Rocky Mountain Farmers Union v. Goldstene: Low Carbon Fuel Standards, Lifecycle Greenhouse Gases, and California's Continued Struggle To Lead the Way

I. OVERVIEW OF THE CASE

In the ongoing effort to combat global warming, the California Air Resource Board (CARB) approved a set of regulations in early 2010 to govern the marketing of all feedstocks and fuel sources used in California, called the "low carbon fuel standard" (LCFS).[1] The LCFS was passed to promulgate the goals of California's Global Warming Solutions Act of 2006, which aims to reduce greenhouse gas (GHG) emissions in California to 1990 levels by the year 2020.[2] The LCFS does not govern the carbon content of fuel or vehicle emissions, but rather considers lifecycle GHG emissions.[3] The LCFS and the Energy Independence and Security Act of 2007 (EISA),[4] which modified the Clean Air Act, share the common goal of reducing lifecycle GHG emissions, while the EISA also proposes to reduce the dependence of the United States on energy from volatile foreign regions.[5]

To achieve a reduction of lifecycle GHG emissions, the LCFS establishes carbon intensity ratings for gasoline and diesel fuels and provides for a gradual implementation of fuel standards that attempt to reduce the carbon intensity of all fuels by ten percent by the year 2020.[6]

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1. Rocky Mountain Farmers Union v. Goldstene, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2010 WL 2490999, at *4 (E.D. Cal. June 16, 2010) (order denying defendant's motion to dismiss).
2. *Id.*
3. *Id.* at *2.
4. 42 U.S.C. § 7545(o) (2006).
5. *Rocky Mountain*, 2010 WL 2490999, at *21. The LCFS and EISA define lifecycle GHGs as the "aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes) . . . related to the full fuel lifecycle, including all stages of . . . production and distribution." 42 U.S.C. § 7545(o)(1)(H); Low Carbon Fuel Standard, CAL. CODE REGS. tit. 17 § 95481(a)(28) (2010).
6. *Rocky Mountain*, 2010 WL 2490999, at *4.

Carbon intensity is an estimate of emissions released during extraction, refining, and transportation of fuels.[7] All ethanol is chemically identical, but the LCFS gives a lower carbon intensity score to fuels produced through less land-intensive means within California, due to shorter transportation requirements.[8] Following the analysis of the United States Environmental Protection Agency (EPA), the LCFS specifically addresses corn-derived ethanol from California and the Midwest, as well as sugarcane-based ethanol from Brazil, with Brazilian sugarcane ethanol having the lowest carbon intensity.[9]

Various parties in the corn ethanol, gasoline production, trucking, and petrochemical manufacturing industries brought this suit against CARB to enjoin implementation of the LCFS regulations.[10] The plaintiffs alleged that the LCFS is preempted by federal law because it conflicts with Congress' goals set forth in the EISA, partly through destruction of the national corn ethanol industry.[11] The plaintiffs also alleged that the LCFS violates the Commerce Clause,[12] because it discriminates against fuels from other states and countries, regulates interstate and foreign commerce, and imposes substantial burdens on commerce in comparison to purported local benefits.[13] CARB filed a motion to dismiss all claims, alleging the LCFS regulations are expressly authorized by § 211(c)(4)(B) of the Clean Air Act,[14] and that the plaintiffs failed to state a sufficient claim of preemption.[15] Various other parties, such as the State of Oregon, filed amicus briefs in consideration of the impact of this case on other regional and state attempts to pass similar LCFS regulations.[16] The United States District Court for the Eastern District of California *held* that the LCFS regulations are not exempt from

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7. *Id.* at *5.
8. *Id.* at *5-6.
9. *Id.* at *5 n.6. Sugarcane ethanol's lower carbon intensity is based on different planting and harvesting practices, as well as carbon dioxide absorption levels by the feedstock. *Id.* at *6.
10. *Id.* at *1, *7-9.
11. *Id.* at *7.
12. U.S. CONST. art. I, § 8, cl. 3.
13. *Rocky Mountain*, 2010 WL 2490999, at *7.
14. Clean Air Act § 211(c)(4)(B), 42 U.S.C. § 7545(c)(4)(B) (2006).
15. *Rocky Mountain*, 2010 WL 2490999, at *1, *11.
16. *Id.* at *10-11. Oregon has submitted proposed changes to legislation to enact an LCFS by the end of the year, while final recommendations for provisions of an LCFS in Washington are due by November. Tom Corcoran, *Low-Carbon Fuel Standard May Be Closer than You Think*, DAILY CALLER (May 18, 2010, 12:00 AM), http://dailycaller.com/2010/05/18/low-carbon-fuel-standard-may-be-closer-than-you-think/. Several organizations intervened on behalf of the defendant, including the Conservation Law Foundation, which played a key role in the adoption of the Regional Greenhouse Gas Initiative (RGGI), a ten-state cooperative effort in New England to limit GHG emissions. *Rocky Mountain*, 2010 WL 2490999, at *10.

