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**“Sink or Swim Together”: How the Recent Challenge to California’s Fuel Regulations Could Have Wide-Reaching Effects**

*Rocky Mt. Farmers Union v. Corey*<sup>1</sup>

Patrick Logan

I. INTRODUCTION

*Rocky Mt. Farmers Union* deals with an issue that has been in litigation for many years.<sup>2</sup> In an effort to curb greenhouse gas (“GHG”) emissions, the California legislature has passed regulations covering the sale of crude oil and ethanol-based fuels within the state. Fuel producers outside of the state filed suit, claiming that the regulations were unconstitutional under the dormant Commerce Clause. The Ninth Circuit disagreed and declined the invitation to strike down the fuel regulations that California had established.

The Ninth Circuit’s holding did not end the debate, as the dissenting justices were glad to point out. The fuel regulations still must survive analysis by the district court under the guidelines set by the Ninth Circuit.<sup>3</sup> Though there are valid legal arguments both for and against this type of regulation, we should also take a step outside of the law and consider the practical realities facing California and, indeed, the rest of the world. Climate change is a serious, global issue that is unique to our modern day way of life. For this reason, the fate of California’s fuel regulations is important for the future of every state in the Union.

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<sup>1</sup> 730 F.3d 1070 (9th Cir. 2013).

<sup>2</sup> See *Rocky Mt. Farmers Union*, 730 F.3d at 1086. *Rocky Mt. Farmers Union* first filed suit in 2009. *Id.*

<sup>3</sup> *Rocky Mt. Farmers Union*, 730 F.3d at 1077-78.

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### II. FACTS AND HOLDING

The Clean Air Act (“CAA”) prohibits individual state regulation of motor vehicle emissions for new cars.<sup>4</sup> However, Congress made an exception in the act allowing California to adopt its own standard of regulation.<sup>5</sup> Pursuant to the authority granted them by the CAA, the California legislature enacted Assembly Bill 32 (aptly named the “Global Warming Solutions Act”).<sup>6</sup> The bill empowered the California Air Resources Board (“CARB”) to design regulations intended to return the state’s GHG emissions to their 1990 level by the year 2020.<sup>7</sup> Transportation emissions are the state’s single largest source of GHG emissions,<sup>8</sup> so CARB designed a three-part approach to lowering GHG emissions from the transportation sector specifically.<sup>9</sup> CARB’s approach was to “reduce emissions at the tailpipe by establishing progressively stricter emissions limits for new vehicles,” reduce the number of “vehicle miles traveled” per year, and establish a new fuel standard “to reduce the quantity of GHGs emitted in the production of transportation fuel.”<sup>10</sup>

The fuel standard applies to nearly all transportation fuels consumed in California currently, as well as any future fuel that may be developed.<sup>11</sup> CARB’s standard works by requiring fuel blenders to keep the average carbon intensity of their total fuel volume below the standard’s annual limit.<sup>12</sup> A blender’s product generates either credits or deficits, depending on whether

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<sup>4</sup> 42 U.S.C. § 7543(a) (2014).

<sup>5</sup> 42 U.S.C. § 7543(b) (2014) (“The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”).

<sup>6</sup> *Rocky Mt. Farmers Union*, 730 F.3d at 1079.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Transportation emissions account for more than 40% of the state’s total GHG emissions. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1080.

<sup>12</sup> *Id.* at 1079 (citing CAL. CODE REGS. tit. 17, § 95482(a) (2011)).

the average carbon intensity is higher or lower than the annual cap.<sup>13</sup> A fuel blender can purchase credits from other blenders, allowing them to comply with the carbon intensity cap despite having a deficit for the year.<sup>14</sup> When implementing the fuel standard, CARB created a market to facilitate the buying and selling of credits between producers.<sup>15</sup> This market was expected to encourage fuel blenders to develop fuels with lower carbon intensities for use in California, wherever the blenders were located.<sup>16</sup>

