No. _____

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.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2014

ADDITIONAL PETITIONERS

Redwood County Minnesota Corn and Soybean Growers; Penny Newman Grain, Inc.; Rex Nederend; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Growth Energy; Renewable Fuels Association.

ADDITIONAL RESPONDENTS

Plaintiffs: American Fuels & Petrochemical Manufacturers Association (AFPM); American Trucking Associations; the Center for North American Energy Security; Consumer Energy Alliance. Defendants: Mary D. Nichols; Daniel Sperling; Ken Yeager; Dorene D'Adamo; Barbara Riordan; John R. Balmes; Lydia H. Kennard; Sandra Berg; Ron Roberts; John G. Telles, in his official capacity as member of the California Air Resources Board; Ronald O. Loveridge, in his official capacity as member of the California Air Resources Board; Edmund G. Brown, Jr., in his official capacity as governor of the State Of California; Kamala D. Harris, Attorney General, in her official capacity as attorney general of the State Of California. Intervenor-Defendants: Environmental Defense Fund; Natural Resources Defense Council; Sierra Club; Conservation Law Foundation.

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. California's Low Carbon Fuel Standard, expressly and on its face, treats chemically identical fuels differently based on where they are 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?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Rocky Mountain Farmers Union; Redwood County Minnesota Corn and Soybeans Growers; Penny Newman Grain, Inc.; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Rex Nederend; Growth Energy; and the Renewable Fuels Association make the following disclosures:

1. Rocky Mountain Farmers Union ("RMFU") is a cooperative association representing family farmers and ranchers in Wyoming, Colorado, and New Mexico. RMFU has no parent company, and no publicly-held company has a 10% or greater ownership interest in RMFU.

2. Redwood County Minnesota Corn and Soybeans Growers ("Minnesota Grower's Association") is a not-for-profit corporation located in Redwood County, Minnesota. Minnesota Grower's Association has no parent company, and no publicly-held company has a 10% or greater ownership interest in Minnesota Grower's Association.

3. Penny Newman Grain, Inc. ("Penny Newman") is a leading merchant in the market for grains and feed by-products, headquartered in Fresno, California. Penny Newman has no parent company, and no publicly-held company has a 10% or greater ownership interest in Penny Newman.

4. Fresno County Farm Bureau ("FCFB") is a non-profit membership organization based in Fresno County. FCFB has no parent company, and no publicly-held company has a 10% or greater ownership interest in FCFB.

5. Nisei Farmers League ("Nisei") is a farmer and grower-support organization headquartered in Fresno, California. Nisei has no parent company, and no publicly-held company has a 10% or greater ownership interest in Nisei.

6. California Dairy Campaign ("CDC") is a non-profit corporation based in Turlock, California. CDC has no parent company, and no publicly-held company has a 10% or greater ownership interest in CDC.

7. Rex Nederend is an individual farmer and rancher who owns a dairy near Tipton, California, and ranches near Wasco and Lemoore, California. The disclosures required under Rule 29.6 are inapplicable to Mr. Nederend.

8. Growth Energy is a non-profit corporation whose members include firms that produce ethanol, as well as other companies who provide equipment and technology used to produce ethanol from corn. Growth Energy has no parent companies, and no publicly-held company has a 10% or greater ownership interest in Growth Energy.

9. The Renewable Fuels Association ("RFA") is a non-profit trade association representing companies that produce fuel ethanol for purposes of marketing that product to blenders and marketers of gasoline. RFA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in RFA.

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INTRODUCTION

The State of California, in the name of combatting global warming, has violated the basic norms of interstate federalism. By its own admission, California's Low Carbon Fuel Standard ("LCFS") seeks to regulate greenhouse gas ("GHG") emissions occurring in *other* States by rewarding and punishing industrial and agricultural activity taking place *outside* California. And it bases the size of these rewards and penalties on whether production took place in "California" or in the "Midwest"—systematically favoring California. The Constitution denies States such authority.

The Ninth Circuit—over strong dissents by Judges Mary Murguia and Milan Smith—has condoned California's efforts as an "experiment" justified by the exigency of global warming, App.51a, but there is no question where that experiment leads: It will Balkanize the national economy, pit States against each other, and allow the larger States to use their economic clout to force farmers and businesses in other States to conform to their idea of good policy—all while harming the Midwest ethanol industry. This Court's immediate intervention is therefore needed to nip this so-called "experiment" in the bud.

Perhaps more troubling, the logic of the opinion below is not confined to global warming measures, but could extend to any socio-economic policy. If a large State concludes that the minimum wage is too low, it could hike its own rate, then impose a tax on distributors of imports from other States with lower rates. We presume the courts would strike down such a brazen law in a moment: It both discriminates

against out-of-state commerce and seeks to regulate conduct in other States. *See Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (a State may not "condition importation upon proof of a satisfactory wage scale in factory or shop"). And yet, the LCFS is structurally identical.

The creation and enforcement of nationwide standards is the business of Congress, where all States are represented, not California alone. If this Court allows large States with economic power to enact regulations of this sort, it will come at the expense of this Union of equal States and the guarantee of a common market. The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-82a) is reported at 730 F.3d 1070. The order of the court of appeals denying rehearing *en banc*, accompanied by concurring and dissenting opinions (App.147a-173a), is reported at 740 F.3d 507. The opinion of the district court (App.83a-146a) is reported at 843 F. Supp. 2d 1042.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2013. A timely petition for rehearing *en banc* was denied on January 22, 2014. App.150a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1), and 1331.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, sec. 8, cl. 3, provides:

> The Congress shall have the power ... [t]o regulate Commerce ... among the several States[.]

Relevant provisions of the LCFS, codified at 17 California Code of Regulations § 95480 *et seq.*, and its organic statute, the Global Warming Solutions Act of 2006 (A.B. 32), codified at California Health & Safety Code § 38500 *et seq.*, are reproduced in the appendix to this petition. *See* App.174a-227a.

