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Nos. 12-15131, 12-15135  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**ROCKY MOUNTAIN FARMERS UNION, ET AL.,**  
Plaintiffs-Appellees,

v.

**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  
The Honorable Lawrence J. O'Neill, Judge

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*AMICUS CURIAE* BRIEF OF BRAZILIAN SUGARCANE INDUSTRY  
ASSOCIATION (UNICA) IN SUPPORT OF APPELLANTS

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## I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Brazilian Sugarcane Industry Association (UNICA) is the largest organization representing sugar, ethanol, and bioelectricity producers in Brazil, which is by far the world's largest sugarcane producing country. UNICA's members are responsible for more than 50% of all ethanol produced in Brazil and are the top producers of sugar, ethanol, renewable electricity, and other sugarcane co-products in Brazil's south central region. UNICA's priorities include serving as a source for reliable scientific data about the competitiveness and sustainability of sugarcane biofuels. UNICA's members exported to the United States over 228, 868 gallons of ethanol made from sugarcane in 2011.

Ethanol from sugarcane produces less greenhouse gas emissions than other fuels produced on a commercial scale. The Low Carbon Fuel Standard ("LCFS") recognizes the environmental benefits of sugarcane ethanol and assigns it low carbon intensities, even factoring in the immense distance it must travel from Brazil. Because the LCFS incentivizes the use of low carbon intensity fuels, like sugarcane ethanol, UNICA strongly supports the regulation. UNICA has consistently demonstrated this support, including by filing an *amicus curiae* brief in the district court in this matter.

No party's counsel has authored this brief in whole or in part, nor has any party or party's counsel contributed money to fund the preparation or submission

of this brief. No person other than the *amicus curiae*, its members, or its counsel has contributed money intended to fund the preparation or submission of this brief. The parties have consented to the filing of this and other briefs from *amicus curiae* parties.

## **II. FACTUAL BACKGROUND**

### **A. Ethanol Made from Sugarcane Has Low Carbon Intensity**

Ethanol potentially can be made from any feedstock that either contains sugar or can be broken down into simple sugars. ER 9:2258 (Initial Statement of Reasons at III-2). Currently, most ethanol is produced either from sugar crops (sugarcane, sugar beets, sweet sorghum) or from grains with starch, like corn. *Id.* Regardless of the feedstock, the end product, ethanol, is always chemically and physically the same. ER 10:2360 (Initial Statement of Reasons at V-30) (“a gallon of ethanol made from corn grown and processed in the Midwest will, under a microscope or other analytical device, look identical in every material way to a gallon of ethanol processed from sugar cane grown in Brazil.”). But not all ethanol has the same carbon intensity. *Id.*

Ethanol from sugarcane currently has some of the lowest carbon intensity values of any biofuel currently produced on a commercial scale. 75 Fed. Reg. 14,786. On average, sugarcane ethanol reduces greenhouse gas emissions by 61%

compared with traditional gasoline, whereas corn ethanol results in a 21% reduction. *Id.*

Sugarcane ethanol has lower carbon intensity than corn ethanol for a number of reasons. First, the sugar juice obtained when sugarcane is pressed needs little processing before it can be fermented into ethanol. ER 9:2258. In contrast, the starch from corn is a more complex carbohydrate than simple sugar, and it must be processed before it can be fermented into ethanol. *Id.* This additional processing requires extra energy, which generates greenhouse gas emissions. *Id.*

Second, the chemicals and fertilizers used in growing sugarcane produce far fewer greenhouse gas emissions than those used in growing corn. *Compare* California Air Resources Board, *Detailed California-Modified GREET Pathway for Corn Ethanol*, February 27, 2009 Version 2.1, available at [http://www.arb.ca.gov/fuels/lcfs/022709lcfs\\_cornetoh.pdf](http://www.arb.ca.gov/fuels/lcfs/022709lcfs_cornetoh.pdf) (hereinafter “Pathway for Corn Ethanol”) at 5 (agricultural chemicals for growing corn produce GHG emissions of 30.2-31.35 gCO<sub>2</sub>e/MJ) *with* California Air Resources Board, *Detailed California-Modified GREET Pathways for Brazilian Sugarcane Ethanol: Average Brazilian Ethanol, With Mechanized Harvesting and Electricity Co-product Credit, With Electricity Co-product Credit*, September 23, 2009, version 2.3, available at [http://www.arb.ca.gov/fuels/lcfs/092309lcfs\\_cane\\_etoh.pdf](http://www.arb.ca.gov/fuels/lcfs/092309lcfs_cane_etoh.pdf), at

page 6 (hereinafter “Pathways for Sugarcane Ethanol”) (sugarcane agricultural chemicals produce GHG emissions of 9.2 gCO<sub>2</sub>e/MJ).

