Appeal Nos. 12-15131, 12-15135

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN FARMERS UNION, et al.,

Plaintiffs-Appellees,

vs.

JAMES N. GOLDSTENE, in his official capacity as Executive Officer of the California Air Resources Board, et al.,

Defendants-Appellants.

ENVIRONMENTAL DEFENSE FUND, et al.,

Intervenor-Defendants-Appellants.

On Appeal From the United States District Court for the Eastern District of California, Fresno Division Case Nos. 1:09-cv-02234-LJO and 1:10-cv-00163-LJO
Hon. Lawrence J. O'Neill

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF ROCKY MOUNTAIN FARMERS UNION APPELLEES

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RULE 29 STATEMENTS

This brief of Amici Curiae is submitted pursuant to Federal Rule of Appellate Procedure 29(a). The parties have consented to the filing of this and other briefs by amici curiae.

No counsel for a party authored this brief in whole or in part. Further, no such counsel or party, or person other than Amici Curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae are the following law professors and scholars in the fields of environmental law, constitutional law, and utility regulation:

- Steven G. Calabresi, Class of 1940 Professor of Law, Northwestern University School of Law;
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- Ronald J. Rychlak, Mississippi Defense Lawyers Association Professor of Law, University of Mississippi School of Law.

Amici are concerned about the potentially unlimited scope of the "local" interests asserted by California in support of the state's low-carbon fuel standard. It is Amici's position that the reasoning advanced in support of California's regulatory scheme is irreconcilable with basic principles of federalism and with the Supreme Court's interpretation of the Commerce Clause.

SUMMARY OF ARGUMENT

The California Low Carbon Fuel Standard ("LCFS") violates basic

principles of federalism by seeking to regulate activities beyond California's borders. The California Air Resources Board ("CARB") freely admits that the LCFS seeks to reduce greenhouse-gas emissions across the United States by altering out-of-state commercial behavior and "exert[ing] an influence on developing low carbon fuel standards elsewhere." But under our federal system, the states are coequal sovereigns, and no state may exercise authority over another. Far from representing "the genius of federalism," the LCFS upends federalism by infringing on the autonomy of other states and seeking to regulate on a national scale.

The LCFS thus also violates the prohibition on extraterritorial regulation under the dormant Commerce Clause, which at its core reflects basic notions of federalism. California's regulatory scheme has the deliberate practical effect of controlling out-of-state activity, the hallmark of impermissible extraterritorial regulation. Moreover, it invites interstate regulatory gridlock, as each state seeks to adopt its own version of the LCFS and impose its own environmental policy preferences on commercial and agricultural practices nationwide.

CARB argues that Congress bestowed "plenary authority" on California to regulate the production and use of transportation fuels, even in other states. But CARB points to no clear statutory statement of congressional intent authorizing this remarkable assertion of state power. Indeed, it has not identified *any* instance

where Congress has bestowed "plenary authority" on one state to regulate the local affairs of another. Nor could it, as any attempt by Congress to do so would be wholly inconsistent with our federal system.

ARGUMENT

I. THE LCFS SEEKS TO AFFECT OUT-OF-STATE COMMERCIAL AND AGRICULTURAL PRACTICES.

Charged by the state legislature to reduce statewide greenhouse gas emissions to 1990 levels by 2020, *see* Cal. Health & Safety Code § 38500, *et seq.* (2006), CARB promulgated the LCFS, *see* Cal. Code Regs. tit. 17, § 95480, *et seq.* (2010), which seeks to reduce the "carbon intensity" levels of transportation fuels offered for sale in California. *Id.* § 95480. The LCFS sets a ten-year schedule for decreasing the carbon-intensity level of such fuels. For example, in 2012, the LCFS permits a regulated entity to distribute an aggregate of gasoline or gasoline substitutes with a maximum average carbon-intensity level of 95.37 gCO_2e/MJ. *Id.* § 95482(b) (Table 1). In 2013, the maximum average will decrease to 94.89 gCO_2e/MJ, and by 2020, it will be 86.20 gCO_2e/MJ. A regulated entity that comes in under the maximum for one type of fuel can earn "credits," which in turn can be used to offset higher carbon-intensity levels for other fuels or be sold to other companies. A regulated entity that exceeds the maximum must either surrender earned credits or purchase credits from other companies.

