosphere lifetime. EPA, METHANE EMISSIONS AND OPPORTUNITIES FOR CONTROL 20–21 (1990) (reporting the findings of two international workshops sponsored by the International Panel on Climate Change which focused current methane emissions and opportunities to control these emissions) [hereinafter METHANE EMISSIONS]. Methane has twenty to thirty times more greenhouse capacity (the ability to trap infrared heat) per molecule than carbon dioxide. SCHNEIDER, *supra*, at 101. Or put another way, a gram of methane absorbs seventy times more infrared radiation than a gram of carbon dioxide. METHANE EMISSIONS, *supra*, at 11. Methane in the atmosphere also contributes to tropospheric ozone formation, another greenhouse gas, and potentially stratospheric ozone depletion. *Id.* at 21; SCHNEIDER, *supra*, at 101. These characteristics make methane an extremely potent greenhouse gas, giving it 120 times more power to cause global warming than carbon dioxide. METHANE EMISSIONS, *supra*, at 21. This characteristic is called “high global warming potential.” *Id.* at 20–21. Global warming potential is defined as “the ratio of the warming cause by the emissions of a unit of a trace gas to that caused by the emission of carbon dioxide at current concentration levels.” *Id.* at 20. Monitoring indicates that methane levels in the atmosphere have increased by almost 100% since

Approximately 29% of U.S. anthropogenic methane emissions—8.1 million metric tons annually—are from waste management.<sup>333</sup> Landfills, representing 98% of this 8.1 million metric tons of methane emissions, are by far the single largest source.<sup>334</sup> Approximately 4.9 million metric tons of the 8.1 million tons of landfill methane annually are captured as landfill gas (LFG), and 2.5 million metric tons of this is used for productive energy use while 2.4 million metric tons of the recovered LFG are flared with no productive energy capture.<sup>335</sup> The United States is responsible for approximately 9% of worldwide methane emissions.<sup>336</sup> According to EPA data, as displayed in Figure 1, methane constitutes the second most prevalent GHG, after CO<sub>2</sub>.<sup>337</sup>

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1800. *See id.* at 21. This increase is mainly attributed to population growth and human related activities, accounting for about 70% of the total methane emissions. METHANE EMISSIONS, *supra*, at 7. Although methane presents numerous problems when released directly into the earth's atmosphere, it presents significant benefits when utilized as an energy source, where methane is a main component of natural gas. SCHNEIDER, *supra*, at 101. When compared with fossil fuels, natural gas has significantly lower emissions of carbon dioxide, sulfur dioxide, nitrogen oxide, and particulates. METHANE EMISSIONS, *supra*, at 37. When directly substituted for electricity generated by fossil fuels, significant reductions of carbon dioxide emissions are achieved. *Id.*

333. ENERGY INFO. ADMIN., EMISSION OF GREENHOUSE GASES IN THE UNITED STATES 2001 at 40 (2002), *archived at* <http://perma.unl.edu/X49J-432C>. This value has been decreasing because of a robust effort to capture methane for productive purposes or destruction. *Id.* Landfills constitute the single largest source of methane emissions within the United States responsible for almost a quarter of human-related methane emissions, while human-related activities such as natural gas and petroleum systems, livestock and wastewater treatment, along with landfills account for other sources of methane emissions. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2003 at 261 (2005), *archived at* <http://perma.unl.edu/3MZH-BHRH>.

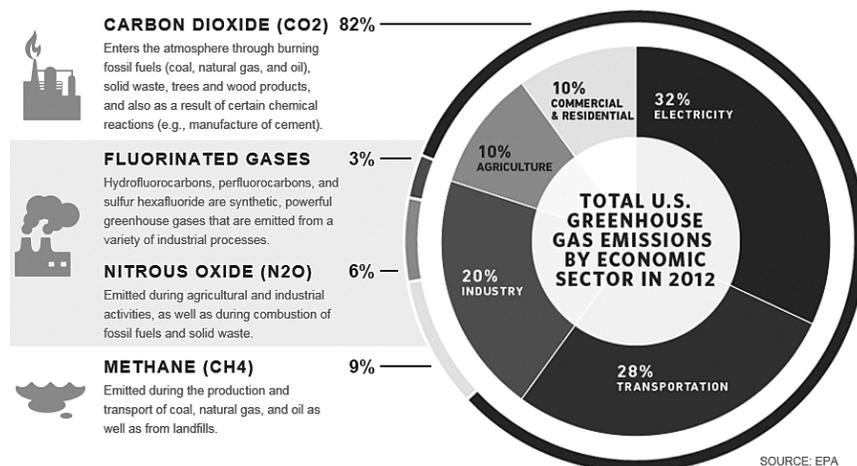
334. ENERGY INFO. ADMIN., *supra* note 333. The remaining 2% of these emissions from waste management are associated with domestic wastewater treatment programs. *Id.*

