

Nos. 12-15131, 12-15135

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.,
Intervenors-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

**BRIEF OF AMICI CURIAE PROFESSORS OF
ENVIRONMENTAL LAW IN SUPPORT OF APPELLANTS**

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INTRODUCTION

The Low Carbon Fuel Standard (“Standard”) adopted by the California Air Resources Board (“CARB”) is an evenhanded and carefully crafted response to the crisis of climate change. The district court plainly erred in concluding that the Standard violated the dormant Commerce Clause. Rather than being based on physical location, the Standard’s treatment of fuels depends on their carbon intensity: the total amount of carbon — the root cause of climate change — released into the atmosphere throughout the fuel’s full lifecycle.

Public policy innovations like the Standard represent the genius of federalism. They are the products of the states acting as “laboratories of democracy,” a phenomenon noted 80 years ago in a famous dissent by Justice Louis Brandeis.¹ To fulfill this role, the states must have room to experiment with new solutions to new problems.

This Court should reverse the district court’s decision and allow California’s experiment to proceed. The Stand-

¹ *New State Ice v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

ard is based on the scientifically accepted methodology of carbon lifecycle analysis. It does not favor domestic fuel production over out-of-state fuel production; rather, it favors lower carbon fuel production over higher carbon fuel production. Nor does it regulate fuel production beyond California's borders. At most, it provides a market incentive for fuel producers — whether located within California or without — to reduce the carbon emissions associated with their fuels. Finally, even assuming, counterfactually, that the Standard could be unconstitutional as applied in some circumstance, that possibility would not justify invalidating the Standard on its face. Plaintiffs cannot show, as they must in a facial challenge, that the Standard is unconstitutional in *all* of its applications.

To avoid a return to the discredited jurisprudence of *Lochner v. New York* that inspired Justice Brandeis's dissent, the Supreme Court has cautioned against overly aggressive judicial enforcement of the dormant Commerce Clause: "We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Com-

merce Clause.”² That caution is particularly apt where a state enacts an innovative policy to address a new and pressing problem as California has here.

STATEMENT OF INTEREST

Amici curiae are the following professors of environmental and constitutional law at law schools from around the country:³

- **William Buzbee** (Professor of Law, Director of the Emory Environmental and Natural Resources Law Program, and Director of the Center on Federalism and Intersystemic Governance, at the Emory University School of Law).
- **Ann Carlson** (Shirley Shapiro Professor of Environmental Law and Faculty Director, Emmett Center on Climate Change and the Environment, at the UCLA School of Law).
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² *United Haulers Ass’n v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007).

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- **Jay P. Kesan** (Professor and H. Ross and Helen Workman Research Scholar, at the University of Illinois at Urbana-Champaign).
- **Alexandra Klass** (Professor of Law, Associate Dean for Academic Affairs, and Solly Robins Distinguished Research Fellow, at the University of Minnesota School of Law).
- **Douglas A. Kysar** (Joseph M. Field '55 Professor of Law and Deputy Dean, at Yale Law School).
- **Thomas O. McGarity** (Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, at the University of Texas School of Law).
- **Daniel P. Selmi** (Professor of Law and Fritz B. Burns Chair of Real Property, at the Loyola University School of Law).

Amici's research interests involve the historical evolution of environmental policy, constitutional constraints on environmental policy, and the development of policy re-

sponses to climate change. In the context of this case, Amici are concerned with the application of the dormant Commerce Clause to the novel and evolving field of regulating the carbon emissions that contribute to global climate change. Amici seek to provide the Court with a historical and doctrinal perspective on the states' traditional role as "first responders" to new environmental challenges.

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief. No person — other than the amici curiae or their counsel — contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The Standard Represents the Best of the Tradition of States Acting as Laboratories of Innovation, Not Protectionism or Isolationism.

A. Our Federal System Encourages States to Innovate in Response to Evolving Social Problems.

Justice Louis Brandeis famously articulated one of the most important virtues of federalism as enabling the whole nation to benefit from innovative state policies.⁴ The Founders intended that states be allowed to “try novel social and economic experiments without risk to the rest of the country,”⁵ with the possibility that a state might develop a solution appropriate for adoption at the national level or by the other states. Since Justice Brandeis’s dissent, the Supreme Court has repeatedly endorsed the states’ role as “laboratories of democracy,”⁶ and that role is

⁴ *New State Ice v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

⁵ *Id.* at 287.

