

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 Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION, ET AL.,
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

Rocky Mountain Farmers Union v. Corey

1. California's Low Carbon Fuel Standard, expressly and on its face, treats chemically identical fuels differently based on where they were produced and how far they travel before they are used in California. Did the Ninth Circuit err in concluding that the Low Carbon Fuel Standard does not facially discriminate against interstate commerce?

2. California's Low Carbon Fuel Standard regulates greenhouse gas emissions occurring in other States by rewarding and punishing industrial and agricultural activity taking place outside California. Did the Ninth Circuit err in concluding that the Low Carbon Fuel Standard is not an extraterritorial regulation?

American Fuel & Petrochemical Manufacturers Association v. Corey

Whether California's Low Carbon Fuel Standard is unconstitutional because it discriminates against out-of-state fuels and regulates interstate and foreign commerce that occurs wholly outside of California.

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF), Cato Institute (Cato), National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), Reason Foundation, California Manufacturers & Technology Association (CMTA), and Energy & Environment Legal Institute (E&E Legal) respectfully submit this brief *amicus curiae* in support of the Petitioners.¹

PLF is the most experienced public interest legal organization defending the constitutional principle of federalism in the arena of environmental law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the balance between state and federal environmental regulation of commercial activities. *See, e.g., Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free

¹ Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case is of central concern to Cato because it implicates the basic principles of federalism as a safeguard for liberty.

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com, and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

CMTA is a 501(c)(6) mutual benefit trade association representing over 700 large and small manufacturers doing business in the state of California. Since 1913, CMTA has advocated for laws, regulations, and court decisions that will support new manufacturing investment and growing employment.

E&E Legal is a nonprofit organization engaged in strategic litigation, policy research, and public education on important energy and environmental issues. Primarily through its petition litigation and transparency practice areas, E&E Legal seeks to correct onerous federal and state policies that hinder the economy, increase the cost of energy, eliminate jobs, and do little or nothing to improve the environment.

SUMMARY OF REASONS FOR GRANTING THE PETITIONS

The Court should grant the Petitions because the decision below conflicts with this Court's Commerce Clause decisions barring extraterritorial state regulation. Relief in this Court is urgent. Without it, California's violation of interstate federalism, and its extraterritorial control of the national fuel supply chain, will become permanent. Absent this Court's review, the decision below also enables significant domestic trade conflict.

This Court has consistently held that state laws controlling actions in other states violate the Commerce Clause. But the decision below allows California to use a methodology in its Low Carbon Fuel Standard (Fuel Standard), called life cycle analysis, to evade these precedents. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1078 (9th Cir. 2013) (“[T]he Fuel Standard does not violate the dormant Commerce Clause’s prohibition on extraterritorial regulation.”); *id.* at 1102-03 (distinguishing this Court’s cases striking state laws under the Commerce Clause, on the basis that the Fuel Standard uses life cycle analysis instead of direct price controls or import conditions).

This Court has consistently struck down state laws that impede the interstate flow of goods based on out-of-state conduct rather than on features of the goods themselves. *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (citing cases); *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989). California’s “Low Carbon Fuel Standard” does not change the composition or physical attributes of the ethanol or finished gasoline it ostensibly regulates. Rather, it

uses life cycle analysis as a legal fiction to assign out-of-state greenhouse gas emissions, resulting from the *production* of transportation fuel, to the fuel itself. A life cycle analysis estimates the greenhouse gas emissions associated with *making* a consumer product, such as fuel, wherever they occur. Since the emissions from making fuel cannot be measured by examining the fuel, the only way for a state to regulate out-of-state emissions from fuel production is to fictionally assign them to the fuel itself. *Rocky Mountain Farmers Union*, 730 F.3d at 1080-81. But, if life cycle analysis is a valid means for states to regulate out-of-state conduct, as the decision below holds, then any state can use it to circumvent this Court's cases barring (i) interference with out-of-state purchase contracts, and (ii) import/export bans based on point of origin or destination.

The Court should grant the Petitions because the decision below violates a fundamental principle of interstate federalism. The Framers of the Constitution expressly sought to limit, not enable, states from acting against each other through import duties, point of origin restrictions, and other trade restraints which the Articles of Confederation too freely permitted. The decision below enables such trade restrictions contrary to the Framers' vision, and foments rather than quells bad trade relations among the states.