preemption under the Clean Air Act, the plaintiffs did state a valid claim for conflict preemption, and the Clean Air Act does not authorize California to regulate interstate and foreign commerce through a fuels provision. *Rocky Mountain Farmers Union v. Goldstene*, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2010 WL 2490999, at *20, *22, *24 (E.D. Cal. June 16, 2010) (order denying defendant's motion to dismiss).

II. BACKGROUND

The well-established preemption doctrine identifies three scenarios in which state law is preempted by federal law under the Supremacy Clause of the Constitution.[17] First, state laws may be preempted expressly (express preemption) if Congress explicitly states its intention to do so.[18] Second, state laws can be impliedly preempted if Congress regulates so pervasively in a field (field preemption) that there is "no room left for the states to supplement federal law."[19] Finally, state laws are impliedly preempted if they actually conflict with federal laws because compliance with both laws is impossible, or the state law interferes with congressional objectives (conflict preemption).[20] If Congress does include an express preemption clause in a statute, it does not narrow the scope of the other preemption principles.[21] Where Congress includes an express preemption clause that does not apply to a state statute, the statute must be analyzed under implied preemption principles of field and conflict preemption.[22]

California enjoys a unique status under the Clean Air Act, with the well-established power to set emission standards stricter than those set by the federal government through a number of exemptions from preemption.[23] For example, based on a history of leading the nation in emission standards, California is permitted to request a waiver from preemption to adopt standards for emissions for new motor vehicles.[24]

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17. U.S. CONST. art. VI, cl. 2; Am. Petroleum Inst. v. Cooper, 681 F. Supp. 2d 635, 641 (E.D.N.C. 2010) (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991)).

18. *Am. Petroleum Inst.*, 681 F. Supp. 2d at 641 (citing Cox v. Shalala, 112 F.3d 151, 154 (4th Cir.1997)).

19. *Id.*

20. *Id.* (citing College Loan Corp. v. SLM Corp., 396 F.3d 588, 596 (4th Cir. 2005)).

21. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

22. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (citing *Geier*, 529 U.S. at 869; Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

23. Aaron Fountain, Note, Davis v. EPA*: A Review of the EPA's Drunken Power Under the Ethanol Bias of the Clean Air Act*, 41 HOUS. L. REV. 1701, 1733 (2005).

24. Rocky Mountain Farmers Union v. Goldstene, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2010 WL 2490999, at *3 (E.D. Cal. June 16, 2010) (order denying defendant's

While all other states are generally preempted from establishing their own mobile source tailpipe standards, they are allowed to adopt new standards if they are identical to the California standards.[25] Section 211(c) of the Clean Air Act[26] "explicitly contemplates that California can, in some instances, place restrictions on fuel additives."[27] The Clean Air Act contains an express preemption clause in § 211(c): "[N]o State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine."[28] However, Congress created an express exemption provision for California: "Any State for which application of section 7543(a)[29] of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive."[30] California is the only state that qualifies for this preemption exemption.[31] Additionally, the United States Court of Appeals for the Ninth Circuit has recognized the principle that the Clean Air Act "generally seeks to preserve state authority" in respect to pollution control and that the "Act's savings provision provides a substantial retention of State authority."[32]

In *Oxygenated Fuels Ass'n v. Davis*, the United States Court of Appeals for the Ninth Circuit held that a ban on fuel additives was not exempt from preemption by § 211(c)(4)(B), because it was enacted to benefit the public health and welfare, not to regulate motor vehicle emissions.[33] CARB passed regulations to ban methyl tertiary-butyl ether (MTBE) from fuels to prevent groundwater contamination.[34] Despite the lack of exemption, the court held that there was no express preemption

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motion to dismiss). California was the only state to have adopted emission standards prior to March 30, 1966. *Id.*

25. DAVID WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK § 5:11 (2010).

26. Clean Air Act § 211(c), 42 U.S.C. § 7545(c) (2006).

27. Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 671 (9th Cir. 2003) (citing 42 U.S.C. § 7545(c)(4)(B)).

