Carbonite Legal Conflict In California

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I. INTRODUCTION

In the context of this conference on "California in the Spotlight: Successes and Challenges in Climate Change Law," we turn to carbon regulation in the *Star Wars* galaxy.[1] In *The Empire Strikes Back*, Han Solo was frozen in carbonite by Boba Fett and transported to Jabba the Hutt,[2] which gravely affected Han's constitution.[3] Princess Leia and Luke Skywalker eventually rescued him in *Return of the Jedi*.[4] Relevant to the California carbon analysis herein, Carbonite also is a brand name for impenetrable, encrypted high security.[5] Without delving into who is assuming the role of Jabba the Hutt or which side is the "Empire" in

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1. This series of galactic battles is particularly relevant to the conference's spotlight on California's regulation of carbon—perhaps even more so now since California's George Lucas in 2013 sold the rights to the Star Wars franchise, including the patented molecule carbonite, to the Walt Disney company for $4 billion. *See* Devin Leonard, *How Disney Bought Lucasfilm—and Its Plans for 'Star Wars,'* BLOOMBERG BUSINESSWEEK, (Mar. 09, 2013), http://www.businessweek.com/articles/2013-03-07/how-disney-bought-lucasfilm-and-its-plans-for-star-wars.

2. In the Star Wars movies, carbon-freezing was the process of freezing stored tibanna gas in carbonite to preserve it while it was being transported over long distances. "*To freeze a being solid, then hang him on a wall like some trophy?*" Han Solo, Star Wars. *See Carbon-freezing Definition*, WOOKIEEPEDIA THE STAR WARS WIKI, http://starwars.wikia.com/wiki/Carbon-freezing (last visited Feb 04, 2014). "*Oh, they've encased him in carbonite. He should be quite well protected. If he survived the freezing process, that is.*" C-3PO, Star Wars. *Id.*

3. *Id.* "*Just relax for a moment. You're free of the carbonite. Shh. You have hibernation sickness." "I can't see.*" — Leia Organa and Han Solo. *Hibernation Sickness Definition*, WOOKIEPEDIA THE STAR WARS WIKI, http://starwars.wikia.com/wiki/Hibernation_sickness (last visited Feb. 04, 2014).

4. *See Han Solo Definition*, WIKIPEDIA, http://en.wikipedia.org/wiki/Han_Solo (last visited Feb. 04, 2014).

5. Carbonite has also been taken as the name of a company which provides highly-secure data centers, guarded around the clock. *See* CARBONITE, www.carbonite.com (last visited Feb. 04, 2014).

California's ongoing carbon battles, the California carbon control program has been in carbonite legal limbo concocted under:

- The Supremacy Clause of the U.S. Constitution,
- The dormant Commerce Clause of the U.S. Constitution, and
- State administrative law (including state environmental requirements).

California has prevailed in less than half of these legal attacks in this trilogy; the program has been delayed by a year[6] in legal carbonite and inhibited in other regards. More specifically, California has been challenged pursuant to the Supremacy Clause of the U.S. Constitution regarding regulation of its electric power generation facilities and liquid fuels in six significant suits. California settled in favor of challengers or lost at the trial stage in five of these six, while the sixth matter was dismissed on procedural grounds without reaching the merits of the claim, leaving the plaintiffs to re-file the complaint.[7] In addition, California was challenged as to whether its regulatory actions regarding sustainable energy fuels violate the dormant Commerce Clause of the U.S. Constitution. It lost this case at the trial level, but the decision recently was reversed 2-1 on appeal with a dissent supporting the trial court,[8] and currently is pending an appeal. California sustainable energy policy has recently undergone seven significant legal challenges under California state law; California already either settled in favor of challengers or lost three of the five of these challenges, while one was sidetracked on procedural grounds without reaching the merits of the claim.[9]

In terms of Constitutional requirements, there were numerous articles signaling California about implementing its carbon program carefully to avoid certain trip wires.[10] California was the last, by a span of four years, of

6. *See* Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th 1487, 1491 (2012).

7. *See infra* Section II.

8. *See infra* Section III.

9. *See infra* Section IV.

10. Steven Ferrey, *Goblets of Fire: Potential Constitutional Impediments to the Regulation of Global Warming*, 35 ECOLOGY L.Q. 835 (2008); Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers,* 20 DUKE ENVTL. L. & POL'Y 125 (2010); *Brian Potts, Regulating Greenhouse Gas 'Leakage': How California Can Evade the Impending Constitutional Attacks*, 25 ELECTRICITY J. 7, 43 (2006) (". . .because of these

11 states in the U.S. to regulate carbon emissions.[11] California's carbon regulation is very broad and affects more sectors of the economy, because the scope of green house gas (GHG) emissions regulated by California includes more gases than other states.[12] California regulates GHG emission from all aspects of its economy, not just power generators as done in many other states.[13] California is the twelfth largest GHG producing political region in the world,[14] making it larger in its carbon emissions than each of two-thirds of the Annex I developed nations regulated under the Kyoto Protocol.[15]

This Article thaws several legal layers of California carbonite, tranche- by-tranche, and examines the legal fabric. First, in Section II we examine federal Constitutional challenges to California's A.B. 32 and sustainable energy statutes under the Supremacy Clause. Section III analyzes litigation against California carbon control pursuant to the Commerce Clause of the Constitution. Section IV analyzes challenges to the California regulation pursuant to state law violations, distinguishing those which proceed from the California Environmental Quality Act (CEQA) and those which utilize other state administrative laws to challenge California's carbon choices and implementation. Section V examines the trilogy of litigation set forth in Sections II –IV as to next steps and implications for state policy.

II. A "BRIGHT LINE"

In contrast to state law claims,[16] Constitutional challenges raise issues of the basic power—or lack thereof—of California to take certain regulatory actions regarding energy or sustainable energy. Transgressions of basic perimeters of state Constitutional jurisdiction and authority cannot be remedied by changes in state law or a quick re-initiation under state

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two Constitutional issues, courts are likely to strike down many or all of their proposals"); Steven Ferrey, Chad Laurent and Cameron Ferrey, *FIT in the U.S.A.*, PUBLIC UTILITIES FORTNIGHTLY, June 2010; Steven Ferrey, *Shaping American Power: Federal Preemption and Technological Change*, 11 U. VA. ENVTL. L.J. 47 (1991); Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future* , VA. J.L. & TECH. 89 (2012).

11. *Goblets of Fire, supra* note 11, at 844–45 (noting ten states participating in the RGGI program prior to California's program).

12. *See* CAL. CODE OF REGS, tit. 17, § 95,802 (2012).

13. *Assembly Bill 32: Global Warming Solutions Act*, CA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD, http://www.arb.ca.gov/cc/ab32/ab32.htm.

14. ARNOLD SCHWARZENEGGER, CAL. ENERGY COMM'N & CAL. PUB. UTIL'S., PROPOSED FINAL OPINION SUMMARY ON GREENHOUSE GAS REGULATORY STRATEGIES 2 (2008).

15. *See* UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, NATIONAL GREENHOUSE GAS INVENTORY DATA FOR THE PERIOD 1990-2011 14 (2013), *available at* http://unfccc.int/resource/docs/2013/sbi/eng/19.pdf.

16. *See infra* Section IV.

administrative process. State regulatory actions regarding energy that cross Constitutional limits render the law invalid.

A. Recent California Energy Regulation

After enacting a feed-in-tariff requiring California state utilities to make wholesale power purchases from cogeneration facilities at well in excess of wholesale rates for power and in excess of federally defined "avoided costs,"[17] there was a challenge at the Federal Energy Regulatory Commission (FERC) as to whether this violated the Federal Power Act and the Supremacy Clause of the U.S. Constitution.

1. The Federal Power Act Distinctions

The Federal Power Act sections 205 and 206[18] empower FERC exclusively to regulate rates for the interstate and wholesale sale and transmission of electricity.[19] The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the reliability of the national electricity grid.[20] The U.S. Supreme Court held that Congress meant to draw a "bright line," easily ascertained and not requiring case-by-case analysis, demarcating exclusive state and federal jurisdiction.[21] When a transaction is subject to exclusive federal FERC jurisdiction and regulation, state regulation is preempted by the U.S. Constitution's Supremacy Clause, according to a long-standing and consistent line of

17. 18 C.F.R § 292.304 (2013).
18. 16 U.S.C. §§ 824(d)-824(e) (2006).
19. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006), *aff'd in part, rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Public Utility District No. 1, 128 S. Ct. 2733 (2008).
20. 16 U.S.C. §§ 797, 824(a), 824(a-2) (2006).
21. Fed. Power Comm'n v. S. Cal. Edison Co.*,* 376 U.S. 205, 215–16 (1964).

rulings by the U.S. Supreme Court:[22] "FERC has exclusive authority to set and determine the reasonableness of wholesale rates."[23]

The Federal Power Act defines "sale at wholesale" as any sale to any person for resale.[24] States, however, retain authority over retail electric sales because "FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market."[25] If states impose a power sale rate in excess of "avoided cost" by either "law or policy," the "contracts will be considered to be void *ab initio*."[26] The rates, terms, and provisions of any wholesale sale, or transmission of electricity in interstate commerce, are exclusively within federal jurisdiction and control, not state authority, pursuant to the Federal Power Act,[27] it does not make any difference whether a state acts through its legislature or its energy regulatory agency.[28]

The Supreme Court in 1986,[29] 1988,[30] 2003,[31] and 2008,[32] reaffirmed and enforced the Filed Rate Doctrine as applied through the Supremacy Clause, when states attempted to assert jurisdiction in areas subject to FERC's exclusive authority. In the most recent of these cases, the Supreme Court in 2008 reiterated that the Federal Power Act creates a

22. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission that restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state. It held this to be an impermissible violation of the dormant Commerce Clause of the U.S. Constitution, Article 1, Sec. 8, clause 3 and the Federal Power Act: "Our cases consistently have held that the commerce clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.* at 338. Mont.-Dakota Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951), Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Miss. Power & Light Co. v. Miss. *ex rel* Moore, 487 U.S. 354 (1988); Entergy La., Inc., v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47-50 (2003).