In order to determine a fuel’s total carbon intensity, the fuel standard used a “lifecycle analysis.”<sup>17</sup> This analysis took into account emissions that were generated during “all aspects of the production, refining, and transportation of a fuel, with the aim of reducing total, well-to-wheel GHG emissions.”<sup>18</sup> After the total emissions were calculated, CARB assigned a fuel’s lifecycle a “cumulative carbon intensity value,” which they referred to as a “pathway.”<sup>19</sup> CARB calculated a number of “default pathways” based on a modified version of the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model.<sup>20</sup> The default pathways were separated into regional categories.<sup>21</sup> These regional categories were California, the Midwest, and Brazil.<sup>22</sup> Even though CARB’s default pathways were separated by region, the total carbon intensity is what determined the value of those pathways, not the fuel’s location of origin.<sup>23</sup> Fuel blenders can choose to either rely on one of these default pathways when reporting their GHG emissions, or they can register an individualized pathway based on one of two methods.<sup>24</sup> The first method is to rely on part of a default pathway, but

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<sup>13</sup> *Id.* at 1080 (citing CAL. CODE REGS. tit. 17, § 95485(a) (2011)).

<sup>14</sup> *Id.* (citing CAL. CODE REGS. tit. 17 § 95485 (2011)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1081.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1082.

<sup>21</sup> *Id.* at 1110; *see also* Appendix 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1089.

<sup>24</sup> *Id.*

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substitute some of the pathway's average values for their own.<sup>25</sup> The second is to propose an entirely new pathway altogether.<sup>26</sup>

The fuel standard regulates both crude oil<sup>27</sup> and ethanol.<sup>28</sup> In 2011, CARB chose to incentivize the production of alternative fuels over crude oil.<sup>29</sup> The provisions passed in 2011 mandated that “no crude oil could be assessed a carbon intensity below the market average, but newer sources causing higher emissions were assessed at their individual carbon intensity.”<sup>30</sup> This meant that a fuel blender could only meet the fuel standard's carbon intensity requirements by selling alternative fuels or buying credits to cover their deficits.<sup>31</sup> CARB later amended the provisions to assess carbon intensity of crude oil fuels based on “either the average of the California market in the year of sale or the average from 2010, whichever is higher.”<sup>32</sup>

In December 2009, Rocky Mountain Farmers Union et al. (“Rocky Mountain”) challenged the fuel standard's ethanol provisions.<sup>33</sup> Their complaint alleged that the ethanol provisions violated the dormant Commerce Clause and were preempted by the federal Renewable Fuel Standard.<sup>34</sup> They sought a preliminary injunction.<sup>35</sup> Then, in February 2010, American Fuels & Petrochemical Manufacturers Association et al. (“American Fuels”) separately challenged both the ethanol and crude oil provisions on similar grounds.<sup>36</sup> American Fuels moved for summary judgment on the Commerce

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1084.

<sup>28</sup> *Id.* at 1083.

<sup>29</sup> *Id.* at 1085.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Clause claim.<sup>37</sup> CARB responded by filing cross-motions for summary judgment on all grounds.<sup>38</sup>

The district court granted Rocky Mountain's request for a preliminary injunction and American Fuel's motion for summary judgment.<sup>39</sup> They concluded that CARB's fuel standard "violated the dormant Commerce Clause by (1) engaging in extraterritorial regulation, (2) facially discriminating against out-of-state ethanol, and (3) discriminating against out-of-state crude oil in purpose and effect."<sup>40</sup> The district court also found that CARB failed to show that the Fuel Standard survived strict scrutiny.<sup>41</sup> The court did grant partial summary judgment for CARB, stating that the Fuel Standard was a permissible "control or prohibition respecting a characteristic or component of fuel under section 211(c)(4)(B) of the CAA."<sup>42</sup> However, they disagreed with CARB that the CAA prevented scrutiny of the Fuel Standard under the Commerce Clause.<sup>43</sup>

The Court of Appeals for the Ninth Circuit held that the Fuel Standard's regulation of ethanol and crude oil did not facially discriminate against out-of-state commerce.<sup>44</sup> They further held that the Fuel Standard did not violate the dormant Commerce Clause.<sup>45</sup> The Ninth Circuit vacated the injunction and remanded the case to the district court.<sup>46</sup> On remand, the district court must determine if the ethanol provisions are discriminatory "in purpose or practical effect."<sup>47</sup> If they are, the court must apply strict scrutiny to those provisions.<sup>48</sup> If not, the court still must determine whether the Fuel