28. 42 U.S.C. § 7545(c)(4)(A).

29. *Id.* § 7543(a).

30. *Id.* § 7545(c)(4)(B).

31. Rocky Mountain Farmers Union v. Goldstene, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2010 WL 2490999, at *4 (E.D. Cal. June 16, 2010) (order denying defendant's motion to dismiss).

32. *Oxygenated Fuels*, 331 F.3d at 670-71 (citing 42 U.S.C. § 7416).

33. *Id.* at 666, 669.

34. *Id.* at 667. MTBE groundwater contamination occurs through fuel spills and leaks from storage tanks. *See Drinking Water*, EPA, http://www.epa.gov/mtbe/water.htm (last visited Oct. 11, 2010).

because the purpose of the statute did not conflict with air pollution reduction goals of the Clean Air Act; the two statutes are "precisely coextensive."[35]

In *Davis v. EPA*, the Ninth Circuit ruled on a California statute that did attempt to regulate fuel additives for the purpose of curbing vehicle emissions.[36] The court held that "[a]lthough California is not preempted from issuing its own fuel additive requirements, it is not authorized to negate the requirements imposed by Congress."[37] As a result of the MTBE ban upheld in *Oxygenated Fuels*, California faced the prospect of all of its gasoline being oxygenated with ethanol to meet the Clean Air Act fuel requirements of two percent oxygen by weight.[38] Studies by CARB suggested that the total load of ethanol used would prevent or interfere with California's ability to meet federal ozone and particulate matter standards.[39] CARB claimed that § 211(c)(4)(B) provided exemption from the oxygen requirements.[40] The state statute in question there was specifically designed to reduce vehicle emissions through regulation of fuel additives.[41] The Ninth Circuit held that § 211(c)(4)(B) acts solely to exempt California from the preemption of § 211(c)(4)(A); it does not empower California to violate other sections of the Clean Air Act.[42] The court held that the different sections must be read in conjunction to harmonize the requirements, and thus CARB's waiver of the oxygen requirement would violate § 211(k)(2)(B).[43] The ruling implied that California can generally regulate fuel requirements unless Congress has already done so. In 2009, California was granted a waiver to regulate GHGs for vehicle emissions, but not lifecycle GHGs.[44]

In 2007, the EISA modified the renewable fuel standard program in the Clean Air Act, requiring EPA to consider lifecycle GHG emissions.[45] Section 211(o) requires mandated volumes of renewable fuels to be included in "transportation fuel sold or introduced into commerce in the

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35. *Oxygenated Fuels*, 331 F.3d at 670. The court also dismissed claims of implied preemption on other grounds. *Id.* at 670-73.

36. 348 F.3d 772, 787 (9th Cir. 2003).

37. *Id.*

38. 42 U.S.C. § 7545(k)(2)(B) (2006); Davis v. EPA, 348 F.3d 772, 776 (9th Cir. 2003).

39. *Davis*, 348 F.3d at 777.

40. *Id.* at 786. CARB also requested a waiver of the oxygen requirement from the EPA, but was denied. *Id.* at 777.

41. *Id.* at 777.

42. *Id.* at 786.

43. *Id.*

44. *California Greenhouse Gas Waiver Request*, EPA, http://www.epa.gov/otaq/climate/ca-waiver.htm (last visited Oct. 12, 2010).

45. Clean Air Act § 211(o)(I)(H), 42 U.S.C. § 7545(o)(1)(H) (2006).

United States" and requires renewable fuel facilities to achieve target reductions in lifecycle GHG emissions.[46] The GHG reduction goals only apply to "new facilities that commenced construction after the date of enactment" of the EISA.[47] The EISA also declared a goal to "reduce the dependence of the United States on energy imported from volatile regions of the world that are politically unstable."[48] The EISA incorporated these regulations of lifecycle GHG emissions into the Clean Air Act, possibly removing control of them from states.