The Court should also grant the Petitions to address California's unprecedented foray into national control of fuel production, and to protect the nation's fuel supply chain from California's interference. The decision below holds that a state does not regulate extraterritorially when it uses its market power to coerce changes in conduct beyond its borders, conduct

that it cannot regulate directly. The court below actually applauded California for taking “legal and political responsibility” for actions that result in greenhouse gas emissions “regardless of location.” *Rocky Mountain Farmers Union*, 730 F.3d at 1106 (quoting *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1092 (E.D. Cal. 2011)).

Finally, the Court should grant the Petitions because the decision below invites domestic trade conflicts. Life cycle analysis models require simplification and policy judgment to be used as regulatory tools. States can easily exploit this malleability to impose a range of barriers to trade in milk, beer, liquor, coal, and other goods against their neighbors.

REASONS FOR GRANTING THE PETITIONS

I

THE COURT SHOULD GRANT THE PETITIONS BECAUSE THE DECISION BELOW UNDERMINES THIS COURT’S COMMERCE CLAUSE PRECEDENTS BY PROVIDING A TEMPLATE FOR EVADING THEM

A. The Decision Below Holds That States May Use Life Cycle Analysis To Regulate Out-of-State Fuel Production and Shipping

California has taken significant actions to reduce greenhouse gas emissions from sources in the state.

See generally Cal. Health & Safety Code §§ 38510, 38530, 38550, 38560 (directing the California Air Resources Board to require reporting of greenhouse gas emissions, establish limits on greenhouse emissions within California, and adopt regulations to enforce those limits). *See also* Cal. Code Regs. tit. 17, § 95801, *et seq.* (establishing state level greenhouse gas emissions cap-and-trade program, limiting aggregate greenhouse emissions from defined sources within California).

California's ambitions are larger, though: to control greenhouse gas emissions beyond its borders. As one among equals, California lacks the police power to regulate emissions in other states. *New York Life Insurance Co. v. Head*, 234 U.S. 149, 161 (1914). But, where police power is lacking, coercion through market power may suffice. The size of the Golden State's market for transportation fuel is a powerful lever: the second largest in the United States, equal to 9.6% of the national market for liquid transportation fuels.² Manufacturing and shipping that fuel to California encompasses an enormous variety of commercial activity in many states all over the nation, which in turn produces out-of-state emissions that California would like to regulate. The state's control of its fuel market gives it market power to control out-of-state emissions which it cannot control through its police power.

² California consumes 3,511.4 trillion btu of petroleum fuels, the United States consumes 46,562 trillion. U.S. Energy Info. Admin., State Profiles and Energy Estimates, Table C11, Energy Consumption by Source, Ranked by State (2011), *available at* http://www.eia.gov/state/seds/data.cfm?incfile=/state/seds/sep_sum/html/rank_use_source.html&sid=US (last visited Apr. 9, 2014).

In order to regulate emissions outside California, the Fuel Standard uses life cycle analysis to fictionally assign out-of-state emissions from producing fuel to the fuel itself. *Rocky Mountain Farmers Union*, 730 F.3d at 1081 (“Without lifecycle analysis, all [greenhouse gases] emitted before the fuel enters a vehicle’s gas tank would be excluded from California’s regulation.”). This legal fiction is referred to as a fuel’s “carbon intensity.” *Id.* at 1080 n.1. Life cycle analysis estimates the greenhouse gas emissions that result from each of the production steps in making fuel or other consumer products. For ethanol, these steps include growing corn, sugar cane, or other feedstocks; transporting feedstocks to an ethanol plant; distilling the feedstocks into ethanol (including onsite heat generation as well as offsite generation of electricity at power plants); and transporting the resulting ethanol to market. Cal. Air Res. Bd., *Proposed Regulation to Implement the Low Carbon Fuel Standard, Volume I, Staff Report: Initial Statement of Reasons*, Executive Summary, p. ES-2 (Mar. 5, 2009) (“Lifecycle analysis represents the GHG emissions associated with the production, transportation, and use” of fuels in motor vehicles.).³ See generally Alexander Farrell & Daniel Sperling, U.C. Davis Inst. of Transp. Studies, *A Low Carbon Fuel Standard for California* p. 24 (2007) (“[T]he word “carbon” in the LCFS name . . . is shorthand for life cycle global warming impact. The term “life cycle” refers to all the activities of production

