

Recommendations for California Air Resources Board Proposal to Amend Low Carbon Fuel Standard Program to Include Fossil Jet Fuel

I. INTRODUCTION

The California Air Resources Board (“CARB”) is considering an amendment to the low carbon fuel standard (“LCFS”) to include fossil jet fuel (the “Proposal”).¹ This paper addresses potential claims—previously asserted in other contexts—that the Proposal would be preempted by federal law, and explains why the Proposal would *not* be preempted.

II. PREEMPTION ANALYSIS

The Supremacy Clause of the U.S. Constitution provides that federal law “shall be the supreme law of the land”² such that state laws are preempted when a federal statute expressly says so (express preemption), federal law impliedly occupies an entire field of regulation (field preemption), or complying with both federal and state law becomes practically impossible or state law stands as an obstacle to the fulfillment of a federal objective (conflict preemption).

This paper addresses three potential sources of federal preemption as it relates to the Proposal: (1) whether the Proposal would be preempted by the Federal Aviation Administration’s (“FAA”) broad authority to regulate the field of aviation safety and airspace management and/or FAA’s specific authority to regulate the composition of aviation fuels; (2) whether the Proposal would be preempted by the Clean Air Act’s prohibition on state regulation of aircraft engine emissions; and (3) whether the Proposal would be preempted by the Airline Deregulation Act’s (“ADA”) prohibition on state regulation of the “price, route, or service” of an air carrier.³

A. Implied Federal Aviation Administration Act Preemption

The Federal Aviation Administration Act’s (“FAA Act”) broad grant of authority to the FAA has been generally held to “preempt the field” of aviation safety and airspace management.⁴ However, the preemptive scope of the FAA Act is not limitless; courts have determined states may still regulate certain aspects of aviation operations that do not directly intrude on the FAA’s domain.⁵

The FAA has general authority to approve aviation fuel⁶ and the specific statutory authority to prescribe “standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions the Administrator of the Environmental

¹ Proposed amendments to 17 C.C.R. §§ 95482-95483(a) (February 2023).

² U.S. Const. Art. VI, cl. 2.

³ Each of the sources of federal preemption have been previously raised by stakeholders in response to CARB’s preliminary proposal discussed above.

⁴ *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471-74 (9th Cir. 2007).

⁵ See *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 209-12 (2d Cir. 2011); *Martin v. Midwest Express Holdings*, 555 F.3d 806, 812 (9th Cir. 2009); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 740 (E.D.N.C. 2008) (“Although the FAA has preemptive control of aviation safety measures, regulations regarding [emergency medical services] related equipment would not intrude on its domain. . . . [O]nly those regulations governing equipment or training directly related to aviation safety are preempted.”).

⁶ See 14 C.F.R. § 33.7 (engine operating limitations for fuel).

Protection Agency decides under section 231 of the Clean Air Act (42 U.S.C. 7571) endanger the public health or welfare.”⁷ Section 44714’s plain terms authorize the FAA to approve fuel formulations but do not stake out an exclusive federal interest in the lifecycle greenhouse gas emissions of jet fuel.

The Proposal would establish standards for the carbon intensity of jet fuel, but would not mandate or prohibit the use of any particular jet fuel approved by the FAA. Because the Proposal would not intrude on, or conflict with, the FAA’s regulatory domain, it would likely not be impliedly preempted by the FAA’s safety authority. While section 44714 authorizes the FAA to essentially establish a federal LCFS program in accordance with the Environmental Protection Agency’s (“EPA”) standards for any pollutant for which EPA has made an endangerment finding,⁸ it does not prohibit CARB from incentivizing the use of approved fuels with lower carbon intensity. State laws setting mandatory chemical or compositional requirements for aviation fuel that differ from federal standards would likely be preempted by Section 44714. But the Proposal would only provide state-level incentives for the use approved fuels, which would operate in tandem with any future-established federal LCFS program to control aircraft emissions.⁹ There is no “clear evidence” that Congress intended section 44714 to preempt state regulation of the carbon intensity of jet fuel or that there is any actual conflict between the two potential regulatory schemes.¹⁰

B. Clean Air Act Preemption

Under the Clean Air Act, EPA is generally required to issue aircraft engine emissions standards for pollutants that it has formally found to threaten public health and welfare.¹¹ The Clean Air Act provides, “No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.”¹²

The Ninth Circuit interprets the Clean Air Act’s preemptive scope in light of its “concern[] with direct state regulation of aircraft or aircraft engines or with other state regulation which would affect the aircraft or engine,” and has not extended such preemption beyond regulation of the performance of aircraft engines.¹³ By its plain terms, the Clean Air Act does not apply to the regulation of jet fuel, and therefore does not expressly preempt the Proposal. The Proposal also does not conflict with the Clean Air Act because a net reduction in the carbon intensity of aviation fuels would complement, rather than stand as an obstacle to, the Clean Air Act’s emissions reduction objectives. Importantly, courts analyzing preemption are “highly deferential to state law

⁷ 49 U.S.C. § 44714. Relatedly, the FAA Act prohibits anyone from manufacturing, delivering, selling, or offering for sale “any aviation fuel or additive in violation of a regulation prescribed under section 44714.” *Id.* § 44711(a)(9).