23. *Miss. Power & Light Co.*, 487 U.S. at 371 (1988)("FERC has exclusive authority to determine the reasonableness of wholesale rates."); accord Pub. Util. Dist. No. 1, Washington v. FERC, 471 F.3d 1053, 1066 (2006) *aff'd in part, rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Public Utility District No. 1, 128 S. Ct. 2733 (2008).

24. 16 U.S.C. § 824(d) (2006).

25. New York v. FERC, 535 U.S. 1, 19 (2002) (italics omitted).

26. Connecticut Light & Power Co., 70 FERC ¶¶ 61,012, 61,029–61,030 (1995).

27. New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

28. Pac. Gas & Elec. Co. et al. v. State Energy Res. Conservation and Dev. Comm'n et al., 461 U.S. 190, 204, 215 (1983).

29. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963 (1986).

30. Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354 (1988).

31. Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 51 (2003).

32. *See* Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 531–32 (2008).

"'bright line' between state and federal jurisdiction with wholesale power sales . . . falling on the federal side of the line."[33]

2. The 2010 California Power Purchase Tariff

California mandated that its utilities, and ultimately their captive ratepayers, pay above-market rates to certain generators using on-site distributed combined heat and power production facilities for their electric generation sold in a wholesale transaction to the utilities. California argued that its environmental purpose for regulation should make it exempt from preemption in setting above-market wholesale feed-in renewable tariff rates for cogeneration facilities of less than 20 Mw and that environmental costs could be considered to inflate avoided costs.[34] The affected utilities and others countered that federal law does not allow state regulation of wholesale sales to achieve state environmental goals, that federal preemption cannot be avoided based on an environmental purpose of the preempted state regulation, and states may not under the guise of environmental regulation adopt an economic regulation that requires purchase of electricity at a wholesale price outside the framework of the Federal Power Act, or if acting under PURPA, at a price that exceeds "avoided cost."[35]

FERC[36] summarily rejected all of California's arguments regarding generic environmental rationales for Constitutional violations of wholesale rates in excess of limits under federal law or as established by FERC.[37] After losing before FERC, California moved for FERC rehearing, or in the alternative a clarification of this FERC order.[38] While FERC dismissed a rehearing of whether California had authority over preempted wholesale power sale rates,[39] FERC did issue a clarification that in no way altered

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33. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1066 (2006), *aff'd in part and rev'd in part sub nom. Morgan Stanley Capital Group*, 554 U.S. at 531 (citing the separate Supreme Court opinions in *Nantahala, Southern California Edison*, and *Mississippi Power*).

34. Cal. Pub. Util. Comm'n, F.E.R.C. ¶ 61,047, ¶¶ 6–7 (2010).

35. *Id.* ¶ 52.

36. Cal. Pub. Util. Comm'n, 132 F.E.R.C. ¶ 61,047 (2010).

37. *Id*. ¶ 64.

38. S. Cal. Edison Co., 133 F.E.R.C. ¶ 61,059, ¶ 2 (2010), (Granting Clarification and Dismissing Rehearing).

39. *Id*. ¶¶ 15, 19.

its original legal finding. FERC reaffirmed that FERC has "exclusive jurisdiction."[40]

FERC reiterated that only the federal government can regulate commerce between the states and California cannot attempt to regulate commerce outside its borders.[41] There is precedent regarding California decisions fifteen years earlier finding preemption as constitutionally not allowed for certain California clean energy regulation altering wholesale renewable prices.[42] Under the Filed-Rate Doctrine, any dispute about these matters may not be arbitrated by the state, but is reserved exclusively to federal authority.[43]

The federal Court of Appeals agreed with the above decision when it previously decided a different recent California case.[44] While this decision proceeded on appeal to the U.S. Supreme Court[45] and thereafter was remanded to FERC for more clarification,[46] this element was not overturned when before the Supreme Court. The court ruled that Congress did not intend that the scope of FERC's jurisdiction over the interstate sale of electricity at wholesale be determined by a case-by-case analysis of the impact of state regulation on national interests.[47]

B. Other California Challenges

1. Federal Preemption of California Authority

In 2013, the U.S. Supreme Court held that a city in California was preempted under the Supremacy Clause by the Federal Aviation Administration Act of 1994 from imposing additional regulation on diesel truck emissions for those trucks that accessed the port.[48] While addressing state/local environmental regulation, the Supreme Court held, in striking the California law, that federal law is preemptive of state and local law. This makes for an interesting comparison to the almost

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40. Cal. Pub. Util. Comm'n, *supra* note 37, ¶ 72 n.99 (citing FPC v. Southern California Edison Co., 376 U.S. 205 (1964)).
41. *Id.*
42. Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994); *S. Cal. Edison Co*., 70 F.E.R.C. ¶ 61,215, at 61,677 (1995).
43. Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 371 (1988).
44. Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006).
45. Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008).
46. Both the *P.U.D. No. 1* and *Morgan Stanley* orders remanded the cases to FERC. *See Morgan Stanley Capital Grp.*, 554 U.S. at 555 (2008).
47. *See also* Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964).
48. *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2105 (2013).

simultaneous decision of the Ninth Circuit, in another legal challenge to A.B. 32.[49]

2. *Truck and Bus Regulation Litigation*

The California Dump Truck Owners Association ("CDTOA") filed suit in federal court in 2011 to challenge CARB's Truck and Bus Regulation, which provides for stricter emissions standards for dump trucks and other diesel-fuel vehicles.[50] The suit alleged that the regulation is unconstitutional because it is preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). In December 2012, a district court concluded that it lacked subject matter jurisdiction and dismissed the case on procedural grounds rather than reaching the merits of the claims.[51]

The district court determined that the EPA was a necessary and indispensable party to the litigation due to the EPA's interests in the State Implementation Plan of California, which requires federal approval, and at which point it becomes a matter not only of state law, but also of federal law.[52] Because the federal district court could not grant any practical relief without joining the EPA, but claims challenging the EPA's final decisions must be brought in the federal court of appeals, the district court concluded that the action could not proceed without necessary parties and should be dismissed.[53]

The CDTOA said it will file a petition for review with the Ninth Circuit challenging EPA's approval of the California State Implementation Plan (SIP) under the theory that the SIP impermissibly conflicts with other

49. *See infra* Section IV.

50. *Cal. Dump Truck Owners Ass'n v. Nichols,* 924 F. Supp. 2d 1126, 1131 (E.D. Cal. 2012) (The regulation requires particulate matter retrofits beginning in 2012, and will require replacement of older vehicles beginning in 2015. Plaintiffs complained that the $150,000 needed for a new CARB-compliant truck and the dramatically decreased value of old trucks unfairly burdened small business owners, influenced who could enter the industry, and thus conflicted with express terms of the FAAA.) *Id.* at 1134.

51. *Id.* at 1136, 1137 (According to the court, a decision favoring CDTOA would undermine the validity of EPA's approval of California's State Implementation Plan ("SIP") under the Clean Air Act because the Truck and Bus Regulation is part of California's SIP. Since exclusive jurisdiction of final Environmental Protection Agency ("EPA") decisions, such as SIP approval, lies with the court of appeals, the District Court concluded it lacked jurisdiction).

52. *Id.* at 1149–50.

53. *Id.* at 1150.

federal laws, specifically, the FAAAA and the Constitution's Commerce Clause. While its language may preempt state regulation in the form of controls on who can enter the trucking industry within a state, it does not appear to limit a state's ability to regulate emission standards.[54] CDTOA was also seeking an injunction to prevent CARB's ability to enforce the regulation, as the newly imposed regulations would impair and already struggling regional industry and economy and have further alleged devastating effects.[55] This was because the regulations essentially require all diesel-powered vehicles utilized in the industry to be replaced with new CARB-compliant vehicles.[56]

In the four California matters mentioned in the sections above, dealing with the borders of federal and state authority over energy and environmental matters, federal authority preempted state authority in all but one of these cases,[57] and the other was procedurally dismissed, without reaching the merits, because of a lack of subject matter jurisdiction. Two of the four decisions above were rendered by the U.S. Supreme Court.[58] Article VI, the Constitution's Supremacy Clause, and the Federal Power Act,[59] establish a judicially defined "bright line" prohibition of state regulation of wholesale transactions in power.[60] State regulation proceeding beyond this jurisdictional border, if challenged, is suspended in carbonite.