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1078.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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Standard imposes a burden on interstate commerce “that is ‘clearly excessive’ in relation to its local benefits.”<sup>49</sup>

### III. LEGAL BACKGROUND

In 1957, California began statewide efforts to regulate GHG emissions.<sup>50</sup> When Congress began instituting federal regulation, they looked to California’s efforts as a guide.<sup>51</sup> The 1977 revisions to the Clean Air Act prohibited state regulation of GHG emissions from motor vehicles,<sup>52</sup> but Congress carved out an exception for California.<sup>53</sup> Over the auto industry’s objections,<sup>54</sup> California’s standards were established as the only alternative to federal clean air standards.<sup>55</sup>

Any valid state regulation cannot violate the Constitution. The Commerce Clause allows Congress “[t]o regulate commerce. . . among the several States.”<sup>56</sup> While the express terms of the Commerce Clause do not restrain the states, courts have read in a negative implication.<sup>57</sup> What this means is that modern legal theorists consider it to be the framer’s intent that the Commerce Clause should “prevent a state from retreating into economic

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<sup>49</sup> *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

<sup>50</sup> *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979).

<sup>51</sup> *Id.* at 1110.

<sup>52</sup> *Id.*; 42 U.S.C. § 7543(a) (2014) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”).

<sup>53</sup> 42 U.S.C. § 7543(b) (“The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”).

<sup>54</sup> *Motor & Equip. Mfrs. Ass’n*, 627 F.2d at 1101 (holding that waiving federal regulation for California was not “arbitrary, capricious, or otherwise not in accordance with law”).

<sup>55</sup> 42 U.S.C. § 7507.

<sup>56</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>57</sup> *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (citing U.S. CONST. art. I, § 8, cl. 3).

isolation.”<sup>58</sup> This theory has become known as the “dormant Commerce Clause.”<sup>59</sup>

Under a dormant Commerce Clause analysis, a court must ask whether the “challenged law discriminates against interstate commerce.”<sup>60</sup> Courts distinguish between laws which “affirmatively discriminate” against interstate commerce and laws which “burden interstate transactions only incidentally.”<sup>61</sup> A law can affirmatively discriminate against interstate commerce “either on its face or in practical effect.”<sup>62</sup> If either condition is shown, the court must apply strict scrutiny to the law.<sup>63</sup> A discriminatory law survives strict scrutiny only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>64</sup> However, if the law’s effects on interstate commerce are only incidental, the court uses a lower standard. The Supreme Court held in *Pike v. Bruce Church* that in such a case, the law will be upheld “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>65</sup>

#### IV. INSTANT DECISION

In the instant case, the Court of Appeals for the Ninth Circuit held that California’s regulation of ethanol and crude oil did not facially discriminate against out-of-state commerce.<sup>66</sup> Furthermore, the Fuel Standard did not violate the dormant Commerce Clause.<sup>67</sup> The Court of Appeals also found that the district court erred in its determination that the regulation of crude oil was discriminatory in purpose and effect under the

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<sup>58</sup> Okla. Tax Comm’n v. Jefferson Lines, 514 U.S. 175, 179-80 (1995).

<sup>59</sup> *Davis*, 553 U.S. at 337.

<sup>60</sup> *Id.* at 338.

<sup>61</sup> *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

<sup>62</sup> *Id.* (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

<sup>63</sup> *Id.* (citing *Hughes*, 441 U.S. at 336).

<sup>64</sup> *Id.* (citing *Hughes*, 441 U.S. at 336).

<sup>65</sup> *Id.* (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *see also Sporhase v. Nebraska*, 458 U.S. 941 (1982)).

<sup>66</sup> *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013).

