Nos. 12-15131, 12-15135

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN FARMERS UNION, ET AL.,
Plaintiffs-Appellees,

v.

JAMES GOLDSTENE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, ET AL.,
Defendants-Appellants,

ENVIRONMENTAL DEFENSE FUND, ET AL.,
Intervenors-Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of California in Case Nos. 09-CV-02234 & 10-CV-00163 (Hon. Lawrence J. O'Neill)

AMICUS CURIAE BRIEF OF CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae California Manufacturers & Technology Association ("CMTA") hereby certifies that CMTA is a non-profit organization under section 501(c)(6) of the Internal Revenue Code and does not issue stock held by the public. CMTA is a corporation organized under the laws of the State of California, it does not have any parent corporation, and no publicly held company owns 10% or more of CMTA.

FED. R. APP. P. 29(C)(5) DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), Amicus Curiae California Manufacturers & Technology Association ("CMTA") states that no party's counsel authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund the preparation of submission of this brief, and no person - other than CMTA, its members, or its counsel - contributed money that was intended to fund the preparation and submission of this brief.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The California Manufacturers & Technology Association ("CMTA") is a mutual, non-profit 501(c)(6) trade association established in 1918 to promote the interests of manufacturers and technology-based companies before state legislators, regulators, and courts with regard to matters that affect their ability to produce and sell products in California and compete in global markets. Manufacturers in the state employ 1.2 million workers, provide high wages and create many more jobs in other sectors of the California economy.

CMTA submits this brief on behalf of its members and in support of the Plaintiffs-Appellees in order to bring to the Court's attention the adverse impacts on CMTA's members and the manufacturing and technology sectors, both in California and across the nation, that will result from the regulatory action that has been undertaken by the California Air Resources Board ("CARB"). Along with affordable energy, labor and other cost inputs and fair taxes, manufacturers need a predictable, uniform and stable regulatory environment to make long term investment and hiring decisions. All of those objectives will be put at risk if the District Court's decision is reversed in this appeal. For that reason, CMTA submits this brief to assist the Court in understanding those risks and the consequences of a ruling in favor of CARB.

CONSENT TO THE FILING OF THE AMICUS BRIEF

As provided by Fed. R. App. P. 29(c)(5), CMTA notes that the parties to the appeal have consented to the filing of this and all other briefs from *amicus curiae* parties. CMTA submits this brief in support of the Plaintiffs-Appellees who filed their principal briefs on August 6, 2012.

STATEMENT OF THE CASE

CMTA incorporates by reference the procedural and factual background to the case set forth in the principal brief of the Plaintiff-Appellees.

SUMMARY OF THE ARGUMENT

California's Low Carbon Fuel Standard ("LCFS") represents an ill-considered protectionist regulatory scheme conceived in derogation of the Commerce Clause of the U.S. Constitution. If upheld, its practical effects will be (1) to infuse a significant economic distortion into free markets in California and the rest of the country, (2) to dramatically expand the scope of protectionist economic regulation, and (3) to set the stage for retaliatory regulation nationally and globally to the detriment of California manufacturers. The LCFS scheme patently discriminates against out-of-state biofuel and crude oil sources by forcing energy suppliers to replace these sources with California fuels, ultimately creating artificially inflated fuel prices, while providing no environmental benefit.

The LCFS has already drawn notoriety in other states and countries as "protectionism masked as environmentalism." These jurisdictions are considering

retaliatory regulatory schemes which will surely impact, if not directly target, California manufacturing. The resulting competing regulatory schemes will result in economic distortions to the detriment of all market participants, including CMTA.

The Pandora's Box of responsive and retaliatory "environmental protectionism" that would be fueled in other jurisdictions by approval of the LCFS scheme portends serious harm to California manufacturers and technology enterprises, even as they recover from the recent recession. Domestically, a web of competing regulations would run counter to free flow of commerce inherent in the economic system established under our Constitution, opening the door to a patchwork of national regulation that will increase compliance costs and compel an inefficient allocation of resources. Internationally, the LCFS will hamper the federal government's ability to negotiate effective fair-trade policies with other nations. In sum, it is in the interests of all participants in the economic marketplace, including California manufacturers, to have a level playing field across all states and fair trade internationally.