One other possible hurdle for California in the regulation of GHGs is the Commerce Clause of the Constitution.[49] The Dormant Commerce Clause doctrine establishes that states may not unjustifiably "discriminate against or burden the interstate flow of articles of commerce."[50] A state law may be found to discriminate against interstate commerce facially, in its practical effect, or in its purpose.[51] However, a state law may survive a Commerce Clause challenge if the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[52] Also, a state may violate the Commerce Clause if Congress gives clear, express intent to "remove federal Constitutional constraints."[53] Even if a savings clause in a federal statute preserves to a state the right to pass regulations that are more restrictive than federal law, the state would have the burden of showing an express intent of Congress to permit exemption from the Commerce Clause.[54]

III. THE COURT'S DECISION

In the noted case, the District Court for the Eastern District of California (Eastern District) relied on Ninth Circuit precedent regarding California fuel regulation statutes to evaluate whether California's LCFS is preempted by the Clean Air Act or violates the Commerce Clause.[55] Ruling on the CARB's motion to dismiss, the court held that even if

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46. *Id.* §§ 7545(o)(1)(H), (o)(2)(A)(i).

47. *Id.* § 7545(o)(2)(A)(i).

48. Energy Independence and Security Act of 2007, Pub. L. No. 110–140, § 806(a)(4) (2007) (to be codified at 42 U.S.C. § 17285).

49. U.S. CONST. art. I, § 8, cl. 3.

50. Am. Petroleum Inst. v. Cooper, 681 F. Supp. 2d 635, 653 (E.D.N.C. 2010) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994)).

51. *Id.* at 654 (citing *Or. Waste Sys.*, 511 U.S. at 99).

52. *Id.* (quoting Granholm v. Heald, 544 U.S. 460, 489 (2005)).

53. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982).

54. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 48-49 (1980).

55. Rocky Mountain Farmers Union v. Goldstene, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2010 WL 2490999, at *14-24 (E.D. Cal. June 16, 2010) (order denying defendant's motion to dismiss).

California's LCFSs were exempt from express preemption by § 211(c)(4)(B) of the Clean Air Act, ordinary principles of preemption would still apply.[56] Next, the court held that, assuming the factual allegations of the complaints were true, the LCFS is not within the § 211(c)(4)(B) preemption exemption because it does not regulate components of fuels or fuel additives.[57] Assuming these same facts to be true, the court next held that the plaintiffs stated a valid claim of preemption because implementation of the LCFS would frustrate the full effectiveness of the Clean Air Act.[58] Finally, the court denied the defendant's motion to dismiss the Commerce Clause violation claims because § 211(c)(4)(B) does not expressly authorize a violation of the Commerce Clause.[59]

First, the court addressed the plaintiffs' claim that the LCFS is preempted by § 211(o) of the Clean Air Act.[60] CARB claimed that the conflict is actually between §§ 211(c)(4)(B) and 211(o), both federal statutes, and therefore the preemption doctrine does not apply.[61] CARB also claimed that the existence of an express preemption statute within the Act bars the application of implied preemption principles.[62] Based on the holding in *Davis* that § 211(c)(4)(B) narrowly exempts California from the express preemption provision of § 211(c)(4)(A), the Eastern District held that § 211(c)(4)(B) does not operate as an exemption from any other sections of the Act.[63] Therefore, it is not a conflict between two federal statutes. Additionally, the court reasoned that CARB mistakenly interpreted a passage from *Freightliner Corp. v. Myrick*[64] in its claim that the existence of an express preemption clause negates the application of ordinary preemption principles.[65] Citing several more recent Supreme Court cases, the court held that "ordinary conflict preemption principles do apply despite other express preemption provisions or savings clauses."[66]

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56. *Id.* at *15.
57. *Id.* at *20.
58. *Id.* at *22.
59. *Id.* at *23.
60. Clean Air Act § 211(o), 42 U.S.C. § 7545(o) (2006); *Rocky Mountain*, 2010 WL 2490999, at *15.
61. *Rocky Mountain*, 2010 WL 2490999, at *15.
62. *Id.*
63. *Id.*
64. 514 U.S. 280 (1995).
65. *Rocky Mountain*, 2010 WL 2490999, at *15 (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)).
66. *Id.* at *15-16 (citing Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); Geier v. Am. Honda Motor Co., 592 U.S. 861 (2000)).

