Nos. 13-1148, 13-1149

In The
Supreme Court of the United States

ROCKY MOUNTAIN FARMERS UNION, *et al.*,

Petitioners,

v.

RICHARD W. COREY, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, *et al.*,

Respondents.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

Petitioners,

v.

RICHARD W. COREY, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATES OF NEBRASKA ET AL. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether California's Low Carbon Fuel Standard is unconstitutional because it discriminates against interstate and foreign commerce and regulates aspects of fuel production occurring wholly beyond the borders of California.

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INTEREST OF *AMICUS CURIAE*[1]

The Ninth Circuit's decision – permitting California to both discriminate against and regulate fuel production in other states – poses a significant threat to the sovereign interests of *Amici* States. The Ninth Circuit's holding authorizes states to contravene the long-standing limitations on the regulation of interstate commerce so long as the objective is deemed worthwhile. *Amici* States submit this brief in support of the challenge to California's Low Carbon Fuel Standard, 17 C.C.R. §§ 95480-95490, because the issues presented by the petitions for certiorari are of exceptional importance to the preservation of state sovereignty.

Amici States are concerned with the impact of the Ninth Circuit's decision on the economies of ethanol-producing states, crude-oil-producing states, as well as the broader trade relationships among the states.[2] If permitted to stand, the decision allows

[1] In accordance with Rule 37 of the Supreme Court's Rules of Practice and Procedure, counsel for *Amici* States provided notice to counsel of record of its intention to file this *amicus curiae* brief in support of Petitioners.

[2] *Amici* States of Nebraska, Illinois, Iowa, Kansas, Michigan, Missouri, North Dakota, and Ohio, are directly harmed by the Low Carbon Fuel Standard because they are the lead producers of ethanol. *Amici* States of Texas, Alaska, Kansas, North Dakota, Oklahoma, and Wyoming, are directly harmed by the Low Carbon Fuel Standard because they are the lead producers of crude oil. *Amici* States of West Virginia, Alabama, Arizona, Georgia, Indiana, Montana, South Dakota, and Utah, are not primarily producers of ethanol or crude oil, but agree that the Ninth Circuit's decision could set the States against each other in a way that will affect their industries as well.

the states to set themselves against one another, balkanizing the nation, and giving rise to trade wars, undoing the protections of the Court's dormant Commerce Clause jurisprudence and the structural limitations on extraterritorial regulation inherent in the Constitution.

INTRODUCTION

The issues underlying the petitions for certiorari are of exceptional importance to state sovereignty because the Ninth Circuit's decision discards the analytical framework long-applied by the federal courts to determine whether state laws run afoul of the dormant Commerce Clause. Generally, the strictures imposed by that Clause prohibit states from discriminating against interstate commerce and from regulating commercial activity occurring wholly beyond their borders.

The Low Carbon Fuel Standard ("LCFS") facially discriminates against interstate commerce by assigning a higher "carbon intensity" to ethanol production pathways based, in part, on the distance the product must travel to reach the California marketplace. In addition, the LCFS discriminates against out-of-state crude oil by artificially inflating its "carbon intensity" value in a manner calculated to protect domestic crude producers. Finally, the LCFS also regulates commercial activity occurring wholly out of state, i.e. the methods states use to produce various fuel. Each infirmity constitutes grounds for striking down the

LCFS. Nevertheless, the Court of Appeals blessed the rule, placing out-of-state goods at a competitive disadvantage based solely on the perceived worthiness of California's underlying goal.

Amici States urge the Court to grant certiorari. The implications of the Ninth Circuit's reasoning should be troubling to all states. If left unturned, the decision will allow states to penalize or altogether prohibit the importation or sale of goods whose transportation through interstate commerce or out-of-state production methods are deemed undesirable according to one state's scientific, aesthetic, or moral judgment.

The question presented stems from multiple errors of law. Unless corrected, these errors will create significant problems for the free flow of goods among the States.

ARGUMENT

The Court of Appeals' decision conflicts with the dormant Commerce Clause's limitations on state laws discriminating against interstate commerce. The Commerce Clause provides:

> The Congress shall have the power . . . [t]o regulate Commerce with foreign nations, and among the several States. . . .

U.S. Const. art. I, sec. 8, cl. 3.

Thus, the power to regulate interstate commerce belongs to the federal government.