The LCFS also represents an unprecedented and unconstitutional expansion of state regulatory power into the realm of interstate commerce. The regulatory regime attempts not only to control what fuels energy suppliers may use, but to control the details of the business, technical and engineering decisions made

outside of California regarding production of those fuels. Since greenhouse gas ("GHG") emissions addressed by the regulation are the byproduct of virtually every form of human economic activity, if LCFS is upheld, this Court's decision could be used to justify similar problematic schemes governing *any* industry. The door would be open for other states to adopt protectionist regulation in the name of environmentalism that could dictate the means of production of, for example, California semiconductors, aircraft or agricultural commodities.

Significantly, the LCFS is designed in a way that will provide no overall reduction in greenhouse gases. The out-of-state biofuel and crude oil which would no longer be purchased by California energy producers under the LCFS will simply be purchased and consumed in other jurisdictions. As such, the LCFS represents little more than an effort directed at economic protectionism. CARB can and should pursue reasonable alternative regulatory measures which will actually reduce greenhouse gas emissions, while respecting the free flow of commerce that the U.S. Constitution provides for as a means of ensuring our national economic union. CMTA respectfully submits that this Court should uphold the decision below and close the door on this inadvisable, ineffective, and unconstitutional regulatory scheme.

ARGUMENT

I. The LCFS Opens the Door to Economic Protectionism that Will Encourage Other Jurisdictions to Adopt Responsive Schemes Harmful to California Manufacturers and Technology Enterprises

The LCFS comprises patent protectionism against out-of-state and international energy sources by facially discriminating against sources based on geographic origin, and running afoul of the Supreme Court's prohibition of state laws "designed to neutralize advantages belonging to the place of origin."[1] Indeed, CARB readily acknowledges that a principal purpose of the scheme is to keep more money in the state.

If upheld, other jurisdictions can be expected to take note of the nature of this regulation and strike back. In fact, the ripple effect of that recognition has already begun both in other states and other countries. Midwestern states have already expressed concern that LCFS unfairly discriminates against biofuels originating there.[2] In addition, both the Canadian government and the Canadian petroleum industry have labeled LCFS and similar American regulatory schemes

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1 *Baldwin v. G.A.F. Seelig, Inc.*, 294 US 511, 527 (1935).

2 *See, e.g. U.S. keeps eyes on California fuel mandate*, The Des Moines Register, Feb. 1, 2009, at 1D (available on Lexis) (expressing concern that Iowa-sourced ethanol would grade out worse than gasoline under LCFS despite the fact that ethanol emits only two-thirds of the carbon that gasoline does).

as protectionist.[3] Critically, these schemes are not even viewed by our most important trading partners abroad as effective or even good-faith climate policies, but rather as "protectionism masked as environmentalism."[4]

Schemes viewed in such light will inevitably lead to retaliatory policies and regulatory confusion in the energy sector. Domestically, such policies represent a direct contradiction to the model of a national economic union based upon the unobstructed flow of commerce established by the Constitution. From its first days, the U.S. Supreme Court has recognized that an essential purpose of the Constitution was to prevent the trade protectionism between states that flourished under the Articles of Confederation.[5] Competing and interlocking state regimes regulating fuels would balkanize energy markets, creating strong incentives for fuel producers to only sell products locally in order to avoid the market distorting effects of out-of-state regulatory regimes. Such cascading competition will only

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[3] Sheldon Alberts, *Oilsands bad reputation 'disproportionate': Doer; New Ambassador to the U.S. defends Alberta's oil producers in new role*, Alberni Valley Times (B.C.), Oct. 19, 2009, at Business 16 (available on Lexis) (Noting that "California has already approved a low-carbon fuel standard that Ottawa argued unfairly discriminates against oil derived from oilsands" and that Canada considers the regulation to be a symptom of "rising protectionist sentiment in the U.S.").