<sup>67</sup> *Id.*



Commerce Clause.<sup>68</sup> Finally, the Court of Appeals determined that the Fuel Standard was subject to scrutiny under the Commerce Clause and not insulated from scrutiny by the CAA.<sup>69</sup> The case was remanded to the district court to consider whether or not the ethanol regulations “discriminate in purpose or effect and, if not, to apply the *Pike* balancing test,” as well as to apply the *Pike* balancing test to the crude oil regulations.<sup>70</sup>

Plaintiffs Rocky Mt. Farmers argued that the Fuel Standard’s regulation of ethanol and crude oil discriminated against out-of-state commerce and impermissibly regulated extraterritorial activity.<sup>71</sup> Before answering the question of discrimination, the Court of Appeals first had to determine which sources of ethanol were similarly situated and, thus, should be compared.<sup>72</sup> Because ethanol from all sources has “identical chemical and physical properties,” and ethanol from every region could end up blended together, the court reasoned that all sources of ethanol should be compared.<sup>73</sup> The court also concluded that GHG emissions generated from the electricity used in the creation process, the efficiency of the plants which produced the ethanol, and the transportation of both the ethanol and feedstock used to produce the fuel were all relevant factors to consider, regardless of the location of the ethanol producer.<sup>74</sup> This is because “[a]ll factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels.”<sup>75</sup>

Taking all of these factors into account, the Court of Appeals determined that CARB’s fuel standard did not impermissibly discriminate based on origin.<sup>76</sup> Rather, fuels were regulated based on their carbon intensity.<sup>77</sup> A fuel’s origin was relevant to the lifecycle analysis “only to the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1086.

<sup>72</sup> *Id.* at 1088.

<sup>73</sup> *Id.* (quoting *Rocky Mt. Ethanol*, 843 F.Supp.2d 1071, 1081 (quoting ISOR V-30)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1089.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

extent that location affects the actual GHG emissions attributable to a default pathway.”<sup>78</sup> The fuel standard did not protect California producers from outside competition.<sup>79</sup> On the contrary, the pathways from the Midwest and Brazil actually have the lowest carbon intensity values, demonstrating that there is no preferential treatment for California producers.<sup>80</sup>

Plaintiffs further argued that considering emissions from the transportation of feedstocks used in the creation of ethanol and the fuel itself was forbidden.<sup>81</sup> The Court of Appeals disagreed. The Fuel Standard did not isolate local Californian ethanol producers from the rest of the world; the transportation factor was applied evenly to all pathways, regardless of origin.<sup>82</sup> Plaintiffs also argued that GHG emissions from electricity are “inextricably intertwined with geography” and, therefore, an impermissible discrimination.<sup>83</sup> Midwest producers, who largely located their plants near carbon-intensive, coal-fired electrical plants, claimed their location adversely affected their pathway, discriminating against them over California producers.<sup>84</sup> However, the Court of Appeals stated that “the dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient.”<sup>85</sup> Ethanol producers could find alternative means of power generation.<sup>86</sup> In fact, some ethanol producers in the Midwest generated their own power, reducing their GHG emissions.<sup>87</sup> The court also concluded that the Fuel Standard did not eliminate any economic advantages that out-of-state producers had earned for themselves.<sup>88</sup> Midwest producers had access to cheap energy from coal-fired electrical plants because of their close proximity to those plants, but that cheap electricity was not “earned” by Midwest Producers.<sup>89</sup> It was actually the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1090.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1091.

<sup>82</sup> *Id.* (citing *Pike v. Bruce Church*, 397 US 137, 145(1970)).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1092.

<sup>86</sup> *Id.* at 1091.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1092.

