Rocky Mountain Farmers Union et al v. Corey, et al

2017 | Cited 0 times | E.D. California | June 16, 2017

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

ROCKY MOUNTAIN FARMERS UNION, et al., Plaintiffs, v. RICHARD W. COREY, in his official capacity as Executive Officer of the California Air Resources Board, et al., Defendants.

Lead Case: 1:09-cv-2234-LJO-BAM Consolidated with member case: 1:10-cv-163-LJO-BAM 1 MEMORANDUM DECISION AND TO DISMISS (Docs. 378, 380)

I. INTRODUCTION 2

3

challenge the , Cal. Code Regs. Tit. 17, §§ 75480-90. Defendants 4 , Doc. 374. Doc. 378. Defendants move for judgment on the pleadings on the AFPM , Doc. 373, concerning the now-repealed version of the LCFS, and move to dismiss the remaining claims against the currently operative LCFS. Doc. 380-1.

1 Rocky Mountain Farmers Union v. Corey, 1:09 cv 2234 LJO BAM. 2 The RMFU Plaintiffs are Rocky Mountain Farmers Union, Redwood County Minnesota Corn and Soybeans Growers; Penny Newman Grain, Inc.; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Rex Nederend; and Growth Energy. 3 The AFPM Plaintiffs are American Fuels & Petrochemical Manufacturers; American Trucking Associations; and the Consumer Energy Alliance. 4 Defendants are various official capacity defendants, who are joined by various environmental groups as intervenors. For - The Court took the matter under submission on the papers pursuant to Local Rule 230(g). Doc.

motions.

II. FACTUAL AND PROCEDURAL BACKGROUND years-long and complex challenge to the LCFS. 5

After the Ninth Circuit remanded the case to this Court in 2014, see Rocky Mountain Farmers Union v. Corey, 730 F.3d RMFU motion to amend the complaint. Rocky Mountain Farmers Union v. Goldstene, No. 1:09-cv-2234-LJO- RMFU Amendment

claims. , No. 1:09-cv-2234-LJO-BAM, 2015 WL

second motion to amend their pleadings. See Rocky Mountain Farmers Union v. Corey, No. 1:09-cv-2234-LJO- RMFU Amendment II The Court incorporates by reference the summary of the extensive procedural history of this consolidated action contained in RMFU Amendment, 2014 WL 7004725, at *1-8, and the MTD Order, 2015 WL 5096279, at *1-5. Only an abbreviated recitation of the complex factual and procedural background follows; the Court discusses the relevant aspects of the facts and prior proceedings in more detail in its analysis below.

The C promulgated and adopted the LCFS 6

in 2009 and 2010. TAC ¶ 37. 5

Briefly summarized and oversimplified, the LCFS is a California state-law scheme that regulates the amount of carbon contained in transportation fuels consumed in California. See generally Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1080 (9th Cir. 2 RMFU 6 RMFU, all of which the Court incorporates by reference. See MTD Order, at *14-19; Rocky Mountain Farmers Union v. Goldstene, 843 F.2d 1071, 1079-1082 (E.D. Cal. 2011); RMFU, 730 F.3d at 1080-1091. 2012 SAC ¶ 75. CARB repealed the LCFS in 2015 after the California Court of Appeal held that CARB made errors when adopting it. See POET, LLC v. Cal. Air. Res. Bd., 218 Cal. App. 4th 681 (2013); see also Doc. 379-1, Ex. A. CARB adopted a new LCFS in 2015 , which went into effect in 2016, and remains the operative version of the regulation. See Doc. 379-1, Ex. A, at 1-6.

The AFPM Plaintiffs now bring claims against all three versions of the LCFS; the RMFU Plaintiffs bring claims against only the 2015 LCFS. As explained in more detail below, the LCFS regulates both ethanol and crude oil. The RMFU Plaintiffs challenge the LC whereas the AFPM Plaintiffs challenge its crude oil provisions.

AC contains four causes of action. TAC at 18-22. Claims one and two allege, respectively, that the LCFS is preempted by federal law on its face and as-applied to Plaintiff Growth Energy. 7

TAC at 15-18. Specifically, the RMFU Plaintiffs assert the federal Renewable Fuel 42 U.S.C. § 7545(o)(2)(A)(i), 8

of the Energy Independence and Security Act Id. ¶¶ 66-68. Claims three and four allege, respectively, that the LCFS on its face and as applied to Growth Energy. Id. at 18-22.

The AFPM Plaintiffs assert three causes of action in their SAC. The first and second allege that

see also id. ¶¶ 93, 101. The third against transportation fuels produced in other States and other countries Id. ¶ 111. The AFPM

7 In RMFU Amendment II, the Court found that, of the RMFU Plaintiffs, only Growth Energy has standing to assert an as- applied challenge to the LCFS because the Court previously found that it was the only RMFU Plaintiff that provided evidence that the LCFS had caused it injury. See 2016 WL 3277018, at *4-5. 8 42 U.S.C. § 7545(o) of the EISA amended § 211(o) of the Clean Air Act, which contains the federal Renewable Fuel . See RMFU, 730 F.3d at 1077; , 134 F. Supp. 3d 1270, 1276 inherent in the Original LCFS, 2012 LCFS, and 2015 LCFS is designed to provide an unfair competitive advantage to local economic interests and to promote the rs in Id. ¶¶ 113-14. With respect to their Commerce Clause claims, both sets of Plaintiffs assert the ethanol provisions of the LCFS discriminate on their face, and in their purpose and effect. The RMFU Plaintiffs further assert the ethanol provisions fail under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). 9 Thus, between both sets of Plaintiffs, they assert the following:

(1) The LCFS is preempted by federal law, namely, the RFS in the EISA, on its face and as applied

to Growth Energy; (2) The LCFS, in all three of its forms, is an impermissible extraterritorial regulation that violates

the Commerce Clause; and (3) The LCFS, in all three of its forms, violates the Commerce Clause

(a) on its face, (b) in purpose and effect, and (c) under Pike. Defendants (1) move for judgment on the pleadings under Federal Rule 10

of Civil Procedure 12(c) (2) move to dismiss the remaining claims under Rule 12(b)(6) as barred by the law of the case, or for failure to state a claim (or both). Plaintiffs oppose in all respects.

9 The Pike balancing test provides that wher -handedly . . . effectuate[s] a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to th 10

III. STANDARDS OF DECISION A. Rule 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. A 12(b)(6) dismissal is proper where there is ence of sufficient facts alleged under a cognizable Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the plaintiff must, in accordance with Rule 8, allege Bell Atl. Corp. v. Twombly, 550 U.S. that allows the Ashcroft v. Iqbal but it asks for more than a Id. (quoting Twombly

Twombly, 550 U.S. at 555 (internal citations omitted). are not entitle Iqbal

allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself eff Starr v. Baca, 652 F.3d 1202, 1216 (9th Twombly, 550 U.S. at 562.

B. Rule 12(c)

the pleadings are closed pleadings should be granted where it appears the moving party is entitled to judgment as a matter of

Geraci v. Homestreet Bank appropriate when, even if all allegations in the complaint are true, the moving party is entitled to Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 670 (9th Cir.1993).

3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1356 (9th Cir.1990), cert. denied, 500 U.S. 917 (1991). A 12 on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed Herbert Abstract Co. v. Touchstone Props., Ltd., 914 F.2d 74, 76 (5th Cir. 1990) (per curiam).

Hughes v. Tobacco Inst., Inc. Austad v. United States, 386 F.2d 147, 149 (9th Cir.1967). Thus, a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). Although Rule 12(c) does not mention leave to amend, courts have discretion to grant a Rule 12(c) motion with leave to amend. See Carmen v. San Francisco Unified Sch. Dist., 982 F.Supp. 1396, 1401 (N.D.Cal. 1997).

Like a Rule 12(b)(6) motion to dismiss, a Rule 12(c) motion challenges the legal sufficiency of n a federal court reviews the sufficiency of a complaint, before the Balistreri, 901 F.2d at 699 gnizable legal Id. allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the comp Twombly, 550 U.S. at 545

more than labels and conclusions, and a formulaic recitations of the elements of a cause of action will Id. at 1964.