⁶ *See, e.g., Arizona v. Evans*, 514 U.S. 1, 7 (1995) (noting that the Court’s opinion did not impede Arizona’s efforts to prevent clerical errors in law enforcement’s computerized recordkeeping); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1985) (states must be free to distinguish essential and nonessential governmental functions);

considered a core virtue of our federal system of government.⁷

History is rife with state legislative “experiments” that were later adopted as federal law. Just a few examples include economic enterprise zones,⁸ organic food labeling,⁹ acid rain legislation,¹⁰ and vehicle emission standards.¹¹

Chandler v. Florida, 449 U.S. 560, 579 (1981) (states should be able to experiment with public broadcast of criminal trials).

⁷ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 430-31 (1998); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1499 (1994); Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 Wm. & Mary L. Rev. 1385, 1391 (2005); David L. Shapiro, *Federalism: A Dialogue* 85-88 (1995).

⁸ Congress provided for the designation of federal Empowerment Zones and Enterprise Communities in the Omnibus Budget Reconciliation Act of 1993 after 40 states, starting with Connecticut and Florida, had enacted some sort of enterprise-zone legislation. See Karen Mossberger, *The Politics of Ideas and the Spread of Enterprise Zones* 81, 83 (2000).

⁹ The Organic Foods Production Act of 1990 was enacted after twenty-two states, starting with Oregon, had passed legislation regulating organic food labeling. See Kyle W. Lathrop, Note, *Pre-empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. Corp. L. 885, 886 (1991).

Congress has acknowledged the crucial role of the states in environmental regulation.¹² Like most federal environmental statutes, the Clean Air Act establishes a cooperative federalist system of implementation in which states often perform fundamental planning and enforcement roles, subject to varying forms of federal approval and oversight.¹³

The states are now going through a period of ferment and experimentation in confronting the multifaceted challenges of climate change. States as distant as Washington and Rhode Island and as different as Massachusetts and

¹⁰ Congress amended the Clean Air Act in 1990 to address acid rain after New York adopted legislation to control power plant emissions that contribute to acid rain. See Bernard C. Melewski, *Acid Rain and the Adirondacks: A Legislative History*, 66 Alb. L. Rev. 171, 176 (2002).

¹¹ Congress imposed vehicle emission standards in a 1967 amendment to the Clean Air Act after California enacted the first such standards for 1966 model year cars. See Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1111 (2009).

¹² See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960) (noting Congress's recognition that "air pollution is peculiarly a matter of state and local concern").

¹³ See, e.g., 42 U.S.C. § 7410 (creating State Implementation Plan criteria and process).

Texas are taking important steps to reduce their carbon emissions. Below is a summary of some of the more prominent initiatives.

- *Greenhouse Gas Emissions Targets.* Twenty-three states have adopted an emissions reduction target they plan to achieve within a specified time period.¹⁴
- *Renewable or Alternative Portfolio Standards.* Today 32 states and the District of Columbia require that electric utilities obtain a specified proportion of their electricity from renewable or alternative (non-fossil-fuel-based) energy sources with low greenhouse gas emissions.¹⁵
- *Emission Caps for Electricity.* Five states have adopted carbon dioxide emission performance standards for electricity generation, and an additional 11 states cap emissions from their utility sectors.¹⁶

¹⁴ Center for Climate and Energy Solutions, *Greenhouse Gas Emission Targets*, http://www.c2es.org/what_s_being_done/in_the_states/emissionstargets_map.cfm (last accessed June. 14, 2012).

¹⁵ Center for Climate and Energy Solutions, *Renewable & Alternative Energy Portfolio Standards*, http://www.c2es.org/what_s_being_done/in_the_states/rps.cfm (last accessed June. 14, 2012).

¹⁶ Center for Climate and Energy Solutions, *Emission Caps for Electricity*,

- *Low Carbon Fuel Standard.* While California is the only state that has adopted a low carbon fuel standard, 13 other states are in the process of developing such a standard.¹⁷
- *Appliance Efficiency Standards.* Fifteen states have established minimum energy efficiency standards for various commercial products, ranging from light bulbs to refrigerators.¹⁸
- *Regional Climate Collaborations.* Several coalitions of states have formed to pursue common policies to reduce greenhouse gas emissions.¹⁹

Both the successes and failures of these programs will generate important lessons for other states and for the

http://www.c2es.org/what_s_being_done/in_the_states/cap_and_offset_map.cfm (last accessed June. 14, 2012).

¹⁷ Center for Climate and Energy Solutions, *Low Carbon Fuel Standard*, http://www.c2es.org/what_s_being_done/in_the_states/low_carbon_fuel_standard (last accessed June. 14, 2012).