335. *Id.* at 40.

336. The EPA estimates that in 2000, global levels of methane emissions reached approximately 5,854.86 MtCO<sub>2</sub>eq (million metric tons of carbon dioxide equivalent), while the U.S. emitted roughly 546.42 MtCO<sub>2</sub>eq. EPA, GLOBAL ANTHROPOGENIC NON-CO<sub>2</sub> GREENHOUSE GAS EMISSIONS: 1990–2020 app. A-2 (2006), *archived at* <http://perma.unl.edu/2567-M92X>.

337. *See Carbon Pollution Standards, supra* note 34.

Figure 1:  
U.S. GREENHOUSE GAS POLLUTION INCLUDES:



Methane is more than 20 times more detrimental for warming the Earth, molecule-for-molecule, than CO<sub>2</sub>.<sup>338</sup> Given how dangerous methane is for the environment,<sup>339</sup> and how ignored it has been to date among the two primary GHG emissions, its regulation deserves more attention. Now for the first time, the Ninth Circuit has created a distinction for regulation or prohibition of trash entering another state. However, as noted,<sup>340</sup> it has no discernible impact on the particular state where methane is emitted, or for that matter, on the country in which it is emitted.

## 2. *Movement of Commerce*

Ethanol and fuel have to be ultimately delivered to consumers, so they can purchase and consume them where they physically are. In contrast, there is no environmental purpose served in moving trash long distances. Every state can accommodate trash disposal locally; every state has land into which to put trash. Although still a product in commerce,<sup>341</sup> trash only needs to go into the ground, and not to downstream customers, unless used as the fuel input for a trash-to-

338. FERREY, *supra* note 5, at 15, tbl.2-1.

339. *Id.*

340. *See supra* notes 157–59 and accompanying text.

341. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Unlike fuel, which is a product still in the course of commerce and must be transported to end users, waste shares none of these characteristics.

energy facility.<sup>342</sup> Because of this, there is no compelling environmental or scientific case for transportation of waste, and it has even less grounds to be immune from state GHG regulation than ethanol does. Landfilling trash locally avoids the CO<sub>2</sub>-emitting transportation component otherwise associated with its disposal in another state.

Under the Ninth Circuit majority opinion, any state concerned about GHGs could impose a carbon index requiring each such transported ton of waste from outside a state's local zone to purchase tradable credits reflecting the distance of its travel, with the revenue from such sales going to the state. There is separate litigation in California contesting the amount of state revenue collected under A.B. 32 and its legitimacy, which the trial court decided was legitimately authorized, although a close call.<sup>343</sup>

Many states, over a period of years, sought other ways to block the movement of external trash into their states. Some of these states attempted to do so with the imposition of additional fees on imported trash into the state.<sup>344</sup> The rationale for these additional charges was that out-of-state waste imposed more costs on the recipient state.<sup>345</sup> However, the states picked somewhat arbitrary values for the extra charge, rather than basing it on an actual calculated additional cost or on a scientific basis for the environmental. All of these schemes previously were blocked by the Supreme Court applying its interpretation of the Constitution.<sup>346</sup>

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342. For a discussion of trash-to-energy technology, see *Waste to Energy*, in STEVEN FERREY, *THE LAW OF INDEPENDENT POWER: DEVELOPMENT, COGENERATION, UTILITY REGULATION* § 2:48 (34th ed. 2014). In 2003, there were 107 active waste-to-energy combustion facilities in operation in the United States. Scott M. Kaufman et al., *The State of Garbage in America*, BIOCYCLE, January 2004, at 31, archived at <http://perma.unl.edu/6K8Q-4GN2>. The most significant deployment of waste-to-energy combustion facilities to handle municipal solid waste is in the New England region, where 34% of the waste stream is handled in this manner. *Id.* The least use of this technology is in the Rocky Mountain and Midwest regions. *Id.* Conversely, the areas where the largest percentage of waste is landfilled are the Rocky Mountain region (90%), the Midwest region (75%), the South region (69%), and the Great Lakes region (68%). *Id.*

