

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 12-15131, 12-15135

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

v.

JAMES N. GOLDSTENE, in his official capacity as
Executive Officer of the California Air Resources Board, et al.,
Defendants-Appellants,

ENVIRONMENTAL DEFENSE FUND, et al.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of
California, Fresno Division Case Nos. 1:09-cv-02234-LJO and 1:10-cv-
00163-LJO

The Honorable Lawrence J. O'Neill, Judge

AMICI CURIAE BRIEF OF PETER BRAGDON, PRESIDENT OF THE
NEW HAMPSHIRE STATE SENATE, AND WILLIAM L. O'BRIEN,
SPEAKER OF THE NEW HAMPSHIRE HOUSE OF
REPRESENTATIVES, IN SUPPORT OF PLAINTIFFS-APPELLEES

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to the consent of all parties and in accordance with Federal Rule of Appellate Procedure 29 and Circuit Rule 29-3, Peter Bragdon, President of the New Hampshire State Senate, and William L. O'Brien, the Speaker of the New Hampshire House of Representatives submit this brief as amici curiae in support of Plaintiffs-Appellees' position that the California Air Resources Board's low carbon fuel standard scheme ("California LCFS") is unconstitutional.

The New Hampshire Legislature recently passed legislation, NH RSA 21-O:3, rejecting low carbon fuel standard schemes such as the California LCFS. Quoting from the report of the New Hampshire House Science, Technology and Energy Committee: RSA 21-O:3 "clearly states our policy position that New Hampshire shall not join, implement, or participate in any state, regional, or national low carbon fuel standards program that requires quotas, caps, or mandates on any fuels used for transportation, industrial purposes, or home heating. We want to make it clear to the other Northeast states that we will not be dragged into a multi-state 'liquid-RGGI'¹

¹ RGGI is an acronym for Regional Greenhouse Gas Initiative, a cap-and-trade among various Northeast States involving carbon emissions from electric companies. The New Hampshire General Court, this past session, passed legislation that would have withdrawn New Hampshire from RGGI.

program.” *HJ No 10* (March 7, 2012.) The practical effect of the California LCFS, however, is that New Hampshire would be dragged, contrary to the policy choice it made in enacting RSA 21-O:3, into participation in California’s low carbon fuel standards scheme.

As comprehensively demonstrated in the brief of Plaintiffs-Appellees, the California LCFS “violates the Commerce Clause because its express purpose and practical effect are to control commerce that occurs wholly outside of California.” More particularly, the California LCFS scores fuels using a “lifecycle” analysis that takes into account activities that occur totally outside of California. The California LCFS, based on these scores, imposes an annual “average” maximum on the use of these fuels by California users. A user who exceeds the maximum must either purchase credits from users whose usage falls below the maximum or face substantial civil and criminal penalties.

In order to remain competitive in the California market, producers of fuels disfavored by the California LCFS will have to change the manner in which they produce and transport these fuels in order to achieve a better score under the California LCFS. Indeed, in the California Air Resources Board’s own words, producers will have to “alter production methods,

However, Governor Lynch, who is not running for reelection, vetoed the bill.

sources of power, or other aspects of their business in order to . . . compete for business in California.”

Because California makes up so much of the domestic market for ethanol (for example, California consumes nearly one-third of ethanol produced in Nebraska), there can be no doubt that producers of ethanol will engage in “fuel-switching” (switching to the more expensive production methods favored by the California LCFS), in order to be able to continue to participate in the California market. The changes in production methods, etcetera will increase the cost to produce the fuel, but so long as the increase is less than the cost imposed by the California LCFS on out-of-state ethanol as presently produced, it would be economically irrational for producers not to engage in “fuel-switching” in order to continue to be able to access the vast California market.

The brief of Plaintiffs-Appellees conclusively establishes that the extraterritorial effects of the California LCFS on how ethanol is produced in other States violate the Commerce Clause of the United States Constitution. Additionally, however, and the reason why Senate President Bragdon and Speaker O’Brien submit this brief, is that an additional unconstitutional extraterritorial effect of the California LCFS is that it will undermine, if not

largely negate, the policy of New Hampshire with respect to low carbon fuel standard schemes.