¹⁸ Center for Climate and Energy Solutions, *Appliance Efficiency Standards*, http://www.c2es.org/what_s_being_done/in_the_states/energy_eff_map.cfm (last accessed June. 14, 2012). Congress has followed the states' lead and adopted national efficiency standards. See Nat'l Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103.

¹⁹ Center for Climate and Energy Solutions, *Multi-State Climate Initiatives*, <http://www.c2es.org/states-regions/regional-climate-initiatives> (last accessed June. 14, 2012).

federal government as we grapple with the challenge of climate change. If we are to meet that complex challenge, “where the best solution is far from clear,” courts must give states latitude to experiment with solutions.²⁰

B. In Adopting the Standard, California Has Reprised Its Role as a Laboratory of Innovation in Air Pollution Control.

Since the mid-twentieth century, California has served as the quintessential laboratory of democracy in leading the development of air pollution policy. California’s leadership began with efforts to regulate stationary pollution sources as early as 1947.²¹ It addressed automotive sources when it established crankcase emission standards in 1960.²² By 1964, virtually every new car in the country included positive crankcase ventilation systems.²³ California then enacted the nation’s first tailpipe

²⁰ *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

²¹ See James E. Krier & Edmund Ursin, *Pollution & Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940-1975*, at 62 (1977).

²² *Id.* at 146.

²³ See Joseph L. Sukek, *Vehicle Emissions, an Overview*, 48 J. Urb. L. 805, 816 (1971).

emissions standards in 1966.²⁴ The federal government followed suit by adopting the same standards, effective for 1968 model year cars.²⁵

California's leadership role in regulating automotive pollution was solidified in federal legislation adopted in 1967. In that year, Congress amended the 1963 Clean Air Act to preempt states from regulating emissions from automobiles.²⁶ California, however, was allowed to issue its own emissions standards — the only state given that authority. The state can do so if it can demonstrate that its standards are at least as protective of public health as the federal standards.²⁷ The Act allows other states to subsequently adopt either the California standards or the federal standards.²⁸

California has used this special authority to remarkable effect. To take one example, its standards have led to nitrous oxide emissions that are more than 99 percent

²⁴ See Krier & Ursin, *supra* note 21, at 175.

²⁵ See *id.*

²⁶ 42 U.S.C. §§ 1857f-1(a), 1857f-6(a) (Supp. IV 1965-68).

²⁷ 42 U.S.C. § 7543(a), (b)(1) (2006).

²⁸ *Id.* § 7507.

lower than the first standards set by the state for the pollutant in 1970.²⁹ The state's air quality and public health have improved as a result.³⁰

California's leadership has led to a number of technological breakthroughs and regulatory accomplishments in the reduction of automobile emissions. The following are several highlights:

- In 1975, California regulations led to the installation of the first catalytic converter.
- In 1976, the state began to limit lead in gasoline.
- In 1988, California required the installation of on-board computer systems to monitor the effectiveness of smog control equipment.
- In 1990, the state mandated the production of various categories of low emissions vehicles ("LEVs"), leading to the manufacture of some of the cleanest automobiles ever produced.

²⁹ See Clean Air Council, *Low Emissions Vehicles: Comparing the Future of Vehicle Emissions Standards: LEV II v. Tier 2*, at 3.

³⁰ South Coast Air Quality Management Dist., *Historic Ozone Air Quality Trends*, <<http://www.aqmd.gov/smog/o3trend.html>> (last accessed June 14, 2012).

- In 1998 the success of the LEV program led California to adopt an even more ambitious program, called LEV II.
- In 2001 California adopted tough new standards to reduce diesel pollution from large diesel engines.
- In 2004, CARB enacted the first greenhouse gas emissions standards in the nation for model year cars through 2016.
- In 2011, in conjunction with federal agencies, CARB tightened greenhouse gas emissions standards for model year cars 2017-2025.³¹

California's leadership prompted the federal government to enact its own laws and regulations based on the California experience.³² The laboratory of democracy has worked precisely as envisioned: successful experiments in

³¹ See California Environmental Protection Agency, Air Resources Board, *Key Events in the History of Air Quality in California* (Feb. 2012), <http://www.arb.ca.gov/html/brochure/history.htm> (last accessed June 14, 2012).

³² For an overview of the relationship between the California standards and federal law, see Carlson, *supra* note 11, at 1109-28; see also U.S. EPA, *Mobile Source Emissions — Past, Present, and Future* (Jan. 2012), <http://www.epa.gov/otaq/inventory/overview/solutions/milestones.htm> (last accessed June 14, 2012).