As CARB has explained, "[c]arbon intensity is not an inherent chemical

property of a fuel, but rather … is a reflective of the process in making, distributing, and using that fuel." ER9:2161 (CARB, *California's Low Carbon Fuel Standard: Final Statement of Reasons* (Dec. 2009) (hereinafter, "FSOR")). The carbon-intensity level of a unit of fuel aims to account for the total quantity of greenhouse gas emissions traceable to the production, distribution, and use of the fuel. This "lifecycle analysis" includes variables that reflect "all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer." Cal. Code Regs. tit. 17 § 95481(a)(28).

As a result, two gallons of ethanol fuel can have "identical physical and chemical properties" and yet be assigned significantly different carbon-intensity levels. ER10:2360 (CARB, *Initial Statement of Reasons* (Mar. 5, 2009) (hereinafter, "ISOR")). For example, the LCFS assigns a lower carbon-intensity level to ethanol produced in a wet-mill plant than a dry-mill plant. ER10:2435 (ISOR). Carbon intensity also varies depending on what is done with the byproduct of production. ER7:1718 (FSOR). And yet another factor is the type of fuel that the ethanol refinery uses. ER7:1718 (FSOR).

The LCFS's lifecycle approach is specifically intended to affect these business and farming decisions that precede the actual use of ethanol and other transportation fuels in California. As CARB explains, it was concerned that "a

significant portion of the emissions generated by fuels … occurs before the fuel is combusted in a vehicle." CARB Br. 21. Thus, "[t]o effectively reduce emissions from fuels, [it] designed the LCFS … with the aim of reducing overall 'well-to-wheel' GHG emissions." *Id.* at 20. CARB even imposes a hefty carbon-intensity penalty on all ethanol fuels to discourage the conversion of non-agricultural land that might occur as farmers seek to enter the corn ethanol feedstock market. ER9:2295 (ISOR).

In so doing, however, California is plainly attempting to affect commercial and agricultural activity outside the State of California. As CARB admits, "[m]ost ethanol consumed in California is produced outside of California." *Id.* at 27. In fact, one of the lifecycle carbon-intensity factors is the geographic location of an ethanol plant. ER7:1718 (FSOR). Take, for example, ethanol produced at a dry-mill biorefinery fueled by natural gas, yielding a byproduct of dry distiller's grain. If the biorefinery is located within California's borders, the ethanol receives a carbon-intensity level of 88.90 gCO_2e/MJ. But if that same biorefinery were located in the Midwest, the ethanol would receive a carbon-intensity level of 98.40 gCO_2e/MJ. *See* Cal. Code Regs. tit. 17, § 95482(b) (Table 1); *id.* § 95486(b) (Table 6).

CARB does not deny its efforts to change out-of-state behavior, though it characterizes what it has done as an "incentives" program. CARB freely concedes

that the "[l]ifecycle analysis can, *and often does*, include consideration of activities that occur outside of California." CARB Br. 74 (emphasis added). In its view, "emissions generated outside of California pose the same risk to California citizens as those generated inside California." *Id.* at 19. Accordingly, it has "change[d] the market conditions" in California—the largest single state in the ethanol market—and "provide[d] incentives [for producers] to make certain choices over others." *Id.* at 77.

II. CALIFORNIA HAS VIOLATED BASIC PRINCIPLES OF FEDERALISM BY ATTEMPTING TO REGULATE ACTIVITIES BEYOND ITS BORDERS AND ON A NATIONAL SCALE.

CARB and its amici maintain that the LCFS represents "the genius of federalism," Profs. of Envtl. Law Amicus Br. 1; *see also* CARB Br. 39. That, however, could not be further from the truth. California's attempt to regulate activities beyond its borders and on a national scale violates basic principles of federalism. CARB and its amici quote Justice Brandeis's famous observation that our federal system permits states to serve as "laborator[ies] and try novel social and economic experiments," but they fail to heed his important limitation that states do so "*without risk to the rest of the country*." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting) (emphasis added).

A. Our Federal System Leaves the States Significant Authority Within Their Sovereign Jurisdictions and Entrusts the Federal Government with Limited National Authority.