³ Available at <http://www.arb.ca.gov/regact/2009/lcfs09/lcfsisor1.pdf> (last visited Apr. 9, 2014).

and use of the fuel, including what happens at the farm (in the case of biofuels) and the refinery.”).⁴

The Fuel Standard does not distinguish any physical attribute of the finished fuel it purports to regulate. It only assigns it an estimate of the emissions that a mathematical model says resulted from making it and moving it around. While the Fuel Standard measures carbon intensity for the use of fuel in California, this amount is constant for each fuel. *Rocky Mountain Farmers Union*, 730 F.3d at 1088 (noting the parties agreement that “ethanol from every source has ‘identical physical and chemical properties.’”) (citing *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d at 1081). The variation in the carbon intensity of different batches of ethanol results from differences in the emissions from its manufacture and shipment to California. The Fuel Standard thus differentiates between manufacturing and transportation processes, without making any distinction in the physical attributes of the resulting fuel itself. See *A Low Carbon Fuel Standard for California*, *supra*, § 2.8.1, pp. 40-41 (distinguishing between the “well-to-tank” portion of a fuel life cycle from the “tank-to-wheels” portion, in which “the resulting fuels behave identically”).

“Low Carbon Fuel Standard” is a misnomer: the Fuel Standard does not require removal of any carbon (or anything else) from any ethanol or gasoline used in California. Cal. Air Res. Bd., *California’s Low Carbon*

⁴ Available at http://www.arb.ca.gov/fuels/lcfs/lcfs_uc_p1.pdf (last visited Apr. 9, 2014). This report was prepared for the California Air Resources Board (Board) as part of the development of the Fuel Standard. One of its principal authors, Daniel Sperling, is a member of the Board and a Defendant-Respondent in this case.

Fuel Standard, Final Statement of Reasons p. 128 (Dec. 2009) (“LCFS does not, by itself, establish any motor vehicle fuel specifications. In other words, the LCFS does not replace or modify other motor vehicle fuel specifications.”); *see also id.* at 131 (further explaining that the Fuel Standard does not establish any motor vehicle fuel standards).⁵

The decision below relies on California’s use of life cycle analysis to affirm the Fuel Standard’s control of activity across the country. *Rocky Mountain Farmers Union*, 730 F.3d at 1102-03. But the Fuel Standard does not change or regulate the characteristics, formulation, or any other real attribute of the fuel itself. In approving this method of cross-border control, the decision below contradicts and undermines this Court’s precedents.

B. This Court Has Consistently Struck Down State Laws That Impede Interstate Trade Without Reference to Features of the Goods Themselves

The Fuel Standard uses life cycle analysis to measure out-of-state emissions resulting from making and shipping ethanol to California, and then assigns those emissions to otherwise identical shipments of ethanol when they arrive in California. Could similar methodologies be used to control out-of-state transactions, sources, or production methods for goods like milk, beer, liquor, solid waste, or coal? The Court should grant the Petitions to consider whether life cycle analysis is a constitutional means for a state to

⁵ Available at http://www.arb.ca.gov/regact/2009/lcfs09/lcfsfs_or.pdf (last visited Apr. 9, 2014).

extend its police power beyond its borders and beyond this Court's case law.

Where states impede interstate trade in goods without reference to any physical attribute of the goods themselves, this Court has consistently held these laws to violate the Constitution. *See, e.g., Healy*, 491 U.S. at 337. State efforts to limit the import or export of goods based on actions that occur outside the state and which are not manifest in the goods themselves have been very uniformly held unconstitutional. *Philadelphia*, 437 U.S. at 626-27 (citing cases). Excepting only those fields in which states grant regulatory monopolies to public utilities, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (natural gas), or where the state itself is a market participant, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008) (municipal bonds), *Amici* are unaware of any decision of this Court to the contrary.

The decision below attempts to distinguish these authorities, but it cites no case in which this Court upheld a state law regulating interstate commerce in goods that did not regulate some physical attribute of the goods. *Rocky Mountain Farmers Union*, 730 F.3d at 1102-03 (distinguishing this Court's Commerce Clause cases on the basis that the Fuel Standard uses life cycle analysis instead of direct price controls or import conditions). In fact, the decision below radically conflicts with and undermines this Court's Commerce Clause precedents.