California have allowed the rest of the country to learn from the state's experience and to emulate its successes.

C. By Acting to Reduce Emissions of Greenhouse Gases, California Is Again Leading the Nation in Pollution Control, and the Standard Is One Element of the State's Comprehensive Program.

As the Supreme Court has recognized, climate change threatens the states in a variety of “serious and well-recognized” ways.³³ Climate change presents an especially diverse array of significant threats to California, ranging from rising sea levels, to shrinking the snow pack that California relies on for water, to increasing risks of wildfire.³⁴ These threats give the state an acute *local* interest in combating global climate change, and thus reducing the carbon emissions that cause these climate impacts is well within the scope of the state's expansive police power to protect public health, safety, and welfare.³⁵ In-

³³ *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007).

³⁴ Daniel R. Cayan et al., *California Second Assessment: New Climate Impacts Studies and Implications for Adaptation*, 109 Climatic Change S1 (2011).

³⁵ See *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir. 2011) (petition for cert. pending) (“[A]ir pollution prevention falls under the broad police powers of

deed, the Supreme Court has recognized air pollution control as a field of policy with especially strong roots in the states' police powers.³⁶

Just as California has historically led the country in developing new responses to conventional air pollutants, it now leads the states — and the federal government — in responding to the climate crisis. California has adopted an extensive framework of statutes³⁷ and regulations³⁸ de-

the states, which include the power to protect the health of citizens in the state.” (quoting *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000)).

³⁶ See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) (noting Congress's recognition that “air pollution is peculiarly a matter of state and local concern,” finding regulation of such pollution plainly within the scope of the police power, and rejecting dormant Commerce Clause challenge).

³⁷ See, e.g., 2006 Cal. Stat. ch. 488 (Global Warming Solutions Act; mandating reduction of state greenhouse gas emissions to 1990 levels by 2020); 2011 Cal. Stat. ch. 1 (California Renewable Energy Resources Act; mandating that 33 percent of retail electricity sales originate from renewable sources by 2020); 2008 Cal. Stat. ch. 728 (Sustainable Communities and Climate Protection Act; requiring metropolitan planning authorities to reduce greenhouse gas emissions through binding land use, transportation, and housing planning); 2007 Cal. Stat. ch. 536 (Solar Hot Water and Energy Efficient Act; authorizing a surcharge on natural gas consumption to fund solar water-heater installations); 2006 Cal. Stat. ch. 598 (prohibiting state utilities from making long-

term investments in power plants that do not meet state emissions performance standards); 2006 Cal. Stat. ch. 132 (establishing an incentive program for solar power in newly-constructed homes); 2003 Cal. Stat. ch. 645 (Replacement Tire Efficiency Program; requiring California agencies to develop an energy efficiency program for replacement tires on passenger vehicles and light-duty trucks).

³⁸ See, e.g., Cal. Code Regs. tit. 13, §§ 1900, 1960, 1961-61.1 (reducing greenhouse gas emissions in new passenger vehicles through 2016); *id.*, tit. 14, §§ 15064-65 (requiring public agencies to consider impacts from greenhouse gas emissions before approving public projects); *id.*, tit. 17, §§ 95801-96022 (establishing a cap-and-trade program for greenhouse gas emissions from stationary sources in California); *id.* § 95550 (reducing greenhouse gas emissions by requiring automotive service providers to inflate vehicle tires to the recommended tire pressure rating during maintenance or repair services); *id.* §§ 95300-12 (improving fuel efficiency through truck aerodynamics and low-resistance tires); *id.* §§ 95600-12 (requiring large industrial facilities to conduct an energy efficiency assessment to identify reduction opportunities for greenhouse gas emissions); *id.* §§ 95380-98 (obligating owners of large-scale refrigeration units to repair and record any leaks that release high global-warming potential refrigerants); *id.* §§ 95360-70 (regulating the manufacturing, labeling and disposal of automotive refrigerants with high global-warming potential); *id.* §§ 95340-59 (reducing potent greenhouse gas emissions from electricity transmission and non-electricity sectors); *id.* §§ 94507-17 (limiting the sale or manufacture of certain consumer products with high global-warming potential); *id.* §§ 95460-76 (directing certain landfill owners and operators to install gas collection and control systems).

signed to reduce emissions of greenhouse gases attributable to the state.

As this litany demonstrates, the Standard is only one part of a comprehensive state program designed to substantially reduce California's aggregate greenhouse gas emissions. This program shows no trace of the "simple economic protectionism" that the dormant Commerce Clause principally targets.³⁹ On the contrary, the program imposes a wide variety of obligations on *California* residents and businesses in the hope of avoiding the far more costly, long-term consequences of climate change.