1. States Retain Significant Authority Within Their Sovereign Jurisdictions.

Our Federalism "preserves the sovereign status of the States," *Alden v. Maine*, 527 U.S. 706, 714 (1999), and reserves to each "numerous and indefinite" powers while according the federal government only "few and defined" ones, The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Each state retains power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 289.

As against one another, the states are "upon an equal footing, in all respects whatever." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845). Since the Founding, there has been a "historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)); *see also PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) ("[T]he States in the Union are coequal sovereigns under the Constitution."). Thus, each state was

granted equal representation in the Senate—a body that "derive[d] its powers from the States, as political and coequal societies." The Federalist No. 39, at 240 (J. Madison).

However expansive, each state's authority is limited to its own sovereign jurisdiction. No state may, by exercising authority over another state, infringe the sovereignty of that other state or diminish the equally "numerous and indefinite" powers expressly reserved to the other state. *See Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877), *overruled in part on other grounds by Shaffer*, 433 U.S. 186.[1]

This requirement that a state respect the sovereignty of its sister states finds expression throughout the Constitution. The Full Faith and Credit Clause imposes a "constitutional obligation to enforce the rights and duties validly created under the laws of other states." *Hughes v. Fetter*, 341 U.S. 609, 611 (1951); *see also* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the

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[1] "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 469 (9th Cir. 2001) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)).

public Acts, Records, and judicial Proceedings of every other State."). The Privileges and Immunities Clause similarly bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States," *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), thereby "plac[ing] the citizens of each State upon the same footing with citizens of other States," *Paul v. Virginia*, 8 Wall. 168, 180 (1868); *see also* U.S. Const. art. IV, § 2. And though a number of jurists and scholars have questioned the constitutional basis of the "dormant" Commerce Clause, Supreme Court precedent has long held that the Commerce Clause prohibits a state from regulating commerce that "takes place wholly outside of the State's borders." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

2. <u>The Constitution Grants the Federal Government Limited Authority To Regulate on a National Scale.</u>

Our federal system entrusts the federal government, not any single state, with limited national power. The very point of forming the union was to create a separate sovereign that, though limited in power, would have the singular authority to regulate on a national scale. Many of the Framers saw, for example, a critical need for a unified system regulating truly interstate commerce. As Alexander Hamilton warned during the 1787 ratification debates, many feared that commercial relations between the states would continue to be "fettered, interrupted, and narrowed by a multiplicity of causes" so long as local laws could

infringe on commerce among the states. The Federalist No. 11, at 85; *see also* James Madison's "Preface to Debates in the Convention of 1787," *in* 3 Records of the Federal Convention of 1787, 547 (Max Farrand, ed. 1911). Indeed, the precursor to the Constitutional Convention, the lesser-known Annapolis Convention of the previous year, had been convened specifically to "consider how far a uniform system in [the states'] commercial regulations may be necessary for their common interest and permanent harmony." *Resolution of the Virginia Legislature, Jan 21, 1786*, *quoted in* Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 30 (2d ed. 2005).

The need for a single national authority stemmed not only from competition between the states but also from the sheer difficulty of coordinating so many individual jurisdictions. Although friction among the states was often due to tariffs and parochial disputes, their disunity was not just a product of protectionist rivalry. Numerous states, for instance, had sought separately to advance the generally beneficial goal of improved trade relations with Great Britain. But "the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, ... frustrated every experiment of the kind." The Federalist No. 22, at 140 (A. Hamilton).

The Constitution thus confers only on the federal government the singular, but limited, power to regulate on a national scale. The President is empowered to

make treaties and appoint ambassadors, subject to congressional consent. U.S. Const. art. II, § 2, cl. 2. And Congress is accorded power to borrow money on the credit of the United States, *id.*, art. I, § 8, cl. 2, to establish uniform rules of naturalization and laws of bankruptcy, *id.*, art. I, § 8, cl. 4, to declare war, *id.*, art. I, § 8, cl. 11, and, of course, to cultivate uniformity in the states' commercial dealings with one another and with foreign nations, *id.*, art. I, § 8, cl. 3.

