

Nos. 12-15131, 12-15135

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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.

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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 BRIEF OF TRUMAN NATIONAL SECURITY INSTITUTE  
AND TRUMAN NATIONAL SECURITY PROJECT IN SUPPORT OF  
DEFENDANTS-APPELLANTS**

Sean Hecht, Cal. Bar No. 181502  
Cara Horowitz, Cal. Bar No. 220701  
M. Rhead Enion, Cal. Bar No. 272098

Frank G. Wells Environmental Law Clinic  
UCLA School of Law  
405 Hilgard Ave.  
Los Angeles, CA 90095  
Telephone: (909) 547-4323  
Fax: (310) 206-1234  
Email: enion@law.ucla.edu

*Attorneys for Amici Truman National Security Institute  
and Truman National Security Project*

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**CORPORATE DISCLOSURE STATEMENT  
PURSUANT TO FED. R. APP. P. 26.1**

Pursuant to Fed. R. App. P. 26.1, I hereby certify that:

Amicus Truman National Security Institute is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Truman National Security Institute does not issue stock and no parent corporation or any publicly traded corporation owns 10% or more of its stock.

Amicus Truman National Security Project is a non-profit political organization under section 501(c)(4) of the Internal Revenue Code. Truman National Security Project does not issue stock and no parent corporation or any publicly traded corporation owns 10% or more of its stock.

*s/ M. Rhead Enion*

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M. Rhead Enion  
Cal. Bar No. 272098

6/15/2012

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Date

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FOR THE NINTH CIRCUIT  
Case Nos. 12-15131, 12-15135

FED. R. APP. P. 29(C)(5) DISCLOSURE

Pursuant to Fed. R. App. P. 29(c)(5), I hereby certify that no party's counsel authored this brief in whole or in part; no part of counsel for a party contributed money that was intended to fund the preparation of submission of this brief, and no person—other than amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

*s/ M. Rhead Enion*

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M. Rhead Enion  
Cal. Bar No. 272098

6/15/2012

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Date

Amici Truman National Security Institute and Truman National Security Project respectfully submit this brief amicus curiae in support of Appellants James Goldstene, *et al.* Pursuant to Fed. R. App. P. 29(a), Amici state that all parties have consented to the filing of this brief.

### **I. Statement of Interest of Amici Truman National Security Institute and Truman National Security Project**

Amicus Truman National Security Institute is a nationwide, non-profit 501(c)(3) organization. Amicus Truman National Security Project is a non-profit political 501(c)(4) organization. (Together these are referred to as the “Truman Project” or the “Project.”)<sup>1</sup> The Truman Project’s headquarters is in Washington, D.C. The Project has twenty-five full-time staffers and approximately 1,000 active members nationwide, including two chapters in California. The Project’s membership includes 550 Truman Fellows (national security policy experts), 320 Partners (political professionals), 30 Veterans Leadership Academy graduates (young veteran leaders), and hundreds of Military Roundtable members (veterans engaged in Truman’s advocacy campaigns).

The Truman Project provides the skills, knowledge, and network to create an influential force of leaders across the country who advance strong national

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<sup>1</sup> <http://trumanproject.org/>.



security policy. Truman's Board of Advisors includes national security experts such as Madeleine Albright, Leslie Gelb, Gary Hart, Lieutenant General Donald Kerrick (ret.) and Anne-Marie Slaughter.<sup>2</sup> Leaders trained by the Project are running for office across the country, advising presidential and Congressional campaigns, drafting legislation in the halls of Congress, assuming leadership posts in the military, playing key roles in local and national government, and working on the front lines of America's homeland security.

The Truman Project works closely with the veterans' community. The Project runs a Veterans Leadership Academy group, a diverse coalition of veteran leaders from across the country who participate in an intensive training program in order to become more effective leaders on security issues. The Project leads Operation Free, a nationwide coalition of veterans who advocate for securing America with clean energy. Operation Free supports all states that want to implement low carbon fuel standards as a way to decrease America's dependence on oil and fight the negative effects of climate disruption.

Climate change has a well-established connection to the Truman Project's core concern: national security. The Department of Defense, the State Department, the National Intelligence Council and the Central Intelligence

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<sup>2</sup> <http://trumanproject.org/about/people/board/>.

Agency have all independently identified climate change as a threat to our national security. Climate change is a threat multiplier that can erode economic and environmental conditions in fragile areas. Climate-change-induced migration and humanitarian disasters not only place demands on our military and economic resources, but also can destabilize societies. By destabilizing weak states, climate change can foster conditions for extremism, authoritarianism and terrorism.

Besides this environmental security threat, our continued reliance on fossil fuels poses a security threat because much of the fossil fuel supply comes from unstable and hostile regimes. Diversifying our fuel supply and reducing emissions that contribute to climate disruption thus help increase security and stability around the world.

## **II. The LCFS will increase the diversity of California's fuel mix and drive innovation in alternatives to fossil fuels**

California's Low Carbon Fuel Standard (LCFS) program seeks to both reduce the potential for dangerous climate change and reduce California's dependence on fossil fuels by increasing the diversity of California's transportation fuel mix. 17 Cal. Code Regs. §§ 95480–95490. Decreasing dependence on fossil fuels and encouraging development of alternative fuels are legitimate local interests for the state of California. Achieving these goals, in addition to reducing

greenhouse gas emissions, limits potential alternatives to California's LCFS approach.

**A. Continued reliance on fossil fuels threatens our security because climate change is a threat multiplier and because our fossil fuel supply depends in large part on unstable and hostile regimes**

Continued reliance on fossil fuels threatens our national security in two respects. First, greenhouse gas emissions from burning fossil fuel contributes to climate change, which in turn can destabilize fragile areas leading to increased armed conflict and proliferation of authoritarian regimes that threaten national (and global) security. Second, much of our fossil fuel supply comes from unstable and hostile regimes that again threaten national security.

In 2007, a blue-ribbon panel of eleven senior retired U.S. admirals and generals described the threat that climate change poses to America's national security. Ctr. for Naval Analysis (CNA) Corp., *National Security and the Threat of Climate Change* (2007) [hereinafter CNA].<sup>3</sup> Their report explained that "[c]limate change acts as a threat multiplier" that will increase international tensions, erode economic and environmental conditions in already fragile areas and foster conditions for extremism, authoritarianism and radical ideologies. *Id.* at 6. Without adequate access to clean water, energy, and a clean environment, societies

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<sup>3</sup> <http://www.cna.org/reports/climate>.

become increasingly stressed, leading to armed conflict and collapse. See id. at 13; id. at 36 (statement of Gen. Paul J. Kern, USA (Ret.)).

Climate change threatens our environmental security. See Kent Hughes Butts, Climate Change: Complicating the Struggle against Extremist Ideology, in Strategic Stud. Inst., Global Climate Changes 128 (2008).<sup>4</sup> America's national security strategy has long considered the importance of achieving environmental security. President Reagan's 1988 National Security Strategy noted the threats to peace and prosperity from the depletion and contamination of nations' natural resources. National Security Strategy of the United States 6 (1988).<sup>5</sup> Both the first Bush administration and the Clinton administration noted the link between environmental insecurity and conflict. See, e.g., National Security Strategy of the United States 22 (1991)<sup>6</sup> ("The stress from these environmental challenges is already contributing to political conflict."); National Security Strategy of the United States 14 (1997)<sup>7</sup> ("Environmental threats . . . can pose long-term danger to our security and well-being."). And in 2008, the Deputy Director of National Intelligence for Analysis testified that "[c]limate change could threaten domestic

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<sup>4</sup> <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=862>.

<sup>5</sup> <http://nssarchive.us/NSSR/1988.pdf>.

<sup>6</sup> <http://nssarchive.us/NSSR/1991.pdf>.

<sup>7</sup> <http://nssarchive.us/NSSR/1997.pdf>.

stability in some states, potentially contributing to intra- or, less likely, interstate conflict, particularly over access to increasingly scarce water resources.” National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030, Hearing before the H. Select Comm. on Intelligence and the H. Select Comm. on Energy Independence and Global Warming, 110th Cong. 4–5 (2008) (Statement of Dr. Thomas Fingar, Deputy Director of National Intelligence for Analysis).

Eight Presidents, from Nixon to Obama, have identified America’s oil dependence as a national security threat.<sup>8</sup> President Bush, in his 2007 State of the Union address, said that “it’s in our vital interest to diversify America’s energy supply.” 1 Pub. Papers 44 (Jan. 23, 2007). In 2009, President Obama stated, “America's dependence on oil is one of the most serious threats that our nation has faced. It bankrolls dictators, pays for nuclear proliferation, and funds both sides of our struggle against terrorism.” 1 Pub. Papers 15 (Jan. 26, 2009).

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<sup>8</sup> See, e.g., State of the Union Address, 1 Pub. Papers 49–50 (Jan. 30, 1974) (discussing the Middle East oil embargo); State of the Union Address, 1 Pub. Papers 40 (Jan. 15, 1975) (proposing steps to “reliable and adequate energy” that can “help foster a new world energy stability”); State of the Union Address, 1 Pub. Papers 197 (Jan. 23, 1980) (highlighting how the Soviet incursion in Afghanistan threatens strategically important oil supplies) 1 Pub. Papers 544–46 (May 1, 1982) (discussing the need for energy security); 1 Pub. Papers 78 (Jan. 29, 1991) (stopping Saddam Hussein from controlling the world’s oil resources); State of the Union Address, 1 Pub. Papers 120 (Feb. 17, 1993) (taxing the heat content of energy to promote energy independence).

The U.S. Department of Defense (DoD) has recently emphasized the need to reduce battlefield fuel demand and secure reliable, renewable energy supplies for our nation's military forces. The Pew Project on Nat'l Sec., Energy & Climate, *From Barracks to the Battlefield: Clean Energy Innovation and America's Armed Forces 4* (2011)<sup>9</sup> [hereinafter Pew Project]. "[T]he department's operations rely upon large quantities of oil, the majority of which must be imported, often from unstable regions and/or hostile regimes." *Id.* at 16. DoD used over 375,000 barrels of oil per day in 2009, which places its oil dependence above all but 35 countries. *Id.* at 14. One out of every 24 fuel resupply convoys in Afghanistan has resulted in an casualty. Casualty Costs of Fuel and Water Resupply Convoys in Afghanistan and Iraq, Army-Technology.com, Feb. 26, 2010;<sup>10</sup> see also Natalie Pompilio, The Real Reason the Military is Going Green, YES! Magazine, June 4, 2012 (describing how over 1,000 Americans have been killed while conveying fuel in Iraq and Afghanistan).<sup>11</sup> But see Pew Project, supra, at 46 ("[T]here is one casualty for every 46 ground resupply convoys in Afghanistan.").

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<sup>9</sup> [http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/DoD-Report\\_FINAL.pdf](http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/DoD-Report_FINAL.pdf).

<sup>10</sup> <http://www.army-technology.com/features/feature77200/>.

<sup>11</sup> <http://www.yesmagazine.org/issues/making-it-home/the-real-reason-the-military-is-going-green>.

Development of alternative energy and alternative fuel sources is thus a military imperative. Pew Project, supra, at 46. “[E]nergy and economic security—key components of our national security—must be undergirded by alternative forms of energy available indigenously and from countries whose values are not at odds with our own.” CNA, supra, at 41 (Adm. Frank “Skip” Bowman, USN (Ret.)). Secretary of the Navy Ray Mabus spoke last year on the strategic importance of shifting to alternative energy sources:

Why the interest in alternative energy? The answer is pretty straightforward: We buy too much fossil fuel from potentially or actually volatile places on earth. We buy our energy from people who may not be our friends. We would never let the countries that we buy energy from build our ships or our aircraft or our ground vehicles, but we give them a say on whether those ships sail, whether those aircraft fly, whether those ground vehicles operate because we buy their energy.

Pew Project, supra, at 68 (speaking at the National Clean Energy Summit 4.0, Las Vegas, NV, Aug. 30, 2011).

Our alternative energy strategy depends in part on biofuel development. Such development is happening through federal-state and federal-private collaborations, and in the private sector. Through the Defense Advanced Research Projects Agency (DARPA), DoD has partnered with private corporations and state universities to develop biofuel technologies. For example, Honeywell, General Electric, and the University of North Dakota have partnered

with DARPA to investigate processes for producing oil from non-food crops. Id. at 36. San Diego-based General Atomics, another DARPA partner, has worked with academic and commercial partners to produce jet fuel from algae. Id. at 36. In the private sector, Continental Airlines used biofuel from California-based Sapphire Energy in test flights of a Boeing 737. Id. at 41.

California's LCFS program is the type of innovative program needed to reduce emissions of greenhouse gases from fossil fuels and encourage development of alternative fuels in order to decrease California's dependence—and thus America's dependence—on fossil fuels.

**B. The multiple goals of the LCFS include decreasing California's dependence on fossil fuels and driving innovation in fossil fuel alternatives**

California's LCFS program is meant to achieve multiple goals, including reducing the threat of climate change and developing alternative fuel technologies. The first priority for the LCFS is reducing greenhouse gas emissions. The LCFS will result in a 10 percent reduction in greenhouse gas emissions from transportation fuels sold in California by 2020. Cal. Air Resources Board, California's Low Carbon Fuel Standards: Final Statement of Reasons 5 (2009) [ER 6:1215] [hereinafter "FSOR"]; Cal. Air Resources Board, California's Low



Carbon Fuel Standards: Initial Statement of Reasons ES-24 (2009) [ER 9:2220] [hereinafter “ISOR”].<sup>12</sup>

Besides the goal of reducing greenhouse gas emissions, “the LCFS is designed to reduce California’s dependence on petroleum, create a lasting market for clean transportation technology, and stimulate the production and use of low-carbon fuels in California.” FSOR at 61 [ER 6:1271]; see also id. at 272, 285, 614, 645 [ER 7:1482, 7:1495, 8:1824, 8:1855]. In issuing the Executive Order prompting the LCFS regulation, Governor Schwarzenegger highlighted these important goals for California. FSOR at 457 [ER 7:1667]; Cal. Exec. Order S-01-07. The California Air Resources Board (CARB) repeatedly described how the LCFS is meant to decrease dependence on fossil fuels, incent cleaner transportation technology, and promote low carbon alternative fuels in California. See, e.g., FSOR at 179 [ER 6:1389] (explaining how the LCFS would mitigate “volatility and cost risk associated with petroleum dependence”); id. at 234 [ER 6:1444 (“[O]n balance, we believe that the LCFS will improve national energy security”); id. at 243 [ER 7:1453] (“The LCFS is structured properly to stimulate the production and use of alternative low-carbon fuels which will diversify the transportation fuel market away from fossil fuels.”).

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<sup>12</sup> Citations to the Appellants’ Excerpts of Record are in the form Volume:Page.

**C. California's interest in decreasing its dependence on fossil fuels is a legitimate and local purpose in light of California's inherent police power and Massachusetts v. EPA**

The District Court acknowledged that reducing the risks of global warming is a legitimate and local purpose that is furthered by the LCFS. ER 1:67 (citing Massachusetts v. EPA, 549 U.S. 497, 519, 522 (2007)). But that is not the only legitimate and local purpose served by the LCFS. Decreasing California's dependence on fossil fuels and encouraging alternative fuel development are also legitimate and compelling local interests that lead to substantial local benefits. In pursuing these interests, California creates important benefits for national security.

Just as California did not surrender its legitimate and local interest in combating global climate change when it surrendered its sovereign prerogative to negotiate international emissions treaties, *cf.* Massachusetts, 549 U.S. at 520, California similarly did not surrender its legitimate and local interest in the safety and security of its people when it joined the Union, *cf.* Chamber of Commerce v. EPA, 642 F.3d 192, 211 (D.C. Cir. 2011) (“California retains a sovereign interest in being able to enforce its own regulations against automobile manufacturers—just as states have a sovereign interest in enforcing state drug laws even if they coincide with federal drug laws.”). Numerous cases have recognized the importance of states' police powers and have upheld the exercise of such powers to

protect the health and security of a state's citizens in the face of dormant Commerce Clause challenges. See, e.g., United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334 (2007) (characterizing trash disposal as a “traditional government activity”); Minnesota v. Clover Leaf Creamery, 499 U.S. 456, 471 (1981) (noting that “environmental protection and resource conservation” are “areas of legitimate local concern”); S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938) (describing safety regulations for state highways as “peculiarly of local concern”); Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1180–81 (9th Cir. 2011), cert. pending (“[T]he state of California clearly has an especially powerful interest in controlling the harmful effects of air pollution resulting from the fuel used by ocean-going vessels while they are within 24 miles of the state's coast.”).

The Rocky Mountain Farmers Union *et al.* (“Rocky Mountain Plaintiffs”) argued in the District Court that the LCFS failed the balancing test used in Pike v. Bruce Church, 397 U.S. 137, 142 (1970), which weighs the local public interest in the regulation against the regulation's effects on interstate commerce. See ER 1:48 n.2 (declining to reach the Pike argument); see also Appellants' Opening Br. 94–95. In such a balancing test, California's local public interest in the LCFS includes not only its goal to reduce greenhouse gas emissions, but also

its complementary goals to decrease its fossil fuel dependence and encourage alternative fuel development to enhance security. Because these complementary goals not only are legitimate state interests, but also align with longstanding federal national security policy, the balance here should weigh strongly in favor of the LCFS.

**D. California's interest in promoting fuel diversity and alternatives to fossil fuels limits potential alternatives to the LCFS**

As discussed above, California did not consider solely greenhouse gas emission reduction when developing the LCFS. Promotion of fuel diversity and development of alternative fuels technology led California to favor the LCFS over alternative regulatory options. Other state programs, such as California's cap-and-trade program for greenhouse gas emissions, cannot promote these other goals as effectively as the LCFS. Nonetheless, in determining that the LCFS constituted impermissible discrimination against interstate commerce, the District Court failed to consider the LCFS's ability to help the state to meet these multiple goals. By focusing solely on greenhouse gas emissions, the District Court gave insufficient weight to the broader legislative and regulatory goals of the LCFS program in its dormant Commerce Clause analysis.

Including fuels in a cap-and-trade program alone would not achieve California's multiple goals. See, e.g. FSOR at 444–45 [ER 7:1654] (explaining that cap-and-trade may not achieve carbon intensity reductions in California's transportation fuels). Specifically, CARB structured the LCFS regulation to encourage fundamental changes to California's mix of transportation fuels, shifting California towards lower carbon intensity fuels in a targeted manner that goes beyond the purview of a more general greenhouse gas cap-and-trade program. Id. at 61 [ER 6:1271]. Governor Schwarzenegger believed the LCFS was a necessary complement, not an alternative, to California's cap-and-trade program, which is why he issued Executive Order S-01-07 directing CARB to establish the LCFS program. Id. at 61 [ER 6:1271]; Cal. Exec. Order S-01-07. Debates as to the reasonableness and wisdom of that Executive Order are not within the purview of the courts, but are rather left to the legislature and the populace. S.C. State Highway Dep't, 303 U.S. at 191

Although a proper analysis of the LCFS would not have subjected it to strict judicial scrutiny in the first place, the District Court's application of that standard reflected serious errors. The Rocky Mountain Plaintiffs, in the district court, pointed to a tax on fossil fuels or regulation of California vehicle tailpipe emissions as potential alternatives to California's LCFS program. ER 1:68.

Strangely, the District Court discounted CARB's objection that regulating tailpipe emissions alone "may result in greater emissions overall", ER 1:68, even though CARB's prediction would seem to reflect technical expertise meriting judicial deference (and—at the very least—a factual issue precluding summary judgment). Fed. R. Civ. P. 56(a). More crucially, the District Court did not consider whether these proposed alternatives would in fact further California's goal of reducing its dependence on fossil fuels or further California's goal of encouraging the development of alternative fuel technology. Cf. ER 1:68 (holding that California failed to establish that it lacked regulatory alternatives to address "the goal of reducing global warming"). Nor did the District Court consider the specific role of the LCFS in light of California's broader greenhouse gas regulations. Cf. ISOR at II-1 to II-7 [ER 9:2237–2243] (summarizing other California programs).

Neither regulation of California vehicle tailpipe emissions nor a tax on fossil fuels nor California's cap-and-trade program would achieve the multiple goals of the LCFS. See Appellants' Opening Br. 98–100 (arguing that none of the proposed alternatives could achieve the multiple goals of the LCFS). First, California already enacted vehicle performance standards to reduce tailpipe emissions, 2002 Cal. Stat. 200 (AB 1493 (Pavley)), but nevertheless determined

that additional regulation was necessary to meet its multiple policy goals. The LCFS represents a second, additional strategy for reducing greenhouse gas emissions in California's transportation sector that can also provide incentives to shift California's economy away from dependence on fossil fuels. 1 Alexander E. Farrell & Daniel Sperling, *A Low-Carbon Fuel Standard for California* 21 (2007);<sup>13</sup> see also ISOR at II-3 [ER 9:2239] (describing Sperling and Farrell's work on low carbon fuel standards as "the backbone" of the LCFS program). Furthermore, vehicle performance standards can improve vehicle efficiencies but do not ensure a reduction in net carbon emissions from transportation fuels nor will such standards provide incentives to develop alternative fuels. Daniel Sperling & Sonia Yeh, Low Carbon Fuel Standards, *Issues in Sci. & Tech.*, Winter 2009, at 57.<sup>14</sup>

Second, California determined that the transportation industry would not effectively respond to a carbon tax or, equivalently, a cap-and-trade approach in part because of market barriers to alternative fuel adoption that would dramatically weaken the price signal of a carbon tax. ISOR at II-3 [ER 9:2239]; Sperling & Yeh, supra, at 61–62; 2 Farrell & Sperling, supra, at 20–23.

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<sup>13</sup> [http://pubs.its.ucdavis.edu/download\\_pdf.php?id=1082](http://pubs.its.ucdavis.edu/download_pdf.php?id=1082),  
[http://pubs.its.ucdavis.edu/download\\_pdf.php?id=1084](http://pubs.its.ucdavis.edu/download_pdf.php?id=1084).

<sup>14</sup> <http://escholarship.org/uc/item/8834g64j.pdf>.

The principal market failure within transportation is that firms and, in turn, consumers do not shoulder the true social cost of fuels (or vehicles that entail fuel choices) when they are purchased. In other words, the market price of transportation fuels does not reflect the social and environmental damages of resulting greenhouse gas emissions . . . so people buy too much of them.”

2 Farrell & Sperling, supra, at 20. In part because of these market failures, while a carbon tax of \$25 per ton would motivate emission reductions in the electricity sector, oil “[p]roducers and consumers would barely respond to even a \$50-a-ton tax.” Sperling & Yeh, supra, at 61.

The District Court’s cursory consideration of the potential alternatives to the LCFS failed to appreciate the role the LCFS plays in addressing multiple complex goals and did not give sufficient deference to California’s regulatory determination that the LCFS is necessary to meet the state’s goals.

### **III. The LCFS is an innovative state regulation that addresses the carbon intensity of California’s transportation fuels in a neutral manner**

The LCFS uses lifecycle analysis of carbon intensity to place a value on alternative fuels based on carbon intensity of those fuels.<sup>15</sup> California’s lifecycle

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<sup>15</sup> “Lifecycle greenhouse gas emissions’ means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Executive Officer, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account



analysis neutrally measures carbon intensity by quantifying the emissions generated throughout a fuel's lifecycle, without considering state borders. By pricing carbon intensity, California corrects a market failure, thereby increasing market efficiency. If California had not accounted for the carbon intensity of transportation fuels, it could not achieve its goals of reducing climate-destabilizing emissions, increasing fuel diversity, and decreasing fossil fuel dependence. The LCFS takes account of these factors in a way that is consistent with federal law and that has already served as a model for other states.

**A. Lifecycle analysis is a neutral measure of carbon intensity**

In the district court, the Rocky Mountain Plaintiffs argued that any reference to geographic distance or location as a shorthand for an ethanol production pathway amounted to facial discrimination against interstate commerce. California countered that lifecycle analysis is blind to geopolitical boundaries. California's lifecycle analysis is based upon carbon intensity, not location. It is not based upon, nor easily equated with, interstate / intrastate categories. Thus California's lifecycle analysis neutrally measures carbon intensity.

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for their relative global warming potential.” 17 Cal. Code Reg. § 95841(28); see also 42 U.S.C. § 2117545(o)(1)(H). A feedstock is the raw material from which a biofuel is made, such as corn or sugarcane.

According to the District Court, “tying carbon intensity scores to the distance a good travels in interstate commerce discriminates against interstate commerce.” ER 1:60. Carbon intensity scores are not in fact based on distance travelled, but upon carbon emissions used in transportation, a relationship far more nuanced and complex than the District Court suggested. See Appellants’ Opening Br. 17–25, 58–59 (describing how California measures carbon intensity). But even had the LCFS tied carbon intensity to distance, distance alone does not equal discrimination against interstate commerce. “Distance is not congruent with state lines, and the effects of geography alone do not constitute impermissible discrimination.” Cherry Hill Vineyard LLC v. Baldacci, 505 F.3d 28, 37 n.7 (1st Cir. 2007); accord Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1234–35 (9th Cir. 2010).

In Cherry Hill, the First Circuit upheld a Maine law requiring farm winery sales to be face-to-face. Out-of-state wineries thus had to establish locations geographically closer to Maine customers in order to compete, which the First Circuit found to be “a complaint about the effects of geography” and not impermissible discrimination. Cherry Hill, 505 F.3d at 37 n.7. The Ninth Circuit similarly upheld an in-person purchase requirement for an Arizona law in Black Star Farms, finding no “differential treatment.” Black Star Farms, 600 F.3d

at 1234–35. The Rocky Mountain Plaintiffs here are similarly complaining about their unfortunate geographic circumstance.<sup>16</sup>

The LCFS does not subsidize California-produced alternative fuels while taxing out-of-state fuels. Rather, the LCFS increases the cost of fuels relative to their carbon intensity. Carbon intensity, as discussed above, does not track state boundaries but is instead determined based on a neutrally-applied, quantitative, science-based analysis. The analysis used to develop the carbon intensity numbers takes into account farming practices, crop harvesting and transportation of the crop, the biofuel production process, as well as transportation, distribution and combustion of the transportation fuel in California vehicles, to name a few factors. ISOR at ES-13 [ER 9:2209].

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<sup>16</sup> CARB has approved fuel pathways for other out-of-state ethanol producers, such as Brazilian producers, with significantly lower carbon intensities than that of California. Appellants' Request for Judicial Notice Exh. A at 50 tbl.6; see also Cal. Air Resources Bd., Method 2A/2B Applications and Internal Priority Pathways (as of 03/30/2012) at 5, 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) (listing Indonesian Molasses ethanol as the lowest carbon intensity for ethanol production). Furthermore, many Midwest producers have lower carbon intensities than the identified California average of 65.66. Appellants' Request for Judicial Notice Exh. A at 47 tbl.6. And because California ethanol producers import corn feedstock from the Midwest, the transportation component of carbon intensity for California-produced ethanol is 1.69 times higher than that of Midwest-produced ethanol. Scheible Decl. ¶ 45 [ER 4:778].

As Cherry Hill and Black Star Farms demonstrate, the dormant commerce clause does not forbid states from acting based on factors distinct from the state of origin. See also Appellants' Opening Br. 52-53. Contrary to the District Court's conclusion, California did in fact "create a process that is blind to the location of energy production" in the crucial sense that it is blind to the state of production. Cf. ER 1:60 (quoting Erwin Chemerinsky et al., California, Climate Change, and the Constitution, 25 *Env'tl. L. F.* 4, 55 (2008)). While it is true that CARB's table of carbon intensities identify different fuel pathways for corn ethanol production by "Midwest" and "California" producers, see ER 59, these labels serve no analytical value. Instead, the labels are descriptive stand-ins for complex factors used to determine carbon intensity, such as type of electrical generation. The District Court conflates a simple geographic label with discrimination based on out-of-*state* origin. Cf. Cherry Hill Vineyard, 505 F.3d at 37 n.7 ("An effect is not discriminatory, in violation of the dormant Commerce Clause, if it results from natural conditions."); accord Black Star Farms, 600 F.3d at 1234-35.

**B. Pricing carbon intensity, as the LCFS does, increases interstate market efficiency by internalizing a negative externality**

With the LCFS, California is attempting to create an efficient market signal within California to account for the state's societal cost of carbon emissions

inherent in the production and use of transportation fuels. Modifying market structures to increase economic efficiency and address harms due to market failures does not raise dormant Commerce Clause concerns.

Scholars and jurists often point to the protection of interstate market efficiency as justification for dormant Commerce Clause scrutiny. See generally Norman R. Williams, The Foundations of the American Common Market, 84 Notre Dame L. Rev. 409, 423–25 (2008) (summarizing the Framers’ fear of state parochialism); id. at 431–37 (discussing arguments for considering economic efficiency in dormant Commerce Clause cases). Thus courts tend to strike laws that promote economic protectionism by burdening out-of-state competitors. See, e.g., New Energy Co. v. Limbach, 486 U.S. 269, 273–74 (1988) (striking favorable tax treatment for Ohio-produced ethanol). Laws that promote overt or concealed economic protectionism receive strict scrutiny; nondiscriminatory laws, on the other hand, can significantly affect the balance of out-of-state to in-state industry so long as the burden does not outweigh the State’s legitimate purposes. Clover Leaf Creamery, 449 U.S. at 471, 474. The LCFS does not promote economic protectionism; rather, it imposes specific market structures on California’s transportation fuel market in order to increase, not impede, market

efficiency in furtherance of its sovereign interests in diversifying its transportation fuel supply and preventing harmful greenhouse gas emissions.

Using lifecycle analysis, California quantifies the total carbon intensity of all transportation fuels imported into or produced in the state (both fossil fuels and alternative fuels, such as ethanol). Then, by requiring importers and in-state producers of high intensity fuels to obtain credits generated from low intensity fuel imports and in-state production, California allows the market to place an explicit value on carbon intensity. In other words, the LCFS takes a negative market externality—carbon pollution—and internalizes it for purposes of California transactions. Internalizing the cost of carbon pollution in California's transportation fuel consumption corrects market failures and provides a strong price signal that encourages fuel diversity in California and alternative fuel technology development.

In the District Court, the Rocky Mountain Plaintiffs argued that the LCFS undermines the competitive advantage of Midwest ethanol producers, who can rely on cheaper coal-generated electricity. Memorandum in Support of Motion for Partial Summary Judgment on Behalf of the NPRA Plaintiffs, 2011 WL 6936368, at \*14, \*16 (filed Nov. 1, 2010). In other words, the Rocky Mountain Plaintiffs believe the judiciary should protect the comparative advantages that arise

from the unpriced negative externalities of fossil fuel reliance—externalities that harm California and the nation. But the dormant Commerce Clause does not prevent California from imposing market structures on the sale of transportation fuels within California that have the effect of internalizing—for California residents—the cost of reliance on fossil fuels. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978) (rejecting the argument “that the Commerce Clause protects the particular structure or methods of operation in a retail market”).

The District Court rejected outright the idea that California could internalize the hidden but real costs of carbon emissions in transportation fuels. To incorporate those costs into its state transportation fuels market, California has no choice but to quantify and price—in some manner—carbon intensity of fuels. Yet the District Court repeatedly stressed that carbon intensity was not a chemical or physical property of corn ethanol. ER 1:50, 1:59, 1:61, 1:64. According to the District Court, California cannot consider how corn ethanol was produced because “that production has no impact on the chemical or physical properties of the corn ethanol ultimately used in California.” ER at 1:64.

Fundamentally, the District Court, in rejecting California’s decision to use a widely-accepted science-based methodology to price the hidden costs of products

sold and used in California, usurped state policymakers' legitimate role. See S.C. State Highway Dep't, 303 U.S. at 190 (“[A] court is not called upon, as are state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected.”); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”). The District Court’s opinion is thus breathtakingly broad: it rejects any attempt to accurately price goods based on their true costs to society if those costs are neither chemical or physical properties of the goods in question. Cf. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981) (finding no discrimination in a Montana severance tax on coal mined in the state that was based, in part, on the method of extraction, which is neither a chemical nor physical property of coal).

Unfortunately, many goods impose hidden costs that are neither chemical nor physical, so the practical effect of the District Court’s decision may be to render constitutionally suspect a wide range of possible regulations that attempt to accurately reflect the true costs of goods to society. See, e.g., Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995) (finding no



discrimination for a ban on the sale of all spray paint and jumbo markers, intended to curtail graffiti).

**C. The LCFS is an innovative state program that complements and furthers EISA's goals of energy independence and U.S. energy security**

The federal Energy Independence and Security Act (EISA) of 2007, Pub. L. 110-140, 33 Stat. 479, contains incentives and mandates for biofuel production that will decrease our dependence on oil and diversify our fuel supply, thereby increasing U.S. energy security. California's innovative LCFS program complements EISA by providing additional incentives for alternative fuel development and strengthening California's fuel diversity. Such innovation is consistent with cooperative federalism and California's historic role under the Clean Air Act.

Decreasing dependence on oil, thereby achieving a subsequent increase in U.S. energy security, is one of the rationales behind EISA. See, e.g., Remarks on Signing the Energy and Security Act of 2007, 2 Pub. Papers 1570 (Dec. 19, 2007) (“[D]ependence on oil . . . . threatens our national security by making us vulnerable to hostile regimes in unstable regions of the world”); 153 Cong. Rec. H14,160 (Dec. 5, 2007) (statement of Rep. Braley) (observing that reducing our oil dependence through EISA “will strengthen our national security”); ISOR at

IV-41 to IV-42 [ER 9:2319–20]. So long as America consumes significant quantities of oil, however, energy independence from *foreign* oil cannot achieve real energy security because prices are set by the global oil market. Energy Security Leadership Council, *The New American Oil Boom: Implications for Energy Security* 11 (2011).<sup>17</sup> “[T]rue energy security comes not from reduced imports, but from reduced dependence on oil as a key input to the economy.” *Id.* Thus EISA aims to simultaneously decrease America’s oil dependence and increase viable biofuel alternatives. These goals are shared by California’s LCFS program. *See supra* Part II.B.

EISA contains a number of incentives for developing alternative fuel sources. California’s LCFS program complements EISA by providing additional incentives for alternative fuel development and strengthening California’s fuel diversity.

With EISA, Congress strengthened the federal renewable fuels standard, sometimes referred to as RFS2. FSOR at 11 [ER 6:1221]. Under RFS2, 21 billion gallons of advanced biofuels must be sold annually by 2022. *Id.* RFS2 requires fuel producers to use increasing amounts of biofuel, which is one of the

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<sup>17</sup> [http://www.eenews.net/assets/2012/05/08/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2012/05/08/document_ew_01.pdf).

pathways to compliance under the LCFS. See ISOR at II-14 to II-15 [ER 9:2250–51].

LCFS innovation goes beyond what the federal government has done in its renewable fuel standard (RFS2). FSOR at 11 [ER 6:1221]. The RFS2 is projected to achieve only one-third of the emission reductions projected under the LCFS program. Id. RFS2 is also narrower in scope than the LCFS; RFS2 does not target electricity, hydrogen or natural gas but rather looks solely to biofuels. Id.; see also ISOR at X-2 [ER 10:2484] (“[N]on-biofuels, such as compressed natural gas, electricity, and hydrogen, play important roles in the LCFS program.”).

EISA also funds research and development into cellulosic ethanol production that could increase the supply of biofuels to the California and national markets. ISOR at III–15 to III-16 [ER 9:2271–72]. The LCFS complements the various federal tax credits created to encourage the production of alternative fuels, such as the tax credits for “waste grease” biodiesel and cellulosic biofuels, by providing a market for those fuels. See ISOR at VIII-19 [ER 10:2443] (listing alternative-fuel tax incentives). In addition, the LCFS uses a carbon credit trading program that rewards incremental improvements through tradable credits that are not part of RFS2. FSOR at 11 [ER 6:1221].

Calculating lifecycle emissions for the traditional oil-derived fuels and alternative biofuels is essential to the success of both EISA and the LCFS. For example, some renewable energy production may reduce emissions at the combustion source while increasing overall emissions through emissions-intensive crop production, transport, processing, or other factors. America's dependence on oil and coal will not be broken, for example, if biofuel replacements use more fossil fuels in the cultivation or processing stage than they displace in the transportation fuel market. To further the policy goals of EISA, alternative fuels must have a lower lifecycle emissions profile than the traditional fossil fuels they seek to replace. And only lifecycle analysis enables an accurate comparison of the total carbon emissions generated by the production and use of different fuels, thereby driving innovation in truly low carbon fuels. ISOR at IV-1, IV-5 [ER 2279, 2283]; U.S. Env'tl. Prot. Agency, EPA Lifecycle Analysis of Greenhouse Gas Emissions from Renewable Fuels 5 (EPA-420-F-09-024) (May 2009).<sup>18</sup>

Not surprisingly, then, Congress required that the lifecycle greenhouse gas emissions of the advanced biofuels required under EISA be at least 50% below the lifecycle greenhouse gas emissions baseline for oil-based fuels. FSOR at 11. EISA required EPA to develop a model to measure lifecycle emissions, known as

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<sup>18</sup> <http://www.epa.gov/oms/renewablefuels/420f09024.pdf>.

GREET, which became the framework for California's analysis, called CA-GREET, of transportation fuel lifecycle emissions in the LCFS program. See ISOR at IV-8 [ER 9:2286]; U.S. Env'tl. Prot. Agency, supra; see also Appellants' Opening Br. 22-23. Indeed, the regulatory definition of "lifecycle greenhouse gas emissions" in the LCFS borrows verbatim from the EISA definition. Compare 42 U.S.C. § 7545(o)(1)(H) with 17 Cal. Code Reg. § 95841(28).

The lifecycle analysis at the heart of the LCFS is already considered a viable model for other states seeking to regulate transportation fuels. Eleven Northeastern and Mid-Atlantic States have been considering a regional low carbon fuel program and "have been closely monitoring California's efforts." Statement of the Northeast States For Coordinated Air Use Management on the California Air Resources Board's Consideration of the Proposed Regulation to Implement the Low Carbon Fuel Standard 1 (April 23, 2009);<sup>19</sup> see also ISOR at ES-5 [ER 9:2201]. Oregon is also actively drafting a low carbon fuel standard. Letter from Ore. Gov. John A. Kitzhaber to Dick Pedersen, Ore. Dep't of Env'tl. Quality, Apr. 17, 2012.<sup>20</sup>

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<sup>19</sup> <http://www.nescaum.org/documents/nescaum-lcfs-testimony-carb-20090423.pdf>.

<sup>20</sup> <http://www.deq.state.or.us/aq/cleanFuel/docs/LowCarbonStandards041712.pdf>.

Courts have long encouraged and protected states' flexibility to implement innovative economic responses to evolving problems, as an important part of cooperative federalism. See, e.g., United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442–43 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.”); New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932) (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

California's LCFS program is squarely within this concept of cooperative federalism. The LCFS achieves its additional reductions in part by expanding the LCFS trading program to more types of transportation fuels than the RFS2 regulates, including non-biofuels such as compressed natural gas, electricity and hydrogen. FSOR at 11 [ER 6:1221]. It provides important incentives—through credit trading—to continuously improve the carbon intensity of biofuels and other

alternative fuels. Id. The LCFS thus extends California’s long history of innovation in air quality regulations, a history that Congress has repeatedly supported and that other states often emulate. See, e.g., Ann E. Carlson, Iterative Federalism and Climate Change, 103 Nw. U. L. Rev. 1097, 1110 (2009) (describing how California’s Motor Vehicle Pollution Control Board preceded the Clean Air Act); id. at 1112 (noting that California’s 1970 evaporative control systems for vehicles became the federal requirement); id. at 1112 (recounting California’s novel ozone vehicle emission standards); id. at 1125–28 (detailing the development of California’s vehicle greenhouse gas emission standards); see also ISOR at X-3 [ER 10:2485] (“[I]mplementation of successful state-level programs can hasten the development of similar programs by other states, and, ultimately, by the federal government.”).

To address the problem of ensuring net emissions reduction under the federal RFS2 program while encouraging development of alternative fuels and decreasing our dependence on oil, EISA takes a holistic, lifecycle view of the greenhouse gas emissions problem. California’s complementary LCFS regulation should be allowed to do the same.

#### IV. Conclusion

The lifecycle analysis of the LCFS merely represents a shift in market priorities—away from petroleum and toward low carbon intensity fuels—without regard to state boundaries. The competitive disadvantage that the Rocky Mountain Plaintiffs fear does not amount to a dormant Commerce Clause violation. See Exxon Corp., 437 U.S. at 126 (“The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”)

California has significant policy interests in not just preventing greenhouse gas emissions that will lead to debilitating rapid climate change, but also reducing its dependence on fossil fuels and encouraging alternative fuel technologies. In response to these multiple policy interests, California has adopted an innovative market-based mechanism to put a price on the harmful greenhouse gas emissions inherent in the transportation fuels used in California.



California's LCFS program thus falls squarely within Exxon Corp. v. Governor of Maryland: California is pursuing legitimate policy goals by making changes to the structure of the market for transportation fuels sold in the state.

Respectfully submitted,

*s/ M. Rhead Enion*

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M. Rhead Enion  
Cal. Bar No. 272098

6/15/2012

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Date

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

CERTIFICATE OF COMPLIANCE  
PURSUANT TO FED. R. APP. P 29(D) AND CIRCUIT RULE 32-1

I hereby certify that, pursuant to Fed. R. App. P 29(d) and 9th Cir.R. 32-1,  
the attached **Amicus Brief of Truman National Security Institute and Truman  
National Security Project in Support of Defendants-Appellants:**

1. This brief complies with the type-volume limitation of Fed. R. App. P.  
29(d) because this brief contains 6940 words, excluding the parts of the brief  
exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.  
32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this  
brief has been prepared in a proportionally spaced typeface using Microsoft Word  
2008 with font style Adobe Caslon Pro with a typeface of 14 points or more.

*s/ M. Rhead Enion*  
\_\_\_\_\_  
M. Rhead Enion  
Cal. Bar No. 272098

6/15/2012  
\_\_\_\_\_

Date

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **Amicus Brief of Truman National Security Institute and Truman National Security Project in Support of Defendants-Appellants** 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.

*s/ M. Rhead Enion*

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M. Rhead Enion  
Cal. Bar No. 272098

6/15/2012

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Date