No. 12-15131

In the United States Court of Appeals
for the Ninth Circuit

ROCKY MOUNTAIN FARMERS UNION, ET AL.
V. GOLDSTENE, ET AL.

AND

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,
ET AL. V. GOLDSTENE, ET AL.

On Appeal from the United States District Court for the Eastern District of California, Fresno Division
The Honorable Lawrence J. O'Neill
Civil Case Nos. 1:09-02234 and 1:10-00163

Amicus Brief of States of Nebraska, Iowa, Kansas, Michigan, Missouri, North Dakota, and South Dakota in Opposition to Appellant's Motion for a Stay of the District Court's Preliminary Injunction Order and 54(b) judgment pending appeal

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INTRODUCTION

The States of Nebraska, Iowa, Kansas, Michigan, Missouri, North Dakota, and South Dakota oppose the appellants' motion for a stay of the district court's preliminary injunction order and judgments during the pendency of these appeals. Amici States argue that granting a stay of the district court's preliminary injunction and allowing the California Air Resources Board's unconstitutional low-carbon fuel standard (LCFS) to take effect would significantly impair the markets for Amici States' corn and ethanol and, by extension, the economies of Amici States.

STANDARD OF REVIEW

When presented with a motion for a stay pending appeal, a court considers the following four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Stormans Inc. v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008).

ARGUMENT

I. *California is unlikely to prevail on the merits because California's LCFS discriminates against ethanol produced in Nebraska and other Midwestern states in favor of ethanol produced in California.*

The central purpose behind the Commerce Clause's prohibitions of discriminatory measures is to proscribe state laws "whose object is local economic

protectionism." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The vision of the Framers of the Commerce Clause was that "every farmer … shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583, 593 (8th Cir. 2003) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Free access to markets is denied when states adopt regulations which grant a competitive advantage upon local business vis-à-vis out-of-state competitors. Such regulations are per-se invalid unless the state "'can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest.'" *Hazeltine*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

California's LCFS is a textbook example of the type of regulation prohibited by the Commerce Clause. In the rulemaking process, CARB detailed its intent to discriminate against interstate commerce in recognizing that one goal of the LCFS regulation was to "[d]isplac[e] imported transportation fuels with biofuels produced in the state," in order to "keep[] more money in the state." *See* RMFU Plaintiffs-Appellees' Exhibit 4 at 479.

In addition to a discriminatory purpose, the LCFS facially discriminates against out-of-state ethanol production by assigning higher carbon intensity values

to ethanol produced in Amici states than it does to chemically identical ethanol produced in California.

The LCFS regulation assigns the highest carbon intensity levels to Midwest corn ethanol production methods, including production from natural-gas-powered dry mills located in Amici States. In fact, the LCFS assigns carbon intensity levels for some Amici State corn ethanol facilities that are ***higher*** than the carbon intensity level that CARB has assigned to gasoline. This means that a company selling gasoline in California and attempting to comply with the LCFS regulation has no incentive -- and to the contrary, is discouraged -- from purchasing corn ethanol using the production methods that CARB has decided to disfavor. By doing so, California has created a significant disincentive for California fuel producers and importers to use Amici States ethanol, and instead blatantly favors California ethanol producers.

The effect will be clear – ethanol produced in Midwestern states will no longer be welcome in the California market, with considerable negative impact on the Amici States' economies. Nebraska alone exports 31 percent of the ethanol produced within its borders to California. While California has argued that individual producers in Amici States can apply to change the LCFS and have individual "pathways" approved, that argument is unavailing here. That a regulation may be changed is no defense of that regulation. The deck remains

stacked: An ethanol plant in California that is in all material respects the same as an ethanol plant in Nebraska, and whose product has an identical effect on the environment, will have a lower carbon-intensity penalty based on its state of origin. Such discrimination is prohibited by the Commerce Clause.