The "Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). And "any attempt to directly assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

This structure reflects the vision of the Framers: that "every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). Free access to markets is denied when States discriminate against out-of-state commerce. Such regulations are invalid unless the State "can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

The Ninth Circuit's decision conflicts with the Court's precedent by upholding a law that facially discriminates against interstate commerce based upon what was deemed "*good and non-discriminatory reason*," without subjecting that rule to strict scrutiny. The decision also conflicts with the long-standing precedent prohibiting the application of state law to wholly extraterritorial commercial activity.

These infirmities give rise to practical implications concerning sovereignty that are of exceptional importance to *Amici* States.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENT OF THIS COURT AND OTHER FEDERAL CIRCUITS

The LCFS requires businesses selling transportation fuel in California to reduce the "carbon intensity" attributable to the fuel's production methods and importation. The "carbon intensity" value is a reflection of the California Air Resources Board's ("CARB") assessment of the carbon emissions generated by the fuel's production and importation. Accordingly, the LCFS assigns differing carbon intensity values to fuels with "identical physical and chemical properties" depending upon the methods used to produce and transport those fuels into the California marketplace. See, Excerpts of Record (ER)10:2360. Thus, the LCFS assigns a higher default "carbon intensity" value to ethanol produced outside of California than that assigned to chemically-identical ethanol produced domestically. The LCFS likewise assigns a higher "carbon intensity" value to crude oil produced outside of California than to crude oil produced domestically.[3] The default "carbon intensity" value is

[3] California has suggested that individual producers can apply to change the fuel standard and have individual "pathways" approved but that argument lacks merit. That a regulation may be changed is no defense. Midwest producers still bear

(Continued on following page)

based, in part, upon the distance the fuel must travel through interstate commerce to reach the California market. See, Rocky Mountain Farmers Union ("RMFU") Pet. at 4.

The Ninth Circuit has committed two critical errors in upholding this regulatory framework, both of which call out for this Court's review.

A. The Ninth Circuit's Reliance On The Purpose Underlying The LCFS In Determining Whether The Rule Is Facially Discriminatory Towards Interstate Commerce Conflicts With Supreme Court and Other Circuit Precedent

The Ninth Circuit erred in holding that the LCFS is not facially-discriminatory toward interstate commerce because California had "good and non-discriminatory reason" for the differential treatment of fuels produced outside California. See, Pet. App. 5a, 28a. The Ninth Circuit held that "facial discrimination"

the burden of applying for better treatment, 17 C.C.R. § 95486(e), (f), and must show that their carbon emissions are substantially lower than their default pathway, 17 C.C.R. § 95486(e)(2). And even if they carry that burden, the deck remains stacked: An ethanol plant in California that is in all material respects the same as an ethanol plant in Nebraska, and whose product has an identical effect on the environment, will still have a lower carbon intensity penalty based on its state of origin because of transportation emissions. In other words, all other things being equal, the LCFS always favors a California facility over a facility located in another State.

only occurs "where a statute or regulation distinguished between in-state and out-of-state products and no nondiscriminatory reason for the distinction was shown." Pet. App. 28a. According to this Court's well-established analytical framework, the Ninth Circuit's reasoning is incorrect.

When determining whether a state law violates the limitations of the dormant Commerce Clause, a court must first examine whether the text of a law discriminates against out-of-state goods or services. See, *Carbone,* 511 U.S. at 392. The textual inquiry does not account for the "purpose of, or justification for" the law because those factors have "no bearing on whether [the law] is facially discriminatory." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994); see, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-76 (1997) ("[i]t is not necessary to look beyond the text . . . to determine that it discriminates against interstate commerce"). Only after a court determines that the law is facially discriminatory does an examination of the state's justification occur. *Id*. Even then, the court must apply strict scrutiny.

In finding that the LCFS is not facially discriminatory because California can offer a "nondiscriminatory reason" for the law, the Ninth Circuit has turned the analysis directly on its head. Because the decision's discrimination analysis conflicts with the

precedent of this Court and other Circuit, certiorari should be granted.[4]

B. The Ninth Circuit's Decision To Uphold A Law That Regulates Wholly Extraterritorial Commercial Activity Conflicts With Supreme Court And Other Circuit Precedent

The Ninth Circuit erred in holding that the LCFS does not violate the prohibition against extraterritorial regulation. The decision incorrectly upheld the regulation of wholly extraterritorial commercial activity based on the notion that California has the authority to "regulate commerce and contracts within [its] boundaries . . . with the goal of influencing the out-of-state choices of market participants." Pet. App. at 57a. The court reasoned that reducing "emissions of carbon resulting from the production and transport, regardless of location, of transportation