STATEMENT OF THE CASE

A. California's Regulation of Nationwide Carbon Emissions

The California Air Resources Board ("CARB") adopted the LCFS on November 25, 2009, as an "early action" item under the Global Warming Solutions Act of 2006. *See* Cal. Health & Safety Code § 38560.5; 9th Cir. Excerpts of Record ("ER") 6:1215. The LCFS requires companies that market transportation fuels in California to reduce the "carbon intensity" of the fuels they sell by 10 percent between 2011 and 2020. *See* ER5:921-22; LCFS §§ 95482, 95485. It assigns carbon-intensity scores to fuels, which are set out in the regulation's "Lookup Table." *See* LCFS § 95486, Table 6; App.248a.

"Carbon intensity," as CARB candidly explains, "is not an inherent chemical property of a fuel, but rather it is reflective of the process in making, distributing, and using that fuel." ER9:2161; *see also*

ER10:2360 ("[T]he relevant inquiry with carbon intensity is not so much what is contained in a fuel, but how was that fuel made, distributed and used."). The "carbon-intensity score" assigned by California to fuel imports is nothing other than a calculation of the GHGs previously emitted in other States during the production and distribution process; none of the differences in carbon-intensity scores for a given fuel has any relation whatsoever to the GHGs that will be emitted within the State of California, because that number is constant. Thus, as the regulations explain, LCFS's "lifecycle" analysis takes into account emissions generated in "*all stages of fuel ... production and distribution*," no matter where they take place. LCFS § 95481(a)(38) (emphasis added).

Ethanol provides a case in point. As CARB acknowledges, all ethanol, no matter how or where it is produced, has the same physical and chemical properties and produces precisely the same emissions when burned. ER15:3588; ER10:2360; ER9:2161. Yet the LCFS Lookup Table categorizes ethanol into dozens of different production "pathways," each with a different carbon-intensity score, based on location and methods of production. Thus, as CARB summarizes it, "individual pathways for corn ethanol in the Lookup Table are differentiated based on four factors; location of the production facility (California or Midwest), type of corn milling (wet or dry), type of distillers grains produced (wet or dry), and source of fuel for heat energy and co-generated electrical power (natural gas, coal, or biomass)." ER7:1718.

The data in Addendum A, App.248a, excerpted from the Lookup Table, show the effect of those

distinctions for Midwest ethanol. As can be seen, the LCFS systematically disadvantages Midwest ethanol as compared to California ethanol. By default, ethanol designated as coming from a California facility is always assigned a lower (better) carbon-intensity score than identical ethanol from a Midwest facility using identical production processes, simply because of where production is located. *See* LCFS § 95486, Table 6. In fact, if a Midwest ethanol facility were picked up and moved to California, it would automatically receive better regulatory treatment.

The preference granted to California ethanol by the LCFS results from a number of presumptions that favor production in California. First, CARB penalizes Midwest ethanol for the GHG emissions associated with transporting finished fuel to California—an integral aspect of interstate commerce. ER9:2289-90; *see also* ER8:1923. Second, the LCFS makes assumptions about "the average efficiency of the equipment at facilities in the Midwest versus California," and about "the average greenhouse gas emissions associated with the electricity used at the facilities in the Midwest and California," in each case favoring California entities. ER15:3589, ER6:1274; ER4:781. As CARB candidly acknowledges, "[t]he carbon intensities of some California-produced fuels ... benefit from shorter transport distances and lower carbon intensity electricity sources." ER8:1923.[1]

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[1] The LCFS permits ethanol producers to seek individualized pathways, but doing so is a heavy burden involving submission of scientific proof. LCFS § 95486(e)(1), (3)(A), (f)(1).

Given that all ethanol produces exactly the same GHG emissions when used in California, the *only* way that a California fuel distributor can reduce the carbon intensity of the ethanol it blends into gasoline is to buy from what CARB views as lower-intensity producers instead of higher-intensity producers. That, in turn, requires them to distinguish between ethanol producers based on location and method of production. Because the LCFS places California fuel distributors under escalating pressure to reduce the carbon intensity of fuel they sell, *see* LCFS § 95485, it penalizes them for doing business with producers of higher-carbon-intensity ethanol (as classified by CARB). Indeed, if distributors fail to achieve the requisite reduction of the carbon intensity of the fuels they market or to purchase offsetting credits, they face civil and criminal penalties. *See* LCFS § 95484(d).

CARB's distinction between identical fuels based on *where* and *how* they are produced was intentional, resulting from California's desire to use its economic leverage to affect behavior nationwide. According to CARB, by making carbon intensity the lodestar of the LCFS, California "has essentially assumed legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California." ER15:3597 (emphasis added).

The economic consequences for Midwest ethanol are severe. As CARB stated during the rulemaking, "[b]y its nature, the LCFS discourages the use of higher-carbon-intensity fuels." ER7:1687. Accordingly, some alternative fuels currently sold in California will be "displaced" by lower-intensity

fuels. ER7:1689. CARB predicts that the LCFS will cause the *total elimination* of Midwest corn ethanol from the California market by 2018. *See* ER11:2728-31 (table showing zero volume of Midwest corn ethanol, called "MW Av. Corn EtOH," in the California market after 2017).

In contrast, CARB expects the LCFS to be an economic boon to California, predicting that some 25 new biorefineries will be built in California to meet increased demand and to replace Midwest ethanol. ER7:1709; ER10:2425. That is more than a collateral consequence of the LCFS; it was one of CARB's express purposes. CARB and its experts have acknowledged that CARB could have achieved reductions in GHG emissions by other means such as "a tax on fossil fuels," ER4:805, or "increasing vehicle efficiency," ER6:1284. But unlike the LCFS, which shifts most burdens onto citizens of other States, the costs of those measures would be borne primarily in California. CARB explained from the beginning that the LCFS was designed to "reduc[e] the volume of transportation fuels that are imported from other states," ER7:1689, and thereby improve California's "business competitiveness," ER7:1684. As CARB put it, "[d]isplacing imported transportation fuels with biofuels produced in the State keeps more money in the State." ER7:1689.