III. State Regulatory Discrimination Affecting Commerce

A. The Precedent

1. Historic Precedent

Even where a particular energy regulation is within state authority, it still must be applied within the constraints of the dormant Commerce

54. Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605, 1606 (codified as amended in scattered sections of 49 U.S.C.).

55. Tina Grady Barbacchia, *CA Dump Truck Owners Association Sues CARB*, Better Roads (last visited July 28, 2013) *available at* http://www.betterroads.com/ca-dump-truck-owners-association-sues-carb/.

56. *Id.*

57. *Morgan Stanley Capital Grp.*, 554 U.S. at 527; *Indep. Energy Producers Ass'n,* 36 F.3d at 853; *S. Cal. Edison Co*., 70 F.E.R.C. ¶ 61,215 (1995); *Re Cal. Public Utils. Comm'n et al.*, 133 F.E.R.C. ¶ 61,059 (2010); *Am. Trucking Ass'ns,* 133 S. Ct. at 2096; *Cal. Dump Truck Owners Ass'n*, 924 F. Supp. 2d at 1131.

58. *Morgan Stanley Capital Grp.*, 554 U.S. at 527; *Am. Trucking Ass'ns,* 133 S. Ct. at 2096.

59. 16 U.S.C. § 791a-825r (1920).

60. U.S. Const. art. VI, § 2 ("the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the contrary notwithstanding.").

Clause, so as not to unduly burden interstate commerce within the United States, pursuant to Article I of the Constitution.[61] The dormant Commerce Clause prohibits actions that are facially discriminatory or unduly burdensome against interstate commerce.[62] The Supreme Court held that statutes which establish regional barriers (not necessarily just one-state isolation) and discriminate only against some states, rather than all states, violate the Commerce Clause.[63] Facially geographically discriminatory statutes are reviewed subject to judicial "strict scrutiny," and for such a statute or regulation to be valid, the state must establish that the statute serves a compelling state interest through the least restrictive means affecting commerce to achieve that interest.[64]

The Supreme Court held that a government agency cannot discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[65] For such a statute or regulation to be upheld, the state usually must establish that there is a compelling state interest for which the statute is the least intrusive means to achieve that interest:[66] However, "even if environmental preservation were the central purpose of the pricing order, that would not be sufficient to uphold a discriminatory regulation."[67]

State statutes or regulation found to discriminate against out-of-state interests based on geography or favoring local interests, are found to be

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61. U.S. CONST. art. I, § 8, cl. 3.
62. *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (quoting Oregon Waste Systems, Inc. v. Dep't of Envt'l Quality of State of Or., 511 U.S. 93, 100 (1994)).
63. *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977).
64. There was an argument advanced that courts would not apply strict scrutiny to an RPS that bases eligibility on a generator's ability to produce benefits for a state rather than the geographic origin of the electricity. NANCY RADER & SCOTT HEMPLING, THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE app. A, at 4 (2001). However, the Supreme Court does not always accept the stated state purpose disavowing facial discrimination and strict scrutiny. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."); Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1150 (1st Cir. 1989).
65. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).
66. Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause,* 4 ENVTL. & ENERGY L. & POL'Y J. 33, 59 (2009) (outlining a history of the dormant Commerce Clause).
67. West Lynn Creamery v. Healy, 512 U.S. 186, 204 n.20 (1994).

per se invalid.[68] State and local laws are deemed unconstitutional under the dormant Commerce Clause when a law differentiates between in-state and out-of-state economic interests in a manner that benefits the former and burdens the latter.[69] If the statute is geographically even-handed facially and in effect, the courts apply the *Pike* balancing test to determine whether the state's interest justifies the incidental discriminatory effect of the regulatory mechanism, as applied.[70] Even when there is no obvious or overt facial discrimination against out-of-state or other geographically- based interests, where the effect or purpose is to discriminate, the ultimate impact is enough to make the regulation unconstitutional.[71]

Laws that attempt to regulate the conduct of out-of-state businesses also violate the Commerce Clause.[72] These laws can assume the form of added taxes and charges on out-of-state goods.[73] States are prohibited from attaching restrictions to any goods that they import from other states: "States and localities may not attach restrictions to . . . imports in order to control commerce in other States."[74]

Where a state statute provided a tax exemption for sales of two types of wine, both produced from products produced in the state, even though not needing to mention the state by name, the effect was practically state-specific discrimination, and it was found to be discriminatory, and a violation of the Dormant Commerce Clause.[75] A state cannot regulate to favor or require use of, its own in-state energy resources even for a small percentage of total use,[76] nor can it, by regulation, harbor energy-related resources originating in the state.[77] States cannot require use of in-state fuels even for the purpose of satisfying federal Clean Air Act

68. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (noting that if a statute is facially discriminatory, it is virtually *per se* invalid); Gen. Motors Corp. v. Tracy*,* 519 U.S. 278, 287 (1997).

69. *See Or. Waste Sys.*, 511 U.S. at 99.

70. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental").

71. C. & A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977).

72. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 326–27, 343 (1989) (striking requirement that the price of beer was not higher than that charged out-of-state).

73. *See, e.g.*, Chem. Waste Mgmt. Inc. v. Hunt, 504 U.S. 334, 336–37 (1992) (invalidating an Alabama law imposing an extra fee on imported hazardous waste).

74. Carbone v. Clarkstown, 511 U.S. 383, 393 (1994).

75. Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 269–70 (1984); *see also Carbone*, 511 U.S. at 393.

76. Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992). The Oklahoma statute overturned involved only a 10% allocation of the market to in-state producers. *See also* Alliance for Clean Coal v. Craig, 840 F. Supp. 554, 560 (N.D. Ill. 1993).

77. New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

requirements.[78] Income tax credits cannot be given by a state only to in-state producers of fuel additives.[79]

2. Recent Precedent

The Supreme Court consistently has required that the regulation of power by the states must not discriminate regarding the origin of power or the ultimate impact, which may discourage its flow in interstate commerce.[80] Recent federal court opinions construing state electric regulation have scrupulously followed this doctrine.[81]

Most recently, Justice Richard Posner, for the Seventh Circuit Court of Appeals, in a unanimous decision, affirmed the Federal Energy Regulatory Commission's approval of the Midwest Independent Service Operator's (MISO)[82] proportionate customer utility allocation of transmission costs for high-voltage transmission lines to move renewable wind power to populated areas.[83] For authority that supports its holding on the respective jurisdiction of state and federal government to regulate electricity, the opinion relied on a 2012 law review article authored by Professor Ferrey.[84] The decision declared unconstitutional a state that limited state renewable portfolio standards to in-state generation, as a violation of the Commerce Clause: it "trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."[85]

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78. Alliance for Clean Coal v. Miller, 44 F.3d 591, 596–97 (7th Cir. 1995).

79. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 271, 278–80 (1988).

80. New England Power Co. v. New Hampshire, 455 U.S. 331, 335, 344 (1982) (overturning as a violation of the dormant Commerce Clause an order of the state Public Utilities Commission that restrained within the state for the financial advantage of in-state ratepayers, renewable power produced within the state).

81. *See Entergy* Nuclear *Vermont* Yankee, LLC *v.* Shumlin*,* 733 F. Supp. 2d 183, (2d Cir. 2013).

82. MISO's service area extends from the Canadian border, east to Michigan and parts of Indiana, south to northern Missouri, and west to eastern areas of Montana.

83. Illinois Commerce Comm'n v. FERC, 721 F.3d 764, 773, 781 (7th Cir. June 7, 2013) MISO allocated the costs of the transmission projects among all of the utilities who draw power from the MISO grid in proportion to each utilities' overall volume of usage; FERC approved MISO's rate design, which led some states to initiate court appeal.

84. *Id.* at 776 (citing to article by Professor Steven Ferrey).

85. *Id.* Michigan actually initiated the issue of in-state electric power discrimination in its RPS program as a demonstration that out-of-state powered transmitted to it was not recognized as of the same value as in-state electricity, therefore Michigan should not pay a share of power line tariffs transmitting power from out of state that did not have equal

Justice Scalia, concurring in the majority prior opinion in *West Lynn Creamery,* submitted that, "subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court's guiding principle" for "dormant" Commerce Clause cases.[86]

B. California Challenge

1. The Trial Court Finding Unconstitutional Regulation

The California Low Carbon Fuel Standard ("LCFS") rule is to reduce the carbon content of transportation fuels sold in California by 10% by the year 2020 from the year 2010 baseline.[87] The LCFS is a "set of regulations to govern the marketing of gasoline-ethanol blends sold in California."[88] CARB's LCFS rule includes the lifecycle GHG emissions of fuel, including emissions produced during production and transportation of fuels *to* California. Corn-derived ethanol produced in the Midwest is assigned a higher carbon intensity score than chemically similar corn-derived ethanol produced anywhere in California, regardless of its transportation within California.[89]

The LCFS rule was challenged in two court cases alleging that it violated federal and state law. One was under California state law claims,[90] and another under federal Constitutional law in Rocky Mountain Farmers Union v. Goldstene. Plaintiffs alleged that CARB discriminated against interstate commerce and fuels produced out of state.