IV. DISCUSSION A.

The AFPM Plaintiffs candidly acknowledge that a number of their claims are foreclosed by RMFU them or for judgment on the pleadings on them. See Doc. 383 at 5-6. Those claims are:

All claims against the Original and 2012 LCFS, except for the claims that those

regulations discriminate against interstate commerce in purpose and effect; The Original, 2012, and

2015 LCFS are impermissible extraterritorial regulations; The crude oil provisions of the Original, 2012, and 2015 LCFS discriminate against

interstate commerce; and The ethanol provisions of the Original, 2012, and 2015 LCFS facially discriminate

against interstate commerce. Doc. 383 at 5-6, 13-14. Although the RMFU Plaintiffs assert the same uncontested claims as the AFPM Plaintiffs do, they do not oppose De claims. See Doc. 384 at 24-28; see also Doc. 387 at 9. Because the parties agree that RMFU decisions foreclose these claims, the Court WITHOUT LEAVE TO AMEND. 11

11 In evaluating whether the ethanol provisions are discriminatory, the Court has determined it is necessary to add an additional layer pertaining to the volume of fuels produced to its analytical approach. That layer was not applied in the MTD Order to the crude oil provision, at least not explicitly, particularly because the AFPM Plaintiffs have never raised it.

provisions of the Original, 2012, and 2015 LCFS discriminate against interstate commerce in purpose and effect. See Doc. 383 at 6. The RMFU Plaintiffs assert the same claims, and additionally assert that all versions of the LCFS are preempted by federal law and the ethanol provisions of all versions of the LCFS fail under Pike. B. Whether the AFPM claims against the Original and 2012 LCFS are moot

Defendants move for judgment on the pleadings on AFPM LCFS and 2012 LCFS on the ground that they are moot because both versions have been repealed and replaced. Doc. 380-1 at 15. Specifically, Defendants argue those claims are moot because the Court cannot grant any prospective relief, and the Eleventh Amendment bars any retrospective relief. Id. at 16.

In their opposition, the AFPM Plaintiffs assert the Ninth Circuit held in RMFU that their

Original LCFS and the 2012 LCFS continue to carry forward and may still be used by regulated parties to comply with the RMFU, 730 F.3d at 1097 n.12). Thus, according to the AFPM Plaintiffs, the Court can grant prospective relief because how credits were calculated under prior versions of the LCFS affects how they will be calculated in the future, and the nondiscriminatory basis that comports with the Constitution. Id. at 16.

Defendants argue they purportedly seek, as stated in their opposition, i.e., that the Court order a recalculation of the credits assigned under the Original and 2012 LCFS. Doc. 385 at 3. 12

Defendants assert that, even if the SAC

Nonetheless, as discussed in greater detail below, the Court does not believe applying a volumetric

approach would have changed the outcome of the MTD Order. 12 Although Defendants correctly point out that the SAC does not explicitly contemplate the relief the AFPM Plaintiffs purportedly seek in their opposition, see SAC at 20, Defendants do not argue that this precludes the AFPM Plaintiffs from seeking that relief.

AFPM alleges, 2) is barred by the Eleventh Amendment, 3) would be inherently inequitable, and 4) is the kind of indiv Id. at 4.

1. Relief AFPM Plaintiffs seek In the SAC, the AFPM Plaintiffs seek the following relief: A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that the LCFS, as originally enacted and as amended in 2012 and 2015, violates the United States Constitution and is unenforceable; B. A preliminary and permanent injunction enjoining the Defendants from implementing or enforcing the LCFS; t to 42 U.S.C. § 1988; and D. Such other and further relief as the Court deems just and proper.

SAC at 20. The SAC thus does not explicitly request that the Court order a recalculation of credits assigned under the Original and 2012 LCFS, should the Court find them unconstitutional. Though

The Court will therefore assume without deciding that the AFPM Plaintiffs seek in the SAC the credits recalculation remedy that they articulate in their opposition. In any event, as discussed below, the AFPM Plaintiffs do not have standing to seek this remedy and, even if they did, it is barred by the Eleventh Amendment.

2. Standing Defendants assert for the first time in their reply that the AFPM Plaintiffs lack standing. 13 The thrust of their one-paragraph argument -after credit recalculation would require an assessment of the credits each of their thousands of members bought and sold, which is not permissible when a plaintiff, like the AFPM Plaintiffs, only has associational

13 Generally, courts do not address arguments raised for the first time in a reply brief. See, e.g., United States v. Bohn, 956 Plaintiffs lack standing is properly raised at any time. See Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434-435 (2011). standing. 14

Doc. 385 at 8. In support, Defendants rely exclusively on Warth v. Seldin, 422 U.S. 490, 511 (1975). Id.

In Warth, the Supreme Court explained that an entity has associational standing if, among other

each injured party indispensable to proper resolution of the cau Id. 15

Warth been understood to preclude associational standing when an organization seeks damages on behalf of its

United Food & Comm. Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 554 (1996)

(declining to apply to a union the prudential limitation barring an organization from seeking damages on behalf of its members, but only because Congress specifically permitted unions to do so).

Although the AFPM Plaintiffs state they do not seek damages, Doc. 383 at 16, their request for a recalculation of credits generated under the Original and 2012 LCFS is effectively a request for damages, or so analogous to a request for damages to render it indistinguishable from the circumstances underpinning Warth, 422 U.S. at 515-16 (nor any assignment of the damages claims of its members. . . . [m]oreover . . . the damages claims are The AFPM Plaintiffs allege the LCFS is unconstitutionally discriminatory, in part because it requires regulated entities who purchase

intensities or to purc see also id. 14

There is no dispute that the AFPM Plaintiffs have only associational standing. See SAC ¶¶ 8-12. 15 An association has stan their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested r Hunt v. Wash. State Apple element. penaliz[es] the use of fuels whose carbon- plac[es] such fuels at a substantial disadvantage in the California market: parties using such fuels must -1 at 53. The AFPM higher carbon-intensity scores Id. at 73. Because of this discriminatory effect, which leads to a price disparity between lower- and higher- carbon-intensity ethan Id. at 39.

The AFPM Plaintiffs therefore contend the purported discriminatory effects of the LCFS caused their members to spend more money on purchasing credits to comply with the LCFS. If the Court were to order a recalculation of credits generated under the Original and 2012 LCFS, as they request, it would require a number of individualized determinations, including (1) who bought which credits; (2) whether the alleged discriminatory effects of the LCFS caused the party to spend more on those credits; and (3) if so, how that should be remedied, i.e., how much the parties are owed due to their overpayment in other words, what their damages are. These necessary individualized determinations thus render the AFPM Plaintiffs without associational standing to seek the credit recalculations that they request because it would be impossible to make the determinations without the partic members. See Warth, 422 U.S. at 515-16; Brown Group, 517 U.S. at 554.

3. Eleventh Amendment

credit recalculations would require determining how much their members overpaid for credits and ordering corresponding relief leads the Court to conclude that the AFPM Plaintiffs essentially seek retrospective damages that are barred by the Eleventh Amendment. As explained above, the AFPM Plaintiffs claim the purported discriminatory effects of the Original and 2012 LCFS required them to purchase more credits (i.e., spend more money) than would have been required had that alleged discrimination not existed. They now ask that the credits all of which were bought and sold by them and other parties be recalculated and redistributed in a different manner. In effect, the AFPM Plaintiffs request a reshuffling of state funds.

Papasan v. Allain, 478 U.S. 265, 278 (1986). This includes cases for declaratory and injunctive relief satory, backward-looking remedy, Porter v. Jones, 319 F.3d 483, 491 n.7 (9th Cir. l Papasan hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the

Eleventh Amendment even though accompanie Id. (emphasis added) (citations omitted).

Accordingly, to the extent the AFPM Plaintiffs seek compensatory relief (whether credit calculations or otherwise) that is based exclusively on Defendants federal law in the past, the Eleventh Amendment precludes that relief. But, to the extent they seek relief Eleventh Amendment does not preclude that relief. See id. The Court therefore GRANTS IN PART and

2012 LCFS on the ground they are barred by the Eleventh Amendment.

As noted above, however, the Court finds it is a stretch, at best, to read the SAC as seeking the credit recalculation relief the AFPM Plaintiffs purportedly seek. More importantly, the Court finds that the Court cannot legally or practically order the recalculations. The AFPM Plaintiffs have provided no authority that remotely suggests that relief is permissible, and the Court cannot locate any. The Court

recalculation relief, the Court is unable to grant it because it would be impossible and inequitable to the parties who have already bought and sold LCFS credits to recalculate and reassign the credits. As Defendants point out, millions of credits worth tens of millions of dollars have already been bought by numerous parties, most of which are not parties to this case. See Doc. 385 at 6-7. The Court therefore

the extent they seek a recalculation of already assigned credits because doing so would be inequitable and impractical.

4. Mootness

and 2012 LCFS are moot. A footnote in the RMFU is directly on point and controls here. The court held:

Although the 2011 Provisions have been amended, this does not render the challenge to Decker v. Nw. Envtl. Def. Ctr., U.S. , 133 S.Ct. 1326, 1335 (2013) (quotation marks and citation omitted). Here, the 2011 Provisions applied to crude oil delivered through December 31, 2011, so one year of Fuel Standard credits were allocated based on the distinction between emerging and existing sources and between HCICOs and non-HCICOs. Advisory 13 01 altered the treatment of Potential HCICOs to conform to the amended provisions, but sellers of verified HCICOs could have reported individual carbon intensity values during 2011. Credits awarded based on those values will carry forward to subsequent years and may be used by a regulated party to comply with the Fuel Standard mandates. Cal. Code Regs. tit. 17, §§ 95484(b), (c)(4), 95485(c). The propriety of the scheme under which those

credits were distributed remains a live controversy. RMFU, 730 F.3d at 1097 n.12.