Second, the court analyzed whether the LCFS is preempted by the Clean Air Act. CARB claimed that the LCFS is exempt from preemption based on a broad authority to regulate fuels given to California by § 211(c)(4)(B), and that the LCFS fits within this exemption because the fundamental purpose of the LCFS is to reduce vehicle emissions.[67] The court held that the exemption of § 211(c)(4)(B) only applies to regulations of fuels or fuel additives and therefore does not apply to the LCFS because it only regulates how fuels are made.[68] However, the court noted that "[a]s in *Oxygenated Fuels*, this [was] a close call," suggesting the balance was influenced by the need to favor the plaintiffs' allegations on a motion to dismiss.[69] Additionally, the court held that, based on *Davis*, the exemption provided to California under § 211(c) does not allow it to disregard the requirements of § 211(o).[70] If the LCFS conflicts with § 211(o), it is subject to preemption.

Next, the court analyzed whether the plaintiffs' allegations were sufficient to support a claim that the LCFS frustrates the purposes and objectives of the Clean Air Act, and would therefore be impliedly preempted by conflict preemption.[71] The LCFS and the Clean Air Act share similar goals of reducing GHG emissions, but the EISA also proclaims the goal of reducing "the dependence of the United States on energy imported from volatile regions of the world that are politically unstable."[72] The court specifically considered the plaintiffs' claim that the grandfather provision of § 211(o) was designed to preserve the existing corn ethanol industry in the face of the GHG reduction requirements.[73] CARB's own economic analysis of the LCFS predicted that Midwest corn ethanol producers would be effectively blocked out of the California market within the first year of the LCFS mandate.[74] In denying the defendant's motion to dismiss, the court held that the LCFS would frustrate the goals of the EISA if the plaintiffs' allegations were true.[75]

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67. *Id.* at *16, *20.

68. *Id.* at *20 (citing Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 669 (9th Cir. 2003)).

69. *Id.* (citing *Oxygenated Fuels*, 331 F.3d at 670).

70. *Id.* at *18.

71. *Id.* at *21.

72. *Id.* (quoting Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 806(a)(4) (2007) (to be codified at 42 U.S.C. § 17285)).

73. *Id.* at *21-22 (citing 75 Fed. Reg. 14,689-14,690 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80) (EPA regulations implementing Clean Air Act section 211(o))).

74. *Id.* at *22.

75. *Id.*

Finally, the court addressed the issue of whether the LCFS violates the Commerce Clause.[76] The court analyzed several Supreme Court cases that establish the principle that "Congress must do more than simply authorize a State to regulate in an area" in order to permit a violation of the Commerce Clause.[77] Congress must expressly grant a state new powers "that [it] would not have possessed absent the federal legislation."[78] The Eastern District held that the sole purpose of § 211(c)(4)(B) was to waive express preemption of § 211(c)(4)(A), and therefore it does not authorize a violation of the Commerce Clause.[79] Additionally, the court held that § 211(c) and the savings clause of the Clean Air Act do not provide "explicit authority to regulate interstate and foreign commerce through a fuels provision," even though the savings clause allows state regulations to be "more restrictive than federal law."[80] The court denied the motion to dismiss the Commerce Clause cause of action.[81]

IV. ANALYSIS

In the noted case, the Eastern District tightened the leash on California's ability to regulate fuels and GHGs. Although California has been given permission to regulate GHGs in vehicle emissions, the court's denial of the defendant's motion to dismiss appears to correctly interpret and follow Ninth Circuit precedent in denying California's attempt to expand its reach to regulate lifecycle GHGs.

The court correctly disregarded CARB's defense that § 211(c) gives California a broad exemption from preemption. The Ninth Circuit has clearly limited the exemption clause in § 211(c)(4)(B) to only exempt California from the express preemption of § 211(c)(4)(A), which narrowly applies to a specific statute for the "purpose of motor vehicle emission control."[82] In the noted case, the LCFS was implemented to control emissions related to fuels, but not specifically for the purpose of motor vehicle emissions. The court did not discuss the fact that part of the LCFS is related to transportation of fuels, which would impact vehicle emissions, but CARB did not raise this issue. CARB likely

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76. *Id.* at *22-23.

77. *Id.* at *23 (citing Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982)).

78. *Id.* (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 49 (1980)).

79. *Id.* (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982); Davis v. EPA, 348 F.3d 772, 786 (9th Cir. 2003)).

80. *Id.* at *24 (quoting *Lewis*, 447 U.S. at 48-49).

