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.

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.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Cases: **Page(s)**

Bacchus Imports, Ltd., v. *Dias*,
468 U.S. 263 (1984) 4, 6

Brown-Forman Distillers Corp. v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) 15, 16, 23

Dean Milk Co. v. *Madison*,
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Granholm v. *Heald*, 544 U.S. 460 (2005) 20

Healy v. *Beer Inst.*, 491 U.S. 324 (1989) 14, 15, 19

Maine v. *Taylor*, 477 U.S. 131 (1986)....................... 12

Nat'l Solid Wastes Mgt. Ass'n v. *Meyer*,
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New Energy Co. of Ind. v. *Limbach*,
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S. Pac. Co. v. *Arizona ex rel. Sullivan*,
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United Haulers Ass'n, Inc. v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*,
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United States v. *E.C. Knight Co.*,
156 U.S. 1 (1895) 14

Statutes: **Page(s)**

2009 Or. Laws Ch. 754 § 6 (H.B. 2186) 19

Cal. Health & Safety Code § 25996 24

Next Generation Energy Act of 2007, Minn. Stat. §§ 216H.01 et seq. 24

Rules:

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Cal. Code Regs. tit. 17, §§ 95480-95490 (2012) 1

Cal. Code Regs. tit. 17, § 95480 (2012) 8

Cal. Code Regs. tit. 17, § 95482 (2012) 8

Wash. Exec. Order 09-05 20

Other Authorities:

AB 1437 Bill Analysis, Cal. Assembly Comm. on Appropriations (May 13, 2009) 29

Am. Compl., *North Dakota* v. *Heydinger*, No. 11-cv-3232 (D. Minn. Dec. 1, 2011) (Doc. 9) 28

Argus White Paper, *California Environmental Markets: Factors that Affect LCFS and GHG Trading* (2012) 19, 20

Barr Eng'g Co., *Low Carbon Fuel Standard "Crude Shuffle" Greenhouse Gas Impacts Analysis* (June 2010) 15

Other Authorities—continued: Page(s)

Boston Consulting Group, *Understanding the Impact of AB 32* (June 19, 2012).......................... 19

Br. of *Amici Curiae* Cal. State Ass'n of Counties et al., *Pharm. Research & Mfrs. of Am.* v. *Alameda County*, No. 13-16833 (9th Cir. Jan. 22, 2014)................. 30

Br. of *Amici Curiae* Minn. Center for Envt'l Advocacy et al., *North Dakota* v. *Heydinger*, No. 11-cv-3232 (D. Minn. Sept. 20, 2013) (ECF 159) 28

Cal. Air Resources Board, *Low Carbon Fuel Standard 2011 Program Review Report* at 101 (Dec. 8, 2011) 21

Michael Canes & Edward Murphy, George C. Marshall Institute, *Economics of a National Low Carbon Fuel Standard* (2009)...................................... 14, 15, 27

Consumer Energy Alliance, *Analysis of the Economic Impact of a Regional Low Carbon Fuel Standard on Northeast/Mid-Atlantic States* (Mar. 2012)................................. 26

Defs.' Mot. to Dismiss at 13, *Missouri ex rel. Koster* v. *Harris* (E.D. Cal. Apr. 9, 2014) (Doc. 36) 30

First Am. Compl., *Missouri ex rel. Koster* v. *Harris*, No. 2:14-cv-341 (E.D. Cal. Mar. 5, 2014) (Doc. 13) 29

Other Authorities—continued: **Page(s)**

IHS CERA, *Oil Sands, Greenhouse Gases, and US Oil Supply: Getting the Numbers Right* (2010) 22

Jim Lyons & Allan Daly, Sierra Research, *Preliminary Review of the ARB Staff Analysis of 'Illustrative' Low Carbon Fuel Standard Compliance Scenarios* (DRAFT) 21

Northeast and Mid-Atlantic Low Carbon Fuel Standard, *Memorandum of Understanding* (Dec. 30, 2009) 24

Northeast States for Coordinated Air Use Management, *Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region* (Aug. 2011) 25

Or. Dep't of Envtl. Quality, *Oregon Clean Fuels Program Q&A* 23

Or. Dep't of Envtl. Quality, *Oregon Low Carbon Fuel Standards* (Jan. 25, 2011) 22, 25, 26

Jack Richards, CRA International, *Change is in the Air: Implications of low carbon fuel standards for refiners and fuel distributors* (Feb. 2009)....................................... 26

Joseph Story, *Commentaries on the Conflict of Laws* § 20 (1834)... 16

Other Authorities—continued: Page(s)

Washington Department of Ecology, *A Low Carbon Fuel Standard in Washington: Informing the Decision* (Feb. 2011) 23

Michael Wines, *Climate Pact Is Signed by 3 States and Partner*, N.Y. Times, Oct. 30, 2013 24

Sonia Yeh & Julia Witcover, Univ. of Cal., Davis, *Status Review of California's Low Carbon Fuel Standard* (Jan. 2014) 20

INTEREST OF *AMICI CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its membership includes businesses across all segments of the economy and, in particular, the transportation fuel industry. The Chamber also represents many other industry sectors that support, or depend upon, transportation fuels.