Finally, sugarcane ethanol plants produce enough electricity from the processing of the sugarcane that they are entirely, or almost entirely, self-sufficient. Pathways for Sugarcane Ethanol at 32. Mills generate this electricity by burning the fibrous residue that is left after the juice is pressed out, which is called bagasse. *Id.* Many of Brazil’s ethanol plants produce more electricity than their plants require, and they sell the surplus to utilities. *Id.* at 32. In contrast, many corn ethanol plants are not self-sufficient and require externally supplied electricity. *See generally* Ethanol Pathway for Corn Ethanol at 41-49. To the extent that corn ethanol plants generate some or all of their own power, the reduction in carbon intensity is evident and acknowledged by the LCFS. *See* ER 2:169 (showing coal-fired ethanol plant using no grid electricity with a carbon intensity as low as 84.27); 2:170 (showing ethanol plant using cogeneration to achieve carbon intensity as low as 76.75); 2:182 (showing ethanol plant using limited grid electricity with a carbon intensity as low as 79.8).

**B. The LCFS Assigns Sugarcane Ethanol Low Carbon Intensities, Even Though That Ethanol is Produced Out-of-State**

The sugarcane ethanol used in California is almost all produced from sugarcane grown and processed in Brazil. ER 9:2259-2260; RJN Exh. A at 50.



Although sugar crops are grown in the United States, they are not used to produce ethanol. *Id.*

Sugarcane ethanol's journey is over 8,000 miles from the sugarcane fields in Brazil to California fuel blending stations. *See Pathways for Sugarcane Ethanol* at 30, 38. The raw sugarcane first travels approximately twelve miles from the field to a Brazilian ethanol plant, *id.* at 30; then the finished ethanol travels 1,000 miles from the plant to the ocean tanker that will take it to California (*id.* at 38); then the ethanol is transported 7,416 miles from Brazil to the U.S. (*id.*); and finally it travels another 150 miles within California. (*id.*).<sup>1</sup>

Despite this long journey and the GHG emissions associated with it, sugarcane ethanol still has low carbon intensity relative to most corn ethanol. The current version of Table 6 assigns CI values ranging from 58.40 to 78.94 gCO<sub>2</sub>e/MJ to ethanol from Brazilian sugarcane. Cal. Code Regs., tit. 17, § 94586 (Appellants' Request for Judicial Notice, Exh. A at 47-50). In comparison, Table 6 assigns corn ethanol, whether from California or the Midwest, CI values ranging from 73.21 to 120.99. *Id.*

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<sup>1</sup> The values in this paragraph are from the CA-GREET 1.8b model. *See Pathways for Sugarcane Ethanol* at 2. Some sugarcane ethanol producers have received different individualized carbon intensities through Methods 2A and 2B. *See RJN Exh. A* at 50.

<sup>2</sup> This number is derived from summing the CI of transporting the cane from the

### III. SUMMARY OF ARGUMENT

UNICA's members are out-of-state entities, yet UNICA strongly supports the LCFS. UNICA's very support underscores that the LCFS does not discriminate against out-of-state actors. The only way the district court could conclude otherwise was by arbitrarily refusing to consider the law's treatment of *all* substantially similar, competing economic interests, instead analyzing only a select few pathways. Had it examined all relevant pathways, it would have been compelled to conclude that the regulation is not discriminatory. For example, out-of-state sugarcane ethanol, which the trial court arbitrarily ignored, often (though not always) receives lower carbon intensity values than in-state or Midwestern corn ethanol.

The story of Brazilian sugarcane ethanol also highlights the district court's misunderstanding of the effect of individual factors, including the transport factor. Even though sugarcane ethanol must travel all the way from Brazil, further than any other major ethanol, its overall carbon intensity remains low. Nor is the electricity usage factor a proxy for out-of-state discrimination. The production of sugarcane ethanol, which occurs out-of-state, has among the lowest CI factors for electricity usage.