Plaintiffs had challenged the crude oil provisions of the Original LCFS (what the Ninth Circuit in this Court and, by the time RMFU issued, they had been amended by the 2012 LCFS. See id. The Ninth Circuit observed that the means by which credits were calculated under the Original LCFS had an effect on how they were calculated under the then-current version of the regulation, the 2012 LCFS. Id. T Original LCFS was not moot because it had a live, ongoing effect then, which would continue into the

future. See id. That holding is directly applicable here. The AFPM Plaintiffs allege, consistent with RMFU, that the Original and 2012 LCFS affect how credits are calculated under the 2015 LCFS. Their challenge to Id. Regardless of this conclusion, as finding that either the Original or 2012 LCFS (or both) violated federal law is limited to the present and

future effects of the Original and 2012 LCFS, and declaratory and injunctive relief against the regulations credits recalculation, is barred by the Eleventh Amendment. See Papasan, 478 U.S. at 278 (citations

omitted); see also Taylor v. Westly, 402 F.3d 924, 929- shields state governments . . . from declaratory judgments against the state governments that would ed). on the ground they are moot is GRANTED IN PART and DENIED IN PART.

C. Preemption

The RMFU Plaintiffs contend the LCFS 16

is preempted under the Supremacy Clause because it conflicts with the EISA. See TAC ¶¶ 1, 65, 81; Doc. 384 at 16. Specifically, RMFU Plaintiffs allege the LCFS conflicts with: (1) the exemption from the RFS for certain fuel-producing facilities as provided in 42 U.S.C. § 7545(o)(2)(A)(i); (2)

ercent reductions in lifecycle GHG requirements, -75.

1. Conflict preemption principles

16 indicated.

Atay v. Cty. of Maui, 842 F.3d 688, 699 (9th Cir. 2016) (quoting U.S. Const., Art. VI, cl. 2). pre- English v. Gen. Elec. Co., 496 U.S. 72, 78-

Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). 17

matter of judgment, to be informed by examining the Trade Council, 530 U.S. 363, 373 (2000).

[W]here a statute regulates a field traditionally occupied by states, such as health, safety, and Atay, 842 F.3d at 700 (quoting Wyeth v. Levine, 555 U.S. 565 n.3 (2009)). id. (quoting Wyeth, 555 U.S. at 565), fed , 505 U.S. 88, 110 (1992).

The California legislature enacted the LCFS to regulate air quality in an attempt to improve, among other things, the well-being . See RMFU, 730 F.3d at 1079 (citing Cal. Health & Safety Code § 38501 (a)). ea of traditional state control. , 331 F.3d 665, 673 (9th Cir. 2003); Exxon Mobil Corp. v. U.S. E.P.A., 217 F.3d 1246, 1 the broad police powers of the states, which include the power to protect the health of citizens in the . Federal courts are

17 The RMFU Plaintiffs do not allege it is impossible for them to comply with both the RFS and LCFS.

federal law preempts state laws regulating those areas. Id. To succeed on their preemption claims, then, the the LCFS when enacting the EISA, or that they actually conflict with one another. Id. (quoting Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 885 (2000)).

2. Analysis

a. finding The Court previously found that RMFU Plaintiffs stated a conflict preemption claim. See Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170, 1195 (E.D. Cal. 2010). RMFU Plaintiffs correctly argue that holding remains the law of the case the preemption claims in the TAC should be denied. See Doc. 384 at 17. Defendants urge the Court to

reconsider its prior holding. See Doc. 387 at 7.

The law of the case doctrine generally precludes a court f United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). from the law of the United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). For the reasons discussed below, the Court concludes its prior holding that Plaintiffs have stated a conflict preemption claim was erroneous, and therefore declines to find it controlling here.

b. The geographic regulations do not preempt the LCFS The geographic regulations provide in regulations promulgated under [§ 7545(o)(2)(A)(i)] . . . shall not . . . restrict geographic areas in which

and any regulations it promulgates. , Civil No. 15 2045 Am. Fuel & , 134 F. Supp. 3d 1270, 1288 (D. Or. 2015) also not an EPA regulation, such that the anti-geographic restriction provision embodied in If Congress intended to limit a s ability to impose . . . geographical restr Stine, 2016 WL 5660420, at *10. RMFU Plaintiffs do not address the issue in their opposition. RMFU Plaintiffs therefore do not provide and the Court cannot find anything that suggests the geographic restrictions preempt the

LCFS.

c. Section 7545(o) does not conflict with and thus does not preempt the LCFS The conflict with the LCFS. In their opposition, the RMFU Plaintiffs do not address their argument

reduction requirements, as provided in §§ 7545(o)(4) and 7545(o)(7), respectively. As discussed in more

detail below, these provisions, like those contained in § 7545(o)(2)(A) (which is the exclusive focus of

Congress enacted the RFS 18

to increase the quantity of renewable fuels Am. Petro. Inst. v. Cooper [the EPA] to adopt regulations to mandate supplies such as gasoline importers and refiners . . . to offer f Id. See

enter the market place, and assigning volume-based quotes to obligated entities in order to meet the Cooper In 2007, Congress amended [the RFS] both to significantly increase use of renewable fuel and to ensure this increase would reduce greenhouse-gas

18 , , 630 F.3d 145, 146-150 (D.C. Cir. 2010). emissions and the , 843 F.3d 1010, 1013-14 (D.C. Cir. 2016) (quoting 75 Fed. Reg. 14,670, 14,799).

Section 7545(o)(2)(A)(i) provides in relevant part: Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions. The RMFU Plaintiffs interpret this provision as Congress ensuring that producers of ethanol i.e. 2007 enactment) are exempt from GHG emissions controls. See Doc. 384 at 18-19. RMFU Plaintiffs

contend that Congress intended this, in part, to guarantee a market for ethanol produced at See TAC ¶¶ 68-70; Doc. 384 at 18-29. According to the RMFU Plaintiffs, the -term effect . . . [is] reducing or altogether ending the California market for corn ethanol from grandfathered plants that do not reduce carbon Id. at 20; see also id. at 18. Put bluntly, the RMFU Plaintiffs provide virtually no authority to support their position, whereas there is substantial authority that demonstrates the RFS not only does not preempt the LCFS, but that Congress intended to allow state legislation First, the plain language of § 7545(o)(2)(A)(i) d Nothing in the provision suggests that Congress intended the RFS to ensure market access or stability for ethanol (grandfathered or not). includ GHG requirements. But, with regard to those requirements, at least a 20 percent reduction in lifecycle

[GHG] emissions compared to baseline lifecycle [GHG] average lifecycle [GHG] emissions . . . for gasoline or diesel . . . sold or distributed as transportation fuel

in 2005 The provision therefore contemplates only a minimum requirement that creates a floor (as opposed to a ceiling) for GHG emissions reductions from non-grandfathered fuels for the RFS; it makes no guarantees for any grandfathered fuel. See Congress elected to exempt such facilities from the requirement that certain fuels achieve a 20% Nor does the RFS require that its mandated renewable fuel volumes be satisfied by any particular fuel. If Congress intended to ensure a market for ethanol (grandfathered or otherwise), it could have structured the RFS so that a fixed amount of ethanol was required to satisfy its renewable fuels volume requirements. More importantly, it is silent as to whether a state may nonetheless subject grandfathered fuels to GHG regulations. There is no indication that the RFS in general or § 7545(o)(2)(A)(i) in particular were intended to protect or ensure a market for ethanol. See id. renewable fuel set in [§ 7545(o)(2)(A)(i)] do not include a minimum amount that must be met with corn

Other aspects of the CAA and the EISA, as well as proceedings concerning the RFS, show that Congress did not intend for the RFS to preempt state legislation like the LCFS. See Exxon Mobil rounding a provision as well as (citation and quotation marks omitted). Oxygenated Fuels As , 331 F.3d 665, 670 (9th Cir. 2003 (citing 42 U.S.C. § 7401(b)).

reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, Id. § 7401(c). Because the Case 1:09-cv-02234-LJO-BAM Document 389 Filed 06/16/17 Page 19 of 48 Davis, 331 F.3d at 670, it government develops baseline standards that the states individually implement and enforce. Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013).

prevention . . . and air pollution control at its source is the primary responsibility of States and local Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 690 (6th Cir. 2015) (quoting 42 U.S.C. § 7401(a)(3)). Further, the CAA rights savings Id. at 191. As the Sixth Circuit explained:

Th the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting contr

implementation plan or specified federal statute.