The American Petroleum Institute ("API") is a nationwide non-profit trade association that represents over 590 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, marketing, transportation, and distribution of petroleum products. The business activities of API's members are frequently subject to regulation under environmental statutes and regulations, such as the California law at issue here. API members participated in the rulemaking process for California's Low Carbon Fuel Standard ("LCFS" or "Fuel Standard") regulation, Cal. Code Regs. tit. 17, §§ 95480-95490 (2012).

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and have consented to this filing.

Both *amici* represent their members' interests in matters before Congress, the Executive Branch, and the courts. The Chamber and API regularly file *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including the petroleum and natural gas industries—such as cases involving challenges to state and federal environmental regulations. The Chamber's and API's members have a strong interest in the LCFS regulation, which has an immediate impact on the transportation fuel industry nationwide, and could have broader adverse effects on upstream and downstream sectors and end users.

Amici also have a strong interest in this case because the LCFS, and the panel's novel rationale upholding it, will impede the free flow of transportation fuels in interstate commerce and hinder the operation of the Nation's integrated market. The LCFS discriminates against out-of-state fuels in favor of in-state fuels, and attempts to export California's policy preferences about means of production, methods of transportation, and land use throughout the United States and abroad. The panel decision may embolden other States to discriminate against out-of-state interests in the guise of health and safety regulation, resulting in a complex web of inconsistent and competing extraterritorial regulations. Fragmentation of the interstate market in transportation fuel and other products will create inefficiencies and could impose significant costs on industry and consumers.

SUMMARY OF ARGUMENT

A divided panel of the Ninth Circuit departed from well-settled constitutional law by upholding Cal-

ifornia's LCFS regulation. In a Circuit home to the Nation's largest market for transportation fuels and many other products, the majority not only effectively eliminated the application of strict scrutiny to state laws that discriminate against interstate commerce—it *lauded* California's effort to export its own policy preferences beyond the State's borders.

The opinion sharply conflicts with decisions of this Court and others by holding that a State's proffered justification bears on whether a law facially discriminates, and that the LCFS does not discriminate in purpose or effect because it advantages some, but not all, in-state interests. The panel decision undermines strict scrutiny's role as an important safeguard against state economic protectionism. Rigorous application of strict scrutiny is particularly important for complex environmental and other technical regulations, where state laws that plausibly appear to serve non-discriminatory purposes may conceal protectionism in regulatory details. The LCFS cannot survive strict scrutiny because it is ineffective (even counterproductive) in achieving its stated goals.

The panel majority also departed from the long-settled constitutional prohibition on extraterritorial state laws. In design and practical effect, the LCFS regime regulates conduct wholly outside of California, including means of production and transportation. The LCFS cannot be distinguished on the ground that it involves "incentives" or a "choice" for regulated entities. Independent studies report that the LCFS credit market is volatile and likely to face severe credit shortages, which will force regulated entities to comply with California's standards or withdraw from

the California market. California's LCFS will also conflict with other States' laws, which already take divergent approaches to issues ranging from land use change to carbon intensity ("CI"), risking the creation of regional "mini-markets."

If left undisturbed, the decision will undermine the proper functioning of the Nation's integrated national market in transportation fuels and embolden California and other States to enact discriminatory and extraterritorial laws. Litigants are already invoking the decision to defend a range of dubious laws against constitutional challenge.

ARGUMENT

I. The Panel Decision Eviscerated Strict Scrutiny As An Important Check on Discriminatory State Laws

As petitioners and the judges dissenting from the panel decision and denial of rehearing *en banc* explained, the panel majority applied a diluted form of scrutiny that bears scant resemblance to the test applied by this Court and others in comparable circumstances. In concluding that the LCFS's crude oil provisions do not discriminate, the panel broke from *Bacchus Imports, Ltd.*, v. *Dias*, 468 U.S. 263, 270 (1984), which applied strict scrutiny to a materially indistinguishable law that helped some, but not all, in-state products. The panel also erred by "consider[ing] California's reasons for distinguishing between in-state and out-of-state ethanol" *before* "examining the text of the statute to determine if it facially

discriminates." Pet. App. 68a.[2] "[T]he purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994).

The practical significance of these doctrinal errors is plain. With respect to both crude oil and ethanol, the panel effectively exempted California from the burden of satisfying strict scrutiny. But strict scrutiny has long served as an important safeguard against the natural "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Or. Waste*, 511 U.S. at 98. Although the panel dismissed application of strict scrutiny as "archaic formalism," Pet. App. 64a, the need for that doctrine is even more acute in the modern era, where state laws may superficially appear to serve a variety of non-discriminatory purposes, while actually concealing economic protectionism in the details of technical, complex regulations. Even where a State begins with a legitimate purpose, regulators often (perhaps inevitably) face pressures to favor in-state interests as they make the myriad technical decisions inherent in a complex regulatory scheme.