The *Rocky Mountain* litigation on the LCFS program aspects of AB 32 in federal court caused standing issues for several of the plaintiffs.[91] The court held that individual plaintiffs have not provided evidence of individual standing, but that at least one of the industry plaintiffs' members suffered an actual injury, which establishes association standing.[92] To

recognition and benefit. Instead of supporting its position, this assertion caused Judge Posner to respond to this assertion, even though it was not the tariff issue before the Court. *Id.*

86. 512 U.S. at 208 (Scalia, J., concurring).

87. California Air Resources Board, Final Regulation Order.

88. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099 (E.D. Cal. 2011); 719 F. Supp. 2d 1170, 1177 (E.D. Cal. 2010), petition for cert. filed, No. 13-1148 (Mar. 20, 2014).

89. *Id*. at 1177–78.

90. *See infra* Section IV.

91. Rocky Mountain Farmers Union v. Goldstene*,* 843 F. Supp. 2d 1071, 1099 (E.D. Cal. 2011), petition for cert. filed, No. 13-1148 (Mar. 20, 2014).

92. *Id.* at 1099–1100. The Court points to two specific affidavits that name specific plants that will be harmed by the LCFS and alleges injuries that have been suffered and therefore the Court finds the first prong satisfied. *Id.* Growth Energy has previously submitted evidence that satisfy this prong.

establish associational standing, the industry plaintiffs have to satisfy three prongs: Its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[93]

Of note, state regulation of biofuels was before the Supreme Court 25 years before. In *New Energy Co. of Indiana v. Limbach*, the Supreme Court struck as unconstitutional a state law that gave favorable tax treatment to ethanol produced in-state, and held that health impacts were only incidental benefits, while the Commerce Clause violation was not permitted.[94]

In December 2011, the Eastern District of California upheld plaintiffs' argument, invalidating certain parts of the LCFS rule and enjoining the rule's enforcement, as it "discriminates against out-of-state corn-derived ethanol while favoring in-state corn ethanol and impermissibly regulates extraterritorial conduct."[95] "Regulating out-of-state conduct" is not the only test applied under the dormant Commerce Clause; the broader definition of discrimination "simply means differential treatment of in-state and out of state economic interests that benefits the former and burdens the latter."[96] However, defendants had not met their burden to

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93. *Id.* at 1099.

94. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 271, 279 (1988).

95. 843 F. Supp. 2d at 1105. CARB attributed the difference in carbon intensity values to multiple scientific factors in addition to geographic location factors (emissions related to shipping or transportation of fuel). The court relied upon a "table" of Carbon Intensity values generated by CARB.

96. Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99. Under the *Pike* test, courts will uphold a non-facially discriminatory statute "unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

"A facially-neutral statute that imposes an incidental 'burden on interstate commerce incommensurate with the local benefits secured,' *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 108, would fail the balancing test articulated by the Supreme Court in *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970). A statute or regulation would discriminate against commerce itself when the statute

(i) shifts the costs of regulation onto other states, permitting in state lawmakers to avoid the costs of their political decisions,
(ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or
(iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods."

Entergy v. Shumlin, 733 F.3d 393 (2d Cir. 2013), quoting Am. Booksellers Found. v. Dean, 342 F.3d 96, 102 (2d Cir. 2003).

show that there is not a nondiscriminatory means to adequately serve their objective.[97] The court found that CARB had several other means to address the state's purpose without discriminating against out-of-state fuel products.[98] The court here incorporates the *Dean Milk* requirement to choose the least discriminatory or intrusive on interstate commerce mechanism to regulate, when it balances local purpose against a statute which either discriminates on its face or impermissibly controls conduct outside its borders.[99]

The court held that the LCFS "may not impose a barrier to interstate commerce based on the distance that the product must travel in interstate commerce."[100] Even though the LCFS does benefit some other out-of-state producers or burdens some in-state producers, the court finds that this does not absolve the LCFS from a finding that it discriminates on its face:[101] "[L]egislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification. *Daghlian v. DeVry Univ.*, 582 F.Supp.2d 1231, 1243 (C.D.Cal.2007)."[102]

2. *Indirect Regulation Beyond State Borders*

The *Rocky Mountain* plaintiffs alternatively asserted that strict scrutiny applies for an additional reason because under the Commerce Clause, one state's laws cannot "control conduct beyond the boundary of the state."[103] Defendants countered that the only effects the LCFS may have on out-of-state producers are indirect and therefore not directly regulating outside California's boundaries.[104] The Court found for plaintiffs, identifying the issue as "whether the practical effect of the regulation is to control

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97. *Supra* note 92, at 1093. The Court did recognize that lifecycle analysis is a widely accepted national and international approach to reduce carbon emissions, but this does not mean there is not a nondiscriminatory means to achieve this goal on a local level. *Id.* The Rocky Mountain plaintiffs offered several nondiscriminatory alternatives including a tax on fossil fuels or solely regulating tailpipe emissions. *Id.* at 1093–94.

98. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

99. *See supra* note 92, at 1093.

100. *Id.* at 1089.

101. *Id.* at 1089. For example, Brazilian sugarcane ethanol has a lower intensity score than some Californian corn ethanol and in-state producers of corn ethanol are penalized when importing corn from out-of-state. *Id.*

102. *Id.* at 1089 (quoting Daghlian v. DeVry Univ., 582 F. Supp. 2d 1231, 1243 (C.D. Cal.2007)).

103. *Id.* at 1090. The *Rocky Mountain* plaintiffs cite such examples as the LCFS regulating land use in the Midwest and deforestation in South America rather than solely regulating ethanol carbon emissions within the borders of California. *Id.* at 1090–91.

104. *Id.* at 1091.

conduct beyond the boundaries of the State."[105] "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess."[106] There are other regulatory mechanisms to do this that raise zero Constitutional concerns, although California did not elect these for this program.[107]

The trial court points out that states cannot place restrictions on imports "in order to control commerce in other states."[108] The court held that "this type of regulation 'forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another,' causing the LCFS to 'directly regulate[ ] interstate commerce.'"[109]

3. *The Pending Preemption Challenge*

Plaintiffs alternatively argued that CARB's LCFS regulations were preempted by federal environmental law,[110] when LCFS closed off California to those federally grandfathered bio-refineries which would need either to not participate in the California ethanol fuel market or

105. *Id.*

106. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986); *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (holding that one state "has no power to project its legislation into [another state] by regulating the price to be paid in that state for [products] acquired there").

107. *See* Steven Ferrey, *Solving the Multi-Million Dollar Constitutional Dilemma*, 49 WAKE FOREST L. REV. (forthcoming 2014).

108. *Supra* note 92, at 1092. The LCFS requires all commercial providers, whether within the state or outside, to detail the entire geographic pathway of the fuel during its lifetime so that CARB may assign it a carbon intensity score. *Id.*; *see also Carbone*, 511 U.S. at 383.

109. *Supra* note 92, at 1092.

110. *Id.* at 1101. The petitioners asserted that the 2007 amendment to the Clean Air Act, the Energy Independence and Security Act (EISA), precluded CARB from its state-level LCFS program. California retorted that regulating emissions is within traditional state police power to protect the health, safety, and welfare of citizens, and "[a]ir pollution prevention falls under the broad police powers of the statesFalseEnvironmental regulation traditionally has been a matter of state authority." Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 668 (9th Cir. 2003). There is a "savings clause" for states in the Clean Air Act ("nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce [any pollution standard]. . .except that such State . . . may not adopt or enforce any standard which is less stringent than the [federal] standard. . ." 42 U.S.C. § 7146).

reduce their carbon emissions, although not so required by federal law.[111] Defendants opposed the Plaintiffs' preemption motion not on their merits, but on procedural defenses based on lack of standing and lack of causation.[112]

The court held that while individual plaintiffs had not provided evidence of individual standing, but that at least one of the industry plaintiff members suffered an actual injury which establishes associational standing.[113] Because the state opposed an as-applied preemption challenge while the plaintiffs opposed a facial challenge, the court required future briefing on these different issues and the standards of review that should be used,[114] and denied "without prejudice the Rocky Mountain plaintiffs' summary judgment motion related to its preemption claim."[115]

4. The Ninth Circuit 2013 Reversal with Dissent

The Ninth Circuit Court of Appeals, in 2013, reversed the federal district court opinion on the unconstitutionality of the California LCFS.[116] The trial court decision was overturned as to the standard of review to apply to the regulation, whether the regulation was facially discriminatory and violated the Constitution's dormant Commerce Clause, and whether the California action was impermissibly extra-territorial.[117] With a dissenting judge, the 2-1 Circuit majority did not apply strict scrutiny to the California

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111. *Supra* note 92, at 1095. These federal objectives were asserted by the plaintiffs to include reducing the United States' greenhouse emissions, enhancing energy independence and protecting pre-existing investment in renewable energy. Plaintiffs argue that Congress struck a balance by not mandating pre-existing bio-refineries to reduce their lifecycle carbon emissions as outlined in the statute. *Id.* at 1094–95.