[4] Shawn McCarthy and Nathan Vanderklippe, *Oil Sands to Take Hit from U.S. Bill; American Clean Energy and Security Act would Result in Sharply Higher Costs*, The Globe and Mail (Canada), June 30, 2009, at B1 (available on Lexis).

[5] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

serve to undermine the free flow of commerce between jurisdictions through the imposition of regulatory regimes that flout the very purpose of the Commerce Clause.[6]

Already, the LCFS has sparked a flurry of legislative activity in other states. In fact, thirteen (13) other states have already considered enacting low carbon fuel schemes.[7] Each state regulatory scheme modeled after the LCFS will have the potential to discriminate against out-of-state energy sources and thereby strip away from those out-of-state industries the "competitive and economic advantages" they have rightly earned for themselves.[8] Upholding the LCFS would amount to active encouragement to enact such schemes, creating an optimal environment for wasteful economic protectionism by states.

Complex webs of competing state regulatory schemes not only would result in inefficient allocation of resources, but would impose unnecessary and burdensome expenditures on individual companies to comply with each individual scheme. State obstructions to the free flow of commerce in derogation of the U.S.

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6 *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 356 (1951) (seeking to avoid "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause").

7 Br. of *Amici Curiae* Professors of Envtl. Law in Support of Appellants at 10 (Dkt. #74).

8 *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977).

Commerce Clause would hamper the efforts of California companies to compete in the national marketplace.

Internationally, the LCFS will interfere with our country's ability to effectively negotiate both fair and equitable trade policies and good faith environmental agreements with other nations, vital functions of the federal government in responding to economically uncertain times and global environmental challenges. Recently, Canada has considered enacting retaliatory climate policies, expressly singling out LCFS as an example of the protectionist policies it intended to combat.[9] Regulatory programs directed against California industry would have significant potential to harm CMTA's members, as well as members of other industries. International trade barriers could affect the ability of California manufacturers to participate in overseas markets where the innovation, efficiency and talent of California manufacturing and technology enterprises would otherwise provide us a decided advantage in the global marketplace. As it stands, the constant specter of retaliatory regulation raises manufacturing costs and burdens by introducing regulatory uncertainty into the marketplace.

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[9] *See, e.g.* Paul Vieira, *Beware Carbon Tariff: report; U.S. Climate Policy Could Hurt Us, Warns Conference Board*, Edmonton Journal (Alta.), Nov. 28, 2009, at E1 (available on Lexis) (quoting a Canadian climate policy report stating that "[t]he Canadian (climate-change) program will have to address the possibility of growing U.S. protectionism buried in the climate legislation"). The article noted that U.S. standards modeled after California's LCFS would be viewed as an example of American protectionism.

CMTA's members are committed to regulatory policies that promote a level playing field of predictable regulation across the nation and fair trade internationally. Within such a framework, they can compete fairly and win. The ideal scenario for that framework is one which would allow the market to provide the most efficient use of energy resources and discourage wasteful protectionist regulation that will harm all market participants. Competing regulatory regimes designed to foster economic protectionism are poor economic policy because they clog commerce[10] and create economic distortions by giving unproductive entities advantages based on geography, rather than efficiency, innovation and quality. The LCFS is an obvious example of such an impediment to commerce already showing signs of sparking retaliatory measures against California manufacturers from other states and countries. Accordingly, this Court should affirm the District Court's ruling striking it down.