The direct economic benefit to California industry is the only real benefit that California can hope to gain from the LCFS. The LCFS will not measurably reduce GHG emissions. CARB admits that "fuel producers are free to ship lower-carbon-intensity fuels to areas with [LCFS] standards, while shipping higher-carbon-intensity fuels elsewhere. The end

result of this fuel 'shuffling' process is little or no net change in fuel carbon-intensity on a global scale." ER7:1687; *see also* ER8:1925. Rather, fuel shuffling—whereby purportedly lower-carbon-intensity fuels are shipped into California and higher-carbon-intensity fuels that used to be shipped to California now are shipped elsewhere—will require transportation over increased distances, *increasing both costs and GHG emissions*. ER14:3522.[2] CARB has accordingly conceded that "GHG emission reductions by the LCFS alone will not result in significant climate change." ER7:1552; ER15:3755-56. The LCFS program is a costly attempt by California to *appear* that it is doing something about global warming, perhaps in hopes of inspiring action elsewhere, without actually reducing emissions—and with the added benefit that the costs will be borne largely by producers in other States, giving a competitive advantage to California producers.

At least *thirteen* States are studying or preparing to adopt LCFS-like regimes with similar treatment of lifecycle carbon intensity. *See* App.66a (citing Oregon House Bill 2186 (2009); Washington Executive Order 09-05 (2009)); *see also* Northeast and Mid-Atlantic Low Carbon Fuel Standard, Memorandum of Understanding 1-2 (Dec. 30, 2009) (*available at* http://www.nescaum.org/documents/lcfs-mou-govs-final.pdf). Development of those plans

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[2] Interstate shuffling would be eliminated under a nationally mandated program. It is an inefficiency entirely caused by a state-by-state approach to a national issue.

paused while this litigation was pending, but is now poised to resume. *See* Pacific Coast Action Plan on Climate and Energy (Oct. 28, 2013) (*available at* http://gov.ca.gov/news.php?id=18284) (pact signed by California, Oregon, and Washington).

B. Proceedings Below

A coalition of farming interests and organizations representing farmers and ethanol producers (collectively, "RMFU") filed an action in the District Court for the Eastern District of California on December 23, 2009, *see* No. 1:09-cv-02234 (E.D. Cal.). The National Petrochemical & Refiners Association (now American Fuels & Petrochemical Manufacturers Association) and others (collectively, "AFPM") filed a second action challenging the LCFS, No. 1:10-cv-00163 (E.D. Cal.), on February 2, 2010. The two actions were partially consolidated. Both sets of plaintiffs contended that the LCFS: (1) facially discriminates against Midwest ethanol, and (2) impermissibly regulates extraterritorial fuel production processes.

In a series of opinions issued on December 29, 2011, totaling nearly 100 pages, *see* App.83a; ER1:21; :46, :84, the District Court (O'Neill, J.) granted the plaintiffs' motions for summary judgment in relevant part, and denied CARB's cross-motions. The court found that the LCFS discriminates against interstate commerce and constitutes extraterritorial regulation in violation of the Commerce Clause.

CARB appealed, and on September 18, 2013, a divided panel of the Ninth Circuit reversed in relevant part. As to discrimination, the majority acknowledged at every turn that the LCFS regulates

with explicit reference to transportation distances, geographic regions, and State boundaries—factors "'inextricably intertwined with origin,'" App.36a—but nonetheless declined to find that it was facially discriminatory. In the majority's view, facial discrimination exists only when a State statute is a "protectionist measure"—that is, when its geographical distinctions are not based on "legitimate goals of regulation" but rather "mere hostility to trade." App.46a. Here, the majority concluded that the LCFS's penalties on Midwest ethanol were "chosen to accurately measure and control GHGs," and therefore do not reflect economic protectionism. App.48a. Because the majority considered CARB to have shown "good and non-discriminatory reason[s]" for the LCFS, it held the LCFS to be facially nondiscriminatory. App.71a.[3]

As for extraterritoriality, the majority applauded the fact that California has "assumed legal and political responsibility" for GHG emissions, "regardless of location." App.69a. The majority acknowledged that the LCFS functions by taking out-of-state activity into account, characterizing the program as giving "incentives" to firms that "wish to gain market share in California" to change their out-of-state activity. App.59a. The majority nonetheless found that the LCFS did not constitute extraterritorial regulation because "no firm must meet a particular carbon-intensity standard and no

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[3] This approach—focusing on the supposed purpose of the LCFS—pervades the majority's facial-discrimination analysis. *See* App.35a, 38a-39a, 45a, 50a.

jurisdiction need adopt a particular regulatory standard for its producers to gain access to California." App.59a. In other words, a State may impose penalties or rewards for extraterritorial behavior, so long as it does not impose absolute mandates dictating *how* out-of-state producers must lower the overall carbon intensity of any fuel that is eventually sold in California. Having reversed as to both facial discrimination and extraterritoriality, the majority remanded to the district court to determine whether the LCFS discriminates in purpose or effect (though the result appears to be predestined based on the majority's reasoning), and whether it impermissibly burdens interstate commerce under the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). App.72a.

Judge Murguia dissented. Applying *Oregon Waste System, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 100 (1994), Judge Murguia said she would "look only to the text of the LCFS to determine if it facially discriminates against out-of-state ethanol." App.75a. The majority's approach, she said, "puts the cart before the horse and considers California's reasons for distinguishing between in-state and out-of-state ethanol before examining the text of the statute to determine if it facially discriminates"—a method she noted was "inconsistent with Supreme Court precedent[.]" App.76a.

Looking at the face of the regulation, Judge Murguia found the LCFS discriminatory because the Lookup Table "differentiates between in-state and out-of-state ethanol, according more preferential treatment to the former at the expense of the latter."

App.75a. She therefore applied strict scrutiny. Although she concluded that the LCFS serves a legitimate local purpose, she reasoned that California could achieve the same purpose without discriminating against out-of-state ethanol producers, and that the LCFS therefore failed strict scrutiny. Judge Murguia did not reach the question of extraterritoriality.

RMFU and AFPM sought *en banc* review, but on January 22, 2014, the Ninth Circuit denied their petitions over the dissent of seven judges. As Judge Milan Smith explained on behalf of his dissenting colleagues: The panel majority opinion upholds "a protectionist regulatory scheme that threatens to Balkanize our national economy. In so doing, the majority disregards longstanding dormant Commerce Clause doctrine, and places the law of this circuit squarely at odds with Supreme Court precedent." App.159a. The dissent concluded that "the dormant Commerce Clause has [now] been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent." App.172a.