In sum, federalism entails limits on the authority of the states' governments as much as on that of the federal government. The states retain significant—indeed, "numerous and indefinite"—powers but only within their own sovereign jurisdictions. The "distinction between what is national and what is local … is vital to the maintenance of our federal system." *N.L.R.B v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see also United States v. Morrison*, 529 U.S. 598, 618 (2000) ("In recognizing [that distinction] we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted.").

B. The LCFS Violates Basic Principles of Federalism.

CARB claims that the LCFS is a classic example of California's police power at work, furthering the state's "local purpose" in combating the threat posed by global warming to "the economic well-being, public health, natural resources, and the environment of California." CARB Br. 13 (quoting Cal. Health & Safety Code § 38501(a)); Profs. of Envtl. Law Amicus Br. 6. But this appeal to state

sovereignty ignores that California is infringing on the autonomy of other states and the prerogatives of the federal government. In fact, California has invited "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337.

1. California Oversteps Its Jurisdiction By Seeking To Shape Commercial Practices Throughout the Nation.

At the expense of California's sister states, the LCFS attempts to regulate on a national scale. As detailed above, the LCFS seeks to affect commercial and agricultural decisions outside the State of California including, among others, the location of ethanol production, the type of corn milling, the type of distiller's grains produced, the source of fuel for heat energy, and the conversion of previously nonagricultural land. Importantly, none of these features has any effect on the properties of the ethanol ultimately imported into and used in California. Regardless of whether a producer located in a Midwestern state uses a "wet" or "dry" corn ethanol plant or creates a byproduct of wet or dry distiller's grain, the resulting ethanol is the same. Similarly, using the ethanol within California's borders will yield the same quantity of greenhouse gas emissions in California irrespective of the fuel's production location, milling process, grain byproducts, energy source, and indirect land use effects. In short, the LCFS targets commercial and agricultural practices outside of California not because those practices have any effect on the fuel brought into California, but because CARB perceives them

to be harmful to the environment in general.

Far from representing "the genius of federalism," *see* Profs. of Envtl. Law Amicus Br. 1, the LCFS upends federalism by dubbing the California Air Resources Board the nation's arbiter of environmental best practices.[2] Under our federal system, "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Regulating environmental matters is closely linked with protecting the health and safety of a state's citizens—one of the "numerous and indefinite" powers reserved to each state within its own borders. The Federalist No. 45, at 289; *see also Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) ("Environmental regulation traditionally has been a matter of state authority."). CARB simply may not harness the power of the California state government to shape environmental policy choices in other states.

In defense of its effort to conform businesses nationwide to California standards, CARB maintains that the LCFS represents no more than an exercise of

[2] Nothing suggests that California will stop just with the regulation of fuel. The lifecycle of producing, transporting, and using *any* commodity yields greenhouse gases. Amici curiae Michael Wang, Ph.D., et al., noted just a few of the items whose production and use could attract lifecycle scrutiny (and, by extension, regulation akin to the LCFS): newspapers, refrigerators, light bulbs, camp stoves, and computers. *See* Br. of Amici Curiae Michael Wang, Ph.D., et al., in Support of Defendants-Appellants, 10; *see also* Br. of Amici Curiae Ken Caldeira, Ph.D., et al., in Support of Defendants-Appellants, 27 ("Greenhouse gas emissions contribute to the problem of global climate change wherever they are emitted.").

California's police power over local matters. In its view, global climate change is adversely affecting California's territory and citizens in numerous ways. Because "emissions generated outside of California pose the same risk to California citizens as those generated inside California," CARB argues, it has a "local" interest in reducing greenhouse gas emissions in other states, too. CARB Br. 19 ("[O]ne ton of [greenhouse gases] emitted in Ohio has the same environmental impact as a ton of [greenhouse gases] emitted in California."). According to CARB, California properly may exercise its authority over local matters to "exert an influence on developing low carbon fuel standards elsewhere." ER8:1853 (FSOR).