A. The Panel Applied An Erroneous and Diluted Form of Scrutiny To The Crude Oil and Ethanol Provisions

The LCFS discriminates against out-of-state fuels, and thus is subject to strict scrutiny. Yet despite patent discrimination on the face of the regulation and

[2] "Pet. App." references are to the appendix in No. 13-1149.

in its design, purpose, and effect, the panel effectively applied a reasonableness standard in judging California's justifications for treating in-state and out-of-state crude and ethanol differently. At the same time, the panel dismissed record evidence of protectionist justifications, including California's curious application of diametrically opposed methodologies for crude oil and ethanol. The two regulations differ in many regards, but share an essential similarity: both favor in-state fuels at the expense of out-of-state fuels. The panel's diluted scrutiny fails to account for these significant concerns.

1. The panel applied an erroneous standard of review to the crude oil regulations, which, by design, discriminate against out-of-state crude. The LCFS crude oil provisions gerrymander a system of selectively-applied "average" values, benefitting one form of carbon-intense crude produced in California (TEOR), and disadvantaging several out-of-state crude oils by assigning them higher-than-"actual" carbon intensities. The panel reasoned that the LCFS assigns an unfavorable carbon intensity to two other in-state crudes. Pet. App. 48a-49a. But where a law discriminates, "neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 276 (1988) (citing *Bacchus*, 468 U.S. 263).

Instead of stringent strict scrutiny, the panel applied a deferential standard of review. It summarily dismissed record evidence of protectionist purpose as "a few quotes" (Pet. App. 50a n.13), and credited the suggestion that regulators' references to "keep[ing]

more money in the State" and "[r]educing the volume of transportation fuels that are imported from other states" (*id.* at 316a-317a) merely reflected an "economic defense of a [regulation] genuinely proposed for environmental reasons," *id.* at 50a n.13. And while conceding "California TEOR was the *only* existing [high carbon-intensity crude oil] source" that benefited from California's decision to use "average" CI values, the panel reasoned that because two other in-state crudes made up a particular percentage of the California market, no discrimination was present. *Id.* at 46a, 49a.

2. On their face, the LCFS default pathways for ethanol discriminate between ethanol from the "Midwest" and "California." Pet. App. 272a-274a. Other things held equal, the LCFS uniformly assigns a higher CI value (and thus a price penalty) to "Midwest" as compared to "California" corn ethanol. *Ibid.* This is the essence of facial discrimination, *i.e.*, the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99; AFPM Pet. 15-23; RMFU Pet. 15-21. To sustain such a law, the State must "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Limbach*, 486 U.S. at 278; accord *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) ("'negative' self-executing Commerce Clause" bars a "state law that facially discriminates against interstate commerce").

But here, the panel reviewed California's proffered justification under a "reasonable[ness]" standard. Pet. App. 44a. While conceding that ethanol sold in California is chemically identical regardless of origin, the panel credited California's "lifecycle analysis" as reflecting "real risks" and "real differences" between in- and out-of-state production and transportation. *Id.* at 26a, 29a, 32a-33a. The panel viewed components of California's "lifecycle analysis" in isolation, reasoning, for instance, that the regulations do not discriminate because they attribute more emissions to "transporting raw corn" from the Midwest to be refined in California than importing finished ethanol—even though the end result prejudices Midwestern ethanol. *Id.* at 32a. In the panel's view, it is constitutionally sufficient that "it *appears* that [California]'s method of lifecycle analysis treats ethanol the same regardless of origin." *Id.* at 29a (emphasis added). The panel did not consider non-discriminatory alternatives. That analysis was a far cry from the "strictest scrutiny" that has long applied to facially discriminatory laws. *Or. Waste*, 511 U.S. at 100-101.

3. The panel's error in bypassing strict scrutiny becomes even clearer when contrasting the ethanol and crude oil regulations. California undertook the same regulatory task for both ethanol and crude oil—*i.e.*, assigning a carbon intensity to account for emissions associated with the full "lifecycle" of a transportation fuel, including means of production and transportation. Both fuels are subject to the regime's declining annual caps on carbon intensity. LCFS §§ 95480, 95482. But California chose diametrically opposed methodologies for crude oil and ethanol.

The dominant product in the ethanol market is imported from the Midwest, where production plants are located near corn supplies but far from California, using electricity that is often generated by coal-fired plants. The California Air Resources Board ("CARB") chose a set of "individualized" default pathways for ethanol, penalizing "Midwestern" ethanol by assigning it a higher carbon intensity than California stocks, based on factors like the efficiency of production methods, source of energy, and transportation. CARB expected that this structure would result in "'high-intensity' ethanol being sold outside of California," while encouraging new "biorefineries * * * to be built in the State." Pet. App. 308a, 316a.