Merrick, 805 F.3d at 690 (citing 42 U.S.C. § 7416). Exxon Mobil Corp. v. U.S. E.P.A., 217 F.3d 1246, 1254, 1255 (9th Cir. 2000); see also id.

Congress enacted the EISA in 2007, which amended parts of the CAA. See generally Pub. L. No. 110-410 (codified as amended at § 7545(o)). The purpose of the EISA is

[t]o move the United States toward greater energy independence and security, to increase the

production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes. Id. Relevant here, Section 204(b) of the EISA provides in full:

EFFECT ON AIR QUALITY AND OTHER ENVIRONMENTAL

REQUIREMENTS. Except as provided in section 211(o)(12) of the Clean Air Act, nothing in the amendments made by this title to section 211(o) of the Clean Air Act shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation. The plain language of this savings clause, like the one contained in the CAA, preserves the right of the states to enact their own legislation that is more restrictive than the EISA.

savings clauses express intent not to preempt state legislation aimed at impro See RMFU, 730 F.3d at 1097 The RMFU suggest any contrary intent, and the RMFU Plaintiffs do not point to anything else that does. The RMFU Plaintiffs thus fall far short from providing any

Nonetheless, as the RMFU Plaintiffs correctly point out, a state law may still be preempted if it actually conflicts with federal law. Davis, 331 F.3d at 672. state law, preemption analysis cannot ignore the effect of the challenged state action on the pre-empted

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 107, 112 (1992). Accordingly, the Court must determine whether the effects of the LCFS interfere with the goals of the EISA, as . See Davis, 331 F.3d at 672-73; Ouellette, 479 U.S. 481, 491 (1987).

Much of the discussion above is directly applicable to this analysis. This is so because the primary argument as to whether the LCFS actually conflicts with the EISA is premised on their assumption that Congress intended the EISA to ensure a market for ethanol produced by corn grown in the Midwest, and guaranteed that grandfathered ethanol would not be subject to GHG regulations. As explained above, the plain language of the EISA makes no such guarantees. The RFS program, like the CAA in general, imposes a nationwide standard: it requires that at least a certain volume of be sold in the United States each year. not just ethanol. Thus, volume requirements theoretically could be met entirely without ethanol. That the RFS imposes GHG emissions requirements only on non-grandfathered facilities does not mean that Congress intended to ensure that those facilities were entirely exempt from all GHG regulations, whatever their source. Cf. Doc. 379-1, Environmental Protection Agency, Renewable Fuel Standard Program (RFS2): Summary and Analysis of Comments RFS Summary , at 7-1 hese [RFS] thresholds do not constitute a specific control on [GHGs] for transportation fuels (such , available at https://www.epa.gov/sites/production/files/2015-08/documents/420r10003.pdf. increase the amount of renewable fuel used as transportation fuel over time, particularly fuels with the

lowest lifecycle GHG emissions, in the transportation f 80 Fed. Reg. 33100-01, 33102 (June 10, 2015) (emphasis added). And as the RMFU Plaintiffs emphasize, the LCFS attempts to do precisely the same thing. The LCFS therefore does not conflict with the RFS . If anything, the programs are complementary. Cf. 80 Fed. Reg. 33,100-01, 33,103 (observing that the

Defendants argue statements EPA notice and comment rulemaking , and that . Although the Court disagrees with Defendants that these statements are entitled to deference or otherwise constitute any binding authority, they are consistent with and provide further support for . Cf. Geier, 529 U.S. ally conflict with its

regulation and its objectives and is uniquely qualified to comprehend the likely impact of state quotation marks omitted). At least two comments from the EPA explicitly

to improve its air quality through fuel regulations, and thus does not preempt the LCFS.

First should preempt state programs designed to address carbon content and lifecycle analysis of fuels. [Renewable Fuels Association] believes that EPA should use its authority to preempt state low carbon Doc. 379-1, Environmental Protection Agency, Renewable Fuel Standard Program (RFS2): Summary and Analysis of Comments RFS Summary -14, available at https://www.epa.gov/ sites/production/files/2015-08/documents/420r10003.pdf. CARB made the following comment:

[CARB] would like to see future RFS proposals reflect the existing standards in place in avoids volumetric requirements and instead promotes carbon intensity reductions from a broad mix of fuels without applying set limits to individual fuels. No fuel production is ce standard. Id. at 13-15. In response to these (and other) comments, the EPA responded:

Issues associated with State LCFS programs, and potential future Federal fuel standards, are not germane to the final RFS program. However, where possible we have attempted to structure the RFS2 program so as to be compatible with existing State LCS programs, including coordination on lifecycle modeling.

Id. Thus, the EPA was explicitly asked by a Plaintiff in this case to preempt state low carbon fuel standards, an so, but concluded that state low carbon fuel standard programs are irrelevant to the RFS and, in any

goal of dependence. In support, the RMFU Plaintiffs transportation fuels from renewable energy would help the United States . . . reduce the dependence of the United States on energy imported from volatile regions of the world that are politically unstable Pub. L. 110-

-140. The RMFU Plaintiffs, however, provide no facts or explanation showing that the LCFS actually conflicts with this goal. For these reasons, the Court finds that its prior holding that the RMFU

Plaintiffs had stated a claim that the LCFS is preempted was clearly erroneous; the RMFU Plaintiffs have not stated and cannot state any preemption claim against the LCFS. Accordingly, the Court DISMISSES their preemption claims WITHOUT LEAVE TO AMEND because amendment would be futile. D. Commerce Clause

As noted above, the only remaining claim the AFPM Plaintiffs assert is their claim that the ethanol provisions of all versions of the LCFS discriminate against interstate commerce in purpose and effect in violation of the Commerce Clause. The RMFU Plaintiffs assert the same claim, and also assert that the ethanol provisions of all versions of the LCFS fail under Pike. See Doc. 384 at 2.

argument is that the LCFS, by design and practical effect, penalizes non-California ethanol producers, specifically those from the Midwest, while benefitting California ethanol producers by assigning higher analysis of fuels, which causes chemically identical fuels sold in California to have varying CI scores

due solely to where they are produced. See, e.g., TAC ¶ 87; SAC ¶¶ 35, 46-50, 94. According to Plaintiffs, the LCFS is intentionally designed to make ethanol produced in the Midwest (and elsewhere) more expensive, and eventually will drive a number of non-California ethanol producers out of the -deficits scheme, which inherently benefits California ethanol producers at the expense of out-of-state producers by incentivizing consumers to purchase California ethanol, even if it is physically identical to Midwest ethanol. SAC ¶ corn ethanol around its borders in an effort to benefit California ethanol. TAC ¶ 87; SAC ¶ 56.

Pike claim builds on these allegations. The RMFU Plaintiffs argue that, in addition to the provides no benefit to California surable reduction of the effects of global

outweigh its benefits to California.

Defendants move to dismiss both claims under Rule 12(b)(6). Distilled, Defendants argue (1) RMFU precludes the and, (2) regardless, neither states a claim.

1. Whether RMFU bars Plaint against the

ethanol provisions The parties correctly observe that the Ninth Circuit not only the ethanol provisions of the LCFS di consideration. See RMFU whether the ethanol provisions discriminate in purpose or effect and, if not, to apply the Pike balancing

provisions do not discriminate in purpose or effect has preclusive effect here under the law of the case.

Plaintiffs, on the other han see

also Doc. 384 at 24. 19

As a preliminary matter, purposes claim, the parties

19 Though the RMFU Plaintiffs make this argument, they do not expound on it in a meaningful way. See Doc. 384 at 24; but see id. at 26 n.5. They simply assert that because the RMFU s in the LCFS, which had different justifications Id. agree that there is no material difference between the ethanol provisions contained in the three versions of the LCFS. See Doc. 380-1 at 27; Doc. 383 at 23; Doc. 384 at 26. Plaintiffs do, however, assert the 2015 LCFS has more of a discriminatory effect than did the Original LCFS because of slight differences in how it permits CI score calculations for ethanols. See id. same discriminatory purposes and effects of the Original LCFS. Finally, to the extent that the 2015

Even though the majority opinion in RMFU did not address Plain

discussed the purposes of the Original LCFS in general and its ethanol provisions in particular when ims that the ethanol provisions were facially discriminatory and impermissibly regulated extraterritorially. In so doing, the majority explicitly and repeatedly held that the ethanol provisions were not purposefully discriminatory, nor was the LCFS generally. 20