<sup>89</sup> *Id.*

Midwest producers who generated their own power that earned benefits which were recognized through the lifecycle analysis.<sup>90</sup>

Plaintiffs also challenged the fuel standard on the grounds that it discriminated based solely on origin by using regional averages for its default pathways.<sup>91</sup> The court reasoned that CARB gave equal treatment to all regions.<sup>92</sup> Carbon intensity values were not assigned based on a fuel's "out-of-state character."<sup>93</sup> Rather, a fuel's carbon intensity was measured according to the same model regardless of its origin.<sup>94</sup> CARB's pathway scheme may have burdened or benefited certain producers, but it did so evenhandedly to both California and Midwest producers.<sup>95</sup> The court attributed this to "the imprecision of averages rather than to discrimination."<sup>96</sup> The fact that the boundaries of the regional categories were set at the California state line was not fatal to the fuel standard.<sup>97</sup> Individual inspection of every pathway was deemed "unreasonably costly[,]"<sup>98</sup> but the regional boundaries were not arbitrary. For example, almost every producer of corn ethanol was located in California or Brazil.<sup>99</sup> In order for corn from the Midwest to reach California so that it could be processed into ethanol by California producers, it had to pass over the Rocky Mountains, raising GHG emissions from transportation.<sup>100</sup> The resulting total carbon intensity of ethanol produced in California is higher than ethanol produced in Brazil, which has much lower GHG emissions from transportation.<sup>101</sup> Therefore, it would have made little sense to place Californian corn ethanol in the same regional average as Midwestern or Brazilian corn ethanol.<sup>102</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1093.

<sup>92</sup> *Id.* at 1094.

<sup>93</sup> *Id.* at 1096.

<sup>94</sup> *Id.* at 1082 (internal citations omitted).

<sup>95</sup> *Id.* at 1094.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1095.

<sup>99</sup> *Id.* at 1096. The only registered producer of corn ethanol elsewhere was in Idaho. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

The Court of Appeals also found that the 2011 provisions which regulated crude oil were not analyzed properly by the district court.<sup>103</sup> The court first examined the legislature’s intent and found that there was no protectionist purpose in enacting the 2011 provisions.<sup>104</sup> Since there was no protectionist purpose, the district court should have determined whether or not the 2011 provisions created an adverse effect.<sup>105</sup> Plaintiffs did not present “substantial evidence” of a discriminatory effect, so the Court of Appeals remanded the claim with instructions for the district court to examine it under the *Pike* balancing test.<sup>106</sup>

Finally, the Court of Appeals held that the fuel standard did not violate the dormant Commerce Clause by regulating out-of-state commerce.<sup>107</sup> The fuel standard did not impose any conditions explicitly on ethanol which was produced out-of-state.<sup>108</sup> Rather than regulating out-of-state producers directly, the fuel standard regulated “contractual relationships in which at least one party is located in [the regulated state].”<sup>109</sup> “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>110</sup> The fuel standard did not regulate any transactions outside of California; it only imposed requirements that out-of-state producers had to meet before selling their product within the state.<sup>111</sup>

The brief dissenting opinion focused on the question of the facial discrimination of the ethanol regulations.<sup>112</sup> The dissent stated that because the text of the fuel standard differentiated between in-state and out-of-state

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<sup>103</sup> *Id.* at 1100.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1100-01 (quoting *Black Star Farms, LLC v. Oliver*, 544 F.Supp.2d 913, 928 (D.Ariz. 2008); citing *Pike v. Bruce Church*, 397 U.S. 137 (1970)).

<sup>107</sup> *Id.* at 1101 (citing *Haley v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

<sup>108</sup> *Id.* at 1102.

<sup>109</sup> *Id.* at 1103 (quoting *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1224 (9<sup>th</sup> Cir. 2003); (citing *Healy*, 491 U.S. at 343)).

<sup>110</sup> *Id.* at 1104.

<sup>111</sup> *Id.* at 1102-03.

<sup>112</sup> *Id.* at 1107-08 (Murguia, J., dissenting).

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ethanol, the fuel standard was a facially discriminatory regulation.<sup>113</sup> Applying strict scrutiny to the provisions, the dissent believed that there were “reasonable, nondiscriminatory alternatives” to reducing GHG emissions, even if the alternative “is more difficult or costly to implement.”<sup>114</sup>

### V. COMMENT

The Ninth Circuit’s holding in *Rocky Mt. Farmers Union* should encourage state legislatures to pursue regulations designed to limit GHG emissions within their borders and reassure them that any such efforts will not be struck down as unconstitutional. For this reason alone, the opinion should be viewed as a victory for environmental activists. That being said, it remains to be seen whether CARB’s regulatory scheme will ultimately be upheld.