For example, in *Baldwin v. G.A.F. Seelig, Inc.*, the Court struck down a New York statute that imposed minimum milk prices that dealers had to pay to dairies, whether in New York or in neighboring states such as Vermont. 294 U.S. 511, 519 (1935). In *Brown-*

Forman Distillers Corp. v. New York State Liquor Authority, the Court struck down another New York statute, this one conditioning access to the state's liquor market on distillers' affirmation that their prices to New York wholesalers were no higher than the lowest prices the distillers charged to wholesalers anywhere else in the nation. 476 U.S. 573, 575 (1986). The Court held that this statute controlled out-of-state transactions, and struck it down as a violation of the Commerce Clause. *Id.* at 580-82. In *Healy v. Beer Institute*, the Court invalidated a Connecticut law that required importers of beer to affirm that they charged Connecticut wholesalers no more than they charged in Massachusetts, New York, or Rhode Island. 491 U.S. at 326. This law had the practical effect of controlling "commercial activity occurring wholly outside the boundary" of the state, *id.* at 337, and discriminated "against brewers and shippers of beer engaged in interstate commerce[.]" *id.* at 340. And in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, the Court struck down a Michigan statute that prohibited private landfill operators from accepting solid waste that originated outside the county in which the landfill was located. 504 U.S. 353, 355 (1992).

Each of these unconstitutional state laws impeded the interstate flow of an article of trade without reference to any attribute of the article itself. The three price control cases regulated out-of-state sales between producers and wholesalers. *Baldwin*, 294 U.S. at 519; *Brown-Forman*, 476 U.S. at 575; *Healy*, 491 U.S. at 326. *Fort Gratiot* banned disposal of (more or less) fungible solid waste based only on its point of origin. 504 U.S. at 355. *Baldwin* and *Healy* applied to transactions in immediately neighboring states.

Baldwin, 294 U.S. at 519 (milk purchased outside New York state); *Healy*, 491 U.S. at 326 (beer prices in specified neighboring states). The New York law in *Brown-Forman* expressly regulated conduct nationwide, 476 U.S. at 575, while the imported waste ban in *Fort Gratiot* had the effect of restricting commerce within Michigan as well as between Michigan and neighboring states, 504 U.S. at 361. Compare *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979) (striking law that banned export of minnows while allowing their use in state) with *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (affirming ban on import of live bait fish based on likely impact of nonnative fish on local species).

C. Under the Decision Below, Life Cycle Analysis Allows States To Evade This Court's Commerce Clause Precedents

If California directly legislated that ethanol made in coal fired plants, or crude oil produced from the oil sands of Alberta, could not be used in California, that law would be struck down under *Healy*, *Baldwin*, *Brown-Foreman*, and *Fort Gratiot*. See also *Wyoming v. Oklahoma*, 502 U.S. 437, 461 (1992) (state cannot require that a percentage of coal used in power plants serving the state be mined in the state). The state should not be able to do indirectly what it is constitutionally forbidden to do directly. And the decision below raises the important new question of whether these precedents can now be evaded by using a life cycle analysis model, rather than the cruder and more obvious Twentieth Century methods of extraterritorial regulation.

To illustrate, New York could identify out-of-state activities involved in the production of milk. New

York's minimum wage, for example, is higher than the federal minimum wage, while neighboring Pennsylvania's equals the federal minimum.⁶ New York might argue that Pennsylvania's lower minimum wage puts New York dairies and milk processors at a disadvantage. *See, e.g.*, Debra Burke, et al., *Minimum Wage and Unemployment Rates: A Study of Contiguous Counties*, 46 *Gonz. L. Rev.* 661, 678-80 (2011) (describing employment effects of different minimum wage laws in state border areas of Washington and Idaho). New York could then employ a life cycle analysis model that estimates economic inputs into milk production, similar to the manner in which the life cycle analysis in the Fuel Standard estimates emissions from fuel production. Using that life cycle analysis, New York could assign a "minimum wage effect" to all milk sold in New York, and require that sellers of milk with a lower assigned minimum wage enter into contracts with their out-of-state suppliers to increase the wages of the producer's employees.