20 See, e.g., RMFU, 730 F.3d at 1079- id. at 1089-90 -of-state ethanol pathway does impose higher costs on California by id. at 1090 id. lifecycle analysis treats ethanol the same regardless of origin, showing a nondiscriminatory reason for the unequal results of id. sessment factors associated with geography id. effect . . . . This is not a form of discrimination against out-of-state producers. Even if California were to someday produce significant amounts of corn for ethanol, the CA GREET transportation factor would remain non-discriminatory to the extent it applies evenly to all pathways and measures real differences in the harmful effects of ethanid. at 1093 -state production even when the same goods could be produced at id. ifornia to ignore the real differences in carbon intensity among out-of-state ethanol pathways, giving preferential treatment to those with a higher carbon intensity. These factors are not discriminatory because they reflect the reality of assessing and attempting to limit id. GREET lifecycle analysis used by CARB, including the specific factors to which Plaintiffs object, does not discriminate against out-of- ; id. at id. id. use regional categories in its default pathways and in the text of Table 6 does not transform its evenhanded treatment of fuels ba id. by strict scrutiny state laws or regulations that incorporate state boundaries for good and non- id. will not at the outset block California from developing this innovative, nondiscriminatory regulation to impede global see also Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 510 (9th Cir. 2014) (Gould, J., concurring in denial from rehea -

understood, in context, as economic defense of a [regulation] genuinely proposed for environmental

Id. t Plaintiffs provided to support their claim that the crude oil provisions were intentionally designed to be discriminatory against out-of-state interests, and the full panel found there was no

explicit discriminatory purpose behind them. Id. at 1100. Inst purpose was genuine. There was no protectionist purpose, no aim to insulate California firms from out- of- Id.

The Court has reviewed thoroughly their briefs to the Ninth Circuit with those they cited in the SAC, the TAC, and their oppositions. The only quote Plaintiffs have cited that the Ninth Circuit did not consider is from a CARB press release. See Doc. 383 at 21 (citing CARB, California Adopts Low Carbon Fuel Standard (Apr. 23, 2009) available at https://www.arb.ca.gov/newsrel/2009/

nr042309b.htm). Even assuming this press release constitutes an accurate reflection of the California , at best, [r RMFU, 730 F.3d at 1100 n.13 (citing

Minnesota v. Clover Leaf Creamery Co statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the . Plaintiffs have not pointed to any Thus, to the extent RMFU forecloses it.

Judge Murguia from the majority opinion holding that the ethanol provisions are not facially discriminatory bolsters this conclusion. See RMFU, 730 F.3d at 1108 (Murguia, J., dissenting).

reasons for distinguishing between in-state and out-of-state ethanol before examining the text of the Id. (emphasis added). inconsistent with Supreme Court precedent, which instructs that we must determine whether the regulation is discriminatory before we a Id. (citation omitted).

Six judges dissented from the denial of rehearing RMFU en banc. Rocky Mountain Farmers Union v. Corey, 740 F.3d 507, 512 (9th Cir. 2014) RMFU Denial . The en banc dissent characterized the RMFU -discriminatory

-of- Id. at 514 (M. Smith, J., dissenting from denial of rehearing en banc) (quoting RMFU, 730 F.3d at 514). The dissent agreed with Judge Murguia that ustification for, a law has no Id. (quoting Quality, 511 U.S. 93, 99 (1994)). The dissent acknowledged that the panel remanded the case to this

Court to consider Pl opined was

enacted with Id. (quoting RMFU, 730 F.3d at 514).

Judge Gould, who authored RMFU Id. at 509. He explained:

We reviewed this case at the summary judgment stage. As such, we had to take as true all

facts presented by California and reasonable inferences therefrom. Our statement, then, about good and non-discriminatory reasons for incorporating state boundaries into the LCFS methodology is based on evidence that had to be credited at the summary judgment stage. It will not control what

the district court decides on remand as it considers the

Id. Thus, the RMFU provisions are purposefully discriminatory. corresponding arguments presented on appeal as to why the provisions are discriminatory did not support their claims.

The logic and record underlying all of provisions, however, has not changed. See

feedstock production and distributi Plaintiffs contend the 2015

both discriminate against interstate commerce in the exact same way, namely, through the discriminatory assignment of CI scores that are determined through a purposefully discriminatory lifecycle analysis an issue the RMFU panel thoroughly considered and rejected. See Doc. 383 at 23; SAC ¶ 87; supra n.20. Their purposeful discrimination claim against the ethanol provisions rises and falls with their argument that specifically, the -based calculations for is inherently and intentionally discriminatory. The Ninth Circuit consid RMFU, 730 F.3d at 1090, and rejected the argument in no uncertain terms. See id. at 1091, 1093; see also supra n.20. Plaintiffs make no meaningful effort to differentiate the factual and legal bases of their claims concerning the ethanol provisions that the Ninth Circuit considered and rejected, and the bases of their pending claim that the ethanol provisions have a discriminatory purpose. Plaintiffs do not, for instance, allege or otherwise suggest that they will be able to produce evidence previously unavailable to them that the Ninth Circuit did not consider. Nor do they argue that their discriminatory purpose claim will rest on facts or theories that the RMFU panel did not consider. They essentially reargue the position they took before the Ninth Circuit.

As noted above, the majority opinion in RMFU unequivocally held that on the record and arguments presented discriminatory. Plaintiffs, however, have not alleged facts or advanced any argument that shows their pending discriminatory purpose claims against the ethanol provisions are materially distinct from the claims the Ninth Circuit considered in RMFU. As a result, RMFU remand the case for the Court to minatory, RMFU bars the claim under the law of the case because it turns entirely on argument that RMFU held was erroneous, as a matter of law. Accordingly, the Court DISMISS e a discriminatory purpose.

RMFU discriminatory effect. To succeed on this claim, Plaintiffs must provide evidence showing that those

Black Star Farms LLC v. Oliver concerning the Origi support for their claim. RMFU, 730 F.3d at 1100. Their failing before the Ninth Circuit, then, was a

wholly evidentiary one. Accordingly, the Ninth Circuit did not make any factual or legal findings concerning the effects of the crude oil provisions beyond observing that the AFPM Plaintiffs failed to meet their burden. RMFU discriminatory effect on interstate commerce.

2. Whether Plaintiffs state a claim that the ethanol provisions of the LCFS discriminate

against interstate commerce in effect

a. Standard

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (Scalia, J., concurring) (citations and quotation marks omitted). Subsequent precedent has not helped clear the weeds. As the Ninth Circuit recently observed Clause appe , 803 F.3d

389, 403 (9th Cir. 2015) (citation and quotation marks omitted); see also id. at 405 (outlining numerous possible tests for determining if a state law has discriminatory effects).

Like neatly into existing Commerce Clause precedent. This is so because, as explained in more detail below, s, appear to burden and benefit some, but not all California and out-of-state ethanol producers alike. There is no across-the-board benefit to California producers, nor is there any across-the-board burden to out-of-state producers. The Court is unable to locate, and the parties do not provide, any case that is factually analogous or on point, and their briefs, which provide only a few pages of argument on the issue, and provide no help in determining which cases and principles should apply here.

A common thread exists in most, if not all, of the analogous Commerce Clause cases that is

about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors , 682 Optometrists The primary purpose of the Commerce Clause, then, is to prevent states and local governments from shielding their markets from interstate competition and erecting barriers to the free flow of goods across the country by giving intrastate business the upper hand over out-of-state producers. See Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980); , 682 F.3d 1144, 1154 n.14 (9th Optometrists resulting from discrimination and interference with the interstate flow of goods. This principle guides

here are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of- Eastern Ky. Res. v. Fiscal Court of Magoffin Cty., Ky., 127 F.3d 532, 543 (6th Cir. 1997); see also Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) (holding Washington regulations were not

iscrimination nor an improper RMFU, 730 F.3d at 1100.

b. Analysis al effect is that they assign artificially lower CI scores to California-produced ethanol while assigning artificially higher CI scores to ethanol produced elsewhere, particularly in the

Midwest. See SAC ¶¶ 122-14; TAC ¶¶ 51-52. It is alleged that because the LCFS encourages regulated parties to use fuels with lower CI scores, the LCFS inherently promotes California ethanols for LCFS compliance. See SAC ¶¶ 42-43; TAC ¶¶ 52-52. These CI scores, in turn, allegedly cause California ethanol to be more economically attractive in the California marketplace at the expense of out-of-state ethanol, all of which have artificially higher costs due to LCFS compliance. See SAC ¶¶ 58; TAC ¶¶ 55-57. It is further alleged that in order to comply with the LCFS, regulated parties will have to purchase significantly more ethanol from sources other than the Midwest. In sum, Plaintiffs allege regulated parties to use California corn ethanol instead of physically identical corn ethanol produced outside of California in the Midwest. The LCFS creates regulatory disincentives for using corn ethanol see also TAC ¶ 59. According to Plaintiffs, once the LCFS is SAC ¶ 57; TAC ¶ 59. In addition to this alleged discrimination, Plaintiffs assert that the LCFS will lead to investments in biofuel facilities in California, which will create thousands of jobs and keep more money in the state. TAC ¶¶ 61, 91 (citation omitted).