112. *Supra* note 92, at 1095. A plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that there injury will be redressed by a favorable decision. *Id.*

113. *Id.* at 1099–1100. The Court points to two specific affidavits that name specific plants that will be harmed by the LCFS and alleges injuries that have been suffered and therefore the Court finds the first prong satisfied. *Id.* Growth Energy had previously submitted evidence that satisfies this prong. *Id.* at 1100. The Court addressed whether they would have associational standing, by plaintiffs demonstrating qualification under the three following prongs: "its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 1099.

114. *Id.* at 1102–03.

115. *Id.* at 1103.

116. Rocky Mountain farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).

117. *Id.*

regulation, and instructed on remand that a balancing test be applied pursuant to *Pike v. Bruce Church, Inc*, 397 U.S. 137 (1970).[118]

The *Rocky Mountain* majority decision states that it is not unconstitutional for a state to impose a regulation whose effect is for only out-of-state commerce to disproportionately purchase additional credits and pay additional fees: "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."[119] Because goods are transported using fossil fuels, this discriminates, by its design, on the distance any goods travel in interstate commerce and imposes costs based on the point of origin of the commerce. However, there was a dissenting opinion—of four federal judges who have ruled on this specific case at the trial and appellate levels, two of the four found it unconstitutional. Including the separate legal challenge to the LCFS based on state law claims before a California superior court,[120] discussed infra.,[121] three of the five judges who have ruled on the LCFS program held it to be illegal.[122]

The dissent in the Ninth Circuit decision found there is facial discrimination.[123] Any geographic discrimination by a state, whether along state or other geographic lines, is subject to strict scrutiny by the court, as cited in the dissent: "*Or. Waste Sys., Inc.*, 511 U.S. 100 ("In making [the] geographic distinction, the [regulation] patently discriminates against interstate commerce.").[124] The burden is on California to demonstrate that no less burdensome regulatory incentives were available to control GHGs, and the dissent notes that at oral argument, California admitted that there were less burdensome alternatives on interstate commerce than "to use lifecycle analysis to reduce GHG emissions."[125]

118. *Id.* at 1078.
119. *Id.* at 1090, 1104.
120. Poet, LLC v. Cal. Air Res. Bd., Cal. Ct. App., No. F064045 (June 3, 2013); *see infra*.
121. *See infra* Section IV.A.3.
122. This includes 2 of 4 federal judges, and the state court judge.
123. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107, 1108 (9th Cir. 2013) (Murguia, J., dissenting) (relying on Supreme Court decision in Chem. Waste Mgmt, Inc. v. Hunt, 504 U.S. 334, 342 (1994) ("additional fee [on imported commerce] facially discriminates.")).
124. *Id.* at 1108.
125. *Id.* (quoting hearing transcript).

Where a state statute is drafted in a fashion which is facially neutral rather than expressly discriminatory, a court applies a strict scrutiny standard where the state law has a discriminatory effect.[126] Justice Scalia, concurring in the majority prior opinion in *West Lynn Creamery,* noted that, "subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court's guiding principle" for "dormant" Commerce Clause cases.[127] Fees imposed on out-of-state commerce have an identical effect to subsidies for in-state industry. Strict scrutiny almost always results in the state action being found unconstitutional.[128] Appeals continue in this already-reversed case.

However, notwithstanding the reversal with dissent by the Ninth Circuit in California, there are relevant developments elsewhere in the federal circuit court of appeals on state energy regulation. Two other federal circuit courts rendered decisions in mid-2013, contemporaneously with the Ninth Circuit decision on the California LCFS, adjudicating state versus federal Constitutional authority to regulate aspects of sustainable energy:

- In 2013, the 7th Circuit unanimously declared that it is a violation of the dormant Commerce Clause of the Constitutional for a state to treat renewable power originating out-of-state differently than renewable power originating in-state.[129]
- In 2013, the 2nd Circuit unanimously affirmed the trial court that it is unconstitutional for a state to regulate low-carbon power in a way which affects the ability of energy commerce to freely flow interstate across state lines, noting that the matter was not yet ripe for review on the facts presented.[130]

126. *Carbone*, 511 U.S. at 391 ("ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352–53 (1977); *see also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 361 (1992).

127. *West Lynn Creamery, Inc*., 512 U.S. at 208 (Scalia, J., concurring).

128. *See* New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 271, 279–80 (1988) (preference for in-state ethanol is discriminatory and environmental benefits are incidental and not a justification).

129. Ill. Commerce Comm'n v. FERC*,* 721 F.3d 764, 776 (7th Cir. 2013). Judge Richard Posner, in an unanimous decision relied on a 2013 law review article on Constitutional energy jurisdiction issues authored by Professor Ferrey. The Seventh Circuit declared unconstitutional state regulation limiting state renewable portfolio standards to in-state generation, as a violation of the Commerce Clause: "it trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy." *Id.*

130. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 430, 433 (2nd Cir. 2013).

These three contemporaneous 2013 federal circuit court decisions all hinge on the restrictions imposed by the Constitution's dormant Commerce Clause and Supremacy Clause on state regulation of energy, wherein the state must demonstrate use of the least discriminatory alternatives. So there is disagreement between state and federal courts as to the legality of the California LCFS, between district and appellate federal court judges, within the federal court of appeals for the Ninth Circuit, and more generically between different federal circuit courts on the application of constitutional principles to state energy regulation which favors the state and burdens interstate commerce in energy. Amid this disagreement, the California LCFS and A.B. 32 carbon regulation labor on.

IV. CALIFORNIA CARBON AND STATE LAW

Several of the new legal challenges to California sustainable energy and carbon control policies are raised pursuant to state law. We analyze these in two dimensions:

- Where the state environmental agency is accused of not following state environmental laws; and
- Where state agencies are accused of violating the administrative procedures which govern their operations.

State law challenges should be more straightforward for state government to side-step than Constitutional challenges. In any challenge, states enjoy particular deference in their exercise of jurisdiction—there is a presumption against implied preemption of state law[131]—and states receive deference in their interpretation of their own state statutes. So despite base-line expectations of success for a state agency challenged for violation of state law with regard to carbon, California has not prevailed in the majority of

131. *See* STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS, at 168 (Wolters Kluwer/Aspen, 6th ed. 2013); Chevron v. NRDC, 468 U.S. 1227 (1984); U.S. v. Mead Corp, 533 U.S. 218 (2001); Skidmore v. Swift & Co., 323 U.S. 134 (1944); City of Arlington v. FCC, ___ U.S. ___, 133 S. Ct. 1863 (May 20, 2013) ("administrative agency is entitled to deference in its . . . scope of its own regulatory authority," or "jurisdiction. "); Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation*, 68 LA. L. REV. 1105 (2008); G. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings – A Response to Professor Stavitz*, 58 FORDHAM L. REV. 173 (1989); Antonio Scalia, *Judicial Deference to Administration Interpretations of Law*, 3 DUKE L. REV. 511 (1989).

significant legal challenges to date under state law to A.B. 32, the California Global Warming Solutions Act of 2006.[132]

A. California Environmental Agency Environmental Violations

When the California carbon regulation has been challenged for violating state environmental regulations, it is typical that the claims will simultaneously include alleged violation of state administrative procedure.

1. Scoping the Regulation

This first case set back the entire implementation of A.B. 32 for approximately a year from its scheduled implementation to correct discretionary agency deficiencies. California in, 2011, lost a suit against its carbon control cap-and-trade regulation, resulting in an additional year of delay in start of the entire regulatory program.[133] The petitioners argued that CARB violated A.B. 32 by excluding whole sectors of the economy from GHG emission controls, adopting a cap-and-trade program without determining whether such potential reduction measures achieved the maximum technologically feasible and cost-effective reductions possible, failing to sufficiently evaluate the total costs and benefits to the environment, economy and public health before selecting the program Scoping Plan, and failing to consider all relevant information regarding GHG emissions reduction programs used throughout the world, as required, prior to recommending a cap-and-trade option.[134] The petitioners claimed

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132. Global Warming Solutions Act of 2006, A.B. 32, 2005-2006 Sess. (Cal.). The California Assembly passed Assembly Bill 32, signed into law by Governor Schwarzenegger on September 27, 2006, *available at* http://www.arb.ca.gov/cc/ab32/ab32.htm.

133. Ass'n of Irritated Residents v. Cal. Air Res. Bd., CGC—09-509562 (Cal. Super. Ct. 2011) (Tentative Statement of Decision: Order Granting in Part Petition for Writ of Mandate) *available at* http://www.courts.ca.gov/opinions/archive/A132165.PDF. Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th 1487 (2012), Lisa Weinzimer & Geoffrey Craig, *Delaying California CHG Cap-and-Trade Regime a Year Draws Support From Stakeholders*, ELECTRIC UTIL. WK., July 4, 2011, at 11–12. The court issued a writ of mandate enjoining CARB from any further cap-and-trade rulemaking until 2013. Ass'n of Irritated Residents, (Cal. Super. Ct. 2011) CGC–09–509562.