An increase in global temperatures is a real problem facing the world today. The Intergovernmental Panel on Climate Change (“IPCC”) defines climate change as “a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer.”<sup>115</sup> The IPCC states that it is “unequivocal” that average temperatures have risen globally.<sup>116</sup> Temperature increases have been much greater at northern latitudes.<sup>117</sup> The average arctic temperature “has increased at almost twice the global rate in the past 100 years.”<sup>118</sup> Since 1961, both the average global surface temperature and average sea level have steadily risen, while snow cover in the northern hemisphere has decreased.<sup>119</sup>

Climate change could have a serious impact around the world. The risk of coastal erosion is expected to increase, and “many millions more

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<sup>113</sup> *Id.* at 1108.

<sup>114</sup> *Id.* at 1109.

<sup>115</sup> *Climate Change 2007: Synthesis Report*, Intergovernmental Panel on Climate Change 30 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 31.

people than today are projected to experience floods every year due to sea level rise.”<sup>120</sup> There will likely be an increase in storm surges along the coasts, more frequent and intense heat waves, and an increased number of wildfires.<sup>121</sup> Poor communities, coastal industries, and communities that rely economically on “climate-sensitive resources” will be the most vulnerable,<sup>122</sup> but decreasing availability of freshwater resources will affect all regions.<sup>123</sup>

Though it is true that there are some natural explanations for climate change, the rise in GHG levels has been directly linked to rising temperatures.<sup>124</sup> GHGs “affect the absorption, scattering and emission of radiation within the atmosphere and at the Earth’s surface.”<sup>125</sup> GHGs, like the carbon dioxide emitted during the burning of fossil fuels, absorb energy and “act like a blanket, making Earth warmer than it would otherwise be.”<sup>126</sup> The IPCC claims that between 1970 and 2004, the largest increase in GHG emissions came from “energy supply, transport and industry.”<sup>127</sup> Significant for our purposes, the IPCC further states that the global increase in carbon dioxide levels is “due primarily to fossil fuel use.”<sup>128</sup>

Rising GHG emissions are a global problem, but the majority opinion in *Rocky Mt. Farmers Union* correctly states that California has a heightened interest in the GHG emissions produced outside of its borders.<sup>129</sup> “With its long coastlines vulnerable to rising waters, large population that needs food and water, sizable deserts that can expand with sustained increased heat, and vast forests that may become tinderboxes with too little rain, California is

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<sup>120</sup> *Id.* at 48.

<sup>121</sup> *Advancing the Science of Climate Change*, Division of Earth & Life Studies of the National Academies 1-2 (2010), <http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Science-Report-Brief-final.pdf>.

<sup>122</sup> *Climate Change 2007: Synthesis Report*, *supra* note 115, at 48.

<sup>123</sup> *Id.* at 49.

<sup>124</sup> *Id.* at 36-37.

<sup>125</sup> *Id.* at 37.

<sup>126</sup> *Causes of Climate Change*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/climatechange/science/causes.html> (last visited May 7, 2015).

<sup>127</sup> *Climate Change 2007: Synthesis Report*, *supra* note 115, at 48.

<sup>128</sup> *Id.* at 37.

<sup>129</sup> *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1090 (9th Cir. 2013).

uniquely vulnerable to the perils of global warming.”<sup>130</sup> Taking this reality into account, the majority did not want to handicap California’s efforts to combat global warming. Stating that the dormant Commerce Clause is not a “blindfold,” the majority made clear that in addition to examining the law, they also based their holding on the practical realities facing our planet today.<sup>131</sup> The majority was hopeful that, if successful, CARB’s regulations would “help ease California’s climate risks and inform other states as they attempt to confront similar challenges.”<sup>132</sup> But did the majority go too far outside of the law in this case?