II. The Standard Is Based on the Well-Established and Congressionally Endorsed Methodology of Carbon Lifecycle Analysis.

Lifecycle carbon intensity must be the touchstone in regulating carbon emissions associated with transporta-

³⁹ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); see also *Nat'l Ass'n of Optometrists & Opticians v. Harris*, No. 10-16233, 2012 WL 2126043, at *3 (9th Cir. June 13, 2012) ("Modern dormant Commerce Clause jurisprudence primarily 'is driven by concern about economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'").

tion fuels.⁴⁰ A regulation that focused solely on the “tailpipe” emissions of greenhouse gases could end up *increasing* aggregate carbon emissions by encouraging the use of fuels with lower tailpipe emissions but higher overall lifecycle carbon emissions.

Accordingly, CARB created the Standard by establishing a baseline, average carbon intensity for all vehicular fuels consumed in California and required each supplier of vehicular transportation fuels in California to reduce its average carbon intensity from that baseline by set amounts each year between 2011 and 2020.⁴¹ The Standard also allows suppliers to generate credits for reducing carbon intensity more than required for that year, creating the opportunity for a trading market in credits among suppliers.⁴²

⁴⁰ Brent D. Yacobucci, Congressional Research Service, *A Low Carbon Fuel Standard: State and Federal Legislation and Regulations 2* (Dec. 23, 2008) (“Regardless of the approach taken to reduce the carbon intensity of a fuel, the full lifecycle emissions of the replacement fuel must be considered.”).

⁴¹ Cal. Code Regs. tit. 17, § 95482.

⁴² Cal. Code Regs. tit. 17, § 95485.

In focusing on the “carbon intensity” of transportation fuels, California has acted consistently with Congress and EPA. In the Energy Independence and Security Act (“EISA”), Congress directed EPA to promulgate regulations to ensure that specific volumes of certain types of biofuels were used within the United States instead of gasoline or diesel.⁴³ Congress mandated that EPA consider

[t]he aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes) . . . related to the *full fuel lifecycle*, including *all* stages of fuel and feedstock production and distribution, from feedstock generation or extraction through distribution and delivery and use of finished fuel to the ultimate consumer. . . .⁴⁴

A lifecycle analysis for carbon emissions for fuels includes (1) the emissions from the consumption of the fuel in vehicles, (2) the emissions associated with transporting the fuel to the source of consumption, (3) the emissions associated with producing the fuel at the refinery, and (4) the emissions associated with changing the land use to

⁴³ 42 U.S.C. § 7545(o)(2)(A).

⁴⁴ *Id.* § 7545(o)(1)(H) (emphases added).

produce the feedstock. Excerpts of Record (“ER”) 4:769 . To provide default carbon intensity values, CARB established aggregates or averages to develop a limited number of lifecycle “pathways” for several common transportation fuels, including natural gas, ethanol, hydrogen, and electricity (as used to power vehicles). ER 4:774-76.

In calculating emissions for the Standard, California relied primarily on a model maintained by Argonne National Laboratory known as GREET (the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation model). ER 4:770. The GREET incorporates a massive amount of data about the lifecycle greenhouse gas characteristics of many different fuels. EPA also used the GREET in its own Renewable Fuel Standards rulemaking. Agencies in Minnesota, New York, and Oregon have also used GREET to estimate emissions from alternative fuels and ethanol production. *Id.*

In Table 6 of the regulation, CARB thus included carbon intensity values for eleven specific corn ethanol pathways as well as a Midwest average and a California average that take into account multiple differences that

favor or disfavor particular pathways relative to others. ER 4:774-78. For example, corn, which is grown primarily in the Midwest, has only a short distance to travel to ethanol plants in the Midwest, thus reducing the emissions associated with Midwest ethanol. By contrast, California producers must transport Midwestern corn a much longer distance before it can be made into ethanol, thus increasing associated emissions. ER 4:777-78.

But ethanol producers need not use these averages. Instead the Standard allows them to obtain — and many *have* obtained — individualized carbon intensity values for their specific fuel pathways. ER 4:780-82.

The average regional values in Table 6 of the Standard are provided for the applicants' convenience. Instead of offering the default averages, the state could have required every fuel supplier to provide individualized data on production pathways as a precondition to selling fuel in California. But that would have been more burdensome for out-of-state suppliers that sell only a small fraction of their output to the California market. Indeed, Plaintiffs would undoubtedly have claimed that such a requirement

of individualized assessment was an undue burden on interstate commerce. Ironically, although the default averages were included to accommodate the needs of suppliers, Plaintiffs now wield that accommodation as a weapon to attack the entire Standard's constitutionality.