For crude oil, by contrast, CARB rejected using individualized pathways, under which a significant California-made crude product would have suffered, and instead applied an "average" carbon intensity based on crude oils that constituted at least two percent of the 2006 California market. The average value disadvantaged several out-of-state crude sources by assigning them higher-than-"actual" carbon intensity. The average did not apply to emerging crude sources that fell below the two percent cutoff, but have carbon intensity above the average, which instead receive (what CARB calculates as) their "actual" value. By design, the only high carbon-intensity crude to benefit from using this "average" CI methodology (Pet. App. 46a) is produced in California.

In other words, for ethanol, California created a regime to divert out-of-state high-carbon ethanol to other markets, while encouraging in-state production of ethanol. But for crude oil, California *discouraged*

the diversion of high-carbon fuels out of California, while protecting that same in-state product from out-of-state competition by assigning it a lower-than-"actual" carbon intensity and assigning out-of-state sources a higher-than-"actual" value. The dissimilar regimes have one thing in common: both advantage California producers and disadvantage out-of-state competitors. This disparity, read in the context of explicitly protectionist statements in the administrative record, justifies application of strict scrutiny. Pet. App. 316a.

B. Strict Scrutiny Is An Important Check Against Protectionist and Discriminatory State Laws

The consequences of the panel's error are severe. States will almost invariably be able to articulate some reasonable-*sounding* explanation beyond bare protectionism for discriminatory regulations, and those pretextual rationales may well pass muster under the panel's diluted and deferential form of review. Only strict scrutiny adequately guards against the States' natural tendency to advance their economic self-interest.

Many of this Court's leading cases invalidating discriminatory state legislation would have been decided differently if, as here, merely articulating a reasonable-sounding justification were enough to spare a facially discriminatory statute from strict scrutiny review. For example, in another case involving a State's asserted efforts to derive environmental benefits from using ethanol as a transportation fuel, this Court applied "the strictest scrutiny" to an Ohio tax

credit "explicitly" and "on its face" limited to ethanol produced in Ohio or a State that granted reciprocal tax advantages to Ohio ethanol. *Limbach*, 486 U.S. at 271, 274, 279. Ohio plausibly defended the law as based on purported "health" benefits, by arguing that the tax credit "encourages use of ethanol * * * to reduce harmful exhaust emissions," *id.* at 279; the trial court found that health was "one of several conceivable purposes of the enactment," and this Court accepted that "the protection of health is a legitimate state goal" and the "use of ethanol generally furthers it." *Id.* at 279 & n.3. But the justification could not satisfy strict scrutiny. Among other things, there were non-discriminatory means to accomplish the same goal, such as other States encouraging ethanol use by means other than a reciprocal credit. *Ibid.* Only under strict scrutiny did this Court conclude that "health is not the purpose of the provision." *Id.* at 279.

Similarly, in *Oregon Waste Systems*, Oregon defended a $2.25 per ton fee for disposal of out-of-state waste (compared to an $0.85 per ton fee for in-state waste) on the ground that the law would ensure out-of-state waste generators would "bear the full costs of in-state disposal." The State argued that in-state, but not out-of-state, shippers cover some of their disposal costs through generally-applicable taxes. 511 U.S. at 102-107. However plausible on its face, this proffered justification could not satisfy strict scrutiny. *Id.* at 108. This Court examined the tax regime as a whole to determine if in- and out-of-state entities faced a "substantially similar" burden. *Id.* at 103-105. And it "condemn[ed] as illegitimate" the State's asserted interest (akin to California's arguments

here) in "requir[ing] shippers of out-of-state waste to bear the full costs of in-state disposal," which it could not distinguish from an interest in "giv[ing] [in-state interests] * * * a cost advantage over their [out-of-state] competitors." *Id*. at 106.

Applying strict scrutiny in such circumstances is compelled not only by doctrine, but also practical necessity. "[W]hen a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of 'simple economic protectionism.'" *United Haulers*, 550 U.S. at 343. Conversely, this Court has "often f[ou]nd discrimination when a State shifts the costs of regulation to other States, because when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *Id.* at 345 (quoting *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768 n.2 (1945)). And strict scrutiny is an important check even where a State enacts facially-discriminatory laws for a *non*-protectionist purpose. *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986).

C. The LCFS Fails Strict Scrutiny Review

As petitioners explain, the panel's doctrinal errors are outcome-determinative, because the LCFS cannot satisfy strict scrutiny. AFPM Pet. 23-25. Among other reasons, California cannot show that its articulated "local purpose" is "legitimate," *Or. Waste*, 511 U.S. at 101, because the LCFS will do little or nothing to achieve its stated environmental goals.

Consistent with California's *own* admissions that the LCFS are unlikely to have any environmental benefits (Pet. App. 19a, 46a-47a, 308a, 315a; E.R. 7:1552), independent studies have suggested the regime will be ineffective at best—and counterproductive at worst—undermining the degree to which it can be said to serve a "legitimate local purpose," *Or. Waste*, 511 U.S. at 101.