Judge Smith echoed Judge Murguia's position on discrimination, noting that "[u]nder the dormant Commerce Clause, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.... Whether California has good reasons for penalizing Midwestern ethanol simply has nothing to do with whether the state's regulations are facially discriminatory." App.165-66a (quotation marks omitted). Applying strict scrutiny, Judge Smith concluded that CARB's

admission that the LCFS "will have little to no effect in averting the environmental catastrophe envisioned by the majority ... shows that the regulations fail strict scrutiny." App.167a-168a. The majority's contrary decision, he wrote, "departs from settled law and cuts this circuit's dormant Commerce Clause jurisprudence loose from its moorings." App.168a.

Judge Smith also addressed the LCFS's extraterritorial effect. He rejected the majority's defense of the LCFS as a system of "incentives": "By penalizing certain out-of-state practices, California's regulations control out-of-state conduct just as surely as a mandate would, particularly in view of California's economic clout. Thus, whether California's scheme is characterized as providing 'incentives' or establishing 'mandates,' it has the practical effect of regulating interstate commerce." App.170a. And he was very clear about the potential consequences. If the LCFS stands and other States follow California's lead, he wrote, "ethanol producers will soon face the daunting prospect of navigating several interlocking, if not entirely contradictory, regulatory regimes. Fragmentation of the national economy may ensue." App.171a.

Judge Gould, the author of the panel majority's opinion, filed an opinion concurring in the denial of rehearing *en banc*. He noted that "the tone and substance of the dissent is perhaps aimed at encouraging Supreme Court review." App.155a (Gould, J., concurring). But even he did not disagree that review by this Court "could be helpful." *Id*.

REASONS FOR GRANTING THE WRIT

Unlike many other fuel standards, the LCFS is not aimed at regulating the types or composition of fuels that are sold and used in California. Instead, California seeks to force Midwest ethanol producers to adopt California-dictated practices at their Midwest facilities on pain of exclusion from the huge California market. The Constitution prohibits both the means (discrimination against out-of-state production) and the purpose (extraterritorial regulation) of the LCFS. *See, e.g.*, *Oregon Waste Sys., Inc.* v. *Department of Envt'l Quality of State of Or.*, 511 U.S. 93, 99 (1994); *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

The Ninth Circuit upheld the LCFS nonetheless, and in so doing put itself at odds with the decisions of this Court and other Circuits. The panel majority's holding that the LCFS is nondiscriminatory because its purpose is environmental rather than economic protectionism, App.46a, 48a, directly contradicts this Court's rule, noted by Judge Murguia in dissent, that "the purpose of, or justification for, a law has no bearing on whether it is *facially* discriminatory." *Or. Waste*, 511 U.S. at 100 (emphasis added). The panel also held that the LCFS is not an impermissible extraterritorial regulation because it takes the form of an incentive rather than a mandate. App.59a. As Judge Smith showed in his dissent from denial of rehearing *en banc*, that contradicts this Court's test for extraterritoriality, which looks to the "practical effect" of a State law, not its mere superficial form. *See, e.g.*, *Healy*, 491 U.S. at 335-36. Indeed, the panel majority implicitly acknowledged its failure to

follow established constitutional principles, dismissing them as "archaic formalism" that would "prevent action against a new type of harm." App.71a. There is, however, no "global warming" exception to this Court's jurisprudence.

The effects of the Ninth Circuit's defiance of settled law are farther-reaching. Part of the genius of our constitutional system, which "split the atom of sovereignty," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), was to form a union of sovereign States which stand in every respect on constitutionally equal footing. Under the Constitution no State may deprive another State's citizens of the right to do business on equal terms, nor may any State penalize use of the national free market without satisfying the strictest scrutiny. *See Oregon Waste*, 511 U.S. at 100-01. By the same token, no State—even one as large as California—is *primus inter pares*; no State exercises legal authority over any other; and only the national government can superpose itself on a State's regulation of conduct within its own territory. California's effort to upset that system cannot be tolerated.

I. THE NINTH CIRCUIT'S ANALYSIS OF DISCRIMINATION DISREGARDS THIS COURT'S PRECEDENT AND CONFLICTS WITH THE APPROACH OF OTHER CIRCUITS.

As Judges Murguia and Smith showed in their respective dissents, the panel majority abandoned the well-established Commerce Clause discrimination analysis that has been consistently applied in this Court and the federal courts of

appeals. In its place, the majority adopted a different, novel approach, seemingly calculated to excuse the LCFS from the full weight of Commerce Clause scrutiny. That is, the majority looked first at the LCFS's supposed *purposes* in order to determine whether it is discriminatory on its *face*. This analysis was based in no small part on the court's agreement with the policy goals of the LCFS. *E.g.*, App.71a ("California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise."). The results-oriented approach adopted by the Ninth Circuit favors State regulations that individual judges might find sympathetic, while green-lighting precisely the State barriers to interstate commerce that the Commerce Clause has long prohibited.

The principle that States cannot discriminate against interstate business activity arises from more than the Commerce Clause alone, of course. At the very least, it emerges from the plain text of other constitutional provisions such as the Article IV Privileges and Immunities Clause, *see Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 280 (1985), and the Article I Export-Import Clause, *see Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 621-37 (1997) (Thomas, J., dissenting). However, it has been most developed in the Commerce Clause context. That approach enjoys historical support of its own, including James Madison's statement that the Commerce Clause "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used

for the positive purposes of the General Government.'" *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 M. Farrand, *Records of the Federal Convention of 1787* 478 (1911)).

This Court has long made clear that when evaluating a State statute for *facial* discrimination, a court must examine the *face* of the challenged law, not its purposes. "[T]he purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Oregon Waste*, 511 U.S. at 100; *see also Camps Newfound*, 520 U.S. at 575-76 (a State law is facially discriminatory when "[i]t is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce"); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (to allow barriers to interstate commerce when "the economic motive is secondary and subordinate ... would be to eat up the rule under the guise of an exception"). If discrimination is apparent, the court then considers the purposes that the offending statute serves, but it must apply "the strictest scrutiny," *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979), an exacting standard that requires the State to show that no nondiscriminatory alternative is possible.