This reasoning cannot be squared with basic principles of federalism. CARB does not contend that emissions in Ohio inflict an injury within California's borders or on California's residents specifically. Rather, CARB's position is that commercial and agricultural practices conducted exclusively in other states harm California *solely* because those practices visit an undifferentiated, general injury on the nation as a whole and California is part of the nation. *Cf.* Note, *The Carbon Border War: Minnesota, North Dakota, and the Dormant Commerce Clause*, 8 Univ. St. Thomas L.J. 60, 86-87 (2010) ("[I]t is practically impossible to separate localized benefits of carbon mitigation from global benefits."). But that cannot be enough to permit California to reach beyond its borders to regulate purely out-of-state practices. Again, the "distinction between what is national and what is local

… is vital to the maintenance of our federal system," *Jones & Laughlin Steel Corp.*, 301 U.S. at 30, and to conceive that an activity visits local harms merely because it visits a national harm blurs any such distinction beyond recognition.[3]

2. The LCFS Specifically Violates the Dormant Commerce Clause Restriction on Extraterritorial Regulation.

The LCFS is an impermissible extraterritorial regulation in violation of the dormant Commerce Clause. It "project[s California's] regulatory regime into the jurisdiction of []other State[s]." *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (quoting *Healy*, 491 U.S. at 337). And it gives rise to a high risk of inconsistent laws across the country—the precise consequence that the Commerce Clause was designed to avoid.

a. The LCFS has the practical effect of regulating beyond California's borders.

The LCFS violates the prohibition on extraterritorial regulation because it has the "practical effect" of controlling conduct in other states. "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. A statute meets that standard if "the practical

[3] Of course, that an activity generally harms the nation as a whole and therefore falls beyond the scope of a single state's powers does not necessarily mean that the activity is properly subject to federal regulation. Congress still must ground its laws in the enumerated powers conferred by the Constitution.

effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336. As noted, CARB freely concedes that the LCFS is intended to influence behavior outside the State of California.

CARB argues that the LCFS avoids the ban on extraterritorial regulation because it "do[es] not impose a direct regulatory burden out-of-state." CARB Br. 70. But the question is not whether California has directly regulated out-of-state entities; it is whether California's regulation has an extraterritorial "practical effect," which CARB admits. As the Appellees show in their brief, the cases cited by CARB do not suggest otherwise. *See* Rocky Mountain Farmers Union Br. 64-79.

In any event, the prohibition on extraterritorial regulation reflects at its core basic notions of federalism. California may not "bring within the orbit of state power matters unrelated to any local interests," *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) (Frankfurter, J.), irrespective of the "direct" or "indirect" design of its regulations. California may only regulate "in-state components of interstate transactions" and only "so long as the regulation furthers legitimate in-state interests." *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 785 (3d Cir. 1999). The state may not disadvantage out-of-state practices that, as here, have no distinct impact on California itself. The authorities offered by CARB reflect this limitation, as well, and therefore do not support the LCFS. *See, e.g.*, *Nat'l Elec.*

Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 111 (2d Cir. 2001) (state lamp-labeling law was a "legitimate intrastate regulation"); *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1189 (9th Cir. 1990) (law permitting ATM transaction fees in-state "promotes legitimate state interests"); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 396 (9th 1995) (state law "address[ed] a legitimate local concern," namely "ensur[ing] universal waste collection service in the state").

The Supreme Court has been down this road before. In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), the Court held unconstitutional a municipal ordinance that disfavored out-of-town waste disposal facilities by requiring in-town solid waste to be disposed of at a particular facility in town. Calling on "well-settled principles of … Commerce Clause jurisprudence," the Court rejected the town's argument that the ordinance was "justif[ed] ... as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." *Id.* at 386, 393. To permit reliance on such a non-local interest, the Court maintained, "would extend the town's police power beyond its jurisdictional boundaries." *Id.*; *cf. Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions.").

This case is similar. Like the municipal law in *C & A Carbone*, the LCFS

directly regulates in-state entities but burdens commerce involving out-of-state entities whose practices CARB "deem[s] harmful to the environment." 511 U.S. at 393. And although CARB labels its environmental interest as "local," courts are "not bound by '[t]he name, description[,] or characterization'" of a challenged law. *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979). Like the town of Clarkstown, California (through CARB) targets practices that have no distinct impact on its residents. If anything, Clarkstown's asserted interest in mitigating the environmental ill-effects of its neighbors' waste-disposal sites is more intuitively "local" than California's sweeping interest in shaping commercial and agricultural practices nationwide.

b. The LCFS invites interstate regulatory gridlock.