134. *Id.* Order Granting In Part Petition For Writ Of Mandate (9th Cir. January 2011)*, rev'd on appeal* unanimously. The plaintiffs' petition alleged specifically that the CARB scoping plan "(a) fails to achieve the maximum technologically feasible and cost-effective reductions; (b) fails to require emissions reduction measures for significant sources of emissions, namely industrial and agricultural sources; (c) does not develop any policies to avoid the pitfalls of other greenhouse gas emission trading programs and fails to address how [C]ARB will monitor and enforce reductions in a regional market; (d) fails to assess the likely impacts of proposed policy choices and regulatory programs and fails to propose policies to ensure that compliance with chosen measures will not

that CARB violated the California Environmental Quality Act[135] in the preparation of its Functional Equivalent Document.[136]

As to basic administrative process, the court held that CARB did not abuse its discretion and was not arbitrary and capricious in making its program choices.[137] However, the court did find that CARB improperly approved its Scoping Plan prior to completing the legally required environmental review.[138] The court held that the scoping plan was selected by CARB prior to the public hearing on it, rather than after, and that the CEQA review was "approved" prior to the requirement to take public comment prior to a decision. The court issued a writ of mandate enjoining CARB from any further cap-and-trade rulemaking until it complied with CEQA by analyzing alternatives to cap-and-trade and considered relevant public comments.[139] This delayed the program implementation for approximately a year until 2013.[140]

When re-promulgated a year later, in 2012, with a more robust consideration of alternatives, CARB's Climate Change Scoping Plan and choice of the previous cap-and-trade option was upheld by a state court.[141] So, this successful state law challenge did not change the ultimate result, however it required the California state agency to reinitiate that choice, and thereby employing the correct process and consume another year delaying the program.

2. Large Project CEQA Applicability

An environmental organization challenged a California statute that attempted to limit the scope of review of environmental approvals for

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disproportionately impact already overburdened communities; and (e) fails to prevent increases in criteria and toxic co-pollutant emissions." *Id.*

135. The California environmental statute is somewhat similar to the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

136. This alleged that CEQA was violated by "1) failing to adequately analyze the impacts of the measures described in the Scoping Plan, (2) failing to adequately analyze alternatives to the Scoping Plan; and (3) impermissibly approving and implementing the Scoping Plan prior to completing its environmental review." Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th at 7.

137. *Id.* Tentative Statement of Decision: Order Granting In Part Petition For Writ of Mandate (9th Cir. January 2011) *rev'd on appeal*.

138. *Id.*

139. *Id.*

140. Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th 1487 (2012).

141. *Id.*

carbon-neutral development projects which would spend at least $100 million on construction in the state.[142] The California statute would truncate review of a challenge to compliance with the California Environmental Quality Act. A.B. 900[143] allowed legal challenges filed pursuant to alleged failures under the California Environmental Quality Act to bypass trial court and go directly to a state court of appeal on a fast-track. When A.B. 900 was challenged, the court held that such limitations were unconstitutional given constitutional mandates allowing writs of mandamus to be brought in trial courts, by restricting the original jurisdiction of superior courts as conferred in the California constitution.[144] The successful plaintiff environmental group subsequently requested that California reimburse its attorney fees for having pursued California to undue an unconstitutional action.

3. Liquid Fuels

As discussed above,[145] California's low carbon fuel standard (LCFS) was "designed to reduce California's dependence on petroleum" and "to stimulate the production and use of alternative, low-carbon fuels in California."[146] The LCFS regulates transportation fuels that are "sold, supplied, or offered for sale in California" and focuses on the "carbon intensity" of fuels, a metric designed to assess "the amount of lifecycle greenhouse gas emissions, per unit of energy of fuel delivered, expressed in grams of carbon dioxide per megajoule."[147] California's LCFS requires that fuel suppliers reduce the carbon intensity of gasoline and diesel fuel by 10 percent at the conclusion of the year 2020, from 2010 levels as its baseline.[148] Ethanol is the only biofuel given an increased carbon rating based on land-use changes.[149]

In a case distinct from a similar suit on the merits by other parties under Constitutional principles in federal court,[150] the largest ethanol producer

142. A new headquarters in Cupertino for Apple Corporation and a new 750-megawatt Solar Project in Riverside County had qualified for this limitation, prior to challenge.

143. CAL. PUB. RESOURCES CODE § 17,785.

144. Planning and Conservation League v. California, No. RG 12626904 (Cal. Super. Ct. Mar. 29, 2013), *available at* http://apps.alameda.courts.ca.gov/domainweb/service?Servicename=DomainWebService&PageName=Image&ID=2&Parent=20429158&Action=28915510.

145. *See supra* Section III.B.1.

146. Cal. Air Res. Bd., California's Low Carbon Fuel Standard: Final Statement of Reasons 457 (Dec. 2009).

147. *Id.* at 5, 923.

148. *Id.* at 461.

149. *See id*. at 19, 21.

150. *See supra* Section II.

in the United States challenged the LCFS rule in California state court, alleging a failure to comply with the California Environmental Quality Act and the state Administrative Procedure Act (APA).[151] Plaintiff Poet, LLC challenged the LCFS regulations on the ground that CARB violated the APA by excluding certain emails sent by consultants not being included in the rulemaking file made available to the public.[152] The trial court found against the challengers, but subsequently was reversed on appeal,[153] holding that California had, in fact, violated CEQA and the California APA by approving the regulation before the required review under CEQA,[154] and had improperly deferred formulating required mitigation measures.[155]

However, after ruling against the state, the court refrained from enjoining the regulation under state law.[156] The California appeals court denied the state's request for rehearing.[157] The parties were directed to submit comments about remedies for these violations.[158]

B. California Administrative Procedure Challenges

There also are challenges which contest administrative aspects of the decision made by the state, without specifically implicating CEQA or other environmental laws.

1. Taxes or Fees

Approximately 350 business with approximately 590 facilities are required to obtain and surrender to the state credits in the first phase of the carbon program.[159] In the first A.B.32 compliance period, approximately 90%

151. Poet, LLC v. Cal. Air Res. Bd., 218 Cal. App. 4th 681, 707 (Aug. 8, 2013) (as modified on denial of rehearing). Poet argued that CARB failed to respond to numerous public comments, that it omitted documents from the rulemaking file, and that the LCFS will lead to increased GHG emissions, not the reductions it promises. Poet alleged that CARB's LCFS rule exceeds the scope of authority delegated to it by the legislature. *See id.* at 708.

152. *Id.* at 698. The emails spoke of the computer model that CARB used to calculate the indirect carbon emissions attributable to ethanol due to land-use changes caused by the increased demand for the crops used to produce ethanol.

153. *Id.* at 709, 766.

154. *Id.* at 726.

155. *Id.* at 738–39.

156. *Id.* at 767.

157. *Id.* at 681.

158. *Id.* at 681.

159. *Id.* at 767.

of allowances are allocated free of charge to regulated entities.[160] As a secondary source to procure allowances, there are CARB allowance auctions[161] and secondary market trades. In the California system, for auctions there are both floor prices[162] and mechanisms to restrain too high allowance prices.[163] The cost of California carbon credits advanced in auctions from an initial price of $10.09 in November 2012, to $13.62 in February 2013, to $14.00 in May 2013.[164]

As the law was scheduled to become effective in 2012, California enacted four pieces of legislation to direct the flow of the anticipated substantial auction.[165] The auction revenues were challenged by the

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160. CALIFORNIA AIR RESOURCES BOARD, APPENDIX J: ALLOWANCE ALLOCATION *available at* http://www.arb.ca.gov/regact/2010/capandtrade10/capv4appj.pdf.

161. Covered Entities may opt to trade allocated allowances by consigning allowances to CARB for sale through auction. The first two auctions were held on November 14, 2012 and February 19, 2013. Auctions are open to Covered Entities, as well as a wide variety of other stakeholders, including opt-in Covered Entities (entities in a covered sector but which emit less than 25,000 MTCO2e) and so-called "voluntary associated entities," such as brokers and derivatives clearing organizations. almost 13 million 2013 vintage allowances which cleared at a price of $13.62, and 9.6 million 2016 vintage allowances, about half of which sold at $10.71 each. CALIFORNIA AIR RESOURCES BOARD, CALIFORNIA AIR RESOURCES BOARD QUARTERLY AUCTION 2, *available at* http://www.arb.ca.gov/cc/capandtrade/auction/february_2013/auction2_feb2013_summary_results_report.pdf. The price of allowances is managed by a limited price-collar mechanism which includes an escalating auction reserve price and a price containment procedure.

162. To control the floor price, CARB sets a reserve price for each auction below which no allowances may be sold. This reserve price was $10 in the first auction in 2012, then $10.71 in 2013, and will increase annually by five percent plus the rate of inflation. CALIFORNIA AIR RESOURCES BOARD, ADDITIONAL AUCTION 1 SUMMARY STATISTICS, and Auction 2 *available at* http://www.arb.ca.gov/cc/capandtrade/auction/november_2012/auction1_summary_statistics_2012q4nov.pdf.