Using this approach, the Ninth Circuit's decision affirming the Fuel Standard is a template for New York and Massachusetts to re-erect their price controls on out-of-state transactions in milk, beer, and liquor, merely by fictionally assigning some production or shipping input (a lower state minimum wage, as described above, or some other input) to the imported product at the state border. Oklahoma and Michigan can re-erect their barriers to imported coal and waste by attributing safety standards for mining or trash

⁶ *See* U.S. Dep't of Labor, *Minimum Wage Laws in the United States – January 1, 2014*, <http://www.dol.gov/whd/minwage/america.htm> (last visited Apr. 9, 2014).

collection to the imported goods. Under *Rocky Mountain Farmers Union v. Corey*, these states could achieve the results that this Court struck down in *Baldwin*, *Healy*, *Brown-Foreman*, *Fort Gratiot*, and *Wyoming v. Oklahoma* if they are willing to invest the time in developing a suitable life cycle analysis model to achieve the desired results.

The Court should grant the Petitions to decide whether life cycle analysis is indeed a constitutional means for states to circumvent precedent and to engage in cross-border regulation.

II

SIGNIFICANT EXTRATERRITORIAL STATE ACTION VIOLATES THE BASIC PRINCIPLE OF FEDERALISM AND CREATES AN URGENT BASIS FOR THIS COURT'S REVIEW

The Fuel Standard is an extraterritorial state action of unprecedented scope. Absent this Court's review, the Ninth Circuit's holding that the Fuel Standard neither discriminates against interstate commerce nor regulates extraterritorially will become the law of the nation, not just the law of the Ninth Circuit. By their nature, extraterritorial state regulations have impacts outside of the state which imposes them, and yet evade political accountability in the "invaded" states.

Although "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions," *Mass. v. EPA*, 549 U.S. 497, 519 (2007), California is using economic coercion to force greenhouse gas emission reductions on its fellow states. But the Framers of our Constitution sought to

prevent economic warfare among the states just as surely as they meant to inhibit the then real possibility of armed conflict among the states. *The Federalist* No. 7 (Alexander Hamilton) (describing the potential of both armed and economic conflict among the states under the Articles of Confederation); *The Federalist* No. 8 (Alexander Hamilton) (detailing the potential sources of armed conflict among the states under the Articles); *The Federalist* No. 11 (Alexander Hamilton) (describing the benefits of good trade relations among the states under the proposed Constitution). Alexander Hamilton underlined the Articles' failure to support good trade relations among the states:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they become no less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

The Federalist No. 22. See also *The Federalist* No. 42 (James Madison) (describing the harms of import duties imposed by the states against each other, and the deeper divisions likely to come under the Articles).

Allowing states to leverage their market power to reach beyond their borders (and the limits of their police power) and control activity that is properly the subject of direct regulation by other states undermines the basic principles of federalism on which this nation was founded. And it does so in a manner that leaves

the invaded states with no legal or political recourse.⁷ See 1 Laurence H. Tribe, *American Constitutional Law*, § 6-5 (3d ed. 2000) (“The checks on which we frequently rely to curb the abuse of legislative power—election and recall—are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state’s borders.”).

III

THE COURT SHOULD GRANT THE PETITIONS BECAUSE THE DECISION BELOW CREATES GRAVE, IMMEDIATE IMPLICATIONS FOR NATIONAL FUEL MARKETS

A. The Fuel Standard Imposes One State’s Control Over a National Fuel Market of Crucial Significance to Every American

The Court should grant the Petitions to address California’s unprecedented foray into national control of fuel production, and to protect the nation’s foundational transportation fuel market from California’s interference.

⁷ The Ninth Circuit’s approval of California’s assumption of “legal and political responsibility for emissions in other states” suggests that the lower court found this to be a strength of the Fuel Standard, rather than a constitutional weakness. *Rocky Mountain Farmers Union*, 730 F.3d at 1105-06 (quoting *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d at 1092). California officials are not legally or politically responsible to any electorate outside the state’s borders.