The “fuel-switching” caused by the California LCFS will have the same effect on disfavored fuels outside the borders of California as it does on these fuels within California – they will cost more. For example, ethanol producers obviously are not going to maintain separate facilities for California and New Hampshire. That would make no economic sense given the enormous disparity in market share. Rather, users of ethanol in New Hampshire will have no option but to purchase ethanol produced in a manner favored by the California LCFS.

The inevitable result of the California LCFS, therefore, is that the cost of ethanol used in New Hampshire will increase. “Fuel-switching” will result in users in New Hampshire paying the same type of higher prices for fuel using ethanol that they would be paying if New Hampshire had enacted or joined a low carbon fuel standards scheme such as the California LCFS. In sum, the practical effect of the California LCFS is that New Hampshire would be dragged into a low carbon fuel standards scheme, which is exactly what New Hampshire sought to eschew by enacting NH RSA 21-O:3.

RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief. No person — other than the amici curiae or their counsel — contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this and other briefs from amicus curiae parties.

II. SUMMARY OF THE ARGUMENT

New Hampshire's policy with respect to low carbon fuel standard schemes can fairly be described as diametric to California's. New Hampshire's policy is to not "join, implement, or participate" in any low carbon fuel standard schemes. California's policy, in stark contrast, is to cause commercial activities occurring in other States to conform to California's LCFS. Stated slightly differently, California's policy is to impose its low carbon fuel standard scheme nationally.

As a practical matter, due to California's dominant share of the domestic fuel market (as noted above, California consumes one-third of all of the ethanol produced in Nebraska) California has the ability to do so. It is manifest that fuel-producers will choose to "alter production methods,

sources of power, or other aspects of their business in order to . . . compete for business in California” because otherwise these producers will lose an immense portion of their business.

This “fuel-switching” will cause increases in the price of fuels disfavored by the California LCFS in all States, not just in California. Given the enormous difference in market share between California and New Hampshire it would be economically irrational for ethanol producers to maintain separate facilities for California and New Hampshire.

The “practical effect” of the California LCFS in New Hampshire, therefore, is that consumers in New Hampshire will have to purchase ethanol produced in a manner favored by the California LCFS. In other words, California will set the price of ethanol in New Hampshire. Ethanol users in New Hampshire will pay the same premium for fuel using ethanol that would be paid if New Hampshire had enacted a low carbon fuel standards scheme such as the California LCFS.

In sum, it is manifest that California’s low carbon fuel standard scheme would undermine, if not largely negate, New Hampshire’s policy with respect to low carbon fuel standard schemes. For this reason, the California LCFS violates the Commerce Clause.

III. ARGUMENT

A. Standard of Review

The “critical inquiry” to determine whether the extraterritorial effects of the California LCFS on New Hampshire constitute a violation the Commerce Clause is “whether the practical effect” of the California LCFS “is to control conduct” in New Hampshire.” *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). This inquiry requires this Court to evaluate the practical effects of the California LCFS in New Hampshire. More particularly, the inquiry involves not just “the consequences of the [California LCFS] itself,” but also requires “considering how the [California LCFS] may interact with the legitimate regulatory regimes of [New Hampshire].” *Id.* In addition, this Court must consider “what effect would arise if not one, but many or every, State adopted” their own low carbon fuel schemes. *Id.*

“Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy v. Beer Institute, Inc.*, *supra*. As demonstrated below, the California LCFS is unconstitutional because it would undermine, if not largely negate, New Hampshire’s policy with respect to low carbon fuel standard schemes.

B. New Hampshire's Policy

The New Hampshire Legislature recently passed legislation, NH RSA 21-O:3, governing low carbon fuel standard schemes:

Low Carbon Fuel Standards Programs; State Participation.

I. The state of New Hampshire shall not join, implement, or participate in any state, regional, or national low carbon fuel standards program or any similar program that requires quotas, caps, or mandates on any fuels used for transportation, industrial purposes, or home heating without seeking and receiving prior legislative approval.

II. The department of environmental services may engage in regional and national discussions of such programs.

III. The department of environmental services shall report all expenses resulting from its discussions to the fiscal committee of the general court on a semi-annual basis.

