B. Clean Air Act

1. Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019)*

Rocky Mountain Farmers Union and other representatives of the ethanol and petroleum industry (collectively, "petitioners")[1] filed suit against California officials[2] alleging that multiple versions of California's Low Carbon Fuel Standard regulations (LCFS) are unconstitutional under the Commerce Clause[3] and Supremacy Clause.[4] The United States District Court for the Eastern District of California granted Respondent's FRCP 12(c)[5] motion for judgment on the claims precluded by the Ninth Circuit's earlier decision in this case, *Rocky Mountain Farmers Union v. Corey* (*Rocky Mountain I*),[6] further granted Respondent's additional motions to dismiss on most of the other claims, and Petitioners voluntarily dismissed all remaining claims.[7] Petitioners appealed. The Ninth Circuit reversed the district court's holding that claims against early versions of the LCFS were not moot, remanded for dismissal of the mooted claims, and affirmed the district court on all other grounds.

The California legislature recognized that climate change poses a serious threat to the health and wellbeing of California's citizens, natural resources, and environment. To address this growing threat, California Air Resources Board (CARB) utilized the police powers of the State of California to enact regulations to minimize the greenhouse gas emissions by allowing the state to assess parties who sell fuel based on its carbon intensity. CARB first released a 2011 LCFS which used two methods to assess the carbon intensity of fuels: one by assigning default values to a fuel based on its particular country or region of origin, and the other by performing a more individualized assessments of each fuel. CARB slightly amended the LCFS in 2012, but the main methodology in determining the carbon intensity of fuels remained. However, in 2015, CARB repealed and replaced the 2011 and 2012 versions of the LCFS, specifically eliminating the method of assigning a default carbon intensity value to fuels based on their geographic origin.

Prior to the enactment of the 2015 standards, Petitioners filed suit alleging CARB unconstitutionally exceeded its police power in promulgating the 2011 and 2012 versions of the LCFS and therefore violated the Commerce Clause by regulating interstate commerce. The district court and the Ninth Circuit both analyzed the original claims, and the Ninth Circuit in *Rocky Mountain I* concluded that the 2011 and 2012 versions of the LCFS did not facially discriminate against interstate commerce in ethanol or crude oil and did not discriminate against crude oil in purpose or effect. The Ninth Circuit remanded for further fact finding on the alleged discriminatory effect of certain portions of the 2011 and 2012 versions of the LCFS. Back at the district court, petitioners amended their complaints numerous times to include claims against the 2012 version and the 2015 version. The final amended complaint alleged that federal law preempts all three versions of the LCFS, all three illegally regulate extraterritorially, all three violate the commerce clause facially (in purpose and in effect), and that the Ninth Circuit's holding in *Rocky Mountain I* does not preclude the claims. The district court

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[1] Petitioners included Redwood County Minnesota Corn and Soybean Growers, Penny Newman Grain, Inc., Rex Nederend, Fresno County Farm Bureau, Nisei Farmers League, California Dairy Campaign, and Growth Energy. American Fuel & Petrochemical Manufacturers Association, American Trucking Associations, and the Consumer Energy Alliance were plaintiffs to the original action.

[2] Respondents included Richard W. Corey in his official capacity as executive officer of the California Air Resources Board (CARB); Alexander Sherriffs, Barbara Riordan, Hector De La Torre, John Eisenhut, John Gioia, Mary D. Nichols, Ron Roberts, Daniel Sperling, Sandra Berg, John R. Balmes, Phil Serna, Dean Florez, Diane Takvorian, Judy A. Mitchell in their official capacity as CARB board members; Gavon Newsom in his official capacity as Governor of the State of California; and Xavier Becerra in his official capacity as Attorney General of California. Additionally, Sierra Club, Conservation Law Foundation, Environmental Defense Fund, and Natural Resources Defense Council were parties to the suit as Intervenor-Defendants-Appellees.

[3] U.S. CONST. art. I, § 9, cl. 3.

[4] U.S. CONST. art. VI, cl. 2.

[5] FED. R. CIV. P. 12(c).

[6] 730 F.3d 1070 (9th Cir. 2013).

[7] Rocky Mountain Farmers Union v. Corey, 258 F. Supp. 3d 1134 (E.D. Cal. 2017); *see also* Rocky Mountain Farmers Union v. Corey, No. 1:09-CV-02234-LJO-BAM, 2017 WL 3479008 (E.D. Cal. Aug. 14, 2017).

first held that the claims against the 2011 and 2012 versions of the LCFS are not moot, then granted respondents' motions for judgment on the claims precluded by *Rocky Mountain I,* and to dismiss most other claims. Petitioners voluntarily dismissed the only remaining claim. The Ninth Circuit reviewed de novo 1) the district court's holding that the claims against the 2011 and 2012 versions of the LCFS are not moot, 2) whether the 2015 LCFS violates the Commerce Clause by regulating extraterritorially, 3) whether the 2015 LCFS violates the Commerce Clause by facially discriminating against interstate commerce, and 4) whether the 2015 LCFS purposefully discriminates against interstate commerce.