81. *Id.*

82. *Davis*, 348 F.3d at 786; Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 669 (9th Cir. 2003) (citing Clean Air Act § 211(c)(4)(B), 42 U.S.C. § 7545(c)(4)(B) (2006)).

avoided this argument because their defense was based on the entire LCFS being exempt from preemption, the regulations do not address what types of fuels are used to transport ethanol to California, and the argument may have shortened the causal connection to a Commerce Clause violation. Unless CARB can tie its regulations directly to vehicle emissions, preemption through § 211(c)(4)(B) will not be an available tool to expand into other methods of regulating GHGs.

With respect to the issues of conflict or field preemption, the LCFS opened itself up to attack because it used the same definition for lifecycle GHGs as did the EISA. The court focused its conflict analysis on the impact to the corn ethanol market in the United States.[83] The court did not cite any precedent, and there does not appear to be any, for its interpretation of the EISA's purpose of regulating only new sources.[84] The court noted only the EPA's final rule on implementation of the EISA in reasoning that many of the existing plants would not be able to meet the reduction standards.[85] The court combined that logic with the purpose stated in the EISA to reduce dependence on "energy imported from *volatile* regions of the world that are *politically unstable*," to determine that the EISA had the purpose to preserve the corn ethanol industry in the United States, and would therefore be frustrated by the LCFS if the plaintiffs' allegations are true.[86] The court did not dig further into this interpretation, likely because CARB did not address the allegation that the purpose of the EISA is to protect the corn ethanol industry.[87] With no precedent for interpreting the purpose of the EISA, CARB could potentially argue whether the purpose is to reduce dependence on all foreign sources of energy, or just volatile and unstable ones. It could at least be argued that Brazil, the source of foreign fuel in this case, is neither volatile nor politically unstable.[88] It is doubtful that Congress would include such bold language in legislation if it was implying that all foreign nations fit into that category, but the courts have yet to address this issue.

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83. *Rocky Mountain*, 2010 WL 2490999, at *21-22.

84. *See id.*

85. *Id.* at *21 (citing Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,689, 14,689-90 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80)).

86. *Id.* at *21-22 (emphasis added).

87. *Id.*

88. Gregg Greenberg, *Brazil's Strong Economy Make Its Bonds a Buy*, STREET (May 13, 2010, 6:01 AM), http://www.thestreet.com/story/10755398/brazils-strong-economy-make-its-bonds-a-buy.html.

The court also ignored CARB's arguments that § 211(o) did not explicitly take any power away from California and that the savings clauses of the EISA and the Clean Air Act indicate an intent to preserve California's power to regulate fuels.[89] The court did not discuss any balancing of savings clause arguments in denying CARB's motion to dismiss, but CARB may have had difficulty arguing a savings clause defense. For example, despite the Clean Air Act's savings clause, the Ninth Circuit in *Davis v. EPA* barred California from violating a separate section of the Act.[90] The various sections of the Clean Air Act seem to operate in silos with respect to state powers, as some sections of the act require either waivers from the EPA or approvals of implementation plans for states to regulate, despite the presence of savings clauses in other sections.[91] It appears that most roads lead to preemption or the need for federal permission to regulate air emissions, even for California.

Another unexplored savings clause is § 211(o)(12), part of the EISA, which states that § 211(o) does not "expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas[ses]."[92] This section has not yet been interpreted by the courts, but may be limited to its "[e]ffect [on] the regulatory status of carbon dioxide or any other greenhouse gas" with respect to standards set by the EPA.[93] The absence of any litigation involving this statute echoes the idea that savings clauses in the Clean Air Act do not actually save anything for the states.

Finally, the court analyzed whether the LCFS violated the Commerce Clause, and CARB's defense that the violation was permitted by § 211(c)(4)(B) and the savings clauses of the Clean Air Act.[94] The court took a hard line on this issue in holding that "[s]ection 211(c)(4)(B) provides no express and unambiguous authority for California to violate the Commerce Clause."[95] It may be true that if § 211(c)(4)(B) does not apply to the LCFS then it does not permit a Commerce Clause violation here, but the Eastern District previously held that § 211(c)(4)(B) did

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89. *Rocky Mountain*, 2010 WL 2490999, at *22.

90. *See* Davis v. EPA, 348 F.3d 772, 786 (9th Cir. 2003) (holding that California was not generally exempt from section 211(k)).

91. *See* Exxon Corp. v. City of New York, 548 F.2d 1088, 1096 (2d Cir. 1977) (holding that state variances under section 211(c) are only allowed if the EPA Administrator approves a state implementation plan); *Davis*, 348 F.3d at 776-77 (discussing a waiver request by California to exempt it from section 211(k)).