Under the proper analysis, it is obvious that the LCFS is facially discriminatory. Quite simply, the LCFS sorts ethanol into geographical categories, treating chemically-identical ethanol differently depending on where it is produced. In doing so, the LCFS consistently advantages ethanol produced in California. As Judge Murguia and Judge Smith both observed, all things being equal, California ethanol is

always treated more favorably than Midwest ethanol. App.75a (Murguia, J., dissenting), 160a (M. Smith, J., dissenting). There is no sensible way to characterize that except as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"—the very definition of facial discrimination. *Oregon Waste*, 511 U.S. at 99.

The majority noted some particular aspects of the LCFS that supposedly rendered it nondiscriminatory, but none carries any weight. Many amount to the argument that the LCFS accounts for "real" differences in GHG emissions between favored and disfavored ethanol production locations. App.36a. But that simply repackages the majority's erroneous view that the reasons for discrimination determine whether a regulation is discriminatory in the first place. Whatever the reasons might be—and even if the differences in GHG emissions are "real," *id.*—there is no way around the discrimination itself.

Finding CARB's environmental purposes to be sympathetic, the majority never applied strict scrutiny. But under the proper analysis, the only question should have been whether CARB could carry its burden of showing that the discriminatory features of the LCFS are *necessary* for reducing GHG emissions. As Judge Smith and Judge Murguia both noted, the LCFS fails strict scrutiny because California can reduce GHG emissions by other means, *see* App.77a (Murguia, J., dissenting); ER4:805; ER6:1284, and because the LCFS's actual effect on global temperatures is negligible, *see* App.167a (M. Smith, J., dissenting); ER7:1552;

ER15:3755-56. In fact, far from reducing global GHG emissions, the LCFS is likely to *increase* them, ER7:1687, while imposing new costs on producers and consumers. For that reason, Judge Gould's concurrence merely focused on the LCFS's symbolic potential as an inspiration for action by other jurisdictions, App.156a, but that is too speculative, and ignores evidence that there would be no effect on the climate even if the entire Nation followed CARB's lead. ER7:1552; ER15:3755-56.

Remarkably, neither the majority nor Judge Gould's concurrence made any real effort to reconcile its discrimination analysis with this Court's jurisprudence. To the contrary, *both* opinions dismissed this Court's facial analysis as "archaic formalism" that cannot be allowed to prevent CARB from "incorporat[ing] state boundaries [into the LCFS] for good and non-discriminatory reason[s]." App.71a, 151-52a (Gould, J., concurring). If it really is "archaic formalism" to evaluate *facial* discrimination with reference to the *face* of a statute alone, though, there is no such thing as facial discrimination. As Judge Smith commented in dissent, such reasoning "contravenes black letter law." App.166a.

To be sure, the majority pointed to cases banning products based on intrinsic qualities—like products infected with pests, or unsafe goods. App.46a-47a; *see also* App.158a (Gould, J., concurring). Of course States may ban the intrastate sale of products (and sometimes even their importation) if in-state use of the products will produce bad effects within that State. *See City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (differential treatment of out-of-

state products may be permissible when "there is some reason, apart from their origin, to treat them differently"); *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U.S. 87, 96 (1926) (upholding a State quarantine law designed to exclude weevil-infested alfalfa). But that is not what California is doing here. The LCFS assigns carbon intensity scores based not on any property intrinsic to ethanol itself, but on the manner and place of production and the length of the distribution chain. High-carbon-intensity and low-carbon-intensity ethanol, as designed by CARB, will emit precisely the same amount of GHGs when they are combusted in California. It is not a proper concern of California whether their production and distribution generated emissions in other States before the ethanol got to California.

Besides conflicting with this Court's own cases, the majority's test creates a circuit split with decisions by other courts applying the proper analysis to a wide variety of discriminatory State schemes. Multiple federal circuits have followed this Court's rule that the purpose of a State statute, even when unrelated to protection of in-state economic interests, does not bear on whether the statute is discriminatory. For example, the Eleventh Circuit held in *National Solid Wastes Management Association* v. *Alabama Department of Environmental Management* that, "[e]ven if Alabama's purpose … was to protect human health and the environment in Alabama, that purpose 'may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" 910 F.2d 713, 720 (11th

Cir. 1990). In *Cooper* v. *McBeath*, the Fifth Circuit likewise rejected Texas's argument that a facially discriminatory statute was justified by public health: "[H]owever legitimate may be the State's ultimate goals, it cannot pursue them via the illegitimate means of a flat proscription of non-Texans." 11 F.3d 547, 554 (5th Cir. 1994). Other circuits have reached similar holdings.[4]

The conflict between the majority's position and those of this Court and other circuits leaves States, regulated parties, and lower courts unable even to tell in a principled and consistent way from case to case, and from circuit to circuit, whether a statute is facially discriminatory under the Commerce Clause—a glaring uncertainty that cries out for prompt and definitive resolution. Resolving the conflict requires immediate review, particularly given the widespread implications of the majority's opinion.

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[4] *See National Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) ("*Meyer II*") (explaining that "it just does not matter" whether a state considers its discriminatory laws "environmentally sound"); *American Trucking Ass'n, Inc.* v. *Whitman,* 437 F.3d 313, 321 (3d Cir. 2006) ("The Supreme Court held that the purpose of [a] law would not be relevant to whether the statute was discriminatory[.]") (citing *City of Philadelphia*, 437 U.S. at 626-27).

II. THE NINTH CIRCUIT'S DECISION ON EXTRATERRITORIALITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Under the constitutional system adopted by the People in 1789, Congress is the only body with authority to legislate nationwide; individual States may not. Two hundred years of this Court's cases therefore make clear that a State "may not impose economic sanctions ... with the intent of changing ... lawful conduct in other States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996). For most of our Nation's history, the ban on extraterritorial legislation was well understood and respected, with the occasional violation promptly struck down by this Court or the lower courts.

In recent years, however, the State of California has discovered that its great market power allows it to extend its legislative ambitions beyond its boundaries. The Ninth Circuit has now blessed California legislation barring or penalizing imports based on their mode of production in other States—not only in this case, but at least once more. *See also Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013) (regulating production of foie gras). Not surprisingly, other proposals are underway. *See* Cal. Health & Safety Code § 25996 (regulating production of eggs).