II. The LCFS Represents an Unprecedented and Alarming Expansion of State Regulatory Power in the Area of Interstate Commerce

With the LCFS, CARB is not simply setting the rules by which market participants must play, but is rigging the game. Not only does LCFS represent an attempt to control what fuels energy suppliers use, but it attempts to control the

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[10] *Nat'l Solid Wastes Mgmt. Ass'n. v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (*Meyer II)* ("the interaction of many extraterritorial laws would serve as a clog on interstate commerce").

detailed mechanics of the production of those fuels outside of California. The system "grades" fuels based on emissions produced at all stages of the fuel's development, not distinguishing between in-state and out-of-state conduct. For example, corn ethanol is graded based on, *inter alia*, farming practices (including fertilizer type), crop yields, harvesting practices, fuel used in the production process, and transportation of the fuel.[11] This unnecessary micro-managing of fuel production business models in other states is no more than a transparent attempt at economic protectionism, as the grades are rigged to favor California fuels.[12] A side effect of this style of regulation will be to stifle innovation as CARB bureaucrats employ command and control approaches to effectively dictate every important fuel production decision to be made by engineering, business and technical experts outside of California.

Worse, if it is allowed to stand, the LCFS would establish an even more far-reaching precedent for an overreaching state regulation. The energy sector is not an industry whose reach is narrowly circumscribed; indeed, CARB itself has acknowledged that "almost every aspect of human activity" produces GHGs. Id. at 44 (internal quotation omitted). Thus, because energy supports all forms of modern human endeavor, purported measures to regulate GHG emissions are

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[11] Appellees' Br. at 11-2 (Dkt. #124).

[12] *Id.* at 13-23.

practically limitless. As such, unless properly cabined, California's regulatory approach threatens to write the Commerce Clause out of the Constitution by opening the door for states to regulate the means and method of production of *any* industry. Citing the legality of the LCFS, a state could regulate in detail the means of production of California semiconductors, commercial aircraft or bottled wines. States could tailor their regulations to specifically target California manufacturers, just as the LCFS has been tailored to target Midwestern biofuels manufacturers and foreign and Alaskan crude oil producers.[13] Manufacturers could be forced to design products not to maximize performance and efficiency through a skilled workforce, technological innovation and scientific research, but to meet arbitrary standards set by legislators and regulators in other states.

In such scenarios, California manufacturers would be especially vulnerable to competing state regulations. Increasingly over the last several decades, California manufacturers and technology enterprises have fostered a culture of creativity and technical proficiency currently exemplified by a host of manufacture-derived technology companies that have made California a

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[13] *See Baldwin*, 294 US at 524 ("One state may not put pressure…upon others to reform their economic standards" by imposing "obstructions to the normal flow of commerce[.]"); *Healy v. Beer Inst.*, 491 US 324, 336 (1989) (Courts should consider "how [a regulation] may interact with the legitimate regulatory regimes of other States and *what effect would arise if not one, but many or every, State adopted similar legislation*.") (emphasis added); Appellees' Br. at 41, 46 (Dkt. #124).

destination of choice for the brightest, most talented engineers, professionals and entrepreneurs from around the world. CMTA members and the people of California benefit enormously from the competitive and economic advantages stemming from this innovation. Similarly, if Midwestern companies have devised a more efficient method of manufacturing ethanol, California regulations such as the LCFS should not neutralize that advantage. A level playing field for all ensures that regulators in other states or countries will not be able to eliminate that advantage through the artifice of anti-competitive regulatory measures imposed on the marketplace and the free flow of commerce.[14]

State regulators across the country will be looking to the decision of the Circuit in this case when contemplating LCFS-like regulatory schemes. In order to protect California industry from competitive regulations from other jurisdictions, this Court must strike down the LCFS.

III. The LCFS Would Exacerbate the Challenges California Manufacturers Face Due to the State's High Energy Costs

California's manufacturing industry has persevered in recent years despite losing business to other states and countries. A significant contributor to the industry's struggles has been California's high energy prices, which consistently

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[14] *Hunt*, 432 US at 351 (state regulations may not "ha[ve] the effect of stripping away from the [out-of-state] industry the competitive and economic advantages it has earned through itself"); Appellees' Br. at 68 (Dkt. #124).

rank among the highest in the country.[15] LCFS promises to push these costs even higher, without any corresponding benefit to the environment, further complicating the efforts of California manufacturers to keep costs down as they recover from a recession that has been one of the deepest and most challenging to business in the state.