343. See *Cal. Chamber of Commerce v. Cal. Air Res. Bd.*, No. 34-2012-80001313 (Cal. Super. Ct. Aug. 28, 2013), archived at <http://perma.unl.edu/3ADL-UDXE> (challenging a bill attempting to lower greenhouse gas emissions to 1990 levels by 2020).

344. *Or. Waste Sys., Inc. v. Or. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994) (invalidating Oregon's increased per-ton surcharge on waste generated in other states); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 336–37 (1992) (invalidating Alabama's imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama).

345. *Oregon Waste*, 511 U.S. at 97.

346. See *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394–95 (1994); *Oregon Waste*, 511 U.S. at 108; *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 355 (1992); *Hunt*, 504 U.S. at 336–37; *Philadelphia*, 437 U.S. at 624. *Cf.* *United Haulers Ass'n, Inc. v. Oneida-*

This *Rocky Mountain* court of appeals majority opinion is the only holding to factor in financially the distance of transportation of the item being transported in treating commerce differently depending on its place of origin. In both the *Oregon Waste* and *Hunt* cases, the Supreme Court found that there was nothing in the differentiation between in-state and out-of-state waste to justify any difference in state-imposed price or fee. Such discriminatory state actions are sanctioned by the Ninth Circuit whether imposed by statute or by regulation of a state agency.

The Ninth Circuit majority noted that commodities are deemed to compete with each other in a single market.<sup>347</sup> Therefore, any state can impose a quantitatively-determined regulatory imposition or fee requirement on trash entering this market from a zone outside the state to control transportation-related GHGs and methane formation and release within the state. Even with a GHG emission basis for regulating distance of travel of commerce, it still has the effect of geographic discrimination based on the point of origin of the commerce.

Waste disposal bans on out-of-state waste cases have been before the Supreme Court more than any other environmental issue. The primary holding in all of these cases by the Supreme Court was that there would be strict scrutiny of discrimination against commerce based on its point of origin. It remains to be determined whether a GHG rationale seized by the Ninth Circuit majority will be upheld to change the interpretation and application of the Constitution by the Supreme Court.

## **B. Today Renewable Fuels, Tomorrow Food, Electricity and Airline Travel?**

The *Rocky Mountain* appellate court majority opinion would seem to allow any state, in the interest of GHG emission reduction, to limit imports or require acquisition of expensive credits for food imports, electricity, or air travel to California: “California may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale in California.”<sup>348</sup> There is no limit on what commercial imports could be regulated based on their transport distance and use of fossil-fuel-fired electricity in production at the location where the commerce is produced, as noted in some amici briefs to the Ninth Circuit.<sup>349</sup>

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Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (finding county’s ordinances had no discriminatory impact on interstate commerce).

347. *Rocky Mountain III*, 730 F.3d 1070, 1088 (9th Cir. 2013) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997)), *cert. denied*, 134 S. Ct. 2884 (2014).

348. *Id.* at 1104.

349. See Brief for Michael Wang, et al. as Amici Curiae Supporting Appellants at 10, *Rocky Mountain III*, 730 F.3d 1070 (No. 12-15131, 12-15135), 2012 WL 2376703

1. *Eat This!*

As shown in Figure 1, transportation is not the most significant source of CO<sub>2</sub> and GHG emissions: electric power production is the largest source, and agriculture is among the top five sources.<sup>350</sup> If a state can legally impose carbon indexes, values, and eventual costs based on transportation distance and fuels, which discriminate based on the geographic origin of the commerce and against out-of-state commerce, as the Ninth Circuit majority has upheld, a state could next provide carbon indexes and regulation reflecting:

- the less-favorable out-of-state GHG emissions associated with electric higher-carbon-emitting power imported into the state;
- agricultural imports into the state; and
- out-of-state wine.

