No. 13-1149

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are distinguished professors of law from several leading law schools across the country. Amici have lectured and written extensively on issues of constitutional law in general and state sovereignty in particular. They believe that California's blatant attempt to establish a nationwide transportation-fuel-production standard is unconstitutional under fundamental principles of state sovereignty, and that the Court should grant certiorari to review this important decision. A list of Amici is set forth in the appendix hereto.[1]

SUMMARY OF ARGUMENT

Like most commodities, the biofuel ethanol can be produced in many different ways. Corn ingredients, for example, can be milled using different methods. Different sources of fuel for heat energy can be deployed. Grain byproducts can differ based on manufacturers' practices. Whatever their differences, though, none of these commercial choices affects the end-product. When a gallon of ethanol leaves the plant, that gallon's production history has no bearing on its properties or performance at its destination. Ethanol is ethanol.

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1. Pursuant to Supreme Court Rule 37.6, counsel for Amici states that no counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, Amici state that Petitioners and Respondents, upon timely receipt of notice of Amici's intent to file this brief, have consented to its filing.

Yet California sees the idiosyncratic choices of all ethanol producers—wherever they may be—as ripe for its oversight. According to California, different production methods yield different levels of greenhouse-gas emissions, which, in turn, affect the global climate, which, in turn, has worldwide consequences. App. 7a, 63a-65a. And, the argument goes, because California is part of the world, it can legitimately exercise its police power to "exert an influence" on environmental standards across the nation. ER8:1853. All California needs is a hook.

California found it in the nation's integrated economy. California's Low Carbon Fuel Standard (LCFS) assigns benefits and burdens to ethanol sold in the state based on an assortment of factors having nothing to do with how the ethanol actually performs in the state. Whatever the ethanol's place of origin, a unit's "carbon intensity" level is calculated by reference to the "location of the production facility," the "type of corn milling," the "type of distillers grains produced," and the "source of fuel for heat energy and co-generated electrical power." ER:7:1718. This calculation has profound significance. Favored practices earn credits; disfavored practices expose fuel distributors to financial burdens and, potentially, civil and criminal penalties. Pet. 4-5. The deliberate result is that out-of-state ethanol producers find it harder to sell their ethanol in California depending on their purely out-of-state business practices.

A deeply divided Ninth Circuit upheld the LCFS, with the majority applauding California for "assum[ing] legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in

California." App. 62a (emphasis added) (citation omitted). But while the LCFS may be "innovative," App. 71a, its constitutional shortcomings are not new. Our federalism "preserves the sovereign status of the States," *Alden v. Maine*, 527 U.S. 706, 714 (1999), and reserves to each "numerous and indefinite" powers within its jurisdiction, The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). Since the Founding, there has been a "historic tradition that all the States enjoy equal sovereignty." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2621 (2013) (citation omitted). And by necessity, "[t]he sovereignty of each State ... implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

This so-called "horizontal federalism" is as much a part of our constitutional structure as the distribution of power between the federal government and the states. It finds expression throughout the Constitution, and it manifests itself in this Court's precedents as a ban on "extraterritorial" regulation—the projection of one state's laws beyond its borders. Extraterritorial laws raise grave concerns wherever they surface, but especially in the zone of interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

To be sure, neither Congress's commerce power nor the federal system in general keeps states from "policing [their] own concerns," even if a state's "regulations may beget effects on those living beyond its borders." *Pac. Coast Dairy v. Dep't of Agric. of Cal.*, 318 U.S. 285, 295 (1943). Subject to limits, a state may protect its citizens from harm caused by articles of commerce, whether those products originate within the state or arrive from outside.