Finally, contrary to the district court's decision, UNICA's members' out-of-state activities are not regulated by the LCFS. Their practices are determined by

numerous factors such as Brazilian law and policy, market pressures, technology, and business judgments. The LCFS is, at most, one factor that indirectly affects decision-making. To conclude that the LCFS *controls* practices and policies in Brazil would dramatically overstate the importance of the LCFS and fundamentally misunderstand how and why businesses make the decisions they do.

#### **IV. ARGUMENT**

##### **A. The LCFS Does Not Facially Discriminate Against Out-of-State Ethanol**

The district court found that the LCFS facially discriminated against out-of-state interests. ER 1:58-59. The only way the district court could reach this conclusion was by ignoring most of the out-of-state ethanol pathways the LCFS addresses, including sugarcane ethanol. ER 1:58-60. Had the trial court considered all of the ethanol pathways, as the law requires, it would have been compelled to find that the LCFS does not discriminate against out-of-state actors.

##### **1. The District Court Erred By Ignoring Most Out-of-State Ethanol Pathways**

A facial discrimination analysis compares a regulation's textual treatment of "substantially similar entities." *See, e.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 342 (2007) (discrimination involves comparing "substantially similar entities").

“[D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc. v. Dep’t of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994). The analysis must, therefore, compare the regulation’s treatment of similar in- and out-of-state interests. A court may not ignore the law’s treatment of substantially similar, competing out-of-state actors.

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the Court rejected an analysis that ignored a group of out-of-state competitors. Exxon and other Appellants challenged a Maryland statute that prohibited producers and refiners of petroleum products from operating retail service stations within Maryland. 437 U.S. at 119-20. Comparing only in-state retailers and out-of-state refiners, Exxon argued that the law protected in-state retailers from competition. 437 U.S. at 125. The Court rejected the argument because it could not ignore a third group of competitors: interstate *marketers*, as opposed to the Appellant refiners and producers, of petroleum that operated their own retail gasoline stations. *Id.* at 126-27. The law did not discriminate against those out-of-state players, which proved, in part, that the law did not discriminate against interstate commerce. *Id.* at 127. Had the Court excluded that third group from the analysis, like the trial court excluded non-California sugarcane ethanol, it might well have concluded that the law did discriminate against out-of-state actors.

Similarly, the Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), analyzed a law's treatment of *all* affected out-of-state products that competed with the local products. There, a Hawaiian statute provided a tax exemption only to pineapple wine and okolehao, a brandy made from the ti plant, two locally produced beverages. *Id.* at 265. The Court did not try to determine which subset of non-Hawaiian beverages were most like pineapple wine and okolehao, but rather examined the statute's treatment of all similar, competing out-of-state economic interests: alcoholic beverages. *Id.* at 268-69.

The principle to be derived from these cases is that courts must compare *all* of the substantially similar competing out-of-state interests with the in-state interests. *See also Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (comparing variety of competing products when analyzing law that banned spray paint); *cf. U.S. v. D.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (holding, in antitrust context, that competitive markets are "composed of products that have reasonable interchangeability for the purposes for which they are produced"); *Colonial Medical Group, Inc. v. Catholic Health Care West*, 44 Fed. App'x 937, 938 (9th Cir. 2011) (relevant antitrust product market includes the "pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand"); *Malaney v. UAL Corp.*, 434 Fed. App'x 620, 621 (9th Cir. 2011) (relevant products in antitrust case need not be perfectly

fungible). In a dormant Commerce Clause case, a court may not ignore substantially similar, competing out-of-state interests.

The district court violated this principle by ignoring numerous out-of-state competitors, including Brazilian sugarcane ethanol pathways. All ethanol, regardless of its feedstock, competes because ethanol is a fungible commodity. ER 4:580 at ¶ 60. “A gallon of ethanol made from corn grown and processed in the Midwest will, under a microscope or other analytical device, look identical in every material way to a gallon of ethanol processed from sugar cane grown in Brazil.” ER 10:2360. Because all ethanol is physically the same, ethanol buyers and sellers do not compare Midwestern corn ethanol only with other corn ethanol. They compare all available ethanols, including those that the district court ignored. ER 9:2331 (regulated parties can meet the annual carbon intensity levels set by the LCFS “with any combination of fuels” or with credits).