163. To contain prices on the upper end, CARB is setting aside a pool of allowances which will be offered if prices exceed certain thresholds. Thus, of the total allowances available, CARB will reserve one percent of the allowances from budget years 2013-2014, four percent of the allowances from 2015-2017, and seven percent of the allowances from 2018-2020 for purposes of relieving rising prices should they occur. CAL. CODE OF REGS. tit. 17, § 95870(a). This reserve will total 121.8 million MTCO2e over the length of the program. The price of reserve allowance will increase annually at five percent plus the cost of inflation. CAL. CODE OF REGS. tit. 17, § 95913(e)(3).

Allowances from future budget years are not placed in the reserve until the relevant year begins, however, all allowances currently in the reserve are available at each reserve sale. CAL. CODE OF REGS. tit. 17, § 95913(e). A percentage of the reserve allowances are made available as allowance prices reach certain thresholds. For example, in 2013 the containment reserve will offer one third of the allowances in the reserve if allowance prices reach $40, with another third to be released if the cost increases to $45, and another third at $50. CAL. CODE OF REGS. tit. 17, § 95913(e).

164. Carolyn Whetzel, *State's Greenhouse Gas Allowances Sell for $14 per Ton in Third Auction*, 44 E.R. 1556 (Issue No. 21, May 24, 2013).

165. Poet LLC v. CARB, Petition, at 13. S.B. 1018 requires that auction proceeds be deposited in a Greenhouse Gas Reduction Fund and authorizes auction funds to be lent to

California Chamber of Commerce.[166] The complaint asserts that A.B. 32 does not authorize CARB to impose fees other than those needed to cover the ordinary administrative costs of implementing a state emissions regulatory program.[167]

This is distinct from a separate, subsequent 2013 suit brought by different plaintiffs challenged the California greenhouse gas allowance auctions under its emissions cap-and-trade program as an illegal, unconstitutional tax or fee.[168] In the state law challenge, plaintiff Morning Star argues that the auction revenues cannot be characterized as valid regulatory fees because the revenues are not limited to the reasonable costs of any regulatory program, there is no relationship between the revenues generated and the benefits bidders receive, there is use of revenues for purposes unrelated to the regulatory program, and no CARB authority to generate

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the State General Fund. *See* Cal. Health & Saf. Code §§ 16428.9, 16428.9. A.B. 1463 states that the Director of Finance may allocate or otherwise use an amount of at least $500 million of the funds raised, while making commensurate reductions to General Fund expenditure authority, for the purpose of advancing the goals of A.B. 32. A.B.1463, § 15.11 Governor Brown subsequently requested such a loan of $500 million in 2013. California S.B. 535 in 2012 was enacted to require at least 25% of the funds raised from auction of carbon credits to benefit disadvantaged communities, and a least 10% used for projects in communities that are identified as disadvantaged. 2012 CAL. LEGIS. SERV. ch. 505 (S.B. 35); *see* CAL. HEALTH & SAF. CODE § 39713. Utilities are required to auction their allocated allowances, obtain the auction revenues, and then rebate them to provide financial rate relief to their customers. CAL. CODE OF REGS. tit. 17, § 95,892 (d)(3) (2012). Auction proceeds and allowance value obtained by an electrical distribution utility shall be used exclusively for the benefit of retail ratepayers of each electrical distribution utility, consistent with the goals of AB 32, and may not be used for the benefit of entities or persons other than such ratepayers.

166. Cal. Chamber of Commerce v. Cal. Air Res. Bd., Cal. Super. Ct., No. 34-2012-80001313. The issuance and oversight of offsets has been performed by private parties, including the Climate Action Reserve.

167. *Id.* at 9.

168. Morning Star Packing Co. v. CARB, Cal. Super. Ct., No. 34-2013-80001464, Joint Ruling on Submitted Matters at 11. The suit asks the court to declare that "the auction and revenue generating provisions" of the cap-and-trade regulation are unconstitutional under Proposition 13, the ballot initiative that requires a two-thirds vote on taxes, or under Proposition 26, a ballot initiative requiring a super-majority vote on some fees and levies. A.B. 32 did not pass on a two-thirds vote, nor did S.B. 1018, A.B. 1532, S.B. 535, and A.B. 1463, which stipulate how the auction revenues must be spent. Plaintiff, Morning Star Packing, participated in CARB's two prior auctions, spending $379,860 on allowances. Complaint.

billions of dollars of revenues for Califomia by selling emission allowances at auction.[169]

The California Chamber of Commerce claimed that CARB itself is projected to raise a total of $70 million dollars, which is well in excess of that necessary to regulate the conduct of the entities paying the fees.[170] It asserted that if the revenue raised from auctioning allowances under the cap-and-trade program is not a tax, but a "regulatory fee," by law it must be relative in amount to the burden placed on the payer, and must be spent on programs that are related to the specific goal of the program reducing greenhouse gas emissions, rather than for other fiscal purposes.[171]

The state court initially allowed CARB to employ an auction mechanism for allowances under A.B. 32.[172] This decision decided only that the scope of the legislative grant was broad enough to allow auction.[173] In late 2013, the state trial court decided that the revenue raised by auction of allowances under A.B.32 was not an unauthorized new tax, although a close call.[174] That decision is now on appeal.

2. *In-State Reduction or Global Application?*

Offsets are an alternative means to achieve compliance with cap-and-trade carbon regulation, allowing lower-cost reduction opportunities outside the capped state to be pursued and monetized as tradable credits applied in California. The *quid pro quo* for offsets has been the requirement for "additionality.[175] A 2012 lawsuit in California by advocates for low-income

169. Morning Star Packing Co. et al v. CARB Cal. Super. Ct., No. 34-2013-80001464, Joint Ruling on Submitted Matters (filed June 10, 2013), Petitioners and Plaintiff's Memorandum of Points and Authorities in Support of Motion for Issuance of Writ of Mandate, at 2–3.

170. Cal. Chamber of Commerce v. Cal. Air Res. Bd., *supra* note 167, at 11.

171. Isaac v. City of Los Angeles, 77 Cal. Rptr. 2d 752 (Cal. Ct. App. 2006). To constitute "regulatory fees" rather than taxes, fees must not exceed the reasonable cost of the services necessary for the activity for which the fees are charged and for carrying out the purpose of the regulation, and the fees may not be levied for unrelated purposes. *Id.*

172. Cal. Chamber of Commerce v. Cal. Air Res. Bd., Cal. Super. Ct., No. 34-2012-80001313.

173. Carolyn Whetzel, Court Upholds California's Authority to Auction Greenhouse Gas Allowances, Bloomberg Law State Environment Daily, Aug. 29, 2013. From the bench, the judge indicated that if it was decided that the California precedent of *Sinclair Paint* applied to the A.B. 32 carbon legislation, it would be an illegal tax. *Id.*

174. *See* Cal. Chamber of Commerce v. Cal. Air Res. Bd., Cal. Super. Ct., No. 34-2012-80001313, Order November 2013; Morning Star Packing Co. v. CARB, Cal. Super. Ct., No. 34-2013-80001464 (Apr. 16, 2013).

175. "Additionality" is the requirement in most carbon control statutes or regulations that only "additional" or non-business-as-usual carbon-reduction projects legally qualify to create carbon "offsets;" "which are tradable credits for compliance with these carbon policies. *See* REGIONAL GREENHOUSE GAS INITIATIVE, MODEL RULE (Jan. 5, 2007)

interests attacked the California climate control legislation on the basis that its compliance requirements would be met principally by offsets from out-of-state or even international locations, without any assurance that the offsets would be "additional" to business-as-usual policies in California.[176] Plaintiffs argued that the regulation was *ultra vires* to the administrative power of CARB, whose actions were arbitrary and capricious and not based on a solid administrative record.[177] The California trial court in 2013 rejected both arguments,[178] deferring to CARB's expertise and experience and demurring to CARB's choice of methodology.[179]

Notwithstanding that states are expected to follow state law and if challenged in state court generally receive deference to their methods and choices from the court, California's record is mixed. The above five challenges under state law either resulted in the state losing the matter, are still in the trial court in some form or are still pending on appeal. The legal carbonite has retarded the timing and clear path for this state carbon regulation.

V. GOING FORWARD

This Article started by reference to the significant effect of carbonite in the Star Wars galaxy. It is of note as we go to press, that Disney has purchased the rights to this virtual galaxy from Lucasfilm[180] and is planning to increase the original 6 Star Wars movies produced by Lucasfilm to a total of nine, with the next release scheduled soon in 2015.[181] Regardless of the prominence of carbonite freezing of galactic heros in the upcoming films, will legal fights over A.B. 32 regulation be settled before the next Star Wars movies are released? The litigation has not ebbed to date, with several

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[hereinafter RGGI MODEL RULE], *available at* http://www.rggi.org/docs/model_rule_corrected_1_5_07.pdf*;* U.S. CONG. RESEARCH SERV., RL34634, CLIMATE CHANGE AND INTERNATIONAL DEFORESTATION: LEGISLATIVE ANALYSIS, at CRS-5, tbl. 1 (2008).