In the short term, the LCFS would force California energy suppliers to substitute more expensive fuels for fuels they currently purchase from other jurisdictions.[16] For instance, suppliers would have to purchase California crude oil instead of foreign or Alaskan crude oil and California ethanol instead of Midwestern ethanol, regardless of price. Thus, even if LCFS "succeeds" in keeping more money in the state, as CARB hopes it will, it will result in higher energy prices, putting additional unnecessary pressure on California manufacturers and technology enterprises to seek alternative venues at a time when industry and the California economy can ill-afford to do so.

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[15] *See, e.g.*, Small Business & Entrepreneurship Council, "Energy Cost Index 2009: Ranking the States" (Apr. 7, 2009), *available at* http://www.sbecouncil.org/uploads/EnEn%20_102%20-%20EnergyCostIndex[1].pdf

[16] As discussed below -- and as CARB acknowledges -- this forced choice would not be accompanied by a decrease in greenhouse gas emissions, making it a poor policy decision.

In the longer term, as discussed above, LCFS would spur retaliatory regulation from other jurisdictions. Such regulations would further prevent the energy industry from economically meeting the country's needs, further increasing fuel prices and undercutting the competitiveness of California-produced goods and technology in the national marketplace. Indeed, this inefficient distribution of resources would not only be to the detriment of CMTA members, as but to manufacturers across the country, as well.

IV. The LCFS Would Result in No Greenhouse Gas Reductions, Negating Any "Benefits" that the Scheme has Beyond Economic Protectionism

Governments often ask business and industry to incur significant costs in order to provide environmental benefits to the community. If the benefits to the community outweigh the costs to industry, the regulatory scheme may be said to provide a net benefit to society and is promised on national rulemaking. The same cannot be argued, however, when the regulatory scheme provides *no* net environmental benefits. Such is the case here.

LCFS was designed with the express goal of forcing energy suppliers to utilize greater percentages of California ethanol and crude oil. However, the scheme does not -- and cannot -- control the fate of the portion of out-of-state fuel no longer purchased by California energy suppliers. Unavoidably, this fuel will be sold to, and consumed by, out-of-state companies. Therefore, as CARB readily admits, LCFS will result in no overall greenhouse gas reduction. The scheme

therefore imposes economic burdens and risks on California manufacturers and technology enterprises without a corresponding social benefit to the environment. Furthermore, CARB admits that it is aware of regulatory schemes which would actually result in lower GHG emissions and would not target out-of-state industries.[17]

Any arguments that the LCFS represents anything other than an ill-considered economic protectionist scheme must fail. The LCFS should be stricken so that California's government may fashion an effective -- and constitutional -- method of addressing the state's greenhouse gas emissions.

CONCLUSION

For the aforementioned reasons, the California Manufacturers & Technology Association respectfully requests that this Court affirm the District Court's ruling that the California Low Carbon Fuel Standard violates the Commerce Clause of the U.S. Constitution and reinstate the injunction issued below.

[17] Appellees' Br. at 7 (Dkt. #124).

DATED: August 13, 2012

Respectfully submitted,

s/Gary J. Smith

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1, I certify that the accompanying brief has been prepared using 14-point Times New Roman typeface. I further certify that the accompanying brief complies with the type-volume limitations of Rule 29(d). The brief is proportionately spaced, and contains less than 7,000 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance.

DATED: August 13, 2012

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 13, 2012, and will therefore be served electronically upon all counsel by the Court's CM/ECF system.

In addition, I have mailed a true and correct copy of the foregoing by first-class U.S. mail to the following participants who are not registered for electronic service by CM/ECF.

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9th Circuit Case Number(s) 12-15131, 12-15135

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