No. 13-

IN THE

Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

RICHARD W. COREY, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2014

QUESTION PRESENTED

Whether California's Low Carbon Fuel Standard is unconstitutional because it discriminates against out-of-state fuels and regulates interstate and foreign commerce that occurs wholly outside of California.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners are American Fuel & Petrochemical Manufacturers Association, American Trucking Associations, and Consumer Energy Alliance (collectively, AFPM).

Respondents who were plaintiffs below are Rocky Mountain Farmers Union, Redwood County Minnesota Corn and Soybean Growers, Penny Newman Grain, Inc., Fresno County Farm Bureau, Nisei Farmers League, California Dairy Campaign, Rex Nederend, Growth Energy, the Renewable Fuels Association, and the Center for North American Energy Security.

Respondents who were defendants below are Richard W. Corey, in his official capacity as Executive Officer of the California Air Resources Board; Mary D. Nichols; Daniel Sperling; Ken Yeager; Dorene D'Adamo; Barbara Riordan; John R. Balmes; Lydia H. Kennard; Sandra Berg; Ron Roberts; John G. Telles, in his official capacity as member of the California Air Resources Board; Ronald O. Loveridge, in his official capacity as member of the California Air Resources Board; Edmund G. Brown, Jr., in his official capacity as Governor of the State of California; and Kamala D. Harris, Attorney General, in her official capacity as Attorney General of the State of California.

Respondents who were intervenor-defendants below are Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, and Conservation Law Foundation.

Pursuant to Supreme Court Rule 29.6, petitioners make the following disclosures:

1. National Petrochemical and Refiners Association (NPRA) is a national trade association of more than 450 companies. In January 2012, NPRA changed its name to American Fuel & Petrochemical Manufacturers Association (AFPM). AFPM's members include virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM.

2. American Trucking Associations, Inc. (ATA) is a District of Columbia non-profit corporation. Neither ATA nor any parent, subsidiary, or affiliate has issued shares or debt securities to the public.

3. Consumer Energy Alliance (CEA) is a nonprofit, nonpartisan organization with more than 230 affiliated organizations and tens of thousands of individual grassroots members that supports the thoughtful utilization of energy resources to help ensure improved domestic and global energy security and stable prices for consumers. CEA has no parent companies, and no publicly held company has a 10% or greater ownership interest in CEA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Fuel & Petrochemical Manufacturers Association, American Trucking Associations, and Consumer Energy Alliance (collectively, AFPM) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit is reprinted in the Petition Appendix (Pet. App.) at 1a–74a and is reported at 730 F.3d 1070. The opinions concurring in and dissenting from the denial of rehearing en banc are reprinted at Pet. App. 228a–252a and reported at 740 F.3d 507. The relevant district court decisions can be found at 843 F. Supp. 2d 1071, 2011 WL 6936368, and 843 F. Supp. 2d 1042, and are reprinted at 75a–134a, 135a–171a, and 172a–225a.

JURISDICTION

The Ninth Circuit entered judgment on September 18, 2013, and denied timely petitions for rehearing en banc on January 22, 2014. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS

The Commerce Clause provides that "Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Relevant provisions of California's Low Carbon Fuel Standard, Cal. Code Regs. tit. 17 (2009), are reproduced at Pet. App. 253a–298a.

INTRODUCTION

In the decision below, a divided panel of the Ninth Circuit rejected constitutional challenges to California's Low Carbon Fuel Standard (LCFS) through which California regulates the average "carbon intensity" of transportation fuels used in California. Petitioners do not question California's authority to reduce greenhouse gas (GHG) emissions from sources in California. Petitioners seek review because the decision below upholding California's regulatory scheme conflicts with this Court's precedent that the Constitution "'forbids discrimination'" by States against interstate and foreign commerce "'whether forthright or ingenious,'" *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994), and precludes States from "attach[ing] restrictions to exports or imports in order to control commerce in other States," *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994).

The panel majority below abandoned this controlling precedent and authorized California (and other States in the Ninth Circuit) to embrace illegitimate "'legislative means'" in an area of paramount importance to the national and international economy. *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 340 (1992). In doing so, the decision below upheld the LCFS even though California adopted methods for regulating ethanol and crude oil that, while fundamentally conflicting in other respects, each discriminate to benefit California's economic interests over out-of-state and foreign competition.

First, the Ninth Circuit approved "forthright" discrimination against ethanol from the "Midwest" when it rejected, as "archaic formalism," this Court's decisions holding that a State law that discriminates on its face against interstate commerce must be evaluated under strict scrutiny. See *Or. Waste Sys., Inc.* v.

Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994). The LCFS discriminates on its face by imposing an economic penalty on fuels produced in the Midwest. Second, the court approved more "ingenious" but equally invidious discrimination by ruling that California could favor, by design, a specific in-state source of crude oil because California did not also extend that discriminatory advantage to other in-state producers. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 271 (1984). In doing so, the court ignored uncontroverted evidence in the administrative record reflecting that the LCFS was designed to benefit California's economy. Finally, the court approved California's adoption of a "lifecycle analysis" that extends California's "police power beyond its jurisdictional bounds" by imposing restrictions on imported fuels based on the way they are produced and transported outside of California. *Carbone*, 511 U.S. at 393.

As explained by Judge Murguia, who dissented from the panel decision, and Judge Smith and the other six judges who would have granted rehearing en banc, the decision below "places the law of [the Ninth Circuit] squarely at odds with Supreme Court precedent" on an issue that "threatens to Balkanize our national economy." Pet. App. 238a (Smith, J., dissenting from denial of rehearing en banc). Likewise, the decision below conflicts with decisions of other circuits that have properly applied this Court's controlling legal standards. See, *e.g.*, *id.* at 249a n.5, 250a n.6. Petitioners respectfully request that the Court grant review of the Ninth Circuit's decision.

STATEMENT OF THE CASE

A. Regulatory Background

1. California's LCFS regulates the "carbon intensity" of transportation fuels used in California

through the year 2020. LCFS §§ 95480, 95480.1(a)–(b). "Carbon intensity" refers to the total amount of GHG emissions associated with "all stages" of a fuel's "lifecycle," including all the steps required to produce the fuel and transport it to market. LCFS § 95481(a)(11), (28). Fuels with "identical physical and chemical properties" are assigned different carbon-intensity scores reflecting California's evaluation of how they are produced and transported outside of California. See Excerpts of Record (ER)10:2360.

The LCFS imposes an annual maximum "average carbon intensity" for fuel producers and importers whose transportation fuels are sold in California. The baseline average carbon intensity of gasoline under the LCFS is 95.86 gCO2e/MJ.[1] That baseline maximum average is reduced by a specified percentage each year, resulting in a 10% reduction by 2020. LCFS § 95482. The LCFS assigns a carbon-intensity score to every transportation fuel sold in California for use in motor vehicles. The regulation includes "Lookup Tables" containing the carbon intensities for various fuel "pathways," *id.* § 95486(b), tbls.6 & 7, and requires producers to use the pathway that most closely corresponds to their production processes.

Providers whose fuels have an average carbon intensity greater than the annual maximum average generate "deficits"; those with an average carbon intensity lower than the annual maximum generate "credits." *Id.* § 95485. Providers eliminate deficits by retiring credits from previous years or purchasing credits from other providers. *Id.* § 95484(b)(4). Viola-

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[1] Carbon-intensity values are expressed in units of grams (g) of carbon dioxide (CO2) equivalent (e) per megajoule (MJ) of energy (gCO2e/MJ).

tion of the LCFS exposes a provider to fines, civil penalties, and incarceration. *Id.* § 95484(e)(2).

2. Midwest corn ethanol plays a dominant role in California's current biofuel market. As explained by EPA, "over 94%" of current domestic ethanol "production capacity" comes from the Midwest, as compared to less than 1% ("0.8%") from West Coast States. 75 Fed. Reg. 14,670, 14,745 (Mar. 26, 2010). The LCFS identified "Midwest" corn ethanol "fuel pathways" because they were "the most likely pathways at this time." Supplemental Excerpts of Record (SER) 15:3620. Under the LCFS, California projects that Midwest corn ethanol would be eliminated from the California market. ER11:2726–32.

The corn ethanol pathways in Lookup Table 6 are differentiated along a number of parameters, including whether the production facility is located in "California" or the "Midwest." For example, an ethanol producer in the Midwest who uses energy from natural gas and dry mill technology and who dries its distillers grains receives a score of 98.40 gCO2e/MJ, whereas its identical counterpart in California receives a score of 88.90 gCO2e/MJ—almost a 10% reduction. LCFS § 95486(b), tbl.6. In each case, the LCFS assigns "Midwest" corn ethanol a higher carbon intensity than its "California" counterpart.

As a result of this regulation, California explained that "[i]t is highly likely that supplies of ethanol with the lowest carbon intensity will be sent to California with the remaining 'high intensity' ethanol being sold outside of California." Pet. App. 308a. California recognized that this "fuel shuffling" would "not result in reductions in" the total amount of global "greenhouse gas emissions" because shuffling would require unnecessary transportation, which may actually increase GHGs. *Id.*

3. As with ethanol, California has stated that the carbon intensity of crude oils differs based on the way they are produced and transported in interstate and foreign commerce. *E.g.*, Pet. App. 306a ("carbon intensities for mainstream crude oil production methods range from about 4 to more than 20 gCO2e/MJ"). In contrast to ethanol, however, California high-carbon-intensity crude oil represents a significant portion of the state's existing crude market. Nearly 15% of the existing California crude-oil market consists of a California high-carbon-intensity crude oil—California crude oil produced from thermal enhanced oil recovery (TEOR).

California accounted for these local economic interests by designing the crude-oil provisions in a manner that differs dramatically from the ethanol provisions. Instead of calculating individualized "fuel pathways," California calculated an "average" carbon intensity that would apply to *all* crude oils that made up 2% or more of the "'2006 California baseline crude mix.'" However, "[e]merging crude oils" that made up less than 2% of the 2006 California baseline crude mix would not benefit from the assigned "average" if they were "'high carbon intensity crude oils'" with a "total production and transport carbon-intensity value greater than 15.00." LCFS § 95486(b)(2)(A). These emerging high-carbon-intensity crude oils instead would be assigned their actual carbon intensities calculated by California.

Under these criteria, the *only* high-carbon-intensity crude oil that benefits from the default average score is California TEOR. Pet. App. 302a, 304a. By assigning California TEOR the baseline "average," California reduces its overall carbon intensity for compliance with the LCFS by 10.82 gCO2e/MJ—an amount *greater* than the entire carbon-intensity reduction re-

quired by the LCFS when fully implemented in 2020. LCFS § 95482(b).[2] Through this treatment of California TEOR, California predicted that crude-oil "refineries in the State will continue to operate at capacity" and that "[t]he displaced petroleum-based fuels will come at the expense of *imported* blendstocks." ER10:2467 (emphasis added).

4. In the administrative record, California addressed environmental and economic effects of the LCFS. California explained that, unless other states and foreign countries adopt and implement standards like the LCFS, it is "highly likely" that the LCFS will merely result in "fuel shuffling," whereby providers send their lower-carbon-intensity fuels to California and their higher-carbon-intensity fuels to other markets. Pet. App. 308a, 314–315a; SER15:3691. As a result, the LCFS would "not result in reductions in greenhouse gas emissions on a global scale." Pet. App. 308a; *accord id.* at 315a ("The end result of this fuel 'shuffling' process is little or no net change in fuel carbon-intensity on a global scale."). Because the effects of GHGs on the environment are, in California's view, determined by aggregate global GHG emissions, its acknowledgment that the LCFS would have no effect on the overall amount of GHGs "on a global scale," *id.* at 308a, means that the LCFS would provide no environmental benefit to California.

In contrast, California emphasized the LCFS's significant benefits to California's local economic inter-

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[2] The LCFS assigns California TEOR the default carbon-intensity score of 8.07 gCO2e/MJ for its production and transportation, even though California calculated the actual value to be 18.89 gCO2e/MJ. ER4:789–90; Pet. App. 302a. In contrast, Alaskan light crude must use the baseline average, which *increases* its carbon intensity for production and transportation from 4.36 to 8.07 gCO2e/MJ. ER4:789–90; ER11:2702.

ests. California recognized that the LCFS is "designed" to "stimulate the production and use of low-carbon fuels in California," SER15:3611, and to "kee[p] more money in the State" by "[d]isplacing imported transportation fuels with biofuels produced in the State," Pet. App. 317a. This is consistent with California's goal of "develop[ing] the LCFS in a manner that minimizes costs and maximizes the total benefits to California." *Id.* at 312a. Indeed, California explained that one of the LCFS's "key advantages" is that it would "reduc[e] [California's] dependence on foreign oil." *Id.* at 309a.

B. Proceedings Below

1. In February 2010, petitioners, representing refineries operating within and outside of California, filed a complaint seeking a declaration that the LCFS impermissibly discriminates against interstate and foreign commerce and regulates commerce occurring wholly outside of California. A separate group of plaintiffs, the Rocky Mountain Farmers Union (RMFU) plaintiffs, filed a similar action in December 2009. The courts below considered the cases together.

The district court granted summary judgment to both groups of plaintiffs. The court held that, as to ethanol, the LCFS facially discriminates against Midwest ethanol by assigning it higher carbon-intensity scores than "physically and chemically identical" ethanol "produced the same way in California." Pet. App. 95a; *id.* at 156a. As to crude oil, the district court held that the "design and practical effect" of the LCFS is to favor California TEOR by assigning it "an artificially favorable and lower carbon intensity value" compared to crude oils imported from other states and countries, thereby giving "an economic advantage to California TEOR" and "a mandatory economic dis-

advantage to out-of-state and foreign existing crude sources." *Id.* at 162a, 170a.

The court further held that California had failed to show that its discrimination satisfied strict scrutiny because (i) California's expert "concede[d] that California could 'adopt a tax on fossil fuels' to 'reduce greenhouse gas emissions associated with California's transportation sector'" and (ii) California acknowledged that GHG emissions could be reduced "by 'increasing vehicle efficiency' or 'reducing the number of vehicle miles traveled.'" Pet. App. 109a, 167a–169a.

Finally, the district court concluded that the LCFS regulates extraterritorial commerce by "penaliz[ing]" imported fuels based on how they are produced and transported in other states and countries. Pet. App. 105a; *id.* at 168a–169a. The court held that "the LCFS impermissibly attempts to 'control conduct beyond the boundary of the state'" and thereby extends California's "'police power beyond its jurisdictional bounds.'" *Id.* at 105a.

2. A divided panel of the Ninth Circuit reversed. The majority began with its view that "California has long been in the vanguard of efforts to protect the environment," Pet. App. 5a, and ended with an exhortation that "California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise," *id.* at 64a. In between, the panel dismissed, without elaboration, what it characterized as "a few quotes from an expansive record" that revealed that California designed the LCFS to promote California's in-state economic interests at the expense of out-of-state competitors. *Id.* at 50a n.13. The court further confirmed that it would not allow "archaic formalism" to "prevent action against a new type of harm" because

the Commerce Clause is neither a "'suicide pact'" nor "a blindfold." *Id.* at 64a.

First, the majority held that the LCFS's "regulation of ethanol does not facially discriminate against out-of-state commerce." Pet. App. 5a. Even though this Court has held that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory," *Or. Waste*, 511 U.S. at 100, the Ninth Circuit ruled that "facial discrimination" occurs "where a statute or regulation distinguished between in-state and out-of-state products *and no nondiscriminatory reason for the distinction was shown*," Pet. App. 28a (emphasis added). Although Table 6 of California's regulation assigns "Midwest" ethanol higher carbon intensity scores than chemically identical "California" ethanol, the court ruled that this was not "facial discrimination" because, in the majority's view, the State had made a "reasonable decision to use regional categories in the default pathways and in the text of Table 6." *Id.* at 43a–44a. The majority thus circumvented strict scrutiny of the ethanol provisions by holding that the Commerce Clause "does not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason." *Id.* at 64a.

Judge Murguia dissented. She explained that the majority's ruling "is inconsistent with Supreme Court precedent, which instructs that we must determine whether the regulation is discriminatory before we address the purported reasons for the discrimination." Pet. App. 68a–69a (citing *Oregon Waste*). Applying strict scrutiny, Judge Murguia concluded "California has failed to meet its burden of showing that discriminating against out-of-state ethanol is the only way to reduce lifecycle GHG emissions." *Id.* at 71a.

Second, the court concluded that (i) California designed its crude-oil provisions to avoid "shuffling" high-carbon-intensity crude oils used in California to markets outside California, (ii) "California TEOR benefited from an assessed carbon intensity value lower than its individual carbon intensity," and (iii) California TEOR was the *only* high-carbon-intensity crude oil to receive this beneficial treatment. Pet. App. 19a–20a, 49a. Nevertheless, the court concluded that "[t]here was no protectionist purpose, no aim to insulate California firms from out-of-state competition." *Id.* at 50a. In doing so, the court rejected petitioners' showing, based on this Court's decisions in *Bacchus* and *New Energy*, that discrimination in favor of an in-state interest is "no less discriminatory because it may burden some in-state competitors as well." *Id.* at 49a. The court dismissed, without discussion, compelling evidence that the crude-oil provisions were designed to benefit California's local economic interests. *Id.* at 50a n.13.

Finally, the majority ruled that the LCFS did not violate the Constitution's prohibition on extraterritorial regulation. Pet. App. 51a–52a. The majority noted that, under this Court's cases such as *Baldwin* and *Carbone*, "'States and localities may not attach restrictions to exports or imports in order to control commerce in other States.'" *Id.* at 54a–55a. The Ninth Circuit, however, held that California could "regulate commerce and contracts within [its] boundaries,"—*i.e.*, "imports"—"with the goal of influencing the out-of-state choices of market participants." *Id.* at 57a. Indeed, the panel lauded California's decision to "'essentially assum[e] legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California.'" *Id.* at 62a.

(emphasis added). Judge Murguia did not "reach" the "extraterritorial conduct" issue because she concluded that the LCFS "facially discriminates." *Id.* at 68a n.2.

3. The Ninth Circuit denied the petitions for rehearing en banc. In a separate concurrence, Judge Gould reiterated the panel majority's refusal to apply "strict scrutiny" to a facially discriminatory law, and stated that application of strict scrutiny absent a showing of "discriminatory purpose or effect" is a "type of 'archaic formalism' that should not be encouraged by the Supreme Court." Pet. App. 232a n.1.[3]

Judge Smith, joined by six judges, dissented from the denial of rehearing en banc. The dissent explained that the majority rejected "longstanding dormant Commerce Clause precedent as mere 'archaic formalism,'" Pet. App. 242a, "and place[d] the law of this circuit squarely at odds with Supreme Court precedent" in the context of a "regulatory scheme that threatens to Balkanize our national economy," *id.* at 238a. Judge Smith highlighted that seven States "which are major producers of corn and ethanol" supported rehearing because California's regulations "'clos[e] the California border to ethanol produced in Amici States in favor of chemically-identical ethanol

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[3] Judge Gould also offered his views on the prospect of "Supreme Court review" of his decision. Pet. App. 235a. He acknowledged that this Court's review "could be helpful to clarify as soon as practical what states may do of their own accord to deter or slow global warming," but suggested that "the record in this case is incomplete and thus unsuitable for understanding the full scope of the issues presented." *Id.* In doing so, Judge Gould overlooked that the Ninth Circuit's decision forecloses any further record development as to crude-oil discrimination, "facial" ethanol discrimination, and extraterritorial regulation, but establishes legal rules that require courts within the Ninth Circuit to disregard this Court's established precedent.

produced within California.'" *Id.* at 238a–239a. Judge Smith further explained that "the panel's approval of California's sweeping crude oil regulations also merited en banc review," *id.* at 240a n.2, and that "[b]y penalizing certain out-of-state practices, California's regulations control out-of-state conduct"—*i.e.*, regulate out-of-state production methods—"just as surely as a mandate would," *id.* at 249a.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Ninth Circuit's decision conflicts with this Court's cases in an area of paramount importance to the national and international economy.

I. The Ninth Circuit held that it would not analyze under "strict scrutiny" a state law that discriminates based on "state boundaries" because that would allow "archaic formalism to prevent action against a new type of harm." Pet. App. 64a. The Ninth Circuit's ruling that the LCFS's preferential treatment of "California" ethanol over chemically identical "Midwest" ethanol was not "facial discrimination" because California had offered a nondiscriminatory reason for preferring California ethanol conflicts directly with this Court's precedent holding that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste*, 511 U.S. at 100. The ruling is critically important because it allowed the Ninth Circuit to circumvent strict scrutiny, which is the accepted framework (in this context and many others) for analyzing whether discrimination that purports to advance legitimate ends does so through illegitimate "'legislative means.'" *Chem. Waste*, 504 U.S. at 340. By rejecting this Court's framework, the decision below "places the law of [the Ninth Circuit] squarely at odds with Supreme Court precedent." Pet.

App. 238a (Smith, J., dissenting). And it creates a conflict with multiple federal courts of appeals and state courts of last resort. Certiorari is warranted to resolve these conflicts.

The panel's decision likewise conflicts with this Court's decisions that prohibit States from discriminating in favor of specific in-state interests even if the State does not favor *all* in-state interests. See *Bacchus*, 468 U.S. at 271; cf. *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 275–76 (1988). The Ninth Circuit acknowledged that the crude-oil provisions benefited California TEOR, and that California TEOR was the only high-carbon-intensity crude oil that benefited. Thus, California designed the crude-oil provisions to preserve the local market for California TEOR. Nevertheless, the Ninth Circuit ruled that the crude-oil provisions "do not appear protectionist" when viewed "in the context of the full market." Pet. App. 49a. In doing so, the Court simply disregarded California's statements that it acted to benefit local industry. See *id.* at 50a n.13.

II. The Court also should grant review because the Ninth Circuit's extraterritoriality holding conflicts with precedent of this Court and other circuits holding that a State "may not attach restrictions to exports or imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393. By allowing California to penalize imported fuels based on the way they are produced and transported in other States and countries—*i.e.*, based on commercial activities outside California that have no effect on the fuel's composition or the GHGs it emits when used in California—the Ninth Circuit has allowed California to "extend [its] police power beyond its jurisdictional bounds." *Id.* The result will be balkanization of the national economy that extends far beyond the produc-

tion and transportation of fuels. If California may penalize imported fuels based on their "carbon intensity," it may likewise penalize every other imported product. And if California may restrict imports based on producers' out-of-state activities, so may every other State. California should not be permitted to obstruct interstate and foreign commerce in an effort to impose its regulatory standards on commerce outside its boundaries.

I. THE NINTH CIRCUIT'S RULINGS ON DISCRIMINATION CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

Review should be granted because the decision below conflicts with this Court's precedent governing the analysis of state laws that discriminate on their face and by design against interstate and foreign commerce. The Ninth Circuit rejected settled precedent so that it could avoid application of strict scrutiny to California's LCFS, when that scrutiny shows that the LCFS's discrimination against out-of-state competition is neither unrelated to economic protectionism nor necessary to serve California's goals of reducing GHG emissions.

A. Certiorari Is Warranted To Address The Ninth Circuit's Rejection Of This Court's Precedents On Facial Discrimination As "Archaic Formalism."

1. Under settled precedent, facial discrimination against interstate and foreign commerce must be judged based on the language of the state law—irrespective of any asserted justification for differing treatment—and facially discriminatory statutes must be subjected to the "'strictest scrutiny.'" *Or. Waste*, 511 U.S. at 100–01. The Ninth Circuit panel dis-

missed this controlling precedent as "archaic formalism," Pet. App. 64a, and, in doing so, created a conflict among the federal circuits and state courts of last resort.

On its face, the LCFS differentiates between "Midwest" ethanols and "California" ethanols, giving chemically identical "Midwest" ethanols higher carbon-intensity scores. Pet. App. 72a–73a. Indeed, the panel acknowledged that the LCFS expressly establishes "categories [that are] formed with reference to state boundaries," *id.* at 39a, and that "[t]he default pathways listed on Table 6 do categorize fuels by their origin," *id.* at 43a; see also *id.* at 72a–74a (reproducing Table 6 and illustrating the disparate treatment of Midwest and California ethanol); *id.* at 233a (Gould, J., concurring) (the "LCFS does attribute different carbon intensity values to fuels from different geographic areas"). In turn, the carbon-intensity scores assigned to Midwest ethanols place them at a disadvantage because the LCFS is designed so that "[t]he source of the ethanol" used in California will shift "to those suppliers who can produce it with lower carbon intensities." SER15:3635.

The treatment of Midwest and California ethanols on the face of the LCFS meets the well-established definition of discrimination, which "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99. The panel concluded, however, that the LCFS is not facially discriminatory because "facial discrimination" occurs only "where a statute or regulation distinguishe[s] between in-state and out-of-state products and no nondiscriminatory reason for the distinction was shown." Pet. App. 28a. Specifically, the panel held that it would "not invalidate by strict scrutiny state laws or

regulations that incorporate state boundaries for good and non-discriminatory reason." *Id.* at 64a.

As Judge Murguia and the other judges dissenting from denial of rehearing recognized, the panel's approach to facial discrimination directly contradicts this Court's decisions. Specifically, in rejecting Oregon's argument that it did not discriminate against imported waste because it had a good reason for treating that waste less favorably than domestic waste, this Court held that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste*, 511 U.S. at 100; see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 575–76 (1997) ("[i]t is not necessary to look beyond the text … to determine that it discriminates against interstate commerce"); *New Energy*, 486 U.S. at 274 ("Ohio provision … explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face" is discriminatory). Judge Murguia aptly explained that "[d]etermining whether a regulation facially discriminates against interstate commerce begins and ends with the regulation's plain language." Pet. App. 67a (following *Oregon Waste*). The panel majority's contrary conclusion conflicts with this Court's precedent.

2. The panel acknowledged this Court's approach to facial discrimination but dismissed that binding precedent as "archaic formalism." Pet. App. 64a. This Court's approach is neither "archaic" nor empty "formalism." Indeed, the Court continues to follow and reaffirm this settled framework. See, *e.g.*, *Camps Newfound*, 520 U.S. at 579, 581–82 (evaluating discrimination on face of state law, and confirming that facially discriminatory laws are subject to the strictest scrutiny); *United Haulers Ass'n* v. *Oneida-*

Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007) (reaffirming that if a law is facially discriminatory, a court then evaluates whether it advances "a legitimate local purpose").

The decision below conflicts with decisions of multiple federal courts of appeals and state courts of last resort which continue to apply this Court's standards. Specifically, the panel's facial discrimination ruling conflicts with decisions from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, which apply strict scrutiny to strike down "facially discriminatory" state laws.[4] Likewise, the panel's decision conflicts with decisions by state courts of last resort. For instance, in *Pacific Merchant Shipping*

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[4] *See Used Tire Int'l, Inc.* v. *Diaz-Saldana*, 155 F.3d 1, 3–4 (1st Cir. 1998) (holding that law is facially discriminatory without reference to purported justification and striking it down under strict scrutiny); *SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. 1995) (same); *Am. Trucking Ass'ns* v. *Whitman*, 437 F.3d 313, 320–21 (3d Cir. 2006) (explaining that "the purpose of the law would not be relevant to whether the statute was discriminatory"); *Envtl. Tech. Council* v. *Sierra Club*, 98 F.3d 774, 785–88 (4th Cir. 1996) (concluding that law "is not facially neutral" from face of the provision and does not withstand strict scrutiny); *Pelican Chapter, Associated Builders & Contractors, Inc.* v. *Edwards*, 128 F.3d 910, 917–18 (5th Cir. 1997) (discrimination on face of provision triggers strict scrutiny); *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 750–51 & n.12 (5th Cir. 2006) (explaining that under the Foreign Commerce Clause "differential treatment … without more, [is] facial discrimination subject to strict scrutiny"); *Waste Mgmt., Inc. of Tenn.* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 130 F.3d 731, 736 (6th Cir. 1997) (differential treatment on face of law triggers strict scrutiny); *Jones* v. *Gale*, 470 F.3d 1261, 1267–70 (8th Cir. 2006) (finding facial discrimination from face of state law); *Nat'l Solid Wastes Mgmt. Ass'n* v. *Ala. Dep't of Envtl. Mgmt.*, 910 F.2d 713, 720 (11th Cir. 1990) (holding that differential treatment on the face of law is facial discrimination, and that environmental purpose cannot be pursued by origin-based distinctions).

Ass'n v. *Voss*, 907 P.2d 430 (Cal. 1995), the California Supreme Court stated that "[i]n determining whether a state statute is *facially* discriminatory, the following matters are irrelevant: the justification that the state offers for the discrimination, the legitimacy of the state interests that the statute is designed to protect, the degree and scope of the discrimination, and the volume of commerce affected." *Id.* at 437; see also *D.D.I., Inc.* v. *State ex rel. Clayburgh*, 657 N.W.2d 228, 235 (N.D. 2003) ("[A]lthough avoiding double taxation of North Dakota income is a legitimate legislative goal, 'the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.'"); *Perini* v. *Comm'r of Rev.*, 647 N.E.2d 52, 56–58 (Mass. 1995) (ruling that a law's justification has no bearing on whether it is facially discriminatory).

3. Finally, the Court's framework for analyzing facially discriminatory statutes is not empty "formalism." As the Court has often observed, "the evil of protectionism" that the Commerce Clause forbids "can reside in legislative means as well as legislative ends." *City of Phila.* v. *New Jersey*, 437 U.S. 617, 626 (1978); *Chem. Waste*, 504 U.S. at 340 (same); *Maine* v. *Taylor*, 477 U.S. 131, 148 n.19 (1986). Applying strict scrutiny, this Court has "often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by 'the illegitimate means of isolating the State from the national economy.'" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 456–57 (1992); see *Hunt* v. *Wash. Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977); cf. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995) ("'searching judicial inquiry into the justification'" for discrimination is necessary to determine whether it is permissible).

Indeed, the panel's decision conflicts with this Court's approach to facial discrimination in numer-

ous contexts, all of which first evaluate discrimination based on the face of a law and thereafter, if discriminatory, subject the law to searching scrutiny. See *Bartnicki* v. *Vopper*, 532 U.S. 514, 526 n.9 (2001) (under the First Amendment "'the mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content'"); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining that the Court "must begin with [the law's] text, for the minimum requirement of neutrality [under the Free Exercise Clause] is that a law not discriminate on its face"); *United Auto. Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (under Title VII, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121–22 (1985) (under the ADEA, court looks to the face of a policy to assess whether it discriminates based on age; such discrimination is then analyzed under a statutory defense).

Contrary to the panel's decision, this Court's decision in *Philadelphia* does not support the panel's approach. The panel quoted *Philadelphia* to assert that a law is not facially discriminatory if there is "'some reason, apart from … origin'" for the disparate treatment apparent on its face. Pet. App. 39a (quoting 437 U.S. at 627). But, as the judges dissenting from the denial of rehearing en banc explained, "the language from *Philadelphia* on which the majority relies has nothing to do with determining whether a regulation facially discriminates against interstate commerce. Rather, it merely shows that some discriminatory regulations may ultimately survive strict scrutiny." *Id.* at 245a (Smith, J., dissenting) (citation omitted).

B. The Ninth Circuit's Approval Of The LCFS's Crude-Oil Provisions Conflicts With This Court's Precedent And Warrants Review.

Review by this Court also is necessary because the Ninth Circuit's decision upholding the LCFS's crude-oil provisions conflicts with this Court's precedent striking down state laws that discriminate in favor of local interests at the expense of out-of-state competitors. See, *e.g.*, *Bacchus*, 468 U.S. 263.

1. As the Ninth Circuit acknowledged, the LCFS's crude-oil provisions assign the same "average" carbon intensity to "existing" crude oils, and as a result "California TEOR," which has an exceptionally high carbon-intensity value, "was treated favorably compared to out-of-state sources." Pet. App. 47a–48a; *id.* at 49a (explaining that California TEOR was the only high-carbon-intensity crude oil that "benefited from an assessed [average] carbon intensity lower than its individual carbon intensity"). The Ninth Circuit further recognized that California designed these crude-oil regulations, in part, "to prevent the mere shift of high carbon intensity crude oils to other markets," *id.* at 19a, and that California TEOR was the "only" "high carbon intensity crude oi[l]" protected in this manner under the LCFS, *id.* at 19a–20a.

California's discrimination in favor of California TEOR is indistinguishable from the discrimination struck down in *Bacchus*. There, this Court considered a Hawaiian statute that exempted two alcohol products from an otherwise applicable 20% excise tax, but did not exempt other "[l]ocally produced sake and fruit liqueurs." 468 U.S. at 265. This Court held that the "exemption [wa]s clearly discriminatory, in that it applie[d] only to locally produced beverages, *even though it d[id] not apply to all such products*." *Id.* at

271 (emphasis added). Accordingly, this Court ruled that the excise tax exemption for two Hawaiian products violated the Commerce Clause. *Id.* at 273.

2. The Ninth Circuit held that *Bacchus* was inapposite because Hawaii "exempted the favored beverages with the explicit purpose of 'encourag[ing] development of the Hawaiian liquor industry,'" Pet. App. 50a (alteration in original) (quoting *Bacchus*, 468 U.S. at 265), whereas "[n]o equivalent statement is present here," *id.* That distinction is baffling. In developing the LCFS, California admitted that one of the LCFS's "key advantages" was that it would "reduc[e] [California's] dependence on foreign oil," *id.* at 309a, and that "[d]isplacing imported transportation fuels with biofuels *produced in the State* keeps more money in the State," *id.* at 317a (emphasis added). In fact, California predicted that crude-oil "refineries in the State will continue to operate at capacity" and that the "displaced petroleum-based fuels will come at the expense of imported blendstocks." ER10:2467. Indeed, the Ninth Circuit itself agreed with California that one of its purposes in designing the crude-oil provisions was to prevent the "shift of high carbon intensity crude oils to other markets," Pet. App. 19a, and that the only high-carbon-intensity crude oil to benefit from that design was California TEOR, *id.* at 20a; see also *id.* at 46a. As in *Bacchus*, the crude-oil provisions are designed to benefit an in-state product in California by shielding it from interstate and foreign competition.

Contrary to the Ninth Circuit's conclusion, Pet. App. 50a, the LCFS is not immune from challenge because it benefits California's one high-carbon-intensity crude oil and not other in-state crude oils. *Bacchus* struck down the preferential treatment given to two in-state products even though that prefer-

ential treatment did not extend to other in-state competitors. 468 U.S. at 271. Likewise, the Ninth Circuit's ruling conflicts with *Carbone*, which held that discrimination favoring only one in-state entity "just makes the protectionist effect of the ordinance more acute." 511 U.S. at 392. And, more generally, the Ninth Circuit's determination conflicts with *New Energy*, which held that "neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." 486 U.S. at 275–76.

Finally, the panel was wrong in asserting that California's statements in the administrative record "do not plausibly relate to a discriminatory design." Pet. App. 50a n.13. To the contrary, California stated that the crude-oil provisions were designed to "*reduce* the incentive for regulated parties to comply with the LCFS by shifting to less carbon-intensive crude oils or refinery operations." *Id.* at 300a (emphasis added). The LCFS protects California TEOR from competition from out-of-state crude oils by assigning it the more favorable "default average carbon intensity values." *Id.* at 302a. California designed the LCFS to avoid displacement of California TEOR by imported crude oils with lower carbon intensities, consistent with its express strategy of decreasing dependence on "foreign imports of oil" and "keep[ing] more money in the State." *Id.* at 316a–317a.

C. Review Is Necessary Because The LCFS Cannot Satisfy Strict Scrutiny Under This Court's Precedent.

Review of the decision below is necessary because the Ninth Circuit's efforts to circumvent strict scrutiny underscore its importance for ferreting out improper economic protectionism and assessing whether discrimination truly is necessary to achieve legiti-

mate local goals. Application of strict scrutiny shows that the LCFS was designed to promote "California's energy industry at the expense of out-of-state competitors" in an area of critical importance to the national economy. Pet. App. 247a (Smith, J., dissenting); *e.g.*, *id.* at 317a ("Displacing imported transportation fuels with biofuels produced in the State keeps more money in the State.").

Discriminatory state laws are invalid "unless [the State] can 'sho[w] that [they] advanc[e] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Or. Waste*, 511 U.S. at 99–101 (second alteration in original) (citing cases). To be "legitimate," the "local purpose" must be "'unrelated to economic protectionism.'" *Id.* at 106. That is, this Court's cases "condemn as illegitimate … any governmental interest that is not 'unrelated to economic protectionism.'" *Id.* (rejecting state's "benign" "characterization" of its law where it "incorporates a protectionist objective as well").

First, the LCFS is not "unrelated to economic protectionism." California acknowledges that at every turn it designed the LCFS to transform the interstate and foreign market for transportation fuels "in a manner that minimizes costs and maximizes the total benefits to California." Pet. App. 312a. The LCFS's ethanol provisions discriminate against Midwest ethanol—the dominant biofuel used in California—by *encouraging* its diversion to other jurisdictions and thereby promoting biofuel production in California. *Id.* at 308a. In contrast, the LCFS's crude-oil provisions discriminate in favor of high-carbon-intensity California TEOR by *discouraging* its diversion to markets outside of California and protecting it from competition by out-of-state crude oils. *Id.* at 46a. These contradictions in the design of the LCFS can be

reconciled only because they both further California's economic interests, including its goal of decreasing "dependence on foreign oil" and keeping "more money in the State." *Id.* at 309a, 317a. Discrimination designed expressly to benefit in-state economic interests at the expense of out-of-state competitors is precisely what the Commerce Clause forbids.

Second, this discrimination is not necessary to further the goal of reducing global GHG emissions. See *Carbone*, 511 U.S. at 392 (requiring defendant to show that it has "no other means to advance" its local purpose than through discrimination). California's own expert admitted below that "California could 'adopt a tax on fossil fuels' to 'reduce greenhouse gas emissions associated with California's transportation sector.'" Pet. App. 168a.

Nor has California shown that other nondiscriminatory means of reducing GHG emissions—for example, improving vehicle efficiency, reducing miles traveled, or regulating other sources of GHG emissions—would be inadequate. Indeed, California's own analysis calls into doubt whether the LCFS would reduce global GHG emissions *at all*. California acknowledged that the LCFS would result in "fuel shuffling" that "'would reduce the carbon intensity of the California market by altering the world-wide distribution of fuels" but would not "*reduce global GHG emissions*." Pet. App. 19a (emphasis added); *id.* at 46a–47a (same). Despite the admittedly dubious benefit of the LCFS, California decided to adopt a discriminatory regime to grow in-state industry at the expense of out-of-state and foreign competitors.

II. THE NINTH CIRCUIT'S EXTRATERRITORIALITY HOLDING WARRANTS REVIEW.

The Ninth Circuit's extraterritoriality holding also warrants review. This Court has long held that States may not "attach restrictions to exports or imports in order to control commerce in other States," because doing so "would extend the [State's] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393. That is precisely what the LCFS is designed to do. By upholding California's decision to penalize imported fuels based on the way they are produced and transported outside California, the Ninth Circuit approved California's stated assertion of "'legal and political responsibility for emissions of carbon resulting from the production and transport'" of transportation fuels "'regardless of location.'" Pet. App. 62a. But California "has no power to project its legislation into" other States and countries. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). The Ninth Circuit's decision "departs from the holdings of [this] Court and [other] circuits," and "approves a regime that threatens the very sort of 'economic Balkanization'" the Commerce Clause was meant to prevent. Pet. App. 248a (Smith, J., dissenting).

1. The "Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotation marks and omission omitted); *accord Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 579–84 (1986). By confining States' regulatory jurisdiction to commerce within their own borders, the Commerce Clause enforces territorial limits on state power that are inherent in the federal structure of the Constitution. See, *e.g.*, *Shaffer* v.

Heitner, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").[5] These provisions "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335–36. They also reflect bedrock principles of political representation and accountability: one State's officials lack power to regulate the activities of people in other States whom they do not represent and to whom they are not accountable. See *S. Pac. Co.* v. *Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945).

In determining whether a law regulates extraterritorially, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. At a minimum, this means that States "may not attach restrictions to exports or imports in order to control commerce in other States." *Carbone*, 511 U.S. at 393. In *Baldwin*, this Court held that New York could not "put pressure" on out-of-state milk producers to raise their prices by prohibiting the resale of imported milk that was bought in another state at a price below New York's minimum price. 294 U.S. at 521–

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[5] The structural limit on extraterritorial regulation is reflected in many other provisions of the Constitution, including Article IV's Privileges and Immunities and Full Faith and Credit Clauses, Article I's Import-Export Clause, and the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315–18 (1992).

24. Likewise, *Carbone*, citing *Baldwin*, held that a town could not restrict waste exports "as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." 511 U.S. at 393. These precedents hold that States may not impose "obstructions to the normal flow of commerce" in an effort to change commercial conduct in other States, *Baldwin*, 294 U.S. at 524, because this would "extend the [State's] police power beyond its jurisdictional bounds," *Carbone*, 511 U.S. at 393.

The Ninth Circuit's decision conflicts with these precedents. The LCFS's express purpose is to force out-of-state fuel producers to change the way they produce and transport fuels to avoid the price penalty the LCFS imposes on fuels with high carbon-intensity scores. LCFS § 95480; see Pet. App. 13a–14a. As California explained, by penalizing fuels based on their "lifecycle" GHG emissions, the LCFS requires out-of-state producers to "alter production methods, sources of power, or other aspects of their business in order … to compete for business in California." SER14:3578. That is precisely what this Court's precedents forbid. Just as "[o]ne state may not put pressure … upon others to reform their economic standards" by restricting imports, California may not "project its legislation" beyond its borders by conditioning access to its market on compliance with California's regulatory policies. *Baldwin*, 294 U.S. at 521, 524.

Contrary to the Ninth Circuit's assertion, California did not "properly bas[e] its regulation on the harmful properties of fuel." Pet. App. 58a. Carbon intensity is not a property of fuel; it is a score that California assigns to the fuel based on California's assessment of the GHG emissions from the fuel's production, transportation, and combustion. ER10:2360; SER15:3700. Because fuels produced within and out-

side the State are physically identical, and thus produce the same emissions when combusted in California, the only variable—the factor that produces the price penalty—is the application of California's regulatory policies to the emissions from the fuel's production and transportation, activities that occur outside California. Those activities are beyond California's jurisdiction, "'whether or not the[y] … ha[ve] effects within the State.'" *Healy*, 491 U.S. at 336.

Moreover, there is a fundamental difference between regulating an imported *product* based on its harmful physical properties—which cause harm due to the product's presence in the State—and restricting access to the California market based on the producer's out-of-state commercial *activities*. The former is a proper exercise of the State's police power; the latter, an improper attempt to "extend the [State's] police power beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393; see *Brown-Forman*, 476 U.S. at 580 (the "mere fact that the effects" of an extraterritorial law "are triggered only by [in-state] sales … does not validate the law if it regulates the out-of-state transactions of [parties] who sell in-state").[6]

Nor is it an answer to repackage the LCFS's price penalty as an "incentiv[e]." Pet. App. 56a. No precedent supports the Ninth Circuit's conclusion, contrary to *Carbone* and *Baldwin*, that States may restrict imports "with the goal of influencing the out-of-state

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[6] There is thus no merit to Judge Gould's concern that striking down the LCFS "would spell the end of much beneficent state legislation." Pet. App. 238a n.2. States would remain free to adopt safety standards for products sold in their own State. They could not, however, penalize imported goods because they were produced in factories that are subject to regulations that do not precisely mirror their own, which is the more apt analogy to the LCFS. *See id.* at 250–251a (Smith, J., dissenting).

choices of market participants." *Id.* at 57a. The panel cited *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), but "nothing in *Walsh* repudiates the principle that a state may not close its borders to out-of-state goods unless exporters alter their out-of-state conduct." Pet. App. 251a n.7 (Smith, J., dissenting). The Maine law in *Walsh* was aimed at drug manufacturers' *in-state* conduct (payment of rebates); it did not penalize imported drugs in an effort to impose Maine's standards on manufacturers' out-of-state production processes. Here, by contrast, the LCFS would fail to achieve its stated purpose if it did *not* change producers' out-of-state production processes.

2. Review also is necessary because the decision below puts the Ninth Circuit "squarely at odds with [its] sister circuits." Pet. App. 250a n.6 (Smith, J., dissenting). Following this Court's precedents, the Seventh and Tenth Circuits have correctly held that a State may not restrict imports in an effort to impose its regulatory standards on commerce in other States. See *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151 (7th Cir. 1999) (per curiam) (*Meyer II*); *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652 (7th Cir. 1995) (*Meyer I*); *Hardage* v. *Atkins*, 619 F.2d 871 (10th Cir. 1980) (all invalidating restrictions on imported waste not processed in accordance with the State's standards). Unlike the decision below, these cases recognize that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders." *Meyer II*, 165 F.3d at 1153; *accord Hardage*, 619 F.2d at 873 (a State may not obstruct commerce in an effort to "forc[e] its judgment with respect to hazardous wastes on its sister states").

These cases cannot be distinguished on the ground that the laws they addressed applied to products that were "produced, sold, and used outside" the regulating State, whereas the LCFS applies only to fuels sold and used in California. Pet. App. 55a (citing *Meyer I*). In *Meyer II*, the Seventh Circuit struck down Wisconsin's law even *after* it had been narrowed to apply only to Wisconsin-bound waste. 165 F.3d at 1152–53. Nor can these cases be distinguished because the laws there "require[d] other jurisdictions to adopt reciprocal standards" as a condition of importation. Pet. App. 55a. There is no material difference between conditioning favorable treatment on another State's adoption of certain standards and conditioning favorable treatment on commercial actors' conformance of their out-of-state conduct to those standards. Either way, the State is improperly attempting to impose its regulatory standards on commerce that occurs outside of the State. *Baldwin* confirms the point: the New York law there did not require other States to adopt New York's minimum milk price, but attempted to achieve the same end by conditioning resale of imports on milk producers' adherence to New York's minimum price.

The decision below further conflicts with the First Circuit's decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). That case invalidated a law imposing a 10% penalty on parties bidding for government contracts in Massachusetts if they did business in Burma. *Id.* That the law imposed a price "incentive" rather than a total ban was immaterial. See *New Energy*, 486 U.S. at 275 (whether a law bans "all transport of the subject product" or simply places the product at a "substantial commercial disadvantage" "makes no dif-

ference for purposes of Commerce Clause analysis"); cf. Pet. App. 60a–61a (asserting that under the LCFS "[n]o form of fuel would be excluded"). The law was invalid because its "intention and effect [was] to change conduct beyond Massachusetts's borders." 181 F.3d at 69. Likewise, the LCFS is invalid because its express intention and practical effect is to change conduct beyond California's borders.

3. Finally, review is necessary because the decision below opens the door to unprecedented state regulation of extraterritorial commerce and with it the balkanization of the national economy. The logic of the Ninth Circuit's decision is not limited to transportation fuels. Because all human activity generates GHG emissions, every imported product could be assigned a carbon-intensity score based on the emissions from its production and transportation. Thus, if California may penalize transportation fuels based on their carbon intensity, it may likewise penalize every other imported product, whether it be peaches from Georgia, cars from Michigan, milk from Vermont, or wine from France. See Pet. App. 250a–251a (Smith, J., dissenting). And "if [California] can insist on [fuel producers] doing things the [California] way in order to obtain access to the [California] market, other states can insist on similar or different prerequisites to their markets." *Meyer I*, 63 F.3d at 662. This would produce the very sort of "competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337.

On the other hand, invalidation of the LCFS would not leave States without a remedy for GHGs emitted in other States. The remedy in these circumstances has never been for States to resort to self-help under state law. Rather, the answer lies with federal law. See *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct.

2527, 2535–36 (2011). If California desires to reduce GHG emissions from the production and transportation of fuels in other States and countries, its remedy is to persuade the federal government to act pursuant to its broad authority over interstate and foreign commerce. See *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 423 (1946) ("The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce."). California may not, however, arrogate to itself the power to regulate commerce outside its borders. Regulation of interstate and foreign commerce is reserved "to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes." *Healy*, 491 U.S. at 340.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

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