In Judge Smith's words, the majority's decision to uphold the LCFS "render[s] toothless" that constitutional prohibition, leaves the Ninth Circuit "in open defiance of controlling Supreme Court

precedent," and threatens irreparable harm to the Union. App.172a.

A. Territorial Limitations of State Regulation Are a Bedrock of Our Federalism.

Although many extraterritoriality cases refer to the Commerce Clause, *e.g.*, *Baldwin*, 294 U.S. at 521-22, the Commerce Clause is pertinent only when, as here, a State uses its market power over imports as a *means* of enforcing its extraterritorial rules. Ultimately, the Constitution's limitation on extraterritorial State regulation is derived from "principles of state sovereignty and comity." *BMW*, 517 U.S. at 571; *see also Galpin* v. *Page*, 85 U.S. 350, 368 (1873) (discussing the history of the rule). As this Court stated in *Bonaparte* v. *Tax Court*, "[n]o State can legislate except with reference to its own jurisdiction." 104 U.S. 592, 594 (1881). States are free to "experiment with regulation," *see* App.68a, but they may not take their experiments on the road.

Breaches of State territorial limitations raise grave concerns for the Union: "[I]t would be impossible to permit the statutes of [one State] 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." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914). The "Constitution's special concern" for both economic harmony and State autonomy, *Healy*, 491 U.S. at 335; App.169a (M. Smith, J., dissenting), is meaningless if one State can effectively "impose its own policy choice on

neighboring States." *BMW*, 517 U.S. at 571. States with potent market shares could dominate their smaller neighbors. Interstate commerce would suffer, and Congress's position as the sole locus of regulation of interstate commerce would be subverted.

Just as troubling, extraterritorial regulation cheats the political process. In our system, a nationwide or interstate regulatory scheme—like lifecycle GHG emissions limitations—is entrusted to Congress, where everyone is represented. *See generally McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[The federal government] is the government of all; its powers are delegated by all; it represents all, and acts for all."). As this Court has recognized, "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945).

This Court has applied the extraterritoriality rule strictly and consistently, issuing a long line of decisions in multiple constitutional contexts constraining State laws and judicial acts within their territorial limits and preventing States from regulating elsewhere. *E.g.*, *United States* v. *Crosby*, 11 U.S. (7 Cranch) 115, 116 (1812); *Bonaparte*, 104 U.S. at 594; *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591 (1897); *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905); *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U.S. 354, 360 (1914); *New York Life Ins.*, 234 U.S. at 161; *Baldwin*, 294 U.S. at 521-22; *Alaska Packers Ass'n* v. *Indus. Acc. Comm'n*, 294

U.S. 532, 540 (1935); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n of State of California*, 306 U.S. 493, 504-05 (1939); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975); *BMW*, 517 U.S. at 571. The Court should not be reticent about continuing to do so here.

B. The Panel Decision Contradicts This Court's Cases and Those of Other Circuits.

The panel majority acknowledged that the LCFS was designed for the express purpose of "influencing the out-of-state choices of market participants." App.64a. As CARB has put it, the lifecycle analysis is intended to account for the "process in making" and "distributing" motor fuel even where those processes occur wholly outside the State, ER9:2161, such that if participants in the worldwide chain of commerce that brings fuel to California do not conform to CARB's views on GHG emissions, they will pay a penalty in the form of reduced access to the California ethanol market. That should have been the end of the matter. As noted above, a State "may not impose economic sanctions ... with the intent of changing ... lawful conduct in other States." *BMW*, 517 U.S. at 572. And yet, the majority held that the LCFS does not have impermissible extraterritorial effect. That holding, and the reasoning underlying it, is irreconcilable with decisions of this Court and other federal courts of appeals. At least three areas of conflict are especially consequential.

First, the majority characterized the LCFS as merely a system of "incentives" that "might encourage ethanol producers to adopt less carbon-

intensive policies," rather than as "control" or a "mandate" over out-of-state activity. App.62a-63a. Financial penalties, however, are interchangeable with mandates. *See National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012) (discussing the penalty for not complying with the individual mandate to purchase health insurance); *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 34 (1922) (discussing tax penalizing use of child labor).

The majority's distinction between "incentive" and "control" directly contradicts this Court's stated rule that the "*practical effect* of the regulation" is the relevant inquiry. *See* App.170a (M. Smith, J., dissenting); *Healy*, 491 U.S. at 336. After all, the invalid statute in *Healy* "did not, by its terms, require or prohibit any conduct outside Connecticut." *See* Br. of United States as *Amicus Curiae* Supporting Petitioners at 22, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003) (No. 02-722) ("*Garamendi* Brief"). And this Court explained in *Camps Newfound* that it is irrelevant to a Commerce Clause analysis whether a statute acts as "a strong incentive" or a "total prohibition." 520 U.S. at 578.

Judge Smith's view in dissent comports with the decisions of other courts of appeals. The majority did not discuss, for example, *National Foreign Trade Council* v. *Natsios*, in which the First Circuit invalidated on extraterritoriality grounds a Massachusetts statute that imposed a 10 percent penalty on State contract bids by companies that did business in Burma. 181 F.3d 38, 69 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). That penalty was an incentive not to do business in

Burma, but did not *require* any company to stop business there. *See also Alliance for Clean Coal* v. *Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (rejecting State's argument that all a law did was "encourage," but not require, the favored conduct). Allowing the panel's decision to stand can only perpetuate a split in how courts analyze claims of extraterritorial regulation.

Second, the majority mistakenly held that there was enough of a nexus to California to defeat extraterritoriality. The majority concluded, for example, that the ultimate sale of a fuel in California provided such a nexus, reasoning that the LCFS "regulates only the California market" because it applies only to firms that "wish to gain market share in California[.]" App.59a. That directly contradicts this Court's rule that a State's authority over in-state transactions does not give it authority over the preceding chain of commerce. As this Court explained in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, "[t]he mere fact that the effects of [a State law] are triggered only by sales of [a commodity] within the State ... does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state." 476 U.S. 573, 580 (1986); *see also Garamendi* Brief at 22 ("A state law does not cease to be impermissibly 'extraterritorial' under the Commerce Clause merely because it has some nexus to domestic persons or activities.").