First, the Ninth Circuit addressed all of petitioners claims stemming from the 2011 and 2012 versions of the LCFS. Petitioners argued the repeal of the 2011 and 2012 versions and subsequent replacement with the 2015 version does not alter the relief the court may provide, therefore the claims arising under the 2011 and 2012 versions were not moot. The court disagreed, holding that because the 2015 LCFS specifically repealed the 2011 and 2012 versions, any claims arising under the 2011 or 2012 versions are moot unless the alleged unconstitutionality is also present in the 2015 standards. Here, petitioners attempted to maintain the claims against the 2011 and 2012 standards by seeking a remedy for unconstitutionally high deficits or unconstitutionally low credits from the 2011 and 2012 versions of the LCFS. The court, however, held that petitioners lack of standing for these particular claims and the Eleventh Amendment bar a remedy. Therefor because no remedy remains and the 2015 LCFS regulations repealed and replaced the 2011 and 2012 versions, the claims arising under the repealed regulations were moot.

Next, the court addressed petitioners' claim that the 2015 LCFS rules regulate extraterritorially, violating the "federal structure" of the Constitution and the Commerce Clause.[8] The court held that *Rocky Mountain I* and recent Ninth Circuit precedent, *American Fuel & Petrochemical Manufacturers v. O'Keeffe,*[9] preclude the extraterritoriality claims arising under the 2015 LCFS. Because *Rocky Mountain I* specified that any future extraterritoriality claim arising under the Commerce Clause against a regulation similar to the 2011 and 2012 versions of the LCFS regulations would fail, the court held here that Petitioners failed to distinguish how their claims differ from those arising under the 2011 and 2012 regulations. The court upheld the reasoning in *Rocky Mountain I*: California may constitutionally regulate the in-state sales of out-of-state entities to ensure a consistent application of the same fuel standards. Further, the court dismissed petitioners' claim that the 2015 LCFS unconstitutionally regulate activities reserved for the jurisdiction of other states' police powers, holding instead that California's interest in the regulations show intent to protect the state's own natural resources, and as such the regulations are constitutional. Finally, the court dismissed any arguments alleging the 2015 LCFS regulations violate the "federal structure" of the Constitution, given *O'Keeffe* created binding precedent in upholding a program very similar to the LCFS regulations. The court, relying on *O'Keeffe*, determined only a Commerce Clause analysis is appropriate in analyzing any claim alleging that a program similar to the LCFS is inconsistent with the "federal structure" of the Constitution. Because *Rocky Mountain I* precluded a Commerce Clause argument, and the facts at hand are not distinct from those in *O'Keeffe*, the court held circuit precedent precludes petitioners' exterritoriality claims against the 2015 LCFS.

The court then addressed petitioners' claim that the 2015 LCFS facially discriminates against interstate commerce in the regulation of ethanol and crude oil. Petitioners concede *Rocky Mountain I* controls the facial discrimination claims, but argue for an overruling of *Rocky Mountain I*. As *Rocky Mountain I* upholds California's ability to regulate types of fuel based on origin to control the state's internal markets and protect against local harms by regulating fuels from different regions, the court here found Petitioners' renewed claims under the 2015 LCFS unpersuasive and insufficient to warrant overruling *Rocky Mountain I*, particularly because the 2015 standards eliminate fuel assessments based on regions of origin. As such, the court held that circuit precedent precludes petitioners' facial challenges.

Finally, the court addressed Petitioners' claim that the 2015 LCFS purposefully discriminates against interstate commerce. *Rocky Mountain I* left open the possibility that all LCFS versions

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[8] U.S. CONST. art. I, § 9, cl. 3.

[9] 903 F.3d 903 (9th Cir. 2018).

intended mainly to boost local fuel interests, but petitioners failed to bring in new information to support an allegation of malintent on remand. The court held that where California incidentally receives beneficial side effects from the standards, petitioners must provide evidence showing the main *purpose* of the standard was to create these benefits. Here, petitioners relied on the same basic facts from *Rocky Mountain I* to support their claim and further only pointed to the legislative history of prior versions of the LCFS. Finding no new evidence to support the claim, the court held *Rocky Mountain I* precludes the claim that the 2015 LCFS discriminates in purpose.

In conclusion, the Ninth Circuit vacated the district court's ruling on the 2011 and 2012 versions of the LCFS and remanded all claims arising under the prior versions to the district court with instructions to dismiss as moot. Further, the court affirmed the district court's finding that *Rocky Mountain I* precluded petitioners' claims that the 2015 LCFS regulates extraterritorially, facially discriminates, and purposefully discriminates.