As a result of its continental reach, the Fuel Standard drew significant comment and concern during its adoption, from diverse parties across the country and internationally. *See, e.g.*, Letter from Lisa Riatt, Canadian Minister of Natural Resources, to Arnold Schwarzenegger, California Governor, at 2 (Apr. 21, 2009) (expressing concern about the Fuel Standard's discriminatory treatment of crude derived from Canadian oil sands);⁸ Letter from Joel W. Velasco, Chief Representative - North America, Brazilian Sugarcane Industry Association, to Mary D. Nichols, Chair, California Air Resources Board (Aug. 19, 2009) (recommending several technical changes to carbon intensity values related to ethanol produced in Brazil);⁹ Letter from Gary Edwards, President, Iowa Corn Growers Association, to Mary Nichols, Chairwoman, California Air Resources Board (Apr. 17, 2009) (expressing concerns about negative impact of the Fuel Standard on corn ethanol and questioning life cycle analysis used in the Fuel Standard).¹⁰ Researchers with the international engineering firm BARR concluded that a national version of the Fuel Standard would change the shipping routes of tanker fleets globally, as crude oil produced with more emissions is rerouted to avoid carbon intensity limits, while crude produced with fewer emissions is sent to the

⁸ Available at <http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=lcfs09>, comment number 206 (last visited Apr. 9, 2014).

⁹ Available at http://www.arb.ca.gov/lists/lcfs09/422-unica_comments_to_lcfs_new_sugarcane_pathways.pdf (last visited Apr. 10, 2014).

¹⁰ Available at http://www.arb.ca.gov/lists/lcfs09/130-carb_letter_4.17.09.pdf (last visited Apr. 9, 2014).

jurisdiction under the carbon intensity regime. BARR, *Low Carbon Fuel Standard “Crude Shuffle” Greenhouse Gas Impacts Analysis*, Executive Summary at 1-3 (June 2010).¹¹ Moreover, ethanol made in Midwest American states is being shipped to Canada, Brazil, and elsewhere, while Brazilian ethanol is being shipped to California, as producers adapt to California’s reshaping of these fuel markets. Geoff Cooper, *March Exports/Imports: “Ethanol Shuffle” with Brazil Alive and Well*, Renewable Fuels Association (May 2, 2013).¹²

Gasoline and diesel fuel are the basic energy inputs that provide most of the mobility and commerce in American life and culture. It is difficult to picture any significant part of the nation that is not reliant, daily, on a reliable market for transportation fuel. It is also hard to imagine anyone who is not harmed by the intentional manipulation or the balkanization of that market. Fuel production is an enormous and complex foundation of our economy. When a state as large as California uses its one-tenth share of the national fuel market as a lever to exert control over the foundational fuel supply chain in every other part of the national market, then the states are no longer equals. The Court should grant the Petitions because of California’s use of the Fuel Standard, and its outsized role in the national fuel market, to micro-manage the national fuel supply chain.

¹¹ Available at http://www.secureourfuels.org/wp-content/uploads/2011/04/Crude_Shuffle_Report_0616101.pdf (last visited Apr. 9, 2014).

¹² Available at <http://www.ethanolrfa.org/exchange/entry/march-exports-imports-ethanol-shuffle-with-brazil-alive-and-well/> (last visited Apr. 9, 2014).

**B. The Decision Below Encourages
Other States To Use Malleable
Life Cycle Analyses To
Regulate Beyond Their Borders**

The Court should grant the Petitions to prevent multiple states from using life cycle analysis to engage in extraterritorial and discriminatory trade conflicts. Oregon and Washington state are both investigating the development of their own versions of the Fuel Standard. Or. Dep't of Env'tl. Quality, *HB 2186: Oregon Low Carbon Fuel Standards & Truck Efficiency*, Report to the Oregon Legislature, Executive Summary at 1 (Mar. 2013) (describing progress in adopting Oregon's version of the Fuel Standard);¹³ Wash. Exec. Order 09-05 (May 21, 2009).¹⁴ And a coalition of eleven states in the Northeast and Mid-Atlantic regions are also jointly developing their own regional low carbon fuel standard. See Ne. States Ctr. for a Clean Air Future, *Introducing a Low Carbon Fuel Standard in the Northeast* (July 2009).¹⁵

States can use life cycle analysis to achieve any purpose desired. Using life cycle analysis to assign carbon intensity values entails significant uncertainty, generalization, simplification, and policy judgment. *A Low Carbon Fuel Standard for California*, *supra*, § 2.8.2, at 41 ("The present generation of transportation fuel [life cycle analysis] models . . .

¹³ Available at <http://www.deq.state.or.us/pubs/legislativepubs/2013/HB2186LegRpt2013.pdf> (last visited Apr. 9, 2014).