One study, for instance, predicted that "implementing LCFS in the U.S. could encourage 'shuffling'"—importing low-carbon crude produced abroad while sending nearby higher-carbon crude to distant markets[3]—"that would double the greenhouse gas emissions associated with crude oil transport to and from regions directly and indirectly impacted by the policy." See Barr Eng'g Co., *Low Carbon Fuel Standard "Crude Shuffle" Greenhouse Gas Impacts Analysis* at 1 (June 2010), *available at* http://www.secureourfuels.org/wp-content/uploads/2011/04/Crude_Shuffle_Report_0616101.pdf. The study predicted that the LCFS will result in a net *increase* in global GHG emissions of 7.1-19.0 million metric tons per year. *Id*. at 1-3.

Other studies predict similar unintended consequences. For instance, even a *nationwide* LCFS could increase crude oil consumption in foreign, non-LCFS jurisdictions, if the price decrease resulting from lower U.S. consumption of crude induces others to con-

[3] *See* Michael Canes & Edward Murphy, George C. Marshall Institute, *Economics of a National Low Carbon Fuel Standard* at 15 (2009), *available at* http://marshall.org/climate-change/economics-of-a-national-low-carbon-fuel-standard/ (nationwide LCFS would "make it more attractive for [Canada] to ship oil sands crude to the Far East, particularly China").

sume more. See Canes & Murphy, supra note 3, at 16. Similarly, these analyses anticipate that increased ethanol demand in a LCFS jurisdiction would increase the price (and thus decrease consumption) of ethanol in non-LCFS jurisdictions. Replacing ethanol consumption with gasoline consumption in those other areas could further offset any gains in the LCFS jurisdiction. See *ibid.* (offset effects eliminate "two thirds of the gains in terms of emission reductions").

II. The Panel Decision Cannot Be Reconciled With The Long-Settled Prohibition on Extraterritorial State Laws

Certiorari is also warranted because the panel decision, which upholds California's regulation of conduct that occurs entirely outside that State, conflicts with precedents of this Court and others. AFPM Pet. 26-33; RMFU Pet. 22-30.

A. The LCFS Impermissibly Regulates Commerce Outside California

The Constitution's prohibition on a State "regulating commerce occurring wholly outside [its] borders," *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989), has deep roots in the structure of the Constitution and this Nation's history. In the Founding era, it was understood that "no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein." Joseph Story, *Commentaries on the Conflict of Laws* § 20 (1834). Consistent with that understanding, a State's power to "protect the lives, health, and property" of its residents was long considered "essentially exclusive." *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 11 (1895).

Today, the prohibition on extraterritorial laws is most commonly grounded in the Commerce Clause, and applies not only where state provisions explicitly regulate extraterritorial conduct, but also where "the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 332, 336 (emphasis added); see also *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 583-584 (1986). Courts ask how a challenged statute "may interact" with other States' regulatory regimes, and prospectively consider "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336-337. The panel contradicted both principles, reasoning that the LCFS "does not [formally] control" out-of-state conduct (but rather involves "incentives"), and suggesting that plaintiffs must show "conflicting, legitimate legislation is already in place" or "actual and imminent." Pet. App. 56a, 60a.

Both in conscious design and "practical effect," California's LCFS regulates conduct "wholly outside [of California's] boundaries." *Healy*, 491 U.S. at 336. The LCFS defines "lifecycle greenhouse gas emissions" to include "fuel * * * production and distribution," including "extraction," wherever it occurs. Pet. App. 256a. For high carbon-intensity crude oils excluded from the 2006 "average" CI, California calculates a "carbon intensity from production and transport." *Id.* at 301a. The LCFS has "the goal of influencing * * * out-of-state choices." *Id.* at 57a. For instance, in response to concerns that its approach would disadvantage Canadian oil sands and other out-of-state crudes, CARB recommended that producers modify their means of production, e.g., by "us[ing]

control measures, such as carbon capture and sequestration." *Id.* at 304a.

The ethanol regulations also reach conduct outside of California. The regulations assign a higher CI if a Midwestern ethanol producer chooses to dry distillers grains (a co-product) rather than leaving them wet. See LCFS § 95486(b) (Table 6) (specifying CIs of 93.60 gCO_2e/MJ and 86.80 gCO_2e/MJ, respectively). And the LCFS "adjust[s]" CI values for emissions California attributes to "[i]ndirect land use change," not only "domestically" but also in "countries that trade with the U.S." See E.R. 9:2279; see also E.R. 9:2305-11 (increasing CI for land-use changes in Brazil). The inevitable "practical effect," *Brown-Forman*, 476 U.S. at 583, of increasing a product's CI based on out-of-state means of production is to make those fuel sources less commercially valuable as compared to identical fuel produced in a manner favored by California. E.R. 2:131 ¶¶ 6-8. The LCFS "control[s] out-of-state conduct just as surely as a mandate would, particularly in view of California's economic clout." Pet. App. 249a (M. Smith, J., dissenting).