There was no valid reason for the district court to ignore sugarcane ethanol. Sugarcane ethanol does not compete in a different market than corn ethanol. *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (court need not compare allegedly competing entities that provide different products and serve different markets); *see supra* p. 10 (explaining that all ethanol competes). Nor is sugarcane ethanol so fundamentally different from corn ethanol that it cannot be compared. *See, e.g., National Assoc. of Optometrists & Opticians Lenscrafters, Inc. v. Brown*,

567 F.3d 521, 525 (9th Cir. 2009) (declining to compare opticians to optometrists and ophthalmologists because the two groups had different purposes, different business structures, and different responsibilities). In terms of chemical and physical properties, sugarcane ethanol is exactly the same product as corn ethanol. ER 10:2360. Sugarcane and corn ethanol producers do not have different purposes or ethical responsibilities: both groups seek to sell ethanol to regulated parties.

Without citing authority (because there is none), the district court explained that it ignored competing ethanol pathways because “the LCFS makes production processes, feedstock, and origin relevant.” ER 1:62. The factors the regulation makes “relevant” do not dictate which economic interests the court must compare. If that were the case, the Court in *Bacchus Imports* could have compared only Hawaiian pineapple wine to out-of-state fruit wines (or to some other subset of non-Hawaiian alcohol that the court deemed similar to pineapple wine) because the factor determining whether the statute’s exemption applied was whether the wine was from pineapples. *Bacchus Imports*, 468 U.S. at 265. Of course, the Court did not analyze only fruit wines, but considered *all* competing alcohols. *Id.* at 269.

Even if the regulation’s “relevant” factors did determine the products to be compared, the district court’s analysis remains untenable. The LCFS makes overall carbon intensity “relevant”—indeed, central—but the district court failed to

compare ethanol pathways (or other gasoline substitutes) with similar carbon intensities.

The dormant Commerce Clause analysis is fundamentally a comparison of a law's treatment of in-state versus out-of-state interests. *See, e.g., Oregon Waste Systems*, 511 U.S. at 99; *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) ("dormant Commerce Clause is driven by concern about economic protectionism"). The district court lost sight of this guiding principle when it ignored competing out-of-state interests like sugarcane ethanol.

**2. When All Ethanol Pathways Are Considered, It Is Clear That the LCFS Does Not Discriminate Against Out-of-State Ethanol**

Had the district court considered all competing ethanol, as the law requires, it would have been compelled to find that the LCFS does not discriminate against non-California interests. The LCFS simply does not assign higher carbon intensities to out-of-state fuel.

The current version of Table 6 assigns to ethanol from sugarcane carbon intensities ranging from 58.40 to 78.94 gCO<sub>2</sub>e/MJ. Cal. Code Regs., tit. 17, § 95486 (Table 6) (Appellants' RJN Exh. A at 50). Carbon intensities for California ethanol are, for the most part, higher and range from 77.44 to 95.66 gCO<sub>2</sub>e/MJ. *Id.* ( RJN Exh. A at 47). Comparing only Brazilian sugarcane ethanol



with California-produced ethanol, arbitrarily excluding Midwestern ethanol, compels the opposite conclusion the district court reached: that the LCFS favors out-of-state, Brazilian ethanol.

In reality, the LCFS does not favor Brazilian ethanol either. The lowest CI for any ethanol in the record before the district court was for a Midwestern ethanol producer using a mix of grains as feedstocks. ER 2:193. Since then, more pathways have been approved, and the lowest CI for ethanol is now for Indonesian Molasses ethanol, which has a CI of 29.19. *See* Summary: Method 2A/2B Applications and Internal Priority Pathways as of 3/30/2012, available at [http://www.arb.ca.gov/fuels/lcfs/2a2b/033012lcfs\\_apps\\_sum.pdf](http://www.arb.ca.gov/fuels/lcfs/2a2b/033012lcfs_apps_sum.pdf). In the current version of the regulation, Brazilian ethanol pathways have CI values both lower and higher than Midwestern and other non-California pathways pathways. (RJN Exh. A at 47-50). UNICA does not consider the LCFS discriminatory against Brazilian sugarcane ethanol, even though some Midwest ethanol pathways have now been assigned lower CIs than sugarcane ethanol. That is because the LCFS is consistently hostile to high carbon intensity fuels, not to fuels from any particular place.