See Doc. 378-1 at 29-30; Doc. 380-1 at 29. has a discriminatory effect against out-of-state ethanols is overly narrow because it focuses exclusively on Midwestern ethanols instead of considering all non-California ethanols, and is undercut by the fact that a number of non- California ethanols, including some from the Midwest and foreign countries, receive low CI scores under the LCFS, many of which are lower than other California ethanols. See Doc. 380-1 at 29. -of-state ethanols is fatal to their claim. See id. Plaintiffs do not address this argument in their oppositions. See Doc. 383 at 20-24; Doc. 384 at 25-27.

Table 6 of the Original LCFS provided thirteen default pathways for corn-based ethanols that corresponded to how they are produced. See CARB, Table 6, Carbon Intensity Lookup Table for Gasoline and Fuels that Substitute for Gasoline, available at https://www.arb.ca.gov/fuels/lcfs/lu_tables_11282012.pdf; see also RMFU her dissent, the default pathways for certain ethanols produced by the same means in California and the Midwest are assigned different CI scores:

The LCFS assigns a default carbon intensity value of 88.90 gCO2e/MJ to California producers utilizing a dry mill, dry DGS, and natural gas production process. Midwest producers utilizing the same production process are assigned a default carbon intensity

value of 98.40 gCO2e/MJ, resulting in a 9.5 gCO2e/MJ difference in favor of California producers. Next, California producers utilizing a dry mill, dry DGS, eighty percent natural gas, and twenty percent biomass production process enjoy a 9.4 gCO2e/MJ lower carbon intensity value than their Midwest counterparts. Finally, California producers benefit from a 9.36 gCO2e/MJ lower carbon intensity value over their Midwest counterparts for a dry mill, wet DGS, eighty percent natural gas, and twenty percent biomass production process.

Id. at 1108 n.1 (Murguia, J., dissenting). In addition, California producers using a dry mill, wet DGS, and natural gas were assigned a default CI score of 80.70 gCO2e/MJ, whereas Midwestern producers

using the same process were assigned a default CI score of 90.10 gCO2e/MJ. See Table 6. Moreover, all of the California-produced ethanols received lower default CI scores than all of those produced in the Midwest. See id. Based on this alone, it therefore appears that the Or assign more favorable CI scores to California ethanols compared to identical Midwest ethanols, which would support an inference that the provisions have a discriminatory effect.

A review of the pertinent 2015 amendments to the LCFS shows that there are significant changes to the Original LCFS. 21

The Original LCFS established a number of default pathways for various fuels, including ethanols, meaning that they were assigned default CI scores. See RMFU, 730 F.3d at 1081 (citing Cal. Code Regs. tit. 17, § 95486(b)(1) 22

id. at 1082. If a regulated party

re, if approved. See id. at 1082.

The 2015 LCFS did away these default pathways for ethanol. See § 95488(b); CARB, Staff Report: Initial Statement of Reasons for Proposed Rulemaking: Proposed Re-Adoption of the Low -9-10, III-30, available at https://www.arb.ca.gov/regact/

21 forms, is purposefully discriminatory. As noted, Plaintiffs argue that the LCFS was passed for discriminatory reasons and its geography-dependent considerations which are inherent in all forms of the LCFS are purposefully discriminatory. How the LCFS calculates CI scores and the practical effect that has on ethanol producers and whether the effect, if any, is discriminatory issues the Ninth Circuit did not consider in RMFU form the basis of their discriminatory effects claim. 22 All further statutory references are to Title 17 of the California Code of Regulations unless otherwise indicated.

1226, 1234, available at https://www.arb.ca.gov/regact/2015/lcfs2015/ fsorlcfs.pdf. Under the 2015 LCFS, ethanol producers must apply for an individualized CI score. See §§ 95488(b)(1)(A), (c)(1), See § 95488(d), tbl. 7.

LCFS Pathway Certified Carbon Intensities, https://www.arb.ca.gov/ fuels/lcfs/fuelpathways/pathwaytable.htm. Table 7 provides five default CI scores for ethanols. Corn-based ethanols regardless of where and how they are produced are assigned the same CI score. Plaintiffs do not (and cannot) argue that these default pathways are discriminatory, but they do argue that the manner in which individualized pathways are calculated ethanols. See, e.g., Doc. 383 at 24.

As Defendants point out and Plaintiffs fail to address, Brazilian firms that produced ethanol from sugarcane were assigned default CI scores lower than all corn-based ethanols. See id. (assigning Brazilian sugarcane ethanols default pathways of 58.40, 66.40, and 73.40 gCO2e/MJ). Compared to

their California-produced counterparts which the RMFU panel held were similarly situated 23 competitors for Commerce Clause purposes, Brazilian ethanols seemingly benefitted default pathways because all of them received more favorable default CI scores than California ethanols. 2011, CARB had approved ethanol pathways with carbon intensities ranging from 24

23 See RMFU, fuel. Because of this close competition, all sources of ethanol in the California market should be compared, and the district court erred in exclud id. at 1088, and the AFPM Plaintiffs assert that Midwestern rimary competitor for California- suggest that California, Midwestern, and Brazilian ethanol are not similarly situated for Commerce Clause purposes. 24 Because the individualized pathways are variable and have changed throughout the years, the Court cannot locate and the parties do not provide a list of the pathways as they existed before the Ninth Circuit. Based on the Table 6 RMFU, 730 F.3d at 1084. 25

To date, numerous Midwestern producers have obtained CI scores lower sometimes dramatically so than their California counterparts. See generally CARB, LCFS Pathway Certified Carbon Intensities, https://www.arb.ca.gov/fuels/lcfs/fuelpathways/pathwaytable.htm (last visited June 6, 2017).

The AFPM Plaintiffs impliedly address this observation by correctly pointing out that, as of 2011, the Midwest produced over 94% (11.3 billion gallons) of domestic ethanol, whereas the West y competitor for California- 26

Plaintiffs percentage of other out-of-state ethanols . . . a possibility that, in any event cannot be resolved on a

motion to dismiss New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 275 (1988)). 27

Put another way, the AFPM Plaintiffs correctly observe that it is not possible to assess the discriminatory effects, if any, that the LCFS may have on ethanol producers without knowing how much

25 As Table 6 indicates, a number of Midwestern ethanol producers were able to achieve CI scores well below those assigned to two of the California default pathways with CI scores of 95.66 and 88.90. See, e.g. explanation why. See Doc. 383 at 23.

26 of ethanol into the country by 2022. See 75 Fed. Reg. 14670, 14747. 27 The AFPM Plaintiffs describe Limbach -of-state pro even though out-of- Limbach, 486 U.S. at 275. Limbach, however, involved a facially discriminatory statute. See that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of- was facially discriminatory, the Court held it was irrelevant that it only discriminated against one out-of-state entity in practical effect. See id. placing the at- did not violate the Commerce Clause because it only made the product less profitable in Ohio, and did not force it out of the Ohio

marketplace entirely. Id. at 275. Limbach therefore has no applicability here. ethanol the affected producers import to California. Although a number of ethanol producers from the Midwest and Brazil have obtained low CI scores and a number of California producers have obtained high CI scores, it is indeterminable how much ethanol these and other producers contribute to the California ethanol market. Without that information, the Court cannot assess adequately the extent to which ethanol producers are benefited or burdened by the LCFS. 28

There is no dispute that Midwestern producers account for the overwhelming majority of ethanol produced in the country. Although a number of them have obtained low CI scores under the LCFS, dozens of them have not, and a number of them have obtained scores higher than almost all California ethanols. Given that (1) an uncontested purpose and goal of the LCFS is to reduce corn-based ethanol, which is almost exclusively produced in the Midwest; (2) seemingly treat some ethanols produced in the Midwest less favorably than identically produced California ethanols; close to 95% by some estimates it is plausible that Midwestern ethanol producers will be disproportionately burdened by the LCFS compared to their California counterparts. The Court therefore concludes that Plaintiffs have stated a claim that both the Original and 2015 LCFS ethanol provisions discriminate in

discriminatory effects claims against those provisions is DENIED.

c. Pike claim To succeed on their Pike Kleenwell

Biohazard Waste & Gen. Eco. Consultants, Inc. v. Nelson, 48 F.3d 391, 399 (9th Cir. 1995) (citation

28 An analogy is illustrative here. If a state statute burdened some out-of-state beer producers and some in-state producers, but benefited others, it would be difficult not to conclude that the statute is nonetheless discriminatory if only the out-of-state producers that were burdened were firms that produced enormous amounts of beer (e.g., Budweiser) while the only burdened in-state and benefited out-of-state beer producers were a handful of microbrewers. So, too, the LCFS may be discriminatory if the evidence shows that, for instance, the LCFS burdens 100% of the Midwestern ethanol producers who account for 90% of all ethanol produced in the country by volume while burdening only 1% of California ethanol producers who produce less than 1% of the nation omitted). Pike impose a substantial burden on interstate commerce (i.e., Midwestern ethanol) while providing little, if any, benefits to California. The RMFU Plaintiffs assert that the LCFS will have because the RMFU Pl substantial burden on interstate commerce. See Doc. 378-1 at 30; Doc. 387 at 11.