The panel insisted that the regulation involves only "incentives" that "encourage[]" behavior by out-of-state producers. Pet. App. 56a, 58a. But courts have invalidated analogous state "incentives." See, *e.g.*, *Brown-Forman*, 476 U.S. at 575-576 (striking down New York law giving distillers an incentive to charge in-state residents the lowest possible prices, in exchange for the right to do business there); *Limbach*, 486 U.S. at 272 (incentive for other States to grant Ohio reciprocal tax credit); *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 654-655 (7th Cir. 1995)

(similar, as to recycling laws and access to Wisconsin landfills).

The panel also reasoned that "[f]irms in any location may *elect* to respond to the incentives provided by the [LCFS]," Pet. App. 52a (emphasis added)—among other ways, by selecting a mix of fuels to meet the LCFS's "system of credits and caps," *id.* at 56a. But that "choice" heavily depends on the availability of credits. Simple mathematics confirms that gasoline "refiners and blenders" must purchase credits because "a 10 [percent] ethanol blend will not be enough to allow gasoline to meet LCFS targets later this decade." Argus White Paper, *California Environmental Markets: Factors that Affect LCFS and GHG Trading* at 4 (2012) ("Argus"), *available at* https://media.argusmedia.com/~/media/Files/PDFs/White%20Paper/California%20Environmental%20Markets.pdf. Many predict the LCFS credit market will face significant cumulative shortages within only a few years. See, *e.g.*, Boston Consulting Group, *Understanding the Impact of AB 32* at 9-10 (2012), *available at* http://www.secureourfuels.org/wp-content/uploads/2012/07/BCG_report.pdf.

A January 2014 status report confirms that LCFS credit prices have been highly volatile, spiking from $16/credit in 2012 to $75-$80/credit in November 2013, before receding to $50/credit a month later. See Sonia Yeh & Julia Witcover, Univ. of Cal., Davis, *Status Review of California's Low Carbon Fuel Standard* at 1 (Jan. 2014), *available at* http://www.its.ucdavis.edu/research/publications/publication-detail/?pub_id=2008. In early 2013, CARB began studying measures to mitigate harmful effects

of volatility, such as selling extra emergency compliance credits (defeating the point of a declining annual cap), or instituting a price ceiling. *Id.* at 10-11.

Another recent report noted the widespread "belief that there will not be enough low-carbon fuels to meet the 2016-2020 targets," which "encourage[s] entities with surpluses to bank credits" and leads to "short[ages]" in the "spot market." See Argus at 1. The report acknowledges the "aggressive" carbon reductions slated to begin "after 2015," and continued "uncertainty" about "which fuels at what price will solve the troublesome equation of the LCFS." *Id.* at 2. Yet another study predicts cumulative credit deficits for gasoline and substitutes of up to 4.37 million metric tons by 2015, and 49.4 million metric tons by 2020. Jim Lyons & Allan Daly, Sierra Research, Inc., *Preliminary Review of the ARB Staff Analysis of "Illustrative" Low Carbon Fuel Standard Compliance Scenarios* at 8 (Dec. 2011) (draft), *available at* http://www.wspa.org/sites/default/files/uploads/documents/Publications/DRAFT_LCFS_Review_12.12.11.pdf. If credits are not available (or not economically priced), the "choice" could become illusory, forcing regulated entities either to comply with the annual target without credits or withdraw from California's market.[4]

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[4] CARB's compliance model relies on credits generated in early years to offset later deficits when the annual reduction targets accelerate. But even CARB's most optimistic forecasts predict a peak cumulative credit surplus (*i.e.*, before deficits rapidly draw it down beginning in 2015) of only 3.2 million metric tons. CARB, *Low Carbon Fuel Standard 2011 Program Review Report* at 101 (Dec. 8, 2011), *available at*

B. California's LCFS Will Overlap and Conflict With Other States' Regulations, Fragmenting the Market for Transportation Fuels

The panel's rationale also conflicts with the longstanding rule that courts must consider "how [a] challenged [regulation] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar [rules]." *Healy*, 491 U.S. at 336. The risk is hardly hypothetical: Underscoring the need for immediate review, "North American jurisdictions implementing or considering LCFS policies represent 34 percent of the US gasoline market and close to 50 percent of the Canadian gasoline market." IHS CERA, *Oil Sands, Greenhouse Gases, and US Oil Supply: Getting the Numbers Right* (2010), *available at* http://www.ihs.com/products/cera/energy-report.aspx?id=1065973276.