The LCFS also gives rise to the precise consequences that our federal system in general, and the Commerce Clause in particular, were designed to avoid. As discussed, the pressing need for uniformity in the states' commercial relations was a major impetus for the Constitutional Convention. *See* Farber & Sherry, *supra*, at 30. The development of the extraterritoriality doctrine in more recent years likewise serves to guard against "inconsistent legislation" arising from states overstepping their boundaries. *Healy*, 491 U.S. at 337. It is important how a statute "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

legislation." *Id.* at 336.

The LCFS invites "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* at 337. CARB openly offers its regulatory scheme as "a model for other entities in the U.S. and internationally," ER7:1551 (FSOR), and a number of other states have already embarked on the development of their own low carbon fuel standards. *See* Oregon, *et al.*, Amicus Br. 4; Profs. of Envtl. Law Amicus Br. 10. The prospect of other states implementing their own low carbon fuel standards that, like the LCFS, reach beyond their borders is "actual and imminent," *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 470 (9th Cir. 2001), and hardly mere "speculation[]," CARB Br. 81.

The likelihood of ensuing "interstate regulatory gridlock" is high. *See Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004). It is all but inevitable that the developing state regulatory schemes will involve vastly different standards from California's and from one another's. As explained in a recent National LCFS Recommendation, "LCFS policies adopted in other countries and regions can vary significantly in policy design, stringency levels, systems boundaries, coverage of fuel types, and various other details." Daniel Sperling, et al., *National Low Carbon Fuel Standard: Policy Design Recommendations*, 71 (July 19, 2012). This high risk of inconsistency derives in large part from the wide

diversity of lifecycle models available. "[T]here are various reports estimating the [greenhouse gas] emission of corn ethanol using different models," with each model "us[ing] different inputs and assumptions." ER7:1725 (FSOR); *see also* Sperling, *supra*, at 44 (remarking that "different definitions of [system] boundaries can result in quite different emission calculations for some products," such as corn ethanol).

Even supposing that many states were to select the same lifecycle model that California chose as a starting point—the Argonne GREET model—it is highly unlikely that every state would then "modif[y that model] to reflect California inputs and assumptions." ER7:1725 (FSOR). California does not account for increased use of fertilizers, pesticides, and irrigation resulting from price-induced intensification of crop production. ER7:1731 (FSOR). In contrast, a model low-carbon fuel standard developed in New York—NY-GREET—uses "values specific to New York" that account for "upstream electricity use characteristic of NY electric grid projections … , transportation and distribution distances specific to fuel pathways in New York State, and crop yields and farming energy, fertilizer, and pesticide use representative of NY agricultural practices." James J. Winebrake, Ph.D., *NY-GREET Model: Overview and Output for NY Climate Action Plan TLU-TWG*, at 1; *see also* State of Or., Dept. of Envtl. Quality, *Oregon Low Carbon Fuel Standards: Advisory Committee Process and Program Design*,

App. B, 3 (Jan. 25, 2011) ("In calculating the carbon intensities [of] petroleum fuels used in Oregon, DEQ used a combination of GREET defaults and Oregon specific inputs and assumptions.").

"With such laws in force in states which are interspersed with those having no limit on [carbon-intensity levels], the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident." *See S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 773-74 (1945). In the face of competing carbon-intensity models, all seeking to affect commercial and agricultural practices nationwide, it would be economically impossible for a fuel producer to have separate "well-to-wheel" manufacturing and distribution processes to satisfy each unique state scheme. CARB Br. 20. As the National LCFS Recommendation explains, "[i]mposing inconsistent obligations under multiple state and regional LCFS policies could increase the complexity and costs of compliance and precipitate multiple redundant regulatory systems." Sperling, *supra*, at 19.