As explained above, the RMFU Plaintiffs have plausibly alleged that the ethanol provisions will

dismiss the claim turns on their assertion that the RMFU Plaintiffs have failed to allege any substantial burden on interstate commerce, the motion is DENIED on that ground alone.

Further, the RMFU Plaintiffs have plausibly alleged that that burden far outweighs the benefits California will obtain as a result of the LCFS. Although the RMFU Plaintiffs do not cite or quote in their opposition the purported admission by CARB that the LCFS will not confer any benefits on California, See TAC ¶ 55; see also

RMFU Denial

Thus, according to CARB, the LCFS will have a marginal, if any, positive effect on the harms from climate change that it is aimed at redressing. Given this, the Court concludes the RMFU Plaintiffs plausibly have alleged that the ethanol provisions of the Original and 2015 LCFS imposes burdens on interstate commerce that outweigh the local benefits it provides. Pike claim.

3. il provisions

discriminate in practical effect As discussed in detail above, the RMFU Plaintiffs argue the Court cannot accurately assess the discriminatory effects of the ethanol provisions without accounting for the amount (i.e., volume) of ethanol finding above that Plaintiffs state a discriminatory effects claim against the ethanol provisions, the Court finds it appropriate to add the following observations and discriminatory effects claims against the 2012 and 2015 crude oil provisions, beyond that contained in the MTD Order, those claims, even though the AFPM Plaintiffs do not advance the argument. 29

As the Court explained in the MTD Order, the claims discussed therein were premised on the -deficit calculating scheme. 30

The LCFS aims to reduce the use of crude oil in general and in particular the use of the most carbon intense crude oils through a system of assigning credits and deficits. In general, a regulated party complies with the LCFS if its credits are greater than or equal to its deficits. See generally § 95485. The use of some fuels will generate deficits whereas the use of others will generate credits. Credit-generating fuels are ones the LCFS encourages because they are lower-polluting than the deficit- -deficit scheme is an effort to promote cleaner fuels by requiring regulated parties who use deficit-generating fuels to offset their deficits by using credit-generating fuels.

Under both the 2012 and 2015 LCFS, credits and deficits for crude oils are assigned at two

29 RMFU See 730 F.3d at 1078. 30 See - intensity values demonstrates why the provisions are discriminatory: all regulated parties . . . are assigned deficits based on the average carbon intensity of all crude oils, not their own individual carbon intensities. This system discriminates in favor of the -of-state crude oils with much lower individual scores. . . . [T]he 2015 provisions are unconstitutionally discriminatory because their overall impact is to benefit California crude oil at the expense of out-of- (citations omitted); see also id. at 18 crude oils with carbon intensities lower than the average are disadvantaged by having to use the average score rather than target that declines over

time to a baseline calculated using the average carbon intensity of all gasoline

. The input

CI XD

standard ensity requirement of either gasoline . . . or diesel fuel . . . provisions contains a table that provides the compliance CI score target for crudes and diesels that

regulated parties must meet. See id. CI XD

BaselineAvg scores for either gasoline or diesel, and represents the average carbon intensity of all gasoline and diesel

Id. Those values are contained in Table 6 in § 95488, see § 95488(c)(4)(B), and provide that the Baseline Average CI score for gasoline is 99.78 gCO2e/MJ and 99.78 gCO2e/MJ for diesel. Both values were which was 11.39 gCO2e/MJ. See § 95454; see also CARB, Supplement Version 2.0 to: Detailed

California-Modified GREET Pathway for California Reformulated Gasoline Blendstock for Oxygenate Blending (CARBOB) from Average Crude Refined in California available at https://www.arb.ca.gov/ regact/2011/lcfs2011/carbob.pdf.

The AFPM Plaintiffs argue the use of these averages is discriminatory in that it has the practical effect of favoring California crudes over foreign crudes. See, e.g., SAC ¶¶ 51, 73, 78; Doc. 383 at 18-19. 31

In other words, according to the AFPM Plaintiffs, if a crude oil is assigned an artificial CI score

31 In their op Annual Crude Average. The opposition contains no argument of Step one, base deficits, or the Baseline Crude Average Step Two is discriminatory. And while the opp Though the AFPM Plaintiffs clearly challenged Step One earlier in this litigation, see Doc. 336 at 8-9, the SAC and their opposition are less clear. In an abundance of caution, the Court addresses both Step One and Step Two. (based on an average) that is higher than its real CI score, that crude oil is burdened by the LCFS. Conversely, if a crude oil is assigned an artificial CI score (based on an average) that is lower than its real CI score, then that crude oil is benefited by the LCFS. The AFPM Plaintiffs contend foreign crudes are burdened (i.e., the LCFS assigns at least some of them a CI score (based on average) higher than their real CI score) while at least some California crudes are benefited (i.e., the LCFS assigns them a CI score (based on average) lower than their real CI score). The MTD Order held that, as a matter of law, the fact that the Baseline Crude Average used in Step One benefited and burdened some, but not all out-of-state crudes while simultaneously benefiting and burdening some, but not all California crudes meant that Step One was not discriminatory. See MTD Order at *33, 36.

The Order further held that Step Two could not form the basis of a discriminatory effects claim because it had not been triggered, meaning that no incremental deficits have been assigned under Step Two. Id. at *31. Accordingly, the Court did not engage in any kind of volumetric analysis.

Even applying the volumetric approach used above in the context of the ethanol provisions, the result would have been the same. The CARBOB Supplement contains information on the CI score and volume in the California market for each crude oil. The document shows the percentage of the market that a given fuel comprised in 2010 and its assigned CI score. As noted above, CARB averaged these results to arrive at the Baseline Crude Average of 11.39 gCO2e/MJ. CARB assigned an average of 12.90 gCO2e/MJ to California crudes, which accounted for 38.78% of the market. The thirteen foreign fuels that had a CI score higher than the Baseline Crude Average, thereby benefitting from it, according to the AFPM Plaintiffs, accounted for 29.72% of the market, whereas the twenty-seven foreign fuels that were burdened by its use due to having a lower CI score accounted for 31.5% of the market.

The CARBOB Supplement provides a partial breakdown of California crudes that shows their individual CI scores and the volume they contributed to the 2010 California market. See CARBOB Supplemental at Table 2. Twenty-two California crudes that had CI scores lower than the Baseline Crude Average (11.39 gCO2e/MJ) and were allegedly burdened by its use accounted for 54.4% (303,860 BOPD) of the California-produced crudes. See id. Eleven other crudes accounted for the remaining 45.6% (254,629 BOPD) of California-produced crudes that were allegedly burdened by the use of the Baseline Crude Average. See id.This would suggest that a majority of California crudes were burdened by the Baseline Crude Average.

Table 2, however, only accounts for crudes that produced at least 2,000 barrels of oil per day accounts for crudes with production of at least 2,000 BOPD, it appears that Table 2 does not provide

information about the crudes whose production was under 2,000 BOPD and whose CI was sufficiently higher to drive up the average CI score for California crudes to 12.90 gCO2e/MJ. In other words, this suggests that these small-scale producers, who are not represented on Table 2, produced enough crude with a CI score higher than the California crudes represented on Table 2 such that they caused

Thus, when accounting for volume of production, the result is the same as in the prior MTD Order: a number of both foreign and California crudes are benefited while a number of both foreign and California crudes are benefited. Although a substantial amount of the California-produced crude oil is burdened, it appears that, on average, California crudes benefit from the use of the Baseline Crude Average. And while approximately 30% of the market is composed of foreign crudes that are benefited by the Baseline Crude Average, slightly more foreign crude is burdened by its use. This result, where, on average, California crude seemingly benefits from Baseline Crude Average while, on average, Order at *33. Plaintiffs do not provide, and the Court cannot locate, any precedent that

suggests a state law offends the dormant Commerce Clause when it confers a benefit on a substantial amount of out-of-state producers while simultaneously burdening a substantial amount of similarly situated in-state producers. More importantly, the crude oil provisions must be considered as a whole, 32 and -credit scheme shows that it is not discriminatory overall.