There are abundant in-state substitutes for both out-of-state renewable and fossil-fuel-fired electricity and out-of-state produced food.<sup>351</sup> California grows so much of its own food and is a leading international producer of wines, that there is not a significant need to import more food, and more wine of same varieties produced in-state than California can consume. Consequently, importing wine and food into California increases GHGs in their transportation into the state. The amount of food and wine transported to California is certainly of a generally similar magnitude as to the amount of ethanol (covered by the LCFS) imported to California as a ten percent gasoline additive. There is no reason that food and wine should not have a California lifecycle carbon rating, as does low-carbon fuels, pursuant to the Ninth Circuit opinion.

This was raised by a different judge in the Ninth Circuit after the Ninth Circuit's *Rocky Mountain* opinion. A petition for a rehearing en banc at the Ninth Circuit was filed by the *Rocky Mountain* plaintiffs and denied, with members of the Ninth Circuit dissenting from that denial noting that "California could—under the majority's reasoning—penalize out-of-state wineries to account for the environmental effects of transporting their wines to California."<sup>352</sup> This is true, as well, of all food imports. In allowing such state GHG-emission-based discrimination against out-of-state renewable fuels,<sup>353</sup> each of the other major GHG emission sources identified in Figure 1 should be

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(noting just a few of the items whose production and use could attract lifecycle scrutiny and, by extension, regulation akin to the LCFS: newspapers, refrigerators, light bulbs, camp stoves, and computers).

350. *See supra* fig.1.

351. For discussion of different electric generation technologies, see FERREY, *supra* note 342, at ch. 2.

352. *Rocky Mountain Farmers Union*, 740 F.3d at 518.

353. *Id.*

equally regulated for the same GHG-emission purpose. This may be an important element for a comprehensive carbon control policy. And the federal government could certainly enact such a policy.

However, the Supreme Court, and a very recent unanimous opinion of the Seventh Circuit, cast doubt on the ability of an individual state to require this. Regarding power, the Supreme Court held that “it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect.”<sup>354</sup> The Supreme Court does not permit discrimination based on the origin of electricity in enforcing the dormant Commerce Clause.<sup>355</sup> The Ninth Circuit majority opinion is not consistent with Supreme Court precedent, if the state discrimination is justified to prevent higher-carbon coal-fired power importation into the state.<sup>356</sup> It would allow any state to discriminate based on the geographic origin of the power and its imputed GHG emissions. It places the state into the position to burden interstate commerce in electricity.

## 2. *Into Thin Air*

Pursuant to the Ninth Circuit majority opinion, California could impose a fee or credit requirement on every ticket for an airline passenger landing or taking off in San Francisco, Los Angeles, or San Diego because air travel emits significant GHGs. This action by a state would be contrary to the U.S. national position against the European Union’s efforts to implement a similar GHG fee on air travel into European Union countries.<sup>357</sup> The original version of EU GHG regulation of airline travel covered GHG emissions for the entire length of

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354. Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 757 (1982).

355. New England Power Co. v. New Hampshire, 455 U.S. 331, 344 (1982).

356. Wyoming v. Oklahoma, 502 U.S. 437, 456 (1992) (finding Oklahoma’s act violated the Commerce Clause because it discriminated against interstate commerce); *FERC*, 456 U.S. at 759; see also *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (discussing Supreme Court precedent that prohibits states from discriminating against out-of-state waste and milk products).

357. See Mark Szakonyi, *US Opposition to EU Airline Carbon Tax Builds*, J. COM (Aug. 2, 2012), [http://www.joc.com/us-opposition-eu-airline-carbon-tax-builds\\_20120802.html](http://www.joc.com/us-opposition-eu-airline-carbon-tax-builds_20120802.html), archived at <http://perma.unl.edu/D5PD-EBS3>. The EU’s carbon market expanded to cover airlines, triggering protests from countries including the U.S., China, and India that prompted the EU to suspend the carbon curbs on foreign flights for a year. Matthew Carr, *EU Can Keep Airline Carbon Plan by Using UN Credits, Emissions Trading Lobby Says*, 44 ENV’T REP. 3019 (2013). A new U.S. law shields U.S. carriers from the EU carbon legislation. Ewa Krukowska, *Global Carbon Plan for Airlines Gets Initial UN Seal of Approval*, 44 ENV’T REP. 3018 (2013). Russia announced it was considering limits on European flights over Siberia as retaliation against the EU GHG law. *Id.* China suspended contracts for 27 orders for new EU Airbus wide-body jetliners in retaliation against the EU GHG plan. *Id.*