California's protectionism will rob Amici States of billions in ethanol sales if allowed to stand. The LCFS's discriminatory effect will deprive Amici States of their inherent competitive advantage in producing corn and ethanol. California's enactment of the LCFS seeks to bar Amici States' ethanol from the state in favor of ethanol produced within its own borders. Because California's regulatory regime facially discriminates against out-of-state products, LCFS should be struck as an impermissible regulation under the Dormant Commerce Clause of the United States Constitution.

II. *The LCFS violates the Commerce Clause because it is an improper exercise of extra-territorial regulation.*

The LCFS is an attempt to impose the views of one large state – California – on the other 49 states. As sovereign states, Amici recognize California's ability to regulate conduct that occurs wholly within its borders, such as imposition of stricter emission limits on ethanol producing facilities and other activities *within* California. But here, the LCFS reaches out, across the Rockies and into the Plains, to regulate Amici States' ethanol industry, corn farming, and a host of activities that are far-removed from California and any legitimate interests it has in

regulating. All corn-based ethanol is chemically identical, and use of Midwest-produced ethanol in California emits no more greenhouse gases than use of California-produced ethanol. The only difference is how ethanol is produced in other states, which is it not California' right to decide.

The LCFS assigns penalties to ethanol based on *where* and *how* it is produced—even though such production occurs hundreds or thousands of miles away, and even though the end-product is chemically the same, no matter how it is produced. Such regulation is impermissibly extraterritorial, because it interferes with Amici State's ability to regulate ethanol production and other activities within their borders as they see fit. The "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). Here, the whole premise of California's approach is to use California's economic power to control out-of-state activities.

For a particularly egregious example, California assigns a penalty based on "indirect land use change"—the theory being that out-of-state lands will have to be cultivated to produce corn for ethanol (or to produce replacement crops). California wants to discourage such activity because it believes it contributes to global warming. But Amici States may want to encourage cultivation and other economic activity. That is our decision to make.

The penalty is also affected by California's views about various "farming practices." See RMFU Plaintiffs-Appellees' Exhibit 4 at 514-17. California is, thus, seeking to change out-of-state "farming practices" based on its views of what is "more sustainable." *Id.* It is none of California's business how farmers in Nebraska choose to grow their corn. The United States is a common market: California may not blockade out-of-state products in an attempt to force changes in out-of-state farming policies.

Another outrageous example: California penalizes Midwest corn ethanol plants for producing one co-product (dry distillers' grains) instead of another (wet distillers' grains), even though this production takes place entirely in our states and the products are not necessarily even sold in California, on the ground that producing dry distillers' grains consumes more energy than the alternative. *See* 17 C.C.R. § 95486(b), Table 6; RMFU Plaintiffs-Appellees' Exhibit 4 at 508; 825. Dry distillers' grains, however, are a more valuable commodity, which can be stored longer and shipped longer distances. California, thus, is directly interfering with the production process for a valuable co-product that may never be shipped into California, and interfering with the Amici States' prerogative to regulate and encourage industry within their own borders. It is hard to imagine a more blatant attempt to use economic muscle to regulate extraterritorially than to penalize production decisions in other states with respect to products that do not even come

to California. California may not adopt regulations that so "'offend sister States and exceed the inherent limits of the State's power.'" *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

III. *A stay of the district court's preliminary injunction and judgments will substantially injure the economies of the Amici States and is against the public interest.*

Corn and ethanol production play vital roles in the economies of Amici States. Any regulations pertaining to corn and ethanol production would necessarily affect Amici States' economies.

Amici States lead the nation in corn production. According to statistics from the United States Department of Agriculture's National Agricultural Statistics Service, in 2011, nearly 5.9 *billion* bushels of corn were produced in Amici States (compared to just 27.8 million bushels in California). Amici States' 2011 corn production was worth over $36 billion. Those dollars multiply as they flow through Amici States' economy, creating and supporting a host of other agricultural and non-agricultural industries.