⁸ See Third Way, FAA’s Existing Authority to Create a Low Carbon Aviation Fuel Standard, at 4 (June 2023), <https://thirdway.imgix.net/Existing-Authority-for-a-Federal-LCFS.pdf>.

⁹ See *Rocky Mountain Farmers Union v. Corey*, 258 F. Supp. 3d 1134, 1152-53 (E.D. Cal. 2017) (holding LCFS was not preempted where and state efforts to reduce GHG emissions complemented and supported the EPA’s efforts).

¹⁰ *Id.* at 1148.

¹¹ 42 U.S.C. § 7571.

¹² 42 U.S.C. § 7573.

¹³ See *California v. Department of Navy*, 624 F.2d 885, 888 (9th Cir. 1980); *California ex rel. State Air Resources Bd. v. Department of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977) (narrowly interpreting the “field” regulated as the “structure or performance of aircraft engines”).

in areas traditionally regulated by the states” such as air pollution prevention and related public health measures.¹⁴ Thus, the Clean Air Act would not preempt the Proposal.

C. ADA Express Preemption

The ADA expressly prohibits states from enacting or enforcing “a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation”¹⁵

While the Proposal may impact the cost of fuel uplifted by an air carrier in California, the Proposal would not be preempted under the ADA. The Proposal would not bind air carriers to any price, route, or service¹⁶ or otherwise regulate those areas. Any impacts on the cost of jet fuel in California would likely be held to be outside the scope of ADA preemption¹⁷ or as imposing such tenuous burden on an air carrier’s price or services that it would not trigger preemption.¹⁸ Moreover, any potential effect on consumer prices is highly speculative because the complexity of airline ticket and fuel pricing would make it difficult to show the Proposal had anything more than a distant effect on air carrier prices, routes, or services.

III. DORMANT COMMERCE CLAUSE ANALYSIS

The “dormant Commerce Clause” is inferred from the Commerce Clause of the U.S. Constitution and limits the States’ authority to enact or enforce laws that burden interstate commerce, even in the absence of legislative action by Congress. Those limits are delineated by two general rules. On one hand, state laws that discriminate against interstate commerce are virtually per se invalid. On the other hand, nondiscriminatory laws with incidental effects on interstate commerce are generally upheld unless the burden on commerce is clearly excessive in relation to the putative local benefits.”¹⁹ The test for facially nondiscriminatory laws is referred to as *Pike* balancing.²⁰

The LCFS has already been upheld against dormant Commerce Clause challenges.²¹ Because the burden on jet fuel providers would not seem appreciably different from the burden imposed by the LCFS on other fuel providers, a court may be hard pressed to reach a different result if a dormant Commerce Clause challenge to the Proposal were brought.

Further, the Proposal would likely be upheld under *Pike* because the local benefits of reduced air pollution from flights taking off in California would outweigh the burdens on interstate

¹⁴ *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000).

¹⁵ 49 U.S.C. § 44713(b)(1). The exceptions do not apply to the Proposal.

¹⁶ *See, e.g., California Trucking Ass’n v. Bonta*, 996 F.3d 644, 658 (9th Cir. 2021) (generally applicable laws are not “related to” a price, route, or service unless it freezes them into place or determines them to a significant degree); *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012) (regulation of “inputs,” such as “labor, capital, and technology,” are removed from the price offered to the customer and not preempted).

¹⁷ *See Nat’l Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 727-28 (9th Cir. 2016) (noting that the Ninth Circuit has narrowly interpreted “service” to mean an air carrier’s transportation service).

¹⁸ *Supra* Footnote 15.

¹⁹ *Ward v. United Airlines*, 986 F.3d 1234, 1239 (9th Cir. 2021) (internal citations and quotations omitted).

²⁰ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²¹ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 948-54 (9th Cir. 2019).

commerce.²² Limiting the Proposal to only intrastate jet fuel may tip the *Pike* balancing test further in CARB's favor; however, such limitation would severely blunt the effectiveness of the Proposal while only nominally reducing litigation risk.

²² See *Ward*, 986 F.3d at 1239-42 (upholding application of labor law against dormant Commerce Clause challenge because they do not discriminate against out-of-state economic interests or excessively burden interstate commerce); *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1136 (9th Cir. 2021) (same); *Air Transp. Ass'n of Am. v. Wash Dept. of Labor & Indus.*, 410 F. Supp. 3d 1162, 1175 (W.D. Wash. 2019) (same).