journeys into and out of the EU,<sup>358</sup> as does the California GHG LCFS carbon intensity index cover all GHG emissions for ethanol fuel into and out of California. A September 2013 retreat allowed the EU to continue its program only for flights within its airspace.<sup>359</sup> The EU suspended its carbon curbs on foreign flights for a year, which when it expires next year, will resume covering GHGs for all airline trips to and from Europe on the entire length of the flights even outside EU airspace.<sup>360</sup>

### 3. GHG Linkage

A contemporaneous decision on a related matter by the Ninth Circuit adds a curious twist to the pending carbon regulation issue for California and other states. In a citizen suit seeking to compel Washington under the Clean Air Act to regulate GHG emissions from the state's five oil refineries, a different Ninth Circuit panel opinion at approximately the same time as the California LCFS opinion found the amount of GHG emissions involved not to satisfy the causality and redressability requirements of an injury for legal standing.<sup>361</sup> The Ninth Circuit held that the chain of causality between Washington's alleged failure to regulate carbon and the plaintiffs' specific, localized injuries was too attenuated, and that the environmental group plaintiffs did not show that their injuries would be redressed by a court order requiring the state to control GHG emissions from the largest GHG emitters in the state, the five large oil refineries.<sup>362</sup> In essence, there was no significant connection between more than 5% of total in-state GHG emissions emitted and climate change within the state:

According to WSPA's expert, however, the effect of this emission on global climate change is "scientifically indiscernible," given the emission levels, the dispersal of GHGs world-wide, and "the absence of any meaningful nexus between Washington refinery emissions and global GHG concentrations now or as projected in the future." Because a multitude of independent third parties

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358. All flights to, from, and between EU airports were originally included in the ETS as of Jan. 1, 2012, under a 2008 EU law 2008/101/EC. See Stephen Gardner, *European Union Agrees to Postpone Emissions Trading for International Airlines*, 48 ENERGY & CLIMATE REP. (BNA) 5 (March 12, 2013). However, after protests from many countries, including China, Russia, and the United States, and following a promise that the International Civil Aviation Organization (ICAO) would take action on greenhouse gas emissions from aviation, the EU adopted a "stop-the-clock" decision and suspended the inclusion of intercontinental flights. *Id.*

359. Krukowska, *supra* note 357.

360. *Id.*; Stephen Gardner, *European Commission Proposes to Bring All Flights Across EU Territory Back Into ETS*, 200 ENERGY & CLIMATE REP. (BNA) 1 (Oct. 16, 2013) ("International airlines . . . would be included again in the European Union's Emissions Trading System (ETS) as of Jan. 1 for the portions of their flights that take place in EU airspace under a proposed directive published by the European Commission Oct. 16, 2013.").

361. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013).

362. *Id.* at 1141.

are responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing.<sup>363</sup>

The decision relies on the Ninth Circuit's earlier GHG decision in *Native Village of Kivalina v. ExxonMobil Corp.*<sup>364</sup>:

"The line of causation between the defendant's action and the plaintiff's harm must be more than attenuated." . . . "[W]here the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain is too weak to support standing."

. . . .  
 . . . "[G]lobal warming has been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are undifferentiated in the global atmosphere."<sup>365</sup>

There arguably is a difference between an individual environmental group or individual standing to sue, and state standing to sue.<sup>366</sup> The Supreme Court also spoke to injury from GHG emissions by specific use of fossil fuels, distinguished from EPA regulation of GHG emissions. The *American Electric Power Co.* litigation plaintiffs alleged that the defendant electric companies were the five largest emitters of carbon dioxide in the United States, collectively responsible for 650 million tons annually—equivalent to 25% of emissions from the domestic electric power sector, 10% of emissions from all human activities in the U.S., and 2.5% of all man-made emissions worldwide.<sup>367</sup> Yet here, the Supreme Court held there was no standing for a legal claim when a 2.5% contribution of the defendants to worldwide GHG emissions was at issue.<sup>368</sup>

And while the litigation involving Washington oil refineries was dismissed by the Ninth Circuit on standing matters, so that the ultimate merits were never addressed, the injury and redressability issues, which the Ninth Circuit discussed at some length and decided, ultimately go to whether the court views any legal linkage between the most significant and singular source of GHG emissions in a state and the impact on climate change in that same state. These Washington oil refineries contributed more than 5% of all the GHG emissions in the state.