176. Citizens Climate Lobby and Our Children's Earth Foundation v. California A.R.B. No. Cal. Super. Ct. CGC-12-5195944, at 12 (2012), (Statement of Decision regarding Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief).

177. *Id.*

178. The court concluded that plaintiffs had "failed to demonstrate that the legislature foreclosed the use of standardized additionality mechanisms or demonstrate that [CARB] acted arbitrarily or capriciously in promulgating additionality standards." *Id.*

179. *Id.*

180. *See* Leonard, *supra* note 2, at 1.

181. *Id.*

appeals pending and new challenges threatened.[182] There are 17,000 separate characters that Lucasfilm has catalogued in the Star Wars empire,[183] and the sheer volume of litigation over A.B. 32 and related California sustainable energy policy suggests that many of them now may have lawyers on retainer.

One can feel a disturbance in the Force. On issues fundamental to the California carbon regulatory structure itself, we still await final appellate court decisions on a California program which at times seems to involve an amount of resources that could rival what Disney expended to buy the Star Wars franchise and Lucasfilm.[184] One barrier was removed as a "close call" by a trial court in late 2013.[185] Forward progress on A.B. 32 has been measurably slowed in legal carbonite. Recalling that carbonite also refers to a brand which supplies encrypted high security,[186] after four years of litigation, things do not seem yet secure.

The recent Ninth Circuit reversal on the legality of A.B. 32 does not appear to have settled Constitutional questions. The 7th Circuit articulated a different posture on state discretion to regulate energy without violating the dormant Commerce Clause[187] and *certiorari* has been requested of the Supreme Court on this.[188] Of note, the U.S. Supreme Court in 2013 interpreted the Constitution to bar a California port's discretion to regulate the air impacts of fuel emissions. However, even should the *Rocky Mountain* decision remain the final *word* on the legal viability of the current LCFS, it may not be the final *act.* Four states—Alabama, Texas, Nebraska and North Dakota—indicated they eventually were planning to bring suit against California claiming that California's Renewable Portfolio Standard (RPS) sustainable energy incentive program as unduly burdening interstate commerce by not fully recognizing renewable power created by out-of-state power generation units.[189]

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182. *See* Michael N. Mills, *Will California's 33% Renewable Portfolio Standard Survive a Commerce Clause Challenge by Other States? A recently filed Colorado Case May Provide the Answer* 6 (May 2011), http://www.stoel.com/Files/TheOverride_Caseof theMonth_may2011.pdf.

183. LEONARD, *supra* note 2, at 1.

184. *Id.* (The price for acquisition was $4 billion).

185. *See Cal. Chamber of Commerce v. Cal. Air Res. Bd.*, Cal. Super. Ct., No. 34-2012-80001313 (Nov. 13 2012); Morning Star Packing Co. v. CARB, Cal. Super. Ct., No. 34-2013-80001464 (Apr. 16, 2013).

186. CARBONITE, *supra* note 6.

187. Illinois Commerce Commission, et al. v. Federal Regulatory Commission, 721 F.3d 764 (7th Cir. June 7, 2013).

188. *Id.*, *petition for cert. filed* (Oct. 07, 2013).

189. Michael N. Mills, *Will California's 33% Renewable Portfolio Standard Survive a Commerce Clause Challenge by Other States? A recently filed Colorado Case May Provide the Answer*, at 6, *available at* http://www.stoel.com/Files/TheOverride_CaseoftheMonth _may2011.pdf.

California sustainable energy and carbon control policy has been a particular recent target of legal challenges. This is, in part, due to California having one of the most assertive renewable energy[190] and carbon control programs among the states.[191] Challenged under the Constitution's Supremacy Clause in 6 significant recent suits, California settled in favor of challengers or lost 5 of these 6; while the 6th matter was dismissed on procedural grounds without reaching the merits of the claim, leaving plaintiffs discretion to re-file the complaint.[192] Challenging California's low carbon fuel regulation pursuant to the dormant Commerce Clause was successful at the federal trial court level and was reversed by a split panel on appeal[193] A feed-in tariff to promote sale of renewable power has separately been declared not legally permissible for California by a federal court and FERC.[194] Prior FERC rulings on this exact issue held that any

190. The California RPS of 33% renewable power by 2020 is one of the most assertive in the U.S. *See id.*

191. A.B. 32. California is one of only ten states in the U.S. regulating carbon emissions. There are only two operating carbon control systems in the U.S., one in California, and one in the nine Eastern RGGI states. The RGGI states only regulate CO_2 emissions from power plants of greater than 25 MW of capacity of generation, not including imported power. California, by contrast, regulates 7 greenhouse gas chemicals (Carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), perfluocarbons (PFCs), nitrogen trifluoride (NF_3), as well as other fluorinated greenhouse gases), whether emitted by power generation facilities or other sources of emissions, including imported power. California allows creation of carbon offsets from 4 sources (U.S. forest and urban forest project resources, livestock projects, ozone depleting substances projects, urban forest projects), while RGGi allows the creation of carbon offsets from 5 options (landfill methane capture and destruction, reduction in emissions of sulfur hexafluoride (SF6) in the electric power sector, sequestration of carbon due to afforestation. reduction or avoidance of CO_2 emissions from natural gas, oil, or propane end-use combustion due to end-use energy efficiency in the building sector, and avoided methane emissions from agricultural manure management operations). When compared, California is much more assertive than the RGGi states (and all other states) in both the number of industries and the number of chemicals that it regulates. *See* Center for Climate and Energy Solutions, *California Cap and Trade*, *available at* http://www.c2es.org/us-states-regions/key-legislation/california-cap-trade.

192. *See supra* Section II.

193. *See supra* Section III.

194. Independent Energy Producers Association v. California Public Utilities Commission, 36 F.3d 848 (9th Cir. 1994); S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995); *In re* California Public Utilities Commission, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, F.E.R.C. Dockets Nos. EL10-64-000 & EL10-66-000 (July 15, 2010). *See also* Steven Ferrey, *Renewable Subsidies in the Age of Deregulation*, PUB. UTIL. FORT. 22 Dec. 1997; Steven Ferrey, *Renewable Orphans: Adopting Legal Renewable Standards at the State Level*, ELECTRICITY J. 52

such mandated wholesale power purchase "contracts will be considered to be void *ab initio*."[195]

The Ninth Circuit *Rocky Mountain* majority's decision would stand somewhat apart from core holdings of Supreme Court interpretation of the dormant Commerce Clause.[196] According to this Ninth Circuit majority decision, a state environmental purpose to reduce GHGs emitted *in the state* is enough to impose regulation and costs on interstate commerce entering the state.[197] Notwithstanding any articulated purpose, the Supreme Court has expressly held that state environmental purpose does not justify discrimination that otherwise infringes on interstate commerce.[198]

How the states handle the legal carbonite inhibiting their regulation and incentives for renewable energy and carbon control is important, given the void of initiatives in recent federal regulation.[199] California is a key state because of both the broad scope of its carbon regulation and the large size of its market share. California and other states can avoid both Constitutional and state law legal challenges to their sustainable energy policies by using proven mechanisms.[200] However, few states have done

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(2006); Steven Ferrey, *Carbon and the Constitution: State GHG Policies Confront Federal Roadblocks*, PUB. UTIL. FORT. 40, Apr. 1, 2009.

195. Connecticut Light & Power Co., ¶ 61,012, 70 F.E.R.C. 61,029–30 (Jan. 11, 1995).

196. See Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (requirement to choose the least discriminatory or intrusive on interstate commerce means to regulate, when it balances local purpose against a statute which either discriminates on its face or impermissibly controls conduct outside its borders); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (state cannot discriminate against articles of commerce originating in other states unless there is a "reason, apart from their *origin*, to treat them differently."); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) (invalidating the provisions of Michigan's Solid Waste Management Act which restricted landfill's ability to accept out-of-state waste); Oregon Waste Systems, Inc. v. Oregon Department of Environmental Quality, 511 U.S. 93 (1994) (invalidating Oregon's increased per-ton surcharge on waste generated in other states); Chem. Waste Mgmt, Inc. v. Hunt, 504 U.S. 334 (1994) (invalidating Alabama's imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ("ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333 (1977); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (invalidating equal fee imposed on in-state and out-of-state commerce, the distribution of which favored in-state commerce).

197. Rocky Mountain farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

198. *See West Lynn Creamery,* 512 U.S. at 201; *Carbone*, 511 U.S. at 394.

199. In the past decade, the only significant federal energy legislation, other than tax incentives, was the Energy Policy Act of 2005, 42 U.S.C. 15,801, a relatively modest statute, and the Energy Independence & Security Act of 2007, 42 U.S.C. 17,071, an even more modest law.

200. *See supra* note 107.

so.[201] The legal status of discretionary state carbon control techniques, measures, and regulations, is far from finally resolved. Stay tuned for the next episode in this sequel.

201. *Id.*