¹⁴ Available at <http://www.ecy.wa.gov/climatechange/fuelstandards.htm> (last visited Apr. 9, 2014).

¹⁵ Available at <http://www.nescawn.org/topics/clean-fuels-standard> (last visited Apr. 9, 2014).

produce . . . values for each fuel pathway, but these values must be understood as both incomplete and, in many cases, highly uncertain.”). One of the sources of “incompleteness and uncertainty” is “[i]nherent variability and limited quality in the data.” Drs. Farrell and Sperling identify an important qualification to the use of life cycle analysis:

In general GREET follows widely accepted methods but significant uncertainties and omissions remain and current methods are not considered adequate by all experts. No single approach may be able to address all concerns. For instance, there is an important trade-off between detail and breadth, typically manifested in the choice between detailed engineering-type process-specific LCAs of limited extent and extensive economy-wide analyses of limited detail. It is not clear how to resolve this tradeoff, and a highly-detailed, economy-wide analysis may be impracticable.

A Low Carbon Fuel Standard for California, supra, § 2.8.2, at 41 (citations omitted).

Due to these limitations, California made numerous policy decisions about life cycle analysis in order to write the Fuel Standard. For example, the Board decided to attribute emissions from land clearing (in Brazil and elsewhere) to the production of ethanol in the United States. The Board staff also chose among alternative ways to estimate the magnitude of these deforestation emissions. *Initial Statement of Reasons, supra*, § IV.C (Determination of Carbon Intensity Values, Indirect Effects Analysis), § IV-16-45. *See also id.*, § IV.D (Uncertainties in the

Analysis), § IV-45-49. In selecting among the policy options forced by the limits of life cycle analysis models, state officials can always exploit these inherent uncertainties and limits to implement their policy preferences and discriminate against disfavored production and shipping methods.

Interstate discrimination is an intended feature of the Fuel Standard, not a bug. As a regulatory tool, life cycle analysis will always be fraught with uncertainty and will require policy decisions that the technical methodology alone does not support. *See, e.g.*, Cal. Air Res. Bd., *Staff Report: Initial Statement of Reasons, Proposed Amendments to the Low Carbon Fuel Standard* at 33 (Oct. 2011) (explaining that California changed the carbon intensity regime for crude oil in the Fuel Standard after considering how various options would influence refiners' sourcing of crude oil).¹⁶ California will always be able to manipulate any life cycle analysis to enforce discriminatory policy preferences over those emission sources that otherwise fall outside of the state's police power.

Under the decision below, California would be far from alone in wielding this power. The malleability of life cycle analysis models, and the need to simplify and generalize their results and fill in their gaps in order to use them as regulatory tools, allows any state the freedom to retaliate against California (or discriminate against their neighbors) in many ways. For example, under *Rocky Mountain Farmers Union v. Corey*, Midwest states could act against California by deciding to apply the same life cycle analysis model to only the U.S. shipping emissions for consumer goods sold in

¹⁶ Available at <http://www.arb.ca.gov/regact/2011/lcfs2011/lcfsis.or.pdf> (last visited Apr. 9, 2014).

their states. The carbon penalties resulting from long ground transport from the West (or East) Coast to the Mississippi Valley would likely impede such trade, to the benefit of Gulf Coast ports. This could have a significant extraterritorial impact on port activity in many of the same states that are currently considering programs similar to the Fuel Standard. *See generally* U.S. Dep't of Transp., Research & Innovative Technology Admin., Bureau of Transp. Statistics, *Special Report: The Changing Tide of U.S.-International Container Trade: Differences Among the U.S. Atlantic, Gulf, and Pacific Coasts* (Dec. 2011) (generally describing differences between the markets served by the three different coastal port regions).¹⁷

This type of domestic trade war is the antithesis of federalism among the states, *see pp. 15-17, supra*, but is precisely what the decision below allows unless the Court grants the Petitions in order to cabin the states' extraterritorial use of life cycle analysis.

CONCLUSION

This Court has consistently held that within our system of federalism, states may not control actions wholly outside their borders. This Court (rather than the one below) should decide whether states may constitutionally unravel this framework by using life cycle analysis as a means of extraterritorial regulation.

¹⁷ Available at http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/special_reports_and_issue_briefs/special_report/2011_12_32/pdf/entire.pdf (last visited Apr. 9, 2014).

For these reasons, the Court should grant the Petitions.

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