While CARB’s regulations were aimed only at fuels sold within California’s borders, one cannot dispute that they will affect how out-of-state producers act.<sup>133</sup> In fact, the regulations are *intended* to affect the behavior of out-of-state producers, and CARB acknowledged that the regulations would “reduce the volume of fuels that are imported from other states.”<sup>134</sup> The dissent argued that this is exactly the kind of economic regulation that Supreme Court precedent was intended to abolish. However, Justice Gould, the author of the Ninth Circuit’s majority opinion, interprets precedent as only prohibiting California from regulating “wholly out-of-state transactions.”<sup>135</sup> In his view, a state may regulate commerce within its borders even if the goal of such regulation is to influence out-of-state choices made by producers.<sup>136</sup> Justice Gould’s interpretation won the day, and based on the Ninth Circuit’s extensive review of the facts, it is difficult to imagine the district court striking down the Fuel Standard on remand.<sup>137</sup> But if the Supreme Court decided to take up the issue, how might they interpret their

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<sup>130</sup> *Id.* at 1106.

<sup>131</sup> *Id.* at 1107.

<sup>132</sup> *Id.*

<sup>133</sup> *Rocky Mt. Farmers Union v. Corey*, 740 F.3d 507, 517 (9th Cir. 2014) (denying petitioner’s motion for rehearing).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 512.

<sup>136</sup> *Id.*

<sup>137</sup> Shelly Welton, *Ninth Circuit Rejects Constitutional Challenge to California’s Low Carbon Fuel Standard*, Climate Law Blog (Sept. 19, 2013), <http://blogs.law.columbia.edu/climatechange/2013/09/19/ninth-circuit-rejects-constitutional-challenge-to-californias-low-carbon-fuel-standard/>.

own precedent? There is case law supporting Justice Gould's interpretation,<sup>138</sup> but the answer is far from clear.

If the fuel standard had been held unconstitutional, there is the possibility that a nondiscriminatory means of reaching the same result could exist. In the lower court opinion, which was reversed and remanded by the Ninth Circuit, Judge Lawrence O'Neill suggested a "tax on fossil fuels" as a nondiscriminatory means to reducing GHG emissions.<sup>139</sup> However, it is doubtful that an increased tax on gasoline is currently politically feasible. A ruling by the Supreme Court that CARB's ethanol and crude oil regulations are unconstitutional could essentially be a death sentence for CARB's fuel standard and prevent other states from enacting their own regulatory schemes. If the Supreme Court overturned the Ninth Circuit's decision, CARB's ability to meet their GHG emission goals would be severely limited. More importantly, there could be serious damage done to the environment if the Court ignored the reality that all aspects of fuel production must be scrutinized to effectively reduce GHG emissions.

Transportation is the largest source of GHG emissions in California, making up 37.6 percent of California's "emission inventory" in 2011.<sup>140</sup> Of all methods of transportation, on-road vehicles are the greatest contributors.<sup>141</sup> After the California legislature enacted the "Global Warming Solutions Act of 2006" and the governor issued his executive order directing CARB to reduce GHG emissions attributable to the fuel market,<sup>142</sup> GHG emission levels from on-road transportation dropped dramatically. Between 2007 and 2008, emissions dropped by 5.9 percent and have continued to decrease over time.<sup>143</sup> The data shows that ever since CARB was directed to

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<sup>138</sup> See *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

<sup>139</sup> *Rocky Mt. Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1093-1094 (E.D. Cal. 2011).

<sup>140</sup> California Environmental Protection Agency Air Resources Board, *California Greenhouse Gas Emission Inventory: 2000 – 2012*, i, 23 (May 2014), [http://www.arb.ca.gov/cc/inventory/pubs/reports/ghg\\_inventory\\_00-12\\_report.pdf](http://www.arb.ca.gov/cc/inventory/pubs/reports/ghg_inventory_00-12_report.pdf).

<sup>141</sup> *Id.* at i. Over 90 percent of total emissions from the transportation sector come from on-road vehicles. *Id.*

<sup>142</sup> *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9<sup>th</sup> Cir. 2013).

<sup>143</sup> *California Greenhouse Gas Emission Inventory: 2000 - 2012*, *supra* note 140, at 11.



regulate fuel emissions in 2007, there has been a significant impact in the amount of GHG emissions from on-road transportation.