The Ninth Circuit seems to think that States are able to regulate out-of-state activity if that activity creates externalities—as GHG emissions harm everyone all over the world. *See* App.64a-65a. But our Constitution supplies a remedy for out-of-state

externalities: Congressional regulation. *See Massachusetts* v. *E.P.A.*, 549 U.S. 497, 519 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions …. These sovereign prerogatives are now lodged in the Federal Government[.]"). It does not permit States to bar or penalize interstate commerce in order to pressure other States to adopt more congenial laws. Extraterritorial commerce regulations are thus prohibited "whether or not the commerce has effects within the State[.]" *Healy*, 491 U.S. at 336; *see also American Beverage Ass'n* v. *Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (same), *cert. denied,* 134 S. Ct. 61 (2013); *Allergan, Inc.* v. *Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013) (same); *Natsios*, 181 F.3d at 69 (same); *National Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) ("*Meyer I*") (same).

The Ninth Circuit's logic was also rejected by this Court in *Baldwin*. There, New York required milk importers to purchase from farmers out-of-state at a minimum price, asserting that "farmers who are underpaid will be tempted to save the expense of sanitary precautions." 294 U.S. at 523. New York therefore defended its statute because it would "impose a higher standard of quality and thereby promote health." *Id.* at 524. But this Court rejected that argument: "We think the argument will not avail to justify impediments to commerce between the states." *Id.* As Justice Cardozo explained, a contrary result would "eat up the rule under the guise of an exception." *Id.* at 523; *see also id.* at 524 ("The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the

business."). This Court has since explained that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected[.]" *Bigelow*, 421 U.S. at 824; *see also C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("Nor may Clarkstown justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds.").

Third, the majority essentially sought to limit the extraterritoriality principle to the facts of a handful of recent Supreme Court and court of appeals cases. App.62a, 67a-68a. That unprincipled distinction is a transparent attempt to get around a rule that this Court has treated as structurally essential to the Republic for hundreds of years, and it flouts the functional test set out in cases like *Healy*.

The panel's approach also ignores the sheer variety of cases applying the principle, including (in this Court alone) circumstances ranging from land title, *Crosby*, 11 U.S. (7 Cranch) at 116, to judicial jurisdiction, *Tennessee Coal*, 233 U.S. at 360, to obligations of contracts, *Alaska Packers Ass'n*, 294 U.S. at 540, to commercial speech, *Bigelow*, 421 U.S. at 824, to corporate takeovers, *Edgar* v. *MITE Corp*, 457 U.S. 624, 642-43 (1982) (plurality), to tort verdicts, *BMW*, 517 U.S. at 572, and others. Other courts of appeals, contrary to the Ninth Circuit, have likewise applied this Court's extraterritoriality analysis according to its terms, whatever the precise factual circumstances might be. *See Natsios*, 181

F.3d at 69; *Meyer I*, 63 F.3d at 659 ("Although cases like *Healy* and *Brown-Forman Distillers Corp.* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context."); *see also American Beverage Ass'n*, 735 F.3d at 374 (holding statute impermissibly extraterritorial despite the fact that it "does not fit squarely … within" the facts of other cases).

Plainly, a State may regulate the characteristics of in-state products and the terms of in-state transactions. But all of these contradictions between the Ninth Circuit's analysis and that of this Court and the other circuits add up to a frontal assault on the ability of courts to protect against extraterritorial legislation. They turn the extraterritoriality principle from a fundamental requirement of federalism into a mere technicality at best and an incoherent mess at worst. This Court should grant review in order to rectify that error and defend the constitutional principles it has long guaranteed.

III. THE PANEL DECISION THREATENS SUBSTANTIAL HARM TO THE NATION'S ECONOMIC UNION, WARRANTING PROMPT REVIEW.

The Ninth Circuit's decision, if allowed to stand, will cause immediate and substantial harm to our Nation's economic union—not only by disrupting the largest transportation-fuel market in our Nation, but also by threatening some of the most basic, structural features of our federal system. Although the panel majority cited the need for leeway to permit State-level "experiments" relating to GHG emissions, App.68a, an experiment of this nature—one that allows California both to facially

discriminate against Midwest ethanol and to assume regulatory "responsibility" for fuel-production methods nationwide—should not be allowed to proceed without explicit congressional action. This Court's immediate attention is therefore needed to restore the longstanding limits of State authority over interstate commerce and extraterritorial conduct.

The Ninth Circuit's decision is already having immediate and irreparable effects on our Nation's largest transportation-fuel market, leading to the collapse of interstate sales by Midwestern producers of corn-based ethanol into California. The LCFS has caused a rapid loss in market share by Midwestern producers of ethanol,[5] and the situation will only grow worse. CARB itself predicts that the LCFS will completely "*eliminate Midwestern ethanol from the California market*" by 2018. App.160a-161a (M. Smith, J., dissenting) (emphasis added). Because Midwest producers cannot rely on the same "political restraints normally exerted when interests within

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[5] According to data available on CARB's website, ethanol with a carbon-intensity score of 90 or higher, which is sold exclusively by Midwestern producers, once made up 62% of the California market; it now composes just 10% of that market, less than three years after the LCFS took effect. *See* CARB, LCFS Quarterly Data (last updated Jan. 23, 2014) (Excel Spreadsheet, Tab 1) (*available at* http://www.arb.ca.gov/fuels/lcfs/media_request_012314.xls); *see also* CARB, Fuel Registration Information with Approved Physical Pathway (last updated Feb. 6, 2014) (*available at* http://www.arb.ca.gov/fuels/lcfs/reportingtool/approvedphysicalpathways_february2014.xlsx) (explaining that only Midwestern producers of corn-based ethanol have carbon-intensity scores of 90 or greater).

the state are affected," *Southern Pac. Co.*, 325 U.S. at 767 n.2, their only practical recourse is in this Court. This imminent, ongoing threat to the ethanol industry warrants this Court's immediate review.