1. Eleven other U.S. States Are Developing LCFS

Oregon also authorized a LCFS. See 2009 Or. Laws Ch. 754 § 6 (H.B. 2186). In January 2011, the Oregon Department of Environmental Quality ("ODEQ") published an extensive technical and economic analysis and proposed program design. See ODEQ, *Oregon Low Carbon Fuel Standards* (Jan. 25, 2011) ("ODEQ Report"), *available at* http://www.deq.state.or.us/aq/committees/docs/lcfs/reportFinal.pdf. Its design reflects factors specific to Oregon, such as exemptions for agricultural applica-

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http://www.arb.ca.gov/fuels/lcfs/workgroups/advisorypanel/20111208_LCFS%20program%20review%20report_final.pdf.

tions and logging trucks. *Id.* at 90; ODEQ, *Oregon Clean Fuels Program Q&A*, http://www.deq.state.or.us/aq/cleanFuel/qa.htm (last visited Apr. 16, 2014).

In 2011, the Washington Department of Ecology ("WDE") published a study examining how to tailor existing LCFS laws to Washington's circumstances. See WDE, *A Low Carbon Fuel Standard in Washington: Informing the Decision* (Feb. 2011) ("WDE Report"), *available at* http://www.ecy.wa.gov/climatechange/docs/fuelstandards_finalreport_02182011.pdf; Wash. Exec. Order 09-05. The report focused on specific "feedstocks for alternative fuel production" available in Washington, including agricultural cultivation, waste-derived materials, and the State's unique access to hydroelectric power. The study "modified" its analysis "to reflect Washington state conditions," including the kinds of crude oil refined and used in Washington. WDE Report at 3-8, 9-13, 32.

In October 2013, California, Oregon, Washington, and British Columbia signed an agreement to "align [their] energy policies." Pet. App. 250a n.6 (citing Michael Wines, *Climate Pact Is Signed by 3 States and Partner*, N.Y. Times, Oct. 30, 2013, at A18). This suggests fragmentation of the national market will include the formation of small trade zones. Contra *Granholm* v. *Heald*, 544 U.S. 460, 472-473 (2005) ("a proliferation of trade zones is prevented" by constitutional prohibition on extraterritorial regulation); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951) (Constitution prohibits the "multiplication of preferential trade areas").

Ten Northeast and Mid-Atlantic States committed to finalize a "proposed program framework" in early 2011 for a "regional low carbon fuel program." See *Northeast and Mid-Atlantic Low Carbon Fuel Standard*, *Memorandum of Understanding* (Dec. 30, 2009) (signed by Governors of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey,[5] New York, Pennsylvania, Rhode Island, and Vermont), *available at* www.nescaum.org/documents/lcfs-mou-govs-final.pdf. In August 2011, Northeast States for Coordinated Air Use Management ("NESCAUM") published a report that drew on a broad range of data beyond the LCFS in customizing a regional program. See NESCAUM, *Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region* at 5-7 (Aug. 2011), *available at* http://www.nescaum.org/documents/nescaum-cfs-economic-analysis-final.pdf.

2. *Differences in State-Specific LCFS Will Adversely Affect Interstate Commerce*

There is no guarantee LCFS laws from other jurisdictions will be "complementary"; those laws present a real threat of a conflicting network of cross-border regimes. Contra Pet. App. 59a-60a.

For instance, existing rules take opposite approaches to indirect land-use change. California assigns an indirect land-use penalty to ethanol from corn and sugarcane, but Oregon's proposed law excludes a similar adjustment. See ODEQ Report at 21. Multiple LCFS regulations may also impose over-

[5] Governor Chris Christie subsequently withdrew New Jersey from the agreement.

lapping and potentially inconsistent informational requirements. A LCFS regime depends on extensive record-keeping to realize the benefits (or record the costs) of low- (high-) carbon fuels in terms of credits earned or needed. The logistical burden could be significant. See Jack Richards, CRA International, *Change Is in the Air: Implications of Low Carbon Fuel Standards for Refiners and Fuel Distributors* at 3 (Feb. 2009) ("Richards"), *available at* http://www.crai.com/uploadedFiles/Publications/implications-of-low-carbon-fuel-standards.pdf.

Different States also assign different CI values to chemically identical fuels. Oregon, for instance, assigns ethanol from corn (Midwest average) a CI of 64.82 (6.6% less than California's CI of 69.40). Conventional biodiesel produced via a single "pathway" might be assigned a CI value of 83.25 in California, 19.99 in Oregon, and 40.0 in the Northeast and mid-Atlantic. Compare LCFS § 95486 (Table 7), with ODEQ Report at 79, and Consumer Energy Alliance, *Analysis of the Economic Impact of a Regional Low Carbon Fuel Standard on Northeast/Mid-Atlantic States* at 20 (Mar. 2012) (Table 2-3), *available at* http://www.secureourfuels.org/wp-content/uploads/2012/03/FINALCEA_LCFS_REPORT-MASTER_DRAFT_DOCUMENT_3-23-2012.pdf.