Id. -year basis and are determined, in part, based on

the volume of crude oil imported into California over that three-year period. Id.; see also CARB, Calculation of 2015 Crude Average Carbon Intensity Value at 2, available at https://www.arb.ca.gov/fuels/lcfs/crude-oil/2015_crude_average_ci_ value_final.pdf. The Baseline Crude Average multiplies pre-determined CI scores by the actual volume of crude imported into California, but the Annual Crude Average uses the actual average CI of each crude imported, taking into account the amount (in barrels) of each crude.

The most recent calculation of these figures (as far as the Court can determine) occurred for the 2015 calendar year, which applies to the 2017 compliance period. See CI Calculation Tables. For 2015, the Baseline Crude Average used pre-determined CI scores of 11.39, 11.39, and 11.98 (in gCO2e/MJ) for the years 2013, 2014, and 2015, respectively. See id.; see also § 95489(b) (requiring use of those CI scores). When the volume of crude for each year was input, the resulting CI score was 11.59 gCO2e/MJ. See CI Calculation Tables at 2. Accordingly, 11.59 gCO2e/MJ is the current Annual Crude Average. See id.

The AFPM Plaintiffs assert the use of the Annual Crude Average is impermissibly discriminatory because it is an average of all crudes, so crude oils whose actual, individualized carbon intensities are below this average are unfairly penalized by its use because they are artificially assigned more deficits than they would be if their actual CI scores were used. See Doc. 383 at 19. Though

32 See Healy, 512 U.S. at 198 (holding that, even assuming the two components of the challenged statute were constitutional, their combined effect was unconstitutional); DIRECTV, Inc. v. Tolson, 513 F.3d 119, 122 (4th Cir. 2008) (observing the Healy] that state economic regulation must be considered as a whole discriminatory effects). Plaintiffs acknowledge that some California crudes have actual CI scores that are lower than the Annual overall benefit to California crudes at the expense of out-of-state crudes. According to Plaintiffs, the Annual Crude Average is discriminatory because it assigns an average CI score to all crudes, as opposed to their actual, individualized CI scores. Thu Annual Crude Average, that crude is burdened by the use of the Annual Crude Average because than the Annual Crude Average, that crude benefits from the use of the Annual Crude Average because regulated parties that use it will incur fewer deficits.

The Court notes at the outset that no incremental deficits will be assessed for the 2017 compliance period because the most recent Annual Crude Average (11.54 gCO2e/MJ) is lower than the corresponding Baseline Average (11.59). See CI Calculation Tables at 2. Accordingly, as the Court

held scheme in Step Two is discriminatory is not plausible. It is difficult to conceive how a provision that has not been triggered could be discriminatory in its effects, and Plaintiffs offer no explanation as to how it could be.

More importantly, however, judicially noticeable facts establish that the allegedly discriminatory Annual Crude Average benefits a substantial amount of the foreign crude imported into California while

Calculation Tables contain four columns that list the country or state of origin, name, CI score, and the

amount (in barrels) of each crude oil consumed in California for 2013, 2014, and 2015. They also show how much crude was consumed in California each year. It is thus possible to calculate how many fuels theory, burdened or benefited by the applicable Annual Crude Average, and 33

The Court is therefore able to determine how much of the California market is composed of foreign crudes that are burdened or benefited by the Annual Crude Average, as well as how much of the market is composed of California crudes that are burdened or benefited.

Whether crude oils will incur incremental deficits turns on whether the Annual Crude Average is greater than the Baseline Crude Average, both of which are based on a three-year average that accounts for the amount and carbon intensity of all crudes imported to California. See § 95489(b). Again, if the Annual Crude Average is not greater than the Baseline Crude Average, then no incremental deficits are assessed. The most current figures represent the state of the California crude market in 2013, 2014, and 2015. See CI Calculation Tables at 2. The Annual Crude Average of 11.54 gCO2e/MJ was less than the corresponding Baseline Crude Average of 11.59 gCO2e/MJ, meaning that, as noted above, incremental deficits were not assessed.

Because no incremental deficits have been assessed, it is impossible to see how this scheme is discriminatory. In fact, if incremental deficits were of an average of the entire market, as Plaintiffs seek, a number of foreign crudes that make up a substantial portion of the California crude oil market whose CI scores are higher than the Baseline Crude Average (11.59 gCO2e/MJ) would have caused regulated parties that used it to incur incremental deficits, meaning that those crudes actually benefited from the use of the Annual Crude Average. 34

33 As discussed in more detail below, because the Midwest produces the overwhelming majority of corn ethanol, Plaintiffs assert their discriminatory effects challenge against the ethanol provisions requires a volumetric analysis to assess accurately the actual effect the LCFS provisions have on ethanol producers, and whether the impact, if any, disproportionately affects ethanol producers from certain regions of the country more than others (e.g., the Midwest). The reason for this is straightforward: the Midwest produces dramatically more ethanol than anywhere else in the country.

Although Plaintiffs have not raised the issue with regard to crude oils, the same logic applies because certain regions of the country and the world produce more crude oil than others. Thus, to account fully for the effects of the LCFS and to determine whether they are use the MTD Order did not do so, instead focusing only CI scores, the Court does so now, even though Plaintiffs did not raise the issue. 34 Although crudes with CI scores lower than the Annual Crude Average potentially could have been burdened by its use if incremental deficits were assessed, that did not occur. Accordingly, it is illogic to conclude any crude was burdened by the

In 2013, eight foreign crudes accounting for approximately 148,000,000 barrels, or approximately 25% of the total California crude oil market, had CI scores higher than 11.59 gCO2e/MJ. Had their actual, individualized scores been used instead of the Annual Crude Average, they would have incurred deficits. Likewise, in 2014, eleven foreign crudes accounting for approximately 223,000,000 barrels, or approximately 36.3%, had CI scores higher than the Annual Crude Average. And, in 2015, twenty-five foreign oils that account for approximately 19.5% of the market (approximately 118,200,000 barrels) had CI scores higher than the Annual Crude Average.

California crudes also benefited from the use of the Annual Crude Average. In 2013, twenty-one California crudes that accounted for approximately 16.5% of the market had CI scores higher than 11.59 gCO2e/MJ. In 2014, twenty-three California crudes that accounted for approximately 17% of the market had CI scores higher than 11.59 gCO2e/MJ. The results in 2015 are virtually identical: twenty-three California crudes that accounted for approximately 17% of the market had CI scores higher than 11.59 gCO2e/MJ.

Thus, in 2013, 2014, and 2015, more foreign crude oil, by volume and corresponding market share, benefited from the use of the Annual Crude Average than did California crudes. In fact, in 2013 and 2014, significantly more foreign crude oil benefited than did California crude oil almost twice the amount of benefited California crude in 2013 (approximately 25% of the total market vs. 16.5%), and more than twice the amount in 2014 (approximately 36% of the total market vs. 17%) . Given this, it is difficult to see how the incremental deficits scheme in Step Two could have a discriminatory effect on foreign oil, particularly given that no crudes were burdened because incremental deficits were not assessed. If Plaintiffs had their way, and all crudes were assigned their real CI score, substantially more foreign crudes, constituting large portions of the entire California crude oil market, would have caused regulated parties that used them to incur incremental deficits. Instead, no incremental deficits were

Annual Crude Average. assessed. And although some California crudes benefited from this scenario, significantly more foreign crude oil did.

On balance, the Court finds that the AFPM Plaintiffs do not and cannot state a claim that the

One appears to benefit California overall, it nonetheless burdens a significant number of California

producers while benefitting a significant number of out-of-state producers. Step Two, on the other hand, provides a clear overall advantage to out-of-state producers when compared to their California counterparts. If incremental deficits were assessed under Step Two in the manner the AFPM Plaintiffs sought, a substantial amount of foreign crude would cause regulated parties that use it to incur incremental deficits. Instead, that foreign crude does not generate incremental deficits, meaning Step - state economic interests by burdening out-of- , 553 U.S. 328, 338 (20 discriminatory effects claim against the provisions WITHOUT LEAVE TO AMEND because amendment would be futile.

V. CONCLUSION AND ORDER For the foregoing reasons, the Court GRANTS IN PA motions for judgment on the pleadings and to dismiss the SAC and TAC. The Court ORDERS that:

1. Original LCFS on the

ground they are moot and barred by the Eleventh Amendment is GRANTED IN PART and DENIED IN PART as discussed above; 2.

and 2015 LCFS discriminate in practical effect is DENIED; 3. Pike claim against the ethanol

provisions of the Original and 2015 LCFS is DENIED;

4. s remaining claims are GRANTED WITHOUT

LEAVE TO AMEND; and 5. The parties shall submit a joint status report by June 30, 2017, explaining how they wish to

proceed. Counsel should not assume that there will be another opportunity, beyond the one provided in this Order, to file another pleading.

IT IS SO ORDERED. Dated: June 15, 2017 /s/ _____ UNITED STATES CHIEF DISTRICT JUDGE