The district court believed that the LCFS's treatment of Brazilian sugarcane ethanol, an out-of-state interest, could not save the regulation. ER

1:62 (citing *Daghlian v. DeVry Univ., Inc.*, 582 F. Supp.2d 1231, 1243-44 (C.D. Cal. 2007)). UNICA's point is not that the LCFS favors some out-of-state products. The point is that the LCFS is indifferent to the origin of the product and certainly does not benefit in-state producers at the expense of out-of-state producers. *See supra* pp. 12-13; *see also* AOB at 47, 55.

### **3. Individual Carbon Intensity Factors Do Not Penalize Out-Of-State Competitors**

The district court erroneously concluded that some of the scientific factors that determine total carbon intensity, namely transportation and electricity usage, penalize out-of-state competitors. ER 1:60-61. Putting aside the error of isolating individual factors at all, AOB at 56-57, the trial court was wrong as a factual matter that either factor penalizes out-of-state producers. Moreover, electricity emissions are not tied to the location of the plant.

#### **a. The Transportation Factor Does Not Discriminate Against Brazilian Ethanol, Which Travels Further Than Any Other Major Ethanol**

The district court was wrong that CARB penalizes out-of-state ethanol by tying "carbon intensity scores to the distance a good travels." ER 1:60.

Counterintuitive though it may be, the transportation factor is not well correlated with the distance a good travels.

Despite travelling the shortest distance, California ethanol receives the highest transportation carbon intensity; Brazilian ethanol, which travels the furthest of any of the pathways before the district court, the next highest; and Midwestern ethanol receives the lowest transportation CI. The default transportation carbon intensity for sugarcane ethanol, from Brazilian field to final blending terminal in California, is 5.5 gCO<sub>2</sub>e/MJ. Pathways for Sugarcane Ethanol at 31, 39.<sup>2</sup> Midwestern corn ethanol generates *less* GHG emissions from transport: only 4.8 gCO<sub>2</sub>e/MJ.<sup>3</sup> ER 4:777-778 at ¶ 45. The total transportation factor for California ethanol is 8.1, which is 1.69 times higher than the Midwest pathway, ER 4:777-778 at ¶ 45, and almost 1.5 times higher than the Brazilian sugarcane pathways, *compare id. with* Pathways for Sugarcane Ethanol 31, 39.

The only scientific factor inextricably tied to location—the distance a product must travel—benefits out-of-state producers. This is because California does not grow feedstocks for ethanol, so it must import those feedstocks in their

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<sup>2</sup> This number is derived from summing the CI of transporting the cane from the field to the plant, and then to a final blending terminal in California. Transporting the cane from the field to the plant generates a CI of 2.0 gCO<sub>2</sub>/MJ. Pathways for Sugarcane Ethanol at 31. Transporting the finished ethanol from the plant to a Brazilian port, then from a Brazilian port to a U.S. port, and then within the US generates a CI of 3.5 gCO<sub>2</sub>e/MJ. *Id.* at 39.

<sup>3</sup> For Midwestern corn ethanol, transporting the corn from the field to the plant is associated with 2.2 gCO<sub>2</sub>e/MJ, and transporting the ethanol from the plant to California results in a CI increment of 2.6 gCO<sub>2</sub>e/MJ. ER 4:777-778 at ¶ 45.

raw, bulk form. See ER 4:777-778 at ¶ 45. Assigning California ethanol relatively high emissions associated with transportation is hardly the mark of economic protectionism.

Asking which fuels the transportation factor penalizes is the wrong question though. Rather, because the LCFS determines the treatment of a fuel using the entire lifecycle carbon intensity, not using isolated factors, the right question is whether the overall carbon intensities discriminate. *See generally* AOB at 56-57; *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (2005) (the court must consider “the entire program,” not isolated “parts of an integrated regulation”). The total CIs of Brazilian sugarcane ethanol and other out-of-state low carbon ethanols demonstrate, once again, that the LCFS does not penalize fuels based on origin. The LCFS often assigns more favorable carbon intensity to Brazilian ethanol than to higher carbon corn ethanol, despite the higher GHG emissions that the long journey from Brazil generates.<sup>4</sup> *See supra* pp.12-13. The LCFS distinguishes fuels based on total carbon intensity, not long distance transport.