III. Plaintiffs' Facial Attack on the Standard as Discriminatory and Extraterritorial Is Based on a Misunderstanding of Both the Regulation and the Case Law.

The well-established methodology adopted by California to assess lifecycle carbon intensity neither discriminates against interstate commerce nor directly regulates activity beyond California's borders.

A. The Standard Does Not Discriminate Against Interstate Commerce Because the Geographic Origin of a Fuel Does Not Dictate Its Treatment Under the Standard.

As described above, California's implementation of lifecycle analysis is based on both EPA's approach for its Renewable Fuel Standards as well as scientific consensus in the field. *See supra* Section II; *see also* ER 4:769-70. The Standard is focused on obtaining the full lifecycle emissions of all fuels regardless of their origin. ER 4:773-774.

Thus, the purpose, design, and effect of the regulation focus on estimating and reducing lifecycle emissions, not on favoring California ethanol producers or disfavoring ethanol producers in other states. *Id.* In other words, “there is some reason, apart from their origin, to treat [fuels] differently.”⁴⁵

Given these facts, Plaintiffs have failed to carry their burden of proof on that the Standard discriminates against interstate commerce. First, they have failed to show facial discrimination because like fuels receive like treatment, regardless of origin. Second, they have failed to show discriminatory intent because no negative impact on the market share of imports has been proven.

First, as this Court has made clear, a state law “discriminates only when it discriminates between similarly situated in-state and out-of-state interests.”⁴⁶ Under the Standard, where in-state and out-of-state interests are similarly situated in the carbon intensity of their fuels,

⁴⁵ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

⁴⁶ *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (9th Cir. 2007).

they are entitled to receive identical carbon intensity ratings.

The district court's analysis of the discrimination issue overlooked several crucial facts. Over one hundred individualized "pathways" have been approved to date under Methods 2A and 2B — ninety-five of them for Midwest ethanol producers. *See* Appellants' Motion for a Stay of the District Court's Orders and Judgments Pending Appeal, Ninth Cir. Docket No. 21, Exh. AA, ¶ 54. At least 26 of these pathways requested by Midwest producers have a carbon intensity value lower than or equal to the lowest California ethanol value reflected in Table 6. ER 4:167-70, 4:182-83, 4:190-94.

Similarly, the district court found discrimination here because Alaskan Light Crude must use a carbon intensity value that is 3.71 higher than its "calculated" value. ER 1:38. However, one pathway for California crude of similar volume must use a carbon intensity value that is 3.76 higher than its "calculated" value. *See* ER 11:2702.

In short, the carbon intensity rating that the Standard applies to a fuel — and thus the Standard's impact on

market demand for that fuel — is based on the fuel’s actual carbon intensity, not its state of origin. High-carbon-intensity fuel, whether produced in the Midwest, Texas, or California, is treated the same. So is low-carbon-intensity fuel from all those locations. The Standard distinguishes among fuels based on objective facts about the fuel and its production and consumption that directly relate to the state’s legitimate interest in reducing total carbon emissions associated with fuel consumed in California.

Second, the Supreme Court has made clear that influencing the operation of the national fuel market does not in itself constitute a discriminatory effect. Instead, a plaintiff must prove that the challenged regulation will “cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market.”⁴⁷ No Commerce Clause concern arises merely because, for example, some corn ethanol from the Midwest is displaced by other corn ethanol or by sugar cane ethanol from Brazil.

⁴⁷ *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 n.16 (1978).

The *Exxon* Court concluded, “In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.”⁴⁸ There has been no showing of discrimination in the present case, nor has Congress disfavored state action to control emissions. On the contrary, the Clean Air Act stresses cooperative federalism and encourages innovative state regulation.⁴⁹

The Supreme Court’s holdings in *Exxon* control this case. To show discriminatory effect, Plaintiffs were required to prove an adverse effect on the market share of imported fuels. To show facial discrimination, they would have had to show that in-state fuels were treated more favorably than similarly situated imported fuels — i.e., fuels

⁴⁸ *Id.* at 128-29.

⁴⁹ See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L. Rev. 1547 (2007). See also 42 U.S.C. § 7416 (Clean Air Act provision preserving “right of any state or political subdivision” to enact “any standard or limitation” of air pollutants as long as it is not “less stringent” than federal law mandates).

of equal carbon intensity. Like the plaintiffs in *Exxon*, Plaintiffs here have failed to make either showing.

B. The Standard Regulates Conduct in California Alone and Is Not Extraterritorial in Scope.

Plaintiffs also contend that the Standard effectively regulates their behavior outside California. Despite Plaintiffs' efforts to derive sweeping prohibitions from the cases, courts have only rarely invalidated a state regulation based on extraterritoriality. None of those cases apply here.

A majority of the Supreme Court has found impermissible extraterritoriality in only two modern cases, both from the 1980s. The first case was *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.⁵⁰ New York required distillers to file their prices each month and barred them from selling below that price in another state without New York's permission, on penalty of revocation of the distiller's license and forfeiture of a bond.⁵¹ The Court held that "[r]equiring a merchant to seek regulatory ap-

⁵⁰ 499 U.S. 472 (1986).

⁵¹ *Id.* at 575-76.

proval in one State before undertaking a transaction in another directly regulates interstate commerce.”⁵² By contrast, California requires no such approval before fuel producers can undertake activities in other states.

Three years after *Brown-Forman*, the Court struck down another liquor pricing regulation in *Healy v. Beer Institute*.⁵³ Under Connecticut law, a distiller had to file its prices and affirm that in-state prices were currently as low as any of its prices charged to out-of-state buyers.⁵⁴ The Court found no practical difference between the New York and Connecticut laws, which were equally coercive of out-of-state conduct.⁵⁵ In contrast, nothing in the Standard here affects sales of fuels for use outside California.

Healy and *Brown-Forman* relied on two earlier cases that were similarly limited. In *Baldwin v. G.A.F. Seelig, Inc.*,⁵⁶ New York banned the in-state resale of milk acquired outside the state at a price below the New York

⁵² *Id.* at 582.

⁵³ 491 U.S. 324 (1989).

⁵⁴ *Id.* at 328.

⁵⁵ *Id.* at 338-39.

⁵⁶ 294 U.S. 511 (1935).

wholesale floor.⁵⁷ The *Baldwin* Court held that the state could not extend its price control regime beyond its borders. Notably, however, the Court also held that New York *could* require out-of-state producers to maintain appropriate health certificates and comply with safeguards in the production of milk for the New York market, a product regulation more closely resembling the Standard here.⁵⁸

The second of the earlier cases, *Edgar v. MITE Corp.*,⁵⁹ involved an Illinois law requiring approval of tender offer terms by Illinois officials if a corporation had a modest Illinois connection.⁶⁰ The majority struck down the law as an undue burden on commerce,⁶¹ and a plurality faulted the law for prohibiting transactions not only with Illinois shareholders “but also with those living in other States and having no connection with Illinois.”⁶² The Illi-

⁵⁷ *Id.* at 520.

⁵⁸ *Id.* at 501.

⁵⁹ 457 U.S. 624 (1982) (plurality opinion), *cited in Healy*, 491 U.S. at 336.

⁶⁰ 457 U.S. at 627.

⁶¹ *Id.* at 646.

⁶² *Id.* at 642.

nois law was the functional equivalent of direct regulation of these out-of-state transactions: making a tender offer to these non-residents would trigger financial penalties and criminal prosecution.⁶³

All of these decisions involved state laws that punished noncompliant commercial transactions completed entirely outside the state. They contrast starkly with the present case. The Standard does not prescribe the terms of any out-of-state contracts, ban transactions having no contact with the state, or threaten punitive sanctions for out-of-state activities. It merely regulates the in-state market and provides an incentive for firms to increase their market share by lowering the carbon intensity of their products. In the language of this Court's controlling precedent on extraterritoriality, *Gravquick A/S v. Trimble Navigation International Ltd.*, the Standard "does not directly regulate the actions of parties located in other states, it regulates contractual relationships [here, fuel sales] in which at least one party is located in California."⁶⁴

⁶³ *Id.* at 630 n.5.

⁶⁴ 323 F.3d 1219, 1124 (9th Cir. 2003).

Like Plaintiffs here, other litigants have tried to recast the Supreme Court's limited precedents into a broad shield against legitimate regulations. The courts of appeals have rightfully resisted these efforts.⁶⁵ In the few court of appeals decisions that found extraterritoriality, the courts considered the state law to be the functional equivalent of a direct regulation of out-of-state actors or conduct.⁶⁶

By contrast, California's Standard does not "control[] conduct beyond the boundaries of the state,"⁶⁷ "control sales" to anyone other than state residents,⁶⁸ or "control

⁶⁵ See, e.g., *Gravquick A/S*, 323 F.3d at 1219; *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110-112 (2d Cir. 2001); *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 193-196 (2d Cir. 2007).

⁶⁶ See *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (state law effectively required a nationwide organization to change its procedural rules in many cases that had no connection with that state); *Nat'l Solid Wastes Mgmt. Ass'n v. Myer*, 63 F.3d 652 (7th Cir. 1995) (Wisconsin banned imports of waste from communities that failed to recycle enough waste, including waste streams headed outside Wisconsin).

⁶⁷ *Cotto Waxo*, 46 F.3d at 793.

⁶⁸ *SPGGC*, 505 F.3d at 195.

the integrity of a product in interstate commerce that occurs wholly outside [its] boards.”⁶⁹ Firms remain free to sell fuels in California or elsewhere created by any production method anywhere in the nation at any price set by the market. The Standard simply ensures that the California fuel market reflects fuels’ carbon intensity, as determined through accepted scientific methods. Like a carbon tax, the Standard may create incentives for out-of-state firms to improve the carbon intensity of the fuels they sell in California. But incentives are not the same as control, and it is only *control* that the case law condemns.

It would be myopic for California to consider only the carbon released at the moment of combustion. And it would be grossly unfair to ethanol producers such as Plaintiffs, whose direct carbon emissions are offset by the carbon absorbed from the atmosphere by the plants that supply the feedstock for their fuel. But if the plaintiff ethanol producers want credit for the carbon intake of their feedstocks, they must also accept the validity of counting other carbon flows along the production path.

⁶⁹ *Miller*, 10 F.3d at 639.

The extraterritoriality doctrine is strong medicine. Because of its draconian consequences, courts have employed it sparingly and only in cases where the state exercised effective control over transactions wholly outside its borders. In contrast, California here has done no more than apply evenhandedly the same methodology mandated by Congress for federal use to encourage a change in the kind of fuels — regardless of their origins — consumed inside the state.

C. Plaintiffs Cannot Satisfy the Test for a Facial Challenge to the Standard.

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”⁷⁰ In other words, the plaintiff must show “that the law is unconstitutional in all of its applications.”⁷¹

Plaintiffs’ challenge to the Standard cannot satisfy this test. Any Midwest ethanol producer — or any other

⁷⁰ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

⁷¹ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

producer — can seek an individualized determination of carbon intensity, and the characterization of the fuel as “Midwest ethanol” would play no role whatsoever in that determination. Thus, the process for creating an individualized pathway in Methods 2A and 2B of the Standard does not *necessarily* take into account whether a fuel is “Midwest ethanol,” or in any other geographic category. Hence, the Plaintiffs cannot “establish that no set of circumstances exists under which the [Standard] would be valid” and thus cannot demonstrate that the Standard facially violates the dormant Commerce Clause.⁷² If a producer chooses to use the values in Table 6 instead of seeking its own pathway, it makes its own choice; the Standard does not demand it.

As this Court has made clear, “Courts examining a ‘practical effect’ challenge must be reluctant to invalidate a state statutory scheme . . . simply because it *might* turn out down the road to be at odds with our constitutional

⁷² See *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (applying *Salerno* to uphold local ordinance against a facial dormant Commerce Clause challenge).

prohibition against state laws that discriminate against Interstate Commerce.”⁷³ Plaintiffs have failed to carry this burden of proof.

Likewise, Plaintiffs’ extraterritoriality claim does not satisfy the test for a facial claim. As noted above, the Standard does not control conduct beyond California’s boundaries in *any* circumstances, let alone in *all* circumstances.

A facial challenge presents the starkest confrontation of the judicial and legislative functions.⁷⁴ Courts therefore apply a test that ensures the legislative act will be given effect in those situations where it constitutionally can be applied. It thus likewise minimizes the impact of judicial review on legislative prerogative.

CONCLUSION

The Standard bears no trace of the protectionism that the dormant Commerce Clause prohibits. On the contrary, it represents the best of what federalism offers: an

⁷³ *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010).

⁷⁴ *See Wash. State Grange*, 552 U.S. at 450-51.

innovative and conscientious response to one of the most pressing problems of the day. Accordingly, this Court should reverse the district court's decision.

DATED: June 15, 2012 SHUTE, MIHALY &
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,420 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced roman typeface, 14-point New Century Schoolbook, using Microsoft Word 2007.

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PROOF OF SERVICE

Rocky Mountain Farmers Union, et al. v. Goldstene, et al.
Docket Nos. 12-15131, 12-15135
U.S. Court of Appeals, 9th Circuit

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

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 will be accomplished by the appellate CM/ECF system.

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