92. Clean Air Act § 211(o)(12), 42 U.S.C. § 7545(o)(12) (2006).

93. Arnold W. Reitze, Jr., *Biofuels—Snake Oil for the Twenty-First Century*, 87 OR. L. REV. 1183, 1248 (2008).

94. *Rocky Mountain*, 2010 WL 2490999, at *22-24.

95. *Id.* at *24.

permit a violation of the Commerce Clause for California to regulate fuel additives.[96] The court was too dismissive of this Commerce Clause defense without clearly justifying its reasoning based on its holding that § 211(c)(4)(B) does not apply to the LCFS. It did not embark on any balancing of impacts on commerce with potential benefits, such as California's "efforts to protect their natural resources and citizens' health from the adverse impacts of global warming by directly regulating GHG[s]."[97] If CARB does pass future regulations that garner protection from § 211(c)(4)(B), a Commerce Clause violation will likely be permitted. Alternatively, CARB may need to target localized benefits to justify LCFS regulations, similar to the MTBE bans that have been upheld previously.

The holdings in the noted case appear to be the correct decisions on a motion to dismiss, but the reasoning is not completely supported by Ninth Circuit precedent. The court did follow the narrow interpretation of § 211(c)(4)(B) to only exempt California from preemption in the specific area of regulating fuel components for the purpose of controlling vehicle emissions.[98] Given that § 211(c)(4)(B) does not apply to the LCFS, it does not grant California the right to violate the Commerce Clause in this case, but the court should have clarified that § 211(c)(4)(B) does permit such a violation in some cases.[99] The noted case is yet another example of the parsing of the Clean Air Act into pieces that work separately to reserve powers for the states, but then work together to preempt the states from using those powers. There currently appears to be no direct way for California to regulate lifecycle GHGs without a special waiver from the EPA, further action from Congress, or finding a highly localized benefit for California to avoid preemption and Commerce Clause violations.

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96. Oxygenated Fuels Ass'n v. Davis, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001), *aff'd*, 331 F.3d 665 (9th Cir. 2003). The Ninth Circuit held that section 211(c)(4)(B) did not apply to California's MTBE ban, possibly mooting the Eastern District holding that it permitted a violation of the Commerce Clause, but it did not explicitly refute the Commerce Clause holding. *See Oxygenated Fuels*, 331 F.3d at 671.

97. Gloria Sefton, *California's Not Dreamin': Federal Inaction on Greenhouse Gas Regulation Provides an Opening for the State To Regulate*, 30 WHITTIER L. REV. 101, 118 (2008) (discussing California's attempt to regulate GHGs in vehicle emissions).

98. *Rocky Mountain*, 2010 WL 2490999, at *19.

99. *Id.* at *24.

V. CONCLUSION

The holding in the noted case followed the Ninth Circuit's narrow interpretation of § 211(c)(4)(B) of the Clean Air Act.[100] The preemption of the LCFS is, however, tenuously based on a conflict of objectives, and not an express preemption or direct conflict of an actor's ability to comply with the LCFS and § 211(o).[101] The Eastern District has only ruled on CARB's motion to dismiss but, if it were to go to trial, CARB would clearly need to prove a different purpose for the LCFS or develop other arguments aside from their reliance on § 211(c)(4)(B) for exemption from preemption and Commerce Clause violations.

With the EPA recently passing regulations of GHGs for stationary sources, this case may soon be mooted as federal enforcement further occupies the field.[102] Although the regulations will only begin as a permitting process, with a phased approach, it will make it harder to prove congressional intent to permit California to regulate lifecycle GHGs, as proposed by the LCFS.[103] Despite these potential hurdles, California and other states continue to move forward with attempting to adopt and implement LCFS statutes.[104] The race to regulate GHGs will continue.

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100. *See id.* at *17-18.

101. *Id.* at *21-22.

102. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 106 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51-52, 70-71); *EPA's Fact Sheet on Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, EPA, http://www.epa.gov/nsr/documents/20100413fs.pdf (last visited Nov. 2, 2010).

103. *See* EPA Fact Sheet, *supra* note 102.

104. *See Low Carbon Fuel Standard Program*, CAL. AIR RES. BD., http://www.arb.ca.gov/fuels/lcfs/lcfs.htm (last visited Oct. 3, 2010); *see also supra* text accompanying note 16.

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