As fuel producers try to coexist with the competing regulatory systems, the country will drift toward either economic balkanization or one de facto system, the precise consequences that the ban on extraterritorial regulation is intended to avoid. For example, fuel producers might ship "lower-carbon" fuels to states with

more stringent standards while shipping "higher-carbon" fuels to more lenient states. *See* Sperling, *supra*, at 19 ("The potential for differential treatment of individual fuels under multiple state and regional policies could … increase incentives for shuffling fuels between jurisdictions on the basis of their treatment under respective policies."). Indeed, producers of certain fuels may be effectively shut out of some markets, depending on the producers' location, the maximum carbon-intensity levels set by various state regulations, the variables that go into each carbon-intensity formula, the mechanics of each "credit" system in effect, and the severity of the penalties imposed. These consequences are precisely the kind of "economic Balkanization" that the Commerce Clause is designed to curtail. *See Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994); *see also NCAA*, 10 F.3d at 640 ("The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause.").

Alternatively, if fuel producers generally found one state regime to be most stringent, they might try to produce and distribute *all* of their fuel consistent with the requirements of that state. That state's laws would thus "control the [producers'] operations both within and without the regulating state." *S. Pac. Co.*, 325 U.S. at 773. This outcome, too, is inconsistent with the dormant Commerce Clause and with federalism generally. "The federal balance is, in part, an end in

itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979).

III. "GOOD SCIENCE" DOES NOT PERMIT CALIFORNIA TO INFRINGE ON THE SOVEREIGNTY OF ITS COEQUAL STATES.

A. The Scientific Soundness of the LCFS Is Irrelevant to Its Constitutionality.

CARB and its supporting amici persistently call attention to the "innovative," "cutting-edge," "conscientious," "vitally important," "carefully crafted," "well-established," and "scientifically sound" qualities of the LCFS. CARB Br. 1, 3, 39, 57; Profs of Envtl. Law Amicus Br. 1, 37. Putting to one side CARB's own acknowledgment that critical factors in the LCFS are "highly uncertain" and "variable," *see* ER:6:1350 (FSOR), the scientific good-sense of the system is not at issue in this case and is not even subject to review.

Federal courts "do not sit as … super-legislature[s] to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (citation omitted). The courts "are not invested with the jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the states …, but only to determine their conformity with the Federal Constitution and the paramount laws

enacted pursuant to it." *Bridges v. California*, 314 U.S. 252, 202-03 (1941) (Frankfurter, J., dissenting). The Constitution reserves judgment of the wisdom of a statute "to the people." *Nat'l Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012). This Court's inquiry is only "whether [California] has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern … ." *Osborn*, 310 U.S. at 62.[4]

B. No Federal Law Permits California To Overstep Its Jurisdiction In the Name of Science.

There is no merit to CARB's suggestion that Congress has somehow given California a blank slate to regulate nationally if it has advanced scientifically innovative laws. CARB asserts that "Congress intended for California to continue its tradition of ground-breaking environmental regulation despite that such regulation would affect interstate commerce." CARB Br. 102. In its view, Congress has thus bestowed upon California "broad, unqualified," and "plenary

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[4] To the extent the LCFS is designed to be protectionist and discriminatory, however, the regulation's purpose is certainly germane. State law can also violate the dormant Commerce Clause by discriminating against out-of-state interests either facially, purposefully, or in practical effect. *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). In that regard, it is notable that the CARB explicitly stated that one of its goals is to "ensure that a significant portion of the biofuels used in the LCFS are produced in California." ER9:2239 (ISOR); *see also* ER7:1689 (FSOR) (noting that the anticipated "[d]isplac[ement of] imported transportation fuels with biofuels produced in the State keeps more money in the State"). Although this brief addresses only the infirmities of the LCFS under basic principles of federalism and the extraterritoriality doctrine, Amici Law Professors note that Appellees have persuasively challenged the LCFS as discriminatory against interstate commerce.

authority" to "prohibit or control fuels." *Id.* 103, 108. This theory is both untenable as a statutory matter and suspect as a constitutional one.

1. As a Statutory Matter, Section 211(c)(4)(B) of the Clean Air Act Does Not Insulate the LCFS from the Commerce Clause.

Under the Supreme Court's interpretation of the Commerce Clause, which this Court must accept, "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid," *Maine v. Taylor*, 477 U.S. 131, 138 (1986), but only with a clear statement of congressional intent. In light of "the important role the Commerce Clause plays in protecting the free flow of interstate trade, th[e] Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been 'unmistakably clear.'" *Id.* at 138-39 (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)). "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause," the Court has held that the judiciary "ha[s] no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).