But far from "policing its own concerns," *id.*, California's LCFS exploits free trade between the states to impose its policy views on the other members of the Union. The production choices California seeks to police are not related to the cross-border ethanol sales the LCFS regulates. The regime instead works to discourage out-of-state commercial practices that visit the same undifferentiated harm in California whether the end-product crosses into California or comes to rest elsewhere. App. 10a ("One ton of carbon dioxide emitted when fuel is produced in Iowa … harms Californians as much as one emitted when fuel is consumed in Sacramento."). The Constitution does not license states to seize on in-state commerce, backtrack up the supply chain, and "assum[e] legal and political responsibility" for whatever out-of-state practices strike them as unwise. App. 62a (citation omitted). Rather, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). In the parlance of the extraterritoriality doctrine, a state "extend[s] [its] police power beyond its jurisdictional bounds" by using commercial laws to curtail perceived wrongdoing elsewhere. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994).

The Ninth Circuit gravely erred in departing from these foundational principles. The need for this Court's intervention is all the more pressing because California's foray into national policy is already inviting "just the kind of competing and interlocking local economic regulation" that horizontal federalism is meant to preclude. *Healy*, 491 U.S. at 337. Despite its concession that critical factors in the LCFS are "highly uncertain" and "variable," ER6:1350, California openly offers its regime as "a

model for other entities in the U.S. and internationally," ER7:1551. Numerous states are accepting the invitation. App. 59a & n.14. And despite the Ninth Circuit's optimism, there is little chance that these emerging laws will "complement[]" the LCFS or one another. App. 59a. For example, Oregon—a state the Ninth Circuit cited with approval—is contemplating a carbon-intensity law that differs from California's in a way that "will drastically alter" how "regulated parties strategize to comply with the low carbon fuel standards." This prospect of "interlocking, if not entirely contradictory regulatory regimes," App. 250a (M. Smith, J., dissenting from denial of rehearing en banc), could not be further from the coequal sovereignty the Framers envisioned, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (each state may "serve as a laboratory" to "try novel social and economic experiments," but only when it does so "*without risk to the rest of the country*") (emphasis added). This Court should grant certiorari to review this important case. And it should hold that California's power over its own intrastate concerns does not translate to a mandate over environmental policy nationwide.

ARGUMENT

I. The LCFS Targets Out-of-State Commercial Practices With No Bearing On The Properties Of California-Bound Fuels.

Charged by the state legislature to reduce statewide greenhouse-gas emissions to 1990 levels by 2020, Cal. Health & Safety Code § 38550, *et seq.*, the California Air Resources Board (CARB) promulgated the LCFS, which seeks to reduce the "carbon intensity" levels of

transportation fuels offered for sale in California, Cal. Code Regs. tit. 17, § 95480, *et seq.* The LCFS sets a ten-year schedule for decreasing the carbon-intensity level of such fuels. In 2014, the LCFS permits a regulated entity to distribute an aggregate of gasoline or gasoline substitutes with a maximum average carbon-intensity level of 97.47 gCO_2e/MJ. *Id.* § 95482(b) (Table 1). In 2015, the maximum average reduces to 96.48 gCO_2e/MJ, and by 2020, it will be 89.06 gCO_2e/MJ. A regulated entity that comes in under the maximum for one type of fuel can earn "credits," which in turn can be used to offset higher carbon-intensity levels for other fuels or be sold to other companies. A regulated entity that exceeds the maximum must surrender earned credits or purchase credits from other companies.

In CARB's words, "[c]arbon intensity is not an inherent chemical property of a fuel, but rather it is reflective of the process in making, distributing, and using that fuel." ER9:2161. The carbon-intensity level of a unit of fuel aims to account for the total quantity of greenhouse-gas emissions traceable to the production, distribution, and use of the fuel. This "lifecycle analysis" includes variables that reflect "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." Cal. Code Regs. tit. 17, § 95481(a)(38); App. 8a n.1.