If the same fuels are assigned a lower CI in one State than another, experts explain that using that fuel to achieve a given reduction will be more onerous in the latter jurisdiction—as "[t]he closer the GHG emissions of the low carbon fuel are to the [baseline] standard, the more of that fuel must be supplied of the total amount of fuel in the marketplace" to

achieve a given reduction. Canes & Murphy at 10. That one State "defin[es] [CI] differently from other States," and the practical difficulty of maintaining multiple parallel distribution systems tailored to specific sub-markets, demonstrates "[t]he ease with which [the LCFS] can interfere with [producers'] operations in other States." *Brown-Forman*, 476 U.S. at 583. Independent experts predict that this regulatory patchwork will "transform what was once one large transportation fuel market into a discontinuous series of 'mini-markets.'" Richards, at 2. Indeed, as a matter of geography, if each State penalizes fuels based on the specific distance they are transported, schemes will necessarily produce conflicting values.

Highlighting the regime's extraterritorial nature, CARB itself predicts that "many producers will want to make their fuels more competitive in California by producing the lowest CI fuels possible" and then will "s[ell] [those low-CI fuels] outside of California." E.R. 4:785. The panel agreed, touting California's LCFS as likely to "inspire imitation" in other States, and praising the State for having "long been in the vanguard of efforts to protect the environment." Pet. App. 61a, 5a. It is not difficult to foresee state-specific LCFS proliferating if California's is upheld.

III. The Panel Decision Is Having Negative Effects Nationwide

Litigants are already citing the panel decision to support market-distorting legislation. Many of these controversies originate in California, whose sheer market power and expansive regulatory regimes have led to efforts to coerce other States into harmonizing their laws with its own.

The panel decision has already played a role in cases outside the Ninth Circuit. One such case involves Minnesota's Next Generation Energy Act of 2007, Minn. Stat. §§ 216H.01 et seq., which prohibits "import[ing] [into Minnesota] or commit[ting] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions," defined to include emissions from the generation of electricity imported from outside, but consumed within, Minnesota. *Id.* § 216H.03, subd. 2-3. North Dakota, which transmits to Minnesota power from coal-fired plants, and industry groups challenged the law under the dormant Commerce Clause. See Am. Compl., *North Dakota v. Heydinger*, No. 11-cv-3232 (D. Minn. Dec. 1, 2011) (Doc. 9). Environmental groups invoked the panel decision in defending the law. See Br. of *Amici* Minn. Center for Envt'l Advocacy et al., *North Dakota* v. *Heydinger*, No. 11-cv-3232 (D. Minn. Sept. 20, 2013) (ECF 159).

Within California, a 2008 ballot initiative prohibited that State's farmers from using industry-standard cage systems for egg-producing chickens, instead requiring larger enclosures. At the urging of California farmers facing increased production costs, the legislature later prohibited the sale of any shelled egg in the State if the seller knows or should have known "that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with [California's] animal care standards." Cal. Health & Safety Code § 25996. In effect, the law bars access to the California market unless out-of-state egg producers "compl[y] with" California law. The legislative record confirms an extraterrito-

rial purpose, explaining that "[t]he intent of this legislation [wa]s to level the playing field so that in-state producers are not disadvantaged." See AB 1437 Bill Analysis, Cal. Assembly Comm. on Appropriations (May 13, 2009).

Five States sued to enjoin the law as discriminatory and extraterritorial. See First Am. Compl., *Missouri ex rel. Koster* v. *Harris*, No. 2:14-cv-341 (E.D. Cal. Mar. 5, 2014) (Doc. 13). The complaint explains that because California is the Nation's largest egg market, farmers in states such as Iowa (which currently exports a *billion* eggs to California every year) and Missouri (600 million) face severe disruptions. Due to seasonal variation in demand, out-of-state farmers must either invest hundreds of millions of dollars to bring their operations into compliance with California law, or exit the California market. The latter option would produce a glut of eggs elsewhere, depressing prices and potentially driving farmers out of business. California cited the panel decision in moving to dismiss the complaint, arguing that the egg law is "[m]uch like the fuel standards at issue in [this case]." Defs.' Mot. to Dismiss at 13, *Missouri ex rel. Koster* v. *Harris* (E.D. Cal. Apr. 9, 2014) (Doc. 36).

California entities have also invoked the panel decision to defend a municipal ordinance that seeks to shift the costs of a local waste collection program entirely onto the interstate market. The law purports to require out-of-state manufacturers of prescription drugs to establish and fund in-county programs for disposing of those products, ostensibly because out-of-state transactions ultimately brought the products into the county. See Br. of *Amici Curiae* Cal. State

Ass'n of Counties et al., *Pharm. Research & Mfrs. of Am.* v. *Alameda County*, No. 13-16833 (9th Cir. Jan. 22, 2014); accord *id.* Br. of *Amicus Curiae* Att'y Gen. Kamala D. Harris in Support of Appellees. This Court's review is urgently needed to address—and prevent the further spread of—such market-distorting legislation.

CONCLUSION

For the forgoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted.

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