The dissenting Justices on the Ninth Circuit eagerly pointed to the admission by CARB that their regulatory scheme will have “little to no effect in averting the environmental catastrophe” posed by global warming.<sup>144</sup> While it’s true that CARB’s regulations will not single-handedly stem the tide of increasing GHG emissions, the data proves that the regulations do have an effect. Justice Gould reminded the dissent “that incremental change, when aggregated, can be significant.”<sup>145</sup> Furthermore, he was hopeful “that successful experimentation by California could lead to broader action by other states and/or the federal government.”<sup>146</sup>

Broader action is exactly what is being contemplated in other states, and their attention is focused on California as they decide how to act. California is currently the only state to have implemented a low-carbon fuel standard.<sup>147</sup> The state of Washington used CARB’s fuel standard as a basis for a fuel standard that was evaluated by the Washington Department of Ecology.<sup>148</sup> Additionally, eleven Northeastern and Mid-Atlantic states formed a coalition to develop a low-carbon fuel standard based on California’s regulations.<sup>149</sup> Because CARB’s regulations serve as the template for other states contemplating regulations of their own, a successful constitutional challenge to CARB’s Fuel Standard could seriously hinder current and future efforts to reduce GHG emissions.

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<sup>144</sup> Rocky Mt. Farmers Union v. Corey, 740 F.3d 507, 517 (9th Cir. 2014).

<sup>145</sup> *Id.* at 511.

<sup>146</sup> *Id.*

<sup>147</sup> Mike Gillett, *Low-Carbon Fuel Standard Fight Erupts in Washington State*, *WASHINGTON PROPERTY LAWYER* (Jan. 16, 2014, 4:28 PM), <http://www.washingtonpropertylawyer.com/2014/01/low-carbon-fuel-standard-fight-erupts-in-washington-state.html>.

<sup>148</sup> *Id.*

<sup>149</sup> California Environmental Protection Agency Air Resources Board, *Proposed Regulation to Implement the Low Carbon Fuel Standard*, ES-5 (2009), <http://www.arb.ca.gov/regact/2009/lcfs09/lcfsisor1.pdf>, <http://www.arb.ca.gov/regact/2009/lcfs09/lcfsisor1.pdf>

It's worth keeping in mind the purpose behind the dormant Commerce Clause. The driving principle behind the theory is that the Commerce Clause should "prevent a state from retreating into economic isolation."<sup>150</sup> Writing for the majority in *Baldwin v. G.A.F. Seelig, Inc.*,<sup>151</sup> Justice Cardozo stated "[the Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."<sup>152</sup> When Justice Cardozo wrote those words in 1935, he could not have foreseen how relevant they would be to environmental law today. The fuel regulations instituted by CARB are not an attempt to cut California's economic ties with other states, but rather they reflect the growing awareness of the dangers of rising GHG emissions and the need to react appropriately. California knows that they cannot resolve the climate change crisis on their own.<sup>153</sup> CARB's efforts should be seen as a call to arms to other state legislatures. In the spirit of Justice Cardozo's words, the states should join together to attack growing GHG emissions; any single state's efforts will not be enough standing alone.

## VI. CONCLUSION

With their holding in *Rocky Mt. Farmers Union*, the Ninth Circuit attempted to encourage states to be proactive in tackling the global problem of increasing GHG emissions. Legislatures in other states should take the initiative and follow California's lead. If fuel regulations are put in place across the country, producers will have to adapt and we could see a significant drop in the amount of GHG emissions nationwide. Reducing the level of GHG emissions means slowing the advance of climate change, which is a goal that all states, not just California, should share. The Ninth Circuit's holding in *Rocky Mt. Farmers Union* is a step towards advancing that goal, and the future of CARB's Fuel Standard will have important implications for lawmakers across the nation.

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<sup>150</sup> Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 179-80 (1995).

<sup>151</sup> *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

<sup>152</sup> *Id.* at 523.

<sup>153</sup> See *Proposed Regulation to Implement the Low Carbon Fuel Standard*, *supra* note 149, at ES-4.