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[4] See, *Used Tire Int'l, Inc. v. Diaz-Saldana*, 155 F.3d 1, 3-4 (1st Cir. 1998); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. 1995); *Am. Trucking Ass'ns v. Whitman*, 437 F.3d 313, 320-21 (3d Cir. 2006); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785-88 (4th Cir. 1996); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 917-18 (5th Cir. 1997); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 750-51 & n.12 (5th Cir. 2006); *Waste Mgmt., Inc. of Tenn. v. Metro. Gov't of Nashville & Davidson Cnty.*, 130 F.3d 731, 736 (6th Cir. 1997); *Jones v. Gale*, 470 F.3d 1261, 1267-70 (8th Cir. 2006); *Nat'l Solid Wastes Mgmt. Ass'n v. Ala. Dep't of Envtl. Mgmt.*, 910 F.2d 713, 720 (11th Cir. 1990).

fuels" provides a sufficient rationale for the LCFS. *Id*. at 62a.

This reasoning conflicts with the precedent of this Court and the other Circuits.[5] States may not "attach restrictions to exports or imports in order to control commerce in other States," because doing so "would extend the [State's] policy power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393.

The LCFS regulates transportation-fuel production activities occurring wholly outside California. In fact, CARB acknowledged the LCFS was specifically designed to require out-of-state producers to "alter production methods, sources of power, or other aspects of their business." SER14:3578. Because the decision's extraterritoriality analysis conflicts with the precedent of this Court and other Circuits, certiorari should be granted.

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[5] See, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999) (per curiam) (*Meyer II*); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) (*Meyer I*); *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

II. THE NINTH CIRCUIT'S DECISION GIVES RISE TO PRACTICAL IMPLICATIONS REGARDING STATE SOVEREIGNTY THAT ARE OF EXCEPTIONAL IMPORTANCE

The Ninth Circuit's decision imposes direct harm upon the citizens of *Amici* States and has significant implications for interstate commerce. The deleterious effect of the decision will be most immediately felt by *Amici* States who manufacture and export ethanol and crude oil. But the problems will not end there. The decision opens the door to all states to enact laws to further their individual policy goals at the expense of the free flow of trade among the Union.

A. The Implications For Fuel Production

The immediate effect of the Ninth Circuit's decision will be severe: as a result of the LCFS, ethanol produced in Midwestern States will no longer be as competitive in the extremely large and important California market. This will have a considerably negative impact on the *Amici* States' economies.

The LCFS assigns the highest "carbon intensity" values to Midwest corn ethanol production methods, including production from natural-gas-powered dry mills. In fact, the rule assigns "carbon intensity" values for some corn ethanol facilities that are higher than the level assigned to gasoline, thus discouraging California distributors from purchasing ethanol from producers in *Amici* States instead steering them toward domestic producers.

Fuel production constitutes a major aspect of the *Amici* States' economies. The ethanol industry is responsible for $42.9 billion of the national GDP. 10.4 billion gallons of Midwestern corn-based ethanol is produced annually in Midwestern States. As of December 2011, Iowa alone had 41 ethanol plants operating within the State with a total production capacity of 3.7 billion gallons of ethanol – ranking first in the country in each category. Nebraska ranked second in each category with 24 ethanol plants and a total production capacity of 1.98 billion gallons of ethanol (as of October 2010). Combined, Midwestern States are home to 132 of the nation's approximately 209 ethanol plants with more planned or under construction. The LCFS's harms will certainly be felt in these *Amici* States. Nebraska alone exports approximately 31 percent of the ethanol it produces to California. Each year, ethanol sales in California from Nebraska *alone* amount to $1.3 billion.

However, the LCFS's impact will not only be limited to ethanol-producing businesses: the citizens of *Amici* States will suffer as well. In Nebraska, more than 1,300 people are directly employed in the ethanol industry, and the indirect and secondary effects of the industry support an additional 1,600 jobs. According to statistics compiled by the Nebraska Public Power District's Economic Development Department, ethanol production also boosts the price of corn by $0.05-0.10 per bushel, thereby boosting local farmers' incomes. In fact, the Nebraska Public Power District estimates that the direct and indirect effects of the

ethanol industry increase household income in Nebraska by $241 billion and produce $31 million in tax revenues. To take just one example, a May 2011 study published by the Iowa State University Center for Agricultural and Rural Development found that the past decade of growth in ethanol production *reduced* gasoline prices in the Midwest region by $0.39 per gallon.