CARB maintains that the Clean Air Act conferred "broad and unqualified" "plenary authority" on California to "regulate any fuel for the 'purpose of motor vehicle emission control.'" CARB Br. 103 (citing 42 U.S.C. § 7545(c)(4)(B)). But the centerpiece of CARB's argument—Section 211(c)(4)(B)—does not show

that Congress clearly intended to insulate the LCFS from the dormant Commerce Clause. CARB points to no clear statement of congressional intent, relying instead on "statutory context," "general structure," and bald assertions of what it perceives Congress to have "understood" and "intended." *Id.* 102, 103, 105.

Far from insulating California fuel regulation from the dormant Commerce Clause, "[t]he sole purpose of § [211](c)(4)(B) is to waive for California the express preemption provision found in § [211](c)(4)(A)." *Davis v. U.S. EPA*, 348 F.3d 772, 786 (9th Cir. 2003). Indeed, in prior litigation before this Court, CARB itself has characterized Section 211(c)(4)(B) as "an explicit provision on preemption." Br. of Governor Gray Davis and Alan C. Lloyd, in his capacity as Chairman of the California Air Resources Board, *Oxygenated Fuels Ass'n Inc. v. Davis*, No. 01-17078, at 23 (9th Cir. Feb. 22, 2002). By "simply sav[ing] from pre-emption … such state authority as was otherwise 'lawful,'" Section 211(c)(4)(B) does not satisfy the Supreme Court's "clear statement" rule and, in turn, does not "alter the limits of state power otherwise imposed by the Commerce Clause." *New England Power Co.*, 455 U.S. at 341.

2. As a Constitutional Matter, Congress Does Not Have the Power To Give California "Plenary Authority" To Infringe on the Sovereignty of Other States.

In any event, the Supreme Court permits Congress only to delegate authority that it possesses under the Constitution, and Congress does not have plenary

authority to give. However broad Congress's authority may be under the Commerce Clause, it does not include the power to allow one state to effectively revoke another state's sovereign status.

Under the Supreme Court's interpretation of the Commerce Clause, Congress may authorize a state to pursue its local interests in a way that would otherwise tread on Congress's commerce power. In the past, the Supreme Court has found that Congress authorized the following "in-jurisdiction" regulations, notwithstanding their effect on interstate commerce. It permitted California to regulate the composition and labeling of fluid milk products "in the State of California," *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 65 (2003) (quoting 7 U.S.C. § 7254), Indian tribes to tax oil and gas obtained on reservation territory, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and all the states to withhold approval of the sale of banks within their respective borders, *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985). *See also State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 455 (1962) (acknowledging that Congress had authorized states to regulate and tax insurance and noting legislative history to the effect that "a State does not have power to tax contracts of insurance … entered into outside its jurisdiction").

There is a critical distinction, however, between Congress permitting a state to exercise its otherwise legitimate police power in a way that burdens interstate

commerce and Congress granting a state plenary authority to regulate affairs entirely within another state. In the former circumstance, Congress effectively "gives up" its exclusive authority to regulate interstate commerce. But in the latter circumstance, which is the case here, Congress would be bestowing power it does not have. As discussed, our federal system "preserves the sovereign status of the States" and reserves to each the general power of government over its residents. *Alden*, 527 U.S. at 714. The Constitution does not grant that general power of local governance to Congress, and Congress in turn is not able to give such plenary authority to any particular state.

It should come as no surprise that CARB has identified no instance in which Congress has authorized a state to pursue anything other than its local interests, let alone bestowed "plenary authority" on one state to "exert an influence on" the purely local affairs of another. *See* CARB Br. 103; ER8:1853 (FSOR). Such a result would fundamentally violate the nation's balance of powers, which, at a basic level, "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997).

"[I]t would be impossible to permit the statutes of [California] to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the

Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). Our federal system has historically served to curb such "trespasses of the States on the rights of each other" not to facilitate them. *See* 1 James Madison, Letters and Other Writings of James Madison, at 321 (J.B. Lippincott & Co. 1865).

CONCLUSION

For all these reasons, Amici Law Professors respectfully urge this Court to affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 14 point Times New Roman font.

Dated: August 13, 2012

/s/ Elbert Lin

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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/s/ Elbert Lin

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