The Ninth Circuit's decision to green-light the LCFS augurs adoption of parallel but conflicting schemes by other States. Oregon and Washington are already actively considering their own LCFS-like regimes. *See* App.66a (citing Oregon House Bill 2186 (2009); Washington Executive Order 09-05 (2009)). Presumably, those States will favor their own domestic producers over those of other States, just as California has done. Meanwhile, eleven other States in the Northeast and Mid-Atlantic regions have entered into a memorandum of understanding pledging their commitment to study and implement an LCFS program with a similar "lifecycle" analysis. *See* Northeast and Mid-Atlantic Low Carbon Fuel Standard, Memorandum of Understanding 1-2 (Dec. 30, 2009) (*available at* http://www.nescaum.org/documents/lcfs-mou-govs-final.pdf). In other words, more than a quarter of the States in the Union are preparing to penalize other States' internal industrial and agricultural practices, along with the shipment of transportation fuels in interstate commerce.

The panel majority is confident that these programs will be "complementary," App.66a, but as Judge Smith noted in his dissent, "there is no guarantee that this is so," App.171a. Conflict between State laws could be as simple as two States disagreeing about which ethanol production methods produce more or less GHG emissions. And even if the programs are truly complementary, "ethanol

producers will [still] face the daunting prospect of navigating several interlocking, if not entirely contradictory, regulatory regimes." *Id.* Indeed, part of the purpose of the LCFS is to encourage local production and consumption, since the transportation of fuels emits GHGs. "Fragmentation" of America's fuel markets will soon follow. *Id.* That is why if any action is to be taken to address this national issue, it must be Congress—not the individual States—that does so.

More troubling still, because the reasoning that underlies the panel's decision is not limited to the market for transportation fuels, its consequences go far beyond the context of the LCFS. *All* commerce involves transportation, and *all* transportation involves the emission of GHGs. The Ninth Circuit's decision is thus a license for every State to penalize the movement of all types of goods and services across the country. California, for instance, could enact a "Buy Local Produce" Act as a means of lowering the GHG emissions generated by the importation of Florida citrus—with Florida likely to respond in kind. And if California, Washington, and Oregon can discriminate against Midwest ethanol because of the GHGs emitted as a result of its transport, they can shut out each other's wines and agricultural products on the same theory. Washington can discriminate against goods trucked north from the Port of Los Angeles, and California can discriminate against goods trucked south from the Port of Seattle. In short, if the Ninth Circuit's ruling is correct, then the problem of global warming permits States to withdraw from the national market and isolate themselves in local markets of production, transportation, and consumption—

exactly the outcome that the Constitution has long been understood to forbid.

Nor is the Ninth Circuit's decision limited to regulations designed to reduce GHG emissions. By the same logic, a State with California's market power could adopt any number of policies on virtually any social and economic policy issue. Suppose California thought there should be a higher minimum wage. "Under the majority's reasoning, California could impose regulatory penalties (or grant 'incentives') to require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California." App.171a-172a (M. Smith, J., dissenting). But this Court explained long ago that a State may not "condition importation upon proof of a satisfactory wage scale in factory or shop." *Baldwin*, 294 U.S. at 524. A State that prohibits employment discrimination based on some status—criminal conviction, for example—could forbid importation of products made by out-of-state companies that did not adopt those same policies. In short, if this Court does not review the Ninth Circuit's ruling, then the States in the largest geographic circuit in the Nation will soon be able to "experiment" not just within their four corners, but nationwide.

These predictions are not merely speculative. California alone has already enacted potentially extraterritorial legislation related to methods of production of foods ultimately sold in California. *See Association des Eleveurs*, 729 F.3d 937 (foie gras); *see also* Cal. Health & Safety Code § 25996 (eggs). There is no telling what might come next, in

California or elsewhere, now that the practice has received the Ninth Circuit's approval.

Significantly, the LCFS has deeply divided the States between those that are actively considering joining California in enacting LCFS-like regulations of their own, and those that believe that such regulations hurt their economies and interfere with their internal affairs. Witness the fact that nine States joined *amicus* briefs opposing the LCFS below. This illustrates precisely the type of interstate tension that the extraterritoriality principle is supposed to prevent. The sooner that tension can be resolved, the better for the Union.

Nor is there any good reason for this Court to delay resolution here. The majority's erroneous decisions as to facial discrimination and extraterritoriality are of paramount national importance; they concern issues of pure law; they are final as to the issues presented herein; they have immediate precedential effect in the Ninth Circuit; and there are no underlying material facts in dispute. Although the panel majority remanded the question of discrimination in purpose or effect to the district court, as Judge Smith noted in dissent, the result of those proceedings appears "predestined." App.162a. The panel majority already declared that there were "good and non-discriminatory reason[s]" for CARB's decisions, App.71a, and it rejected out of hand the Petitioners' evidence that tended to "show CARB's discriminatory purpose," App.57a. Instead, the majority claimed that the Petitioners' evidence of discriminatory purpose was "'easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.'" *Id.*

All that really remains is *Pike* balancing and consideration of the Petitioners' preemption claims, App.72a-73a, neither of which will inform this Court's resolution of the two pure questions of law that are ripe for adjudication now. Further proceedings in the District Court are likely to be costly and fact-intensive—all without any net benefit in clarifying the important issues in conflict that are squarely before this Court. More importantly, these proceedings will have no effect on the dangerous precedent that the Ninth Circuit's decision has wrought.

This Court has not hesitated to grant certiorari in cases of great importance, even where the court of appeals has remanded for further proceedings. *See, e.g.*, *McComish* v. *Bennett*, 611 F.3d 510, 514 (9th Cir. 2010) (reversing the district court's decision on a First Amendment claim and remanding for consideration of an Equal Protection claim), *rev'd sub nom. Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2816 (2011) (reviewing on certiorari notwithstanding this posture and reversing the Ninth Circuit's decision on the First Amendment claim); *see also Tennessee* v. *Lane*, 541 U.S. 509, 515 (2004) (reviewing on certiorari notwithstanding court of appeals decision remanding for further "factual" development on remand); *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 16 (2006) (reviewing on certiorari despite order from the court of appeals remanding the case to determine whether other acts might support a nationwide injunction); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (reviewing on certiorari because, although "[t]he judgment of the Court of Appeals was not a

final one," an "issue was 'fundamental to the further conduct of the case'"). There is no reason to wait here either.

In short, the Ninth Circuit's decision undermines the most basic, structural features of our federalism. And by permitting California to regulate beyond its territorial borders, that decision is not simply a precedent confined to the Ninth Circuit. It extends as far as the LCFS reaches—both domestically and internationally. Review by this Court is urgently needed.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted.

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