California's decision to undermine the ethanol industry will also countermand the pro-ethanol policies enacted by Congress and Midwestern States. The federal government has favored – and indeed, *mandated* – increasing the use of renewable fuels like ethanol. See, 42 U.S.C. §§ 7547(o)(2)(A) and (B). Under this policy, the U.S. Energy Information Administration estimates that ethanol blended into gasoline will therefore rise from 4.3 percent of the total gasoline pool by volume in 2007 to 7.6 percent in 2030. And the capital cost to meet this rising need for ethanol will be $67 million for a single 50-million gallon-per-year ethanol facility. Consistent with this federal policy, states such as Iowa, Kansas, Missouri, and Ohio have adopted state-based fleet fuel purchase requirements. Others, like Illinois, Iowa, Kansas, Michigan, Missouri, Nebraska, North Dakota, Ohio, and South Dakota, have retail pump incentives for ethanol blends. In addition, the States of Missouri, North Dakota, Ohio, and South Dakota have adopted producer incentive programs. By seeking to eliminate these States' ethanol from California's market, the LCFS works against these States' efforts

to grow their own production of ethanol. California's regulation penalizes exactly what these States seek to promote.

Finally, the LCFS also seeks to control the conduct of the production and distribution chains of these States' fuels industry. California seeks to change these States' "farming practices" based on its own views of what methods are "sustainable." ER, volume 7, page 1724. This effort seeks to undo the free choices of citizens of other States without providing those citizens any democratic recourse against California. And California has no legitimate interest in regulating these in-state farming methods. All corn-based ethanol is chemically identical, and use of Midwest-produced ethanol in California emits no more greenhouse gases than use of California-produced ethanol. The only difference is how ethanol is produced in other States – which is not California's right to decide.

Likewise, the LCFS protects California Thermal Enhanced Oil Recovery ("TEOR") from competition by out-of-state crude oils that have lower carbon intensities and emit fewer greenhouse gases. For example, the LCFS gives the exact same "carbon intensity" score to Alaska light crude and California TEOR – even though the production and transport of California TEOR is *four times worse* for the environment than Alaska light crude. See, CAB Initial Statement of Reasons, C-56 tbl. C12-1 (CA9 ER 11:2699); *id.* at C-59 tbl. C12-6 (CA9 ER 11:2702); CAB, Further Statement of Reasons 23-24 (CA9 SER 15:3607-08).

When asked to explain why they discriminated in favor of California TEOR, respondents admitted that the LCFS was designed to "decrease dependence on foreign oil," and to "keep[ ] more money in the State" by "[d]isplac[ing] imported transportation fuels with biofuels produced in the State." CA9 SER 15:3663 (FSOR 479). That discrimination directly harms States like Alaska, which is responsible for more than 16 percent of the crude oil consumed in California. And it indirectly harms all States that produce and export crude oil, including Texas, which produces more than 2.5 million barrels of crude oil per day for commodity markets affected by California's discrimination.

B. Implications Beyond Fuel Production

The implications of the Ninth Circuit's decision are not limited to ethanol- or crude oil-producing states. Its effects on state sovereignty and interstate commerce are much broader. The logic of the decision permits states to penalize or altogether prohibit importation of products produced out of state based upon the condemnation of the production method or the distance the product must travel to reach the marketplace. Such a regulatory regime would inevitably lead to trade wars among the States, which destroys the principle underpinning the dormant Commerce Clause.

As the dissent from the denial of rehearing *en banc* below explained, "[u]nder the majority's reasoning, California could impose regulatory penalties . . .

to require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California." Pet. App. 171a-172a (M. Smith, J., dissenting). "Such a measure would, of course, benefit California to the extent that it would minimize the risk of competition from Texas businesses, with their lower labor costs." *Id.* And, of course, "under the same logic, Texas could – and assuredly would – respond in kind, perhaps by penalizing California agriculture on account of its reliance on costly irrigation methods." *Id.* Environmental standards, terms and conditions of employment, and the permissible treatment of animals in farming differ widely among the States, to name just a couple of broad categories. If, as the Ninth Circuit would have it, States are permitted to discriminate against out-of-state goods that were not produced using methods that comport with the scientific, aesthetic, or moral values of their citizens, the interstate market would be seriously damaged in exactly the manner the Commerce Clause prohibits.

Nor is this a hypothetical concern. In 2010, California passed a law requiring anyone who sells eggs in California to use cage-free farming methods. *Missouri et al. v. Harris et al.*, 2:14-cv-00341 (E.D. C.A. February 9, 2014). The inevitable retaliation against such laws will impermissibly fragment the "commerce . . . among the several States."

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted this 21st day of April, 2014.

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