The uses of corn are diverse, but one particular use in Amici States has been carefully nurtured and grown: the production of ethanol. In the early 1970s, leaders in the state saw an economic development opportunity created by conditions of high energy prices, foreign oil dependence, and grain surpluses. In 1971, the

Nebraska Legislature created the Nebraska Ethanol Board, the first state agency in the nation devoted solely to the development of the ethanol industry – an industry that scarcely existed at the time. The obstacles facing these boards were significant: no production facilities, limited knowledge and research regarding ethanol's potential use as an automotive fuel, undeveloped markets, regulatory obstacles, and political opposition from those with vested interests in the status quo. To overcome those obstacles, some Amici States created incentive funds designed to attract increased ethanol production in the state. See e.g., Neb. Rev. Stat. § 66-1345 (Reissue 2009).

Today, Amici States, through their ethanol boards and other state agencies focus on production and industry support, market development, research and technology issues, and public policy development. The results have been impressive. As of February 2012, Nebraska had 24 ethanol plants operating within the state with total production capacity of approximately 2 billion gallons of ethanol.

Just as importantly, the ethanol industry's economic impact is felt across the Amici States. In Nebraska alone, more than 1,300 people are directly employed in the ethanol industry, and the indirect and secondary effects of the industry employ an additional 1,600 people. According to statistics compiled by the Nebraska Public Power District' Economic Development Department, ethanol production

boosts the price of corn by $0.05-0.10 per bushel, thereby supporting farmers' incomes. In fact, the Nebraska Public Power District estimates that the direct and indirect effects of the ethanol industry increase household income in Nebraska by $241 billion and produce $31 million in tax revenues. A May 2011 study published by the Iowa State University Center for Agricultural and Rural Development found that the past decade of growth in ethanol production reduced gasoline prices in the Midwest region by $0.39 per gallon.

Given all of the above, any regulations impacting the ethanol industry are likely to be felt by citizens of all Amici States. That is particularly the case where the regulations occur in California because of California's importance as a destination and market for Amici States' ethanol. Nebraska alone exports approximately 31 percent of its ethanol produced to California. The value of Nebraska ethanol sold in California is $1.3 billion annually. California's enactment of the LCFS directly places that $1.3 billion in jeopardy, and, indirectly, untold billions more across the Amici States.

The LCFS has already had a negative impact on Amici States. For example, Chief Ethanol Fuels' ethanol plant in Hastings, Nebraska has, historically, shipped a significant amount of its ethanol to California. In 2011, however, it shipped *no* ethanol to California because of California's LCFS. The loss of the California ethanol market to Chief Ethanol has had significant detrimental effects on its

business, forcing it to locate other buyers at lower prices. See RMFU Plaintiffs-Appellees' Exhibit 17 (Declaration of Duane Kristensen).

Chief Ethanol's experience is typical of ethanol plants in Amici States – its business will, and already has, suffered significantly at the hands of California's unconstitutional LCFS. Citizens throughout Amici States will feel similar affects if the district court's preliminary injunction is lifted.

In addition to significantly injuring the Amici States, a stay of the district court's preliminary injunction is also against the public interest. California argues the opposite because, it claims, a preliminary injunction infringes on the will of California citizens, expressed through its legislative enactments. See Motion In Support of Stay, page 27. But the will of California voters stops at California's borders; they have no right to decide how ethanol will be produced elsewhere, and no right under the Commerce Clause to close their border to out-of-state products. The Amici States have a sovereign interest in regulating activities within their borders, free of interference from other states. The LCFS infringes on that interest. The public interest lies in respecting the sovereign authority of states to regulate activities within its own borders. In light of that interest, this Court should deny California's motion to stay.

CONCLUSION

Staying the district court's preliminary injunction and judgments and allowing California's LCFS to take effect would significantly injure the corn markets, ethanol markets, and overall economies of Amici States. For that reason, and the others argued above, this Court should deny the appellants' motion for a stay.

Dated: March 12, 2012

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Amicus Brief of States of Nebraska, Iowa, Kansas, Michigan, Missouri, North Dakota, and South Dakota in Opposition to Appellants' Motion for a Stay of the District Court's Orders was filed electronically on March 12, 2012, and will therefore be served electronically upon all counsel by the Court's CM/ECF system.

In addition, I have mailed a true and correct copy of the foregoing by first-class U.S. Mail to the following participants who are not registered for electronic service by CM/ECF.

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