RSA 21-O:3.

The report of the New Hampshire House Science, Technology and Energy Committee unequivocally states that the policy objective underlying RSA 21-O:3 is to prevent New Hampshire's participation in low carbon fuel standard schemes, such as the California LCFS:

Rep. Frank R. Holden for the Majority of Science, Technology and Energy: This bill, as amended, does three things: First, it clearly states our policy position that New Hampshire shall not join, implement, or participate in any state, regional, or national low carbon fuel standards program that requires quotas, caps, or mandates on any fuels used for transportation, industrial purposes, or home heating. We want to make it clear to the other Northeast states that we will not be dragged into a multi-state "liquid-RGGI" program. Second, it still allows the Department of Environmental

Services (DES) to represent the state in regional discussions of such topics, but requires DES to make the state's policy position clear. Third, it requires DES to report to the fiscal committee on a quarterly basis any expenses resulting from such regional discussions. Vote 8-5.

HJ No 10 (March 7, 2012.)

New Hampshire's policy with respect to low carbon fuel standard schemes can fairly be described as diametric to California's. New Hampshire's policy is not to "join, implement, or participate" in any low carbon fuel standard schemes. California's policy, in stark contrast, is to cause commercial activities occurring in other States to conform to California's views of sound environmental policy. In the California Air Resources Board's own words, producers will have to "alter production methods, sources of power, or other aspects of their business in order to . . . compete for business in California."

C. The California LCFS Is Unconstitutional Because it Would Undermine, if not Largely Negate, New Hampshire's Policy with Respect to Low Carbon Fuel Standard Schemes.

The machinations of the California LCFS are thoroughly discussed in the brief of Plaintiffs-Appellees and the aspects of the scheme relevant to New Hampshire were synopsized above. For ease of reference, the California LCFS scheme is also synopsized below.

The California LCFS scores fuels using a “lifecycle” analysis that takes into account activities that occur totally outside of California. The California LCFS, based on these scores, imposes an annual “average” maximum on the use of these fuels by California users. A user who exceeds the maximum must either purchase credits from users whose usage falls below the maximum or face substantial civil and criminal penalties. In other words, the California LCFS increases the cost for California users to use fuels that the California LCFS disfavors.

In order to remain competitive in the California market, producers of fuels disfavored by the California LCFS will have to change the manner in which they produce and transport these fuels. Indeed, in the California Air Resources Board’s own words, producers will have to “alter production methods, sources of power, or other aspects of their business in order to . . . compete for business in California.” Because California so dominates the domestic market for ethanol there can be no doubt that producers of ethanol will engage in “fuel-switching” (switching to more expensive production methods that score better under the California LCFS), in order to be able to continue to participate in the California market.

However, “fuel-switching” will increase the cost of ethanol everywhere, not just in California, because ethanol producers obviously

cannot maintain different facilities for different States. Ethanol users in New Hampshire (as well as other States that have not enacted low carbon fuel standards schemes) will have to purchase ethanol produced in a manner favored by the California LCFS. Thus, they will pay the same type of higher prices for fuel using ethanol that they would be paying if New Hampshire (and similarly situated States) had enacted or joined a low carbon fuel standards scheme such as the California LCFS.

Stated more succinctly, the “practical effect” of the California LCFS is that California will set the price of ethanol in New Hampshire. This, obviously, is the very “projection of one state regulatory regime into the jurisdiction of another State” that the federal Commerce Clause prohibits. *Healy v. Beer Institute, Inc., supra*. 491 U.S. at 336. Moreover, in “considering how the [California LCFS] may interact with the legitimate regulatory regimes of [New Hampshire],” *Healy v. Beer Institute, Inc., supra*, 491 U.S. at 336, it is beyond cavil that the California LCFS would undermine, if not largely negate, New Hampshire’s policy with respect to low carbon fuel standard schemes.

For these reasons, the California LCFS violates the Commerce Clause. *Healy v. Beer Institute, Inc., supra*, 491 U.S. at 336.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the decision of the District Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is proportionately spaced, uses Times New Roman 14 point type, and contains 2,620 words.

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, I made service of this brief by electronically filing it through the appellate CM/ECF system.

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