The ethanol-related emissions in California arguably constitute an even smaller percentage of total California in-state GHG emissions:

363. *Id.* at 1143–44 (citation omitted).

364. *Id.* (citing *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867–68 (9th Cir. 2012)).

365. *Id.* at 1141–43 (quoting *Native Village of Kivalina*, 696 F.3d at 867, 868).

366. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

367. *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).

368. *Id.*

Ethanol is used at a 10% blend in motor vehicle fuels.<sup>369</sup> The entire transportation sector of the California economy constitutes 38% of California GHG emissions according to the California Energy Commission.<sup>370</sup> Ten percent attributable to ethanol's total component to the 38% motor fuel category, is 3.8% of California GHGs.

Analyzing another case on a quantitative metric, the *Massachusetts v. EPA* Supreme Court decision considered evidence that U.S. motor-vehicle emissions constituted 1.7 billion metric tons of CO<sub>2</sub> emissions in 1999 alone, or over 6% of world-wide carbon dioxide emissions—which it concluded constitutes a “meaningful contribution” to GHG concentrations, and thus, to global warming.<sup>371</sup> California has about 12% of U.S. population,<sup>372</sup> and thus assuming that this percentage is roughly equivalent to use of motor fuels, about 0.6% of world GHG emissions are attributed to California motor fuels, or about 0.06% to the ethanol fuel component of motor fuels used in California. Whether a 0.06% “effect of this emission on global climate change is ‘scientifically indiscernible’” yet still poses a “significant effect on plaintiffs’ injuries, . . . [or whether] the causal chain is too weak,”<sup>373</sup> becomes an interesting question given this other contemporaneous decision of the Ninth Circuit, where 5.9% of total state GHG emissions by the defendants was not deemed significant.<sup>374</sup>

These two Ninth Circuit decisions are distinct. One involving Washington looks at individual claims for GHG damages against a state failure to regulate, finding no linkage of damage from a greater than 5% share of state GHG emissions.<sup>375</sup> The present California LCFS matter makes a finding that the less than 5% GHG emission share related to ethanol is significant in terms of injury from GHG emissions. The three-judge panels on these two contemporaneous Ninth Circuit decisions were different, as were the parties. However, each involved litigation between citizens and groups and a State regarding GHG regulation.

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369. See *Ethanol*, FUELECONOMY.GOV, <http://www.fueleconomy.gov/feg/ethanol.shtml> (last visited Oct. 19, 2014), archived at <http://perma.unl.edu/8Q6V-GXZA>.

370. See *Fuels and Transportation Division*, CAL. ENERGY COMMISSION, <http://www.energy.ca.gov/transportation/> (last visited Oct. 19, 2014), archived at <http://perma.unl.edu/6VZE-3ZBL>.

371. *Massachusetts*, 549 U.S. at 525.

372. See *California QuickFacts*, U.S. CENSUS BUREAU (July, 8, 2014), <http://quickfacts.census.gov/qfd/states/06000.html>, archived at <http://perma.unl.edu/CVK7-UVP2> (estimating 316,128,839 people lived in the United States in 2013, of which 38,332,521 lived in California, which equals around 12%).

373. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142, 1143–44 (9th Cir. 2013).

374. *Id.* at 1143.

375. *Id.* at 1145–46 (“Here, the GHG emissions are from five oil refineries in Washington, making up 5.9% of emissions in *Washington*.”).

#### 4. *Going Up!*

So can the Ninth Circuit sidestep and reorient Supreme Court precedent regarding a century of interpretation of the core requirements of the Commerce Clause? The majority opinion assumes that it can if state action is motivated by climate change control. The dissent and the trial court, as well as decisions on state energy regulation in two other circuit courts, disagree. This “virtual split” in interpretation among three circuit courts begs for Supreme Court resolution in some way at some level. This federalism issue is constitutional and federal, and must some day be resolved. This resolution will fundamentally shape state climate control options and state regulation of energy.