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<sup>4</sup> Ethanol made from molasses in Indonesia must travel even further than Brazilian ethanol, but it has one of the lowest CI values of any fuel. *See* Summary: Method 2A/2B Applications and Internal Priority Pathways as of 3/30/2012, available at [http://www.arb.ca.gov/fuels/lcfs/2a2b/033012lcfs\\_apps\\_sum.pdf](http://www.arb.ca.gov/fuels/lcfs/2a2b/033012lcfs_apps_sum.pdf); *see also* Indonesian Sugar Group Molasses Ethanol CA-GREET Model, at 2, available at <http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/indo-mol-greet-121511.pdf> (showing that Indonesian Molasses Ethanol travels 9,500 miles by sea).

**b. The Efficiency of Plants Is Not Tied to Location, Nor Does the LCFS Penalize Out-of-State Plants on This Factor**

The district court also erroneously found that the emissions associated with the electricity used by Midwestern plants were “inextricably intertwined with origin,” and therefore impermissible. ER 1:58. Emissions from electricity are determined primarily by how much electricity is used and how the electricity is generated. Neither of these factors is tied to location. *See* AOB at 59-60.

Brazilian sugarcane ethanol mills demonstrate this: they receive very low CI values for electricity during ethanol production, not because of their location, but because of their technology, business decisions, and the nature of sugarcane.

Sugarcane ethanol mills burn the fiber material, called bagasse, that remains after the sugar juice is squeezed out of the plant. Pathways for Sugarcane Ethanol at 32. The burning of the bagasse provides heat for distillation and electricity to run machinery at the plant. *Id.* Sugarcane ethanol plants are energetically self-sufficient, and some generate surplus electricity to sell to utilities. *Id.* The LCFS credits sugarcane ethanol for the GHG emissions avoided by this production process, and the total carbon intensity for producing sugarcane ethanol is a mere 2.1 gCO<sub>2</sub>e/MJ. *Id.* at 33, 35. In contrast, the carbon intensity for producing corn

ethanol can be over twenty times higher, ranging from 38.3-48.78 gCO<sub>2</sub>e/MJ.

Pathway for Corn Ethanol, at 5.

Sugarcane ethanol mills are so efficient, first, because of the structure of sugarcane. Its fibrous material allows for the generation of significant electricity. The electricity cogeneration is also possible because many companies are choosing to retrofit or build mills with high-pressure steam cycle generators that produce significant electricity. February 10, 2009 UNICA Comments on “Detailed California-Modified GREET Pathway for Brazilian Sugarcane Ethanol,” at p.5. These generators reduce emissions, not because of location, but because of improved technology and because of the business decision to use that technology. Further, economic incentives to cogenerate electricity are growing because of the increased availability of contracts to supply electricity to power distribution companies. *Id.*; August 19, 2009 UNICA Comments regarding “Detailed California-Modified GREET Pathway for Brazilian Sugarcane Ethanol,” Version 2.2, at p. 2-3 (discussing significant amount of electricity sugarcane mills export).<sup>5</sup> Finally, the mechanization of harvesting is increasing electricity cogeneration by making more biomass available for burning at the mills. August 19, 2009 UNICA Comments.

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<sup>5</sup> Available at [http://www.arb.ca.gov/lists/lcfs09/422unica\\_comments\\_to\\_lcfs\\_new\\_sugarcane\\_pathways.pdf](http://www.arb.ca.gov/lists/lcfs09/422unica_comments_to_lcfs_new_sugarcane_pathways.pdf).

The Brazilian example also demonstrates that the LCFS is not using electricity as a proxy for out-of-state status. If California were trying to discriminate against out-of-state ethanol using the electricity factor, it would not assign Brazilian sugarcane such a low CI for ethanol production or recognize other out-of-state ethanols for emissions reductions caused by the use of similar practices.

**B. The LCFS Does Not Control Which Fuels Are Preferred;  
External Factors Like Trade Policy and Technology Do**

Unlike discriminatory laws, the LCFS does not divert, or even attempt to divert, market share to local companies. *See West Lynn Creamery*, 512 U.S. at 203 (law was unconstitutional because the purpose and effect were to divert market share to local farmers). Nor does it try to divert market share to a particular type of fuel. Instead, the LCFS is designed to encourage low carbon fuels, whatever those fuels may be and wherever they may come from. AOB at 33, 41. Non-regulatory factors, such as technological innovation or the size of the corn harvest, which affects the price of ethanol, control which fuels are available and which are ultimately preferred by regulated parties. Appellants have highlighted this point by arguing that the LCFS is designed to encourage innovation, favoring new fuels that do not yet exist. AOB at 41; ER 7:1714, 1730 (LCFS tables were designed to grow to incorporate new fuels); 9:2197. Because CARB cannot control when or

how those fuels will develop, or where they will come from, it cannot discriminate according to origin.

The recent lapse of the federal import tariff on foreign ethanol, which happened after the LCFS was promulgated, demonstrates that factors outside the regulation determine the fuels that are available and preferred. At the end of 2011, Congress allowed a thirty-year-old import tariff on foreign ethanol to lapse. *See generally* Robert Pear, *After Three Decades, Tax Credit for Ethanol Expires*, N.Y. Times, January 1, 2012. It is expected that, in time, this will make foreign-produced ethanol cheaper, which naturally will encourage regulated parties to use more foreign ethanol. CARB promulgated the LCFS long before Congress lifted the import tariff and, of course, CARB could not have known that Congress would eliminate the trade barrier to foreign ethanol.

Although the LCFS incentivizes the use of Brazilian ethanol relative to higher CI corn ethanol, the LCFS does not ultimately determine whether regulated parties will use sugarcane ethanol. Regulated parties must weigh numerous considerations when deciding which fuels to use, among them price, availability, and carbon intensity. Today, a key factor was the elimination of a trade barrier, which will reduce the price of foreign ethanol and make it more available. Tomorrow, a critical factor may be the building of an energy-self-sufficient corn ethanol plant in Kansas. In twenty years, the factor may be the development of



breakthrough low-carbon fuel by a company in Florida. CARB cannot predict which fuels will benefit from these changes or where those fuels will come from. Nor does it care: the LCFS incentivizes the use of any low carbon intensity fuel, regardless of its origin or why it is low carbon intensity.

**C. The LCFS Does Not Regulate Extraterritorially in Brazil**

The District Court found that, “in penalizing [certain farming and harvesting practices, and collection and transport of the crop] to ‘incentivize regulated parties to change their conduct (including conduct occurring wholly outside of the state), the LCFS impermissibly attempts to ‘control conduct beyond the boundary of the state.’” ER 1:65 (citation omitted). The district court erred because controls and incentives are not the same. The LCFS permissibly *incentivizes* low carbon production methods; it does not control or dictate out-of-state policy or methods.

The dormant Commerce Clause prohibits states from enacting laws that regulate wholly out of state conduct. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986). Impermissible statutes are those that force merchants to conduct wholly out-of-state transactions in a particular way. *Id.* (forbidding New York from regulating the price of liquor in other states); *Healy v. Beer Institute*, 491 U.S. 324, 339 (1989) (law impermissibly established the prices for use in other states).

In contrast, the LCFS does not force growers or ethanol producers to conduct their businesses in any particular way. The LCFS does not determine the farming or production processes of UNICA's members. Rather, their practices are determined by Brazilian state and national law, market pressures, and business judgments. *See generally* April 16, 2009, UNICA Comments on Proposed Low Carbon Fuel Standard, at 4-7 (discussing regulations, market pressures, and agreements).<sup>6</sup>

The harvesting of cane fields provides a good example of how practices are determined. Historically, sugarcane fields were burned before harvest, but recently mechanical harvesting, without burning, has increased dramatically. *See generally* April 16, 2009 UNICA Comments at 4-7. Mechanical harvesting yields significantly more biomass, which can be used at the mill to produce electricity. *Id.* The LCFS did not force this change in harvesting practice. It is the result of state and federal laws, as well as the voluntary agreements of UNICA members. *See* São Paulo State Law 11.241;<sup>7</sup> *see also* Protocolo Agro-Ambiental do Setor

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<sup>6</sup> Available at [http://www.arb.ca.gov/lists/lcfs09/129unica\\_comments\\_to\\_carb\\_on\\_sugarcane\\_ethanol.pdf](http://www.arb.ca.gov/lists/lcfs09/129unica_comments_to_carb_on_sugarcane_ethanol.pdf)

<sup>7</sup> Available at [http://sigam.ambiente.sp.gov.br/Sigam2/Repositorio/24/Documentos/Lei%20Estadual\\_11241\\_2002.pdf](http://sigam.ambiente.sp.gov.br/Sigam2/Repositorio/24/Documentos/Lei%20Estadual_11241_2002.pdf) (discussed in April 16, 2009 Comments at 6)

Sucroalcooleiro Paulista.”<sup>8</sup> Similarly, the amount of electricity an ethanol mill generates is the result of business decisions about whether to use new technology, the availability and efficacy of such technology. *See supra* p. 18.

Nor does the LCFS regulate land use in Brazil. Land use regulation in Brazil is a delicate and complex balancing act, particularly because Brazil is home to the Amazon rain forest and other fragile ecosystems. Only Brazilian governments can weigh the many competing interests that drive land use, such economic, institutional, technological, cultural, and demographic values. *See* April 16, 2009 UNICA Comments at 12. For example, the Brazilian government has instituted Agro-Ecological Zoning, which establishes rules and regulations for the expansion of sugarcane production. *See generally* Brazilian Government, *Sugarcane Agroecological Zoning*, available at <http://sweeteralternative.com/admin/documents/sugarcane-agroecological-zoning.pdf>. The zoning takes into account factors that the LCFS does not even consider, such as the existence of native vegetation, cultural values, degradation of land, and the existence of biodiversity. *Id.* The district court’s view that the LCFS regulates extraterritorially massively inflates the importance of the LCFS. Governments

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<sup>8</sup> Available in Portuguese at <http://www.ambiente.sp.gov.br/cana/protocolo.pdf> (agreement between UNICA members and Brazilian environmental authorities to move forward the deadline for elimination of sugarcane field burning from 2021 and 2031 to 2014 and 2017, respectively) (cited in April 16, 2009 UNICA Comments at p. 6).

must balance numerous competing constituencies, as must businesses, and the LCFS is, at most, only one factor.

The LCFS imposes less extraterritorial force than the bottled water example Plaintiffs have cited with approval. *Oppo. of Rocky Mountain Farmers Union Appellees to Appellants' Motion to Stay*, at 28 (Dkt. No. 34-1). Plaintiffs have argued that “California would have the right to prohibit the import of bottled water that does not meet California’s filtration standards . . . .” *Id.* The hypothetical water filtration law requires out-of-state production practices that ensure the water meets certain filtration standards if producers want to participate in the California market. The LCFS does not even do this much, as producers may still participate in the market even if they maintain high carbon intensity practices. Indeed, courts have upheld numerous statutes that affect or incentivize out of state conduct without controlling it. *See generally* AOB at pp. 72-73 (collecting cases).

Of course, if companies maintain practices with high carbon intensities, their products may not be preferred under the LCFS. But a law is not discriminatory merely because it causes some business to shift from one entity to another, such as from high carbon intensity ethanol to low carbon intensity ethanol. *See Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981) (statute is not discriminatory only because it causes some business to shift from out-of-state companies to in-state companies); *Exxon*, 437 U.S. at 127 (a law does not create an impermissible

burden on interstate commerce merely because it causes business to shift from one interstate supplier to another).

## V. CONCLUSION

The LCFS does not violate the dormant Commerce Clause. For the above reasons and the reasons stated in the Appellants' Opening Brief, the district court's judgments and preliminary injunction should be reversed.

Dated: June 15, 2012

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1, I certify that the accompanying brief has been prepared using 14-point Times New Roman typeface. I further certify that the accompanying brief complies with the type-volume limitations of Rule 29(d). The brief is proportionately spaced, and contains less than 7,000 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance.

Dated: June 15, 2012

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 15, 2012.

I certify that all participants in the case are registered CM/ECF users and that service on those parties will be accomplished by the appellate CM/ECF system.

s/ Katherine Mayer Mangan  
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