Accordingly, two gallons of ethanol fuel can have "identical physical and chemical properties" and yet be assigned significantly different carbon-intensity levels. App. 26a (citation omitted). For example, the LCFS assigns a lower carbon-intensity level to ethanol produced

in a wet-mill plant than a dry-mill plant. ER10:2435. Carbon intensity also varies depending on what is done with the byproduct of production; yet another factor is the type of fuel that the ethanol refinery uses. ER7:1718. But whichever practice a manufacturer employs, the end-product is always the same because "the market relies on this undifferentiated structure[.]" App. 26a.

The point of California's exercise is to bring pressure to bear on the business and farming practices that go into producing an ultimately indistinguishable commodity. As CARB acknowledged, it was concerned that "a significant portion of the emissions generated by fuels … occurs before the fuel is combusted in a vehicle." Appellants' Br. 21. So "to account for emissions associated with all aspects of the production, refining, and transportation of a fuel," CARB designed the LCFS "with the aim of reducing total, well-to-wheel [greenhouse-gas] emissions." App. 11a. It even imposes a hefty carbon-intensity penalty on all ethanol fuels to discourage the conversion of non-agricultural land that might occur as farmers seek to enter the corn ethanol feedstock market. ER9:2295.

In so doing, however, California is openly targeting commercial and agricultural activity beyond its borders. For example, the LCFS favors or burdens ethanol crossing state lines based on the location of production, the type of corn milling, the type of distillers grains produced, and the source of fuel for heat energy. Yet none of these features has any effect on the properties of the ethanol ultimately consumed in California. Regardless of whether an out-of-state producer uses a "wet" or "dry" corn ethanol plant or creates a byproduct of wet or dry distillers grain, the resulting gallon of ethanol will be the same.

And regardless of whether that gallon is later burned in Long Beach or on Long Island, its contribution to climate change in California—and the world at large—is constant. Thus, the LCFS targets commercial and agricultural practices outside of California not because they have any effect on the fuel brought into California, but because California perceives such practices to be harmful to the environment generally.

California denies none of this. CARB freely conceded below that the "[l]ifecycle analysis can, and often does, include consideration of activities that occur outside of California." Appellants' Br. 74. In its view, "emissions generated outside of California pose the same risk to California citizens as those generated inside California." *Id.* 19; App. 10a. By design, then, CARB has coercively altered market conditions in California—the largest state in the ethanol market—to bring pressure to bear on wholly out-of-state business practices.

II. The Extraterritoriality Doctrine Has Always Been The Bedrock Of Horizontal Federalism.

A. Our Federal System Leaves The States Significant Authority, But Only Within Their Sovereign Jurisdictions.

Our federalism "preserves the sovereign status of the States," *Alden*, 527 U.S. at 714, and reserves to each "numerous and indefinite" powers while according the federal government "few and defined" ones, The Federalist No. 45, at 289. Each state retains power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people,

and the internal order, improvement, and prosperity of the State." *Id.* In this way, states remain "more sensitive to the diverse needs of a heterogeneous society" and "more responsive" to their citizenry. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted).

As against one another, the states are "upon an equal footing, in all respects whatever." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845). The Tenth Amendment deliberately reserves powers "to the States *respectively*"—not to the states as a single unit. U.S. Const. amend. X (emphasis added). Since the Founding, therefore, there has been a "historic tradition that all the States enjoy equal sovereignty." *Shelby Cnty., Ala.*, 133 S. Ct. at 2621 (citation omitted); *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) ("[T]he States in the Union are coequal sovereigns under the Constitution."). Each state, upon its entry into the Union, is granted equal representation in the Senate—a body that "derive[d] its powers from the States as political and coequal societies." The Federalist No. 39, at 240 (J. Madison).

However expansive, a state's authority is limited to its own sovereign land. No state may, by exercising authority over another state, infringe the sovereignty of that other state or reduce the equally "numerous and indefinite" powers expressly reserved to the other state. "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Brown v. Fletcher's Estate*, 210 U.S. 82, 89 (1908) (citation omitted).

The requirement that states respect the sovereignty of sister states finds expression throughout the Constitution.

The Full Faith and Credit Clause, for example, imposes a "constitutional obligation to enforce the rights and duties validly created under the laws of other states." *Hughes v. Fetter*, 341 U.S. 609, 611 (1951); U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). And the Privileges and Immunities Clause similarly bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States," *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), thereby "plac[ing] the citizens of each State upon the same footing with citizens of other States," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); U.S. Const. art. IV, § 2.

The need for equal sovereignty has special purchase when it comes to interstate commerce. The very point of forming the union was to create a separate sovereign that, though limited in power, would have singular authority to regulate on a national scale. Many feared that commercial relations between the states would remain "fettered, interrupted, and narrowed by a multiplicity of causes" so long as local laws could infringe on commerce among the states. The Federalist No. 11, at 85 (A. Hamilton); James Madison's "Preface to Debates in the Convention of 1787," *in* 3 Records of the Federal Convention of 1787, 547 (Max Farrand, ed. 1911). Indeed, the precursor to the Constitutional Convention, the lesser-known Annapolis Convention of the previous year, had been convened specifically to "consider how far a uniform system in [the states'] commercial regulations may be necessary for their common interest and permanent harmony." *Resolution of the Virginia Legislature, Jan 21, 1786*, *quoted in* Daniel

A. Farber & Suzanna Sherry, A History of the American Constitution 30 (2d ed. 2005).

This demand for a national authority stemmed not only from competition between the states but also from the sheer difficulty of coordinating so many jurisdictions. Although friction among the states was often due to tariffs and parochial disputes, their disunity was not just a product of protectionist rivalry. Numerous states, for instance, had sought separately to advance the generally beneficial goal of improved trade relations with Great Britain. But "the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, ... frustrated every experiment of the kind." The Federalist No. 22, at 140 (A. Hamilton). This discord would persist, Hamilton predicted, "as long as the same obstacles to a uniformity of measures continue to exist." *Id.* The Constitution thus confers only on the federal government the singular, but limited, power to regulate on a national scale. The states retain significant—indeed, "numerous and indefinite"—powers, but only within their sovereign jurisdictions.

B. The Extraterritoriality Doctrine Inheres In Our Constitutional Tradition.

The extraterritoriality doctrine follows from the Constitution's text, structure, and history, but it also reflects "foundational principles of our federalism." Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1885 (1987). Importantly, "the extraterritoriality principle does not flow from the

dormant commerce clause." *Id.* at 1887. By securing to each state the power over its internal affairs, it derives "from the structure of the Constitution as a whole." *Id.* at 1885; Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law & Legislation*, 84 Notre Dame L. Rev. 1057, 1060 (2009) (the extraterritoriality principle is "better understood as a prohibition rooted in general structural principles of horizontal federalism"). Some attributes of sovereignty are so elemental to our republican form of government that they inhere in the compact that formed this nation. *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Haywood v. Drown*, 556 U.S. 729, 742-77 (2009) (Thomas, J., dissenting). The foundational principle that "[n]o state can legislate except with reference to its own jurisdiction" is one of them. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

This holds especially true in matters of commerce. *Healy*, 491 U.S. at 335-36 (noting "the Constitution's special concern … with the maintenance of a national economic union"). In that arena, the extraterritoriality doctrine holds "at a minimum" that a state may not apply its law "to commerce that takes place wholly outside of the State's borders." *Id.* at 336. It makes no difference "whether or not the commerce has effects within the State," *id.*; if the "practical effect" of a state law is "to control conduct beyond the boundaries of the State," the law "exceeds the inherent limits of the enacting State's authority and is invalid … ." *Id.*

This is not to say that states have no control over the properties of goods that arrive within their borders

from elsewhere. Quite the opposite. The Court has long held "that a state is not disenabled from policing its own concerns[] by the mere fact that its regulations may beget effects on those living beyond its borders." *Pac. Coast Dairy*, 318 U.S. at 295. A state is free, for instance, to set product safety standards or labeling rules on items sold within its borders, and these laws may govern cross-border products so long as the rules are even-handed and "regulate matters of 'legitimate local concern.'" *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citation omitted). In other words, in regulating goods that hail from other states, a state can address those harms that arise because of the products' presence or use within its borders. That is the essence of a "local" interest. *Cf. Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 351 (1939) ("One of the commonest forms of state action is the exercise of [] police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens.").

As an example, Vermont required that mercury-containing light bulbs sold in the state bear a label identifying that ingredient. Vt. Stat. Ann. tit. 10, § 6621d(a), *repealed by* 2005, No. 13, § 4(a). This law governed all bulbs sold at retail, to retailers, or for use in Vermont, *id.,* and it applied regardless of the bulb's origin. In upholding the law, the Second Circuit maintained that it was a "legitimate intrastate regulation." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001). Even if the law might "as a practical matter" oblige bulb manufacturers "to label lamps sold in every other state," *id.* at 110, Vermont had targeted a state-specific harm—threats to "human health and the environment from mercury poisoning," *id.* at 115—that existed solely

by virtue of the regulated item's presence and use within the state.

At base, the interests served by local regulations are just that—local. A product's arrival in a state does not give that state plenary power over the supply chain from end to end ("well-to-wheel," in the Ninth Circuit's words. App. 11a.). Vermont could not, for instance, "condition importation" of light bulbs "upon proof of a satisfactory wage scale" at an originating New York plant—even if Vermont were to impose that requirement only on bulbs that crossed into its jurisdiction. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). Whatever the New York plant's wage scale, the bulbs used in Vermont would be the same. And whatever harm the wage scale might visit on neighboring Vermont, that harm would not depend on how many—if any—light bulbs crossed state lines. As to Vermont, New York wages would be "none of her concern." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

Thus, a state can regulate in-state aspects of interstate transactions, but, at a bare minimum, it can do so only when there is a nexus between the state's regulatory interest and the transaction's effects within the state. Where New York's product would harm Vermont equally if it were to enter Vermont or go elsewhere, Vermont cannot project its commercial regulations across state lines under the guise of "policing its own concerns." *Pac. Coast Dairy*, 318 U.S. at 295. The "sovereign prerogative[]" to remedy such out-of-state mischief rests with the product's host state or is "lodged in the Federal Government." *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007); Florey, *supra* at 1091 ("[The extraterritoriality doctrine] is perhaps best understood as a means of establishing order—and confining each state to its proper sphere of authority—in a federalist system.").

III. The Ninth Circuit's Decision Cannot Be Reconciled With The Constitution's Structure Or With This Court's Precedent.

A. California Outstrips Its Jurisdiction By Seeking To Shape Commercial Practices Nationwide.

In upholding the LCFS, the Ninth Circuit framed the regulation as an innocent exercise of California's police power. "[T]he state faces tremendous risks from climate change," the Ninth Circuit reasoned, App. 63a, so any law that purports to combat climate change is a legitimate exercise of the state's power. It makes no difference whether the practices California views as environmentally harmful take place inside or outside of the state's borders. Because "[o]ne ton of carbon dioxide emitted when fuel is produced in Iowa … harms Californians as much as one emitted when fuel is consumed in Sacramento," App. 10a, California may properly "assume[] legal and political responsibility for emissions of carbon resulting from the production and transport, regardless of location, of transportation fuels actually used in California," App. 62a. All that is required is a cross-border hook, however tenuous.

This view of interstate relations does not square with basic principles of federalism. To the contrary, the LCFS upends federalism by dubbing the California Air Resources Board the nation's arbiter of environmental best practices. Under our federal system, "[t]he sovereignty of each State ... implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp.*, 444 U.S. at 293. Regulating environmental matters is

closely linked with protecting the health and safety of a state's citizens—one of the "numerous and indefinite" powers reserved to each state within its own borders. The Federalist No. 45, at 289 (J. Madison); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). CARB may not harness the power of the California state government to shape environmental policy choices in other states.

That California cabins its overreach to the fuels crossing its borders does not rehabilitate the law. Again, California is free, subject to other constitutional constraints, Pet. 15-25, to regulate the properties of products within its borders. But California is decidedly *not* free to seize on in-state commercial activity, scale the supply chain, and "assum[e] legal and political responsibility" for whatever out-of-state practices catch its eye. App. 62a (citation omitted). Though California has a legitimate interest in ensuring that California-bound goods do not injure the state or its citizens upon crossing state lines, the LCFS goes far beyond that. The regime targets out-of-state commercial practices that, the Ninth Circuit found, visit the same undifferentiated harm in California whether the end-product enters California or goes anywhere else. App. 10a. In other words, there is no link between the worldwide harms California seeks to combat and the consumption of out-of-state ethanol within California's borders. Far from "regulat[ing] with reference to local harms," App. 58a, California "has reached beyond her borders to regulate a subject which was none of her concern because the Constitution[al structure] has placed control elsewhere," *Osborn*, 310 U.S. at 62.

It is no answer to say that the state-specific ill-effects of a global problem give each state license to devise its own

global solution. App. 63a-65a. Even if emissions in Ohio, for instance, somehow inflicted a distinct injury within California's borders, California *still* could not combat those emissions by regulating incoming Ohio fuel based on its production history. And the case against such regulation is even stronger here, since California argues that commercial and agricultural practices elsewhere harm California *solely* because they visit an undifferentiated, general injury on the world at large and California is part of the world. That cannot be enough to permit California to reach beyond its borders and discourage purely out-of-state practices. "The Constitution requires a distinction between what is truly national and what is truly local," *United States v. Morrison*, 529 U.S. 598, 617-18 (2000), and the two may not be merged simply because California would like to decide the issue for the other states, *id.* at 618 ("In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted."). Even if, to a degree, "the lines between the separate spheres [have] blurred," *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring), a state's self-confessed exercise of force to pressure its coequal sovereigns is a bridge too far.

In fact, the Court has been down this road before. In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), the Court held unconstitutional a municipal ordinance that disfavored out-of-town waste disposal facilities by requiring in-town solid waste to be disposed of at a particular facility in town. Relying on "well-settled principles of … Commerce Clause jurisprudence," the Court rejected the town's argument that the ordinance was "justif[ied] ... as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to

the environment." *Id.* at 386, 393. To permit reliance on such a non-local interest, the Court maintained, "would extend the town's police power beyond its jurisdictional bounds." *Id.* at 393.

California's LCFS suffers the same failing. Like the ordinance in *C & A Carbone*, the LCFS directly regulates in-state entities but burdens commerce involving out-of-state entities whose practices California "deem[s] harmful to the environment." *Id.* Just as Clarkstown regulated only waste originating within its borders, the LCFS regulates only products entering California. Each law is formally confined to transactions that are linked to the regulator's jurisdiction, yet each impermissibly exploits that hook to target "commerce occurring wholly outside [its] boundaries." *Healy*, 491 U.S. at 336. In upholding California's overreach, the Ninth Circuit erred as a matter of constitutional law.

B. Preserving Each State's Sovereignty Within Its Borders Is Of Paramount Importance.

The LCFS gives rise to constitutional concerns of the first order. As noted above, the need for uniformity in the states' commercial relations with one another was a major impetus for the Constitutional Convention. The development of the extraterritoriality doctrine in a range of contexts, *supra* 11-12, likewise serves to guard against "inconsistent legislation" arising from states' overstepping their boundaries. *Id.* at 337. Because "our economic unit is the Nation," *City of Phila. v. New Jersey*, 437 U.S. 617, 623 (1978) (citation omitted), it is important how a statute "may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but

many or every State adopted similar legislation," *Healy*, 491 U.S. at 336.

Here, the need to enforce these foundational restraints is all the more pressing because California's "experiment," App. 44a, is already inviting the precise problems that our federal system was designed to avoid. As the Ninth Circuit acknowledged, other states "are considering legislation similar to the [LCFS]," App. 59a, though the court summarily dismissed the potential for economic balkanization. The court maintained that "[s]o long as California regulates only fuel consumed in California, the Fuel Standard does not present the risk of conflict with similar statutes." App. 61a. But this optimism is unfounded. CARB openly offers its regulatory scheme as "a model for other entities in the U.S. and internationally," ER7:1551, and "ethanol producers will soon face the daunting prospect of navigating several interlocking, if not entirely contradictory regulatory regimes" from state to state, App. 250a (M. Smith, J., dissenting from denial of rehearing en banc). "Fragmentation of the national economy may ensue." App. 250a.

Indeed, it is all but inevitable that other states' regulatory schemes will involve vastly different standards from California's and from one another's. As explained in a National LCFS Recommendation, "LCFS policies adopted in other countries and regions can vary significantly in policy design, stringency levels, system boundaries, coverage of fuel types, and various other details." Daniel Sperling et al., *National Low Carbon Fuel Standard: Policy Design Recommendations* 71 (July 19, 2012). This high risk of inconsistency derives in large measure from the array of lifecycle models available. "[T]here are various

reports estimating the [greenhouse-gas] emission of corn ethanol using different models," with each model "us[ing] different inputs and assumptions." ER7:1725; Sperling, *supra*, at 44 (remarking that "different definitions of [system] boundaries can result in quite different emission calculations for some products," such as corn ethanol).

Even supposing that many states were to select the same lifecycle model that California chose as a starting point—the Argonne GREET model—it is highly unlikely that every state would follow CARB's lead and "incorporate[] detailed information about local [California] conditions." App. 12a-13a; ER7:1725 (CARB "modified [the Argonne GREET model] to reflect California inputs and assumptions"). Consider Oregon's efforts, which the Ninth Circuit hailed as an example of a "complementary" emerging regulatory scheme. App. 59a & n.14. Like CARB, the Oregon Department of Environmental Quality contemplates a low carbon fuel standard based on the Argonne GREET model, but the department also has recommended "adjust[ing]" the model to reflect "Oregon-specific inputs." State of Or., Dep't of Envt'l Quality, *HB 2186: Oregon Low Carbon Fuel Standards and Truck Efficiency* 90 (Mar. 2013) (*Oregon Low Carbon Fuel Standards*). Whereas CARB accounts for indirect land use, *supra* 7, its Oregon counterpart "proposes to begin the low carbon fuel standards program *without* using any indirect land use change values," *id.* at 206 (emphasis added); Or. Admin. R. 340-253-0000(4)(f). Even this single discrepancy would yield noticeably different carbon-intensity levels: In Oregon's words, including or excluding indirect land use from its formula "will drastically alter the way regulated parties strategize to comply with the low carbon fuel standards." *Oregon Low Carbon Fuel Standards* at 207.

"With such laws in force in states which are interspersed with those having no limit on [carbon-intensity levels], the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident." *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 773-74 (1945). In the face of competing carbon-intensity models, all seeking to affect commercial and agricultural practices nationwide, it would be economically impossible for a fuel producer to have separate "well-to-wheel" manufacturing and distribution processes to satisfy each unique state scheme. *Cf. Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1152-53 (7th Cir. 1999) (per curiam). As the National LCFS Recommendation explains, "[i]mposing inconsistent obligations under multiple state and regional LCFS policies could increase the complexity and costs of compliance and precipitate multiple redundant regulatory systems." Sperling, *supra*, at 19.

As fuel producers try to manage competing regulatory systems, the nation will drift toward either economic balkanization or one de facto system—"precisely [the] results that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 324. For example, fuel producers might ship fuels with lower carbon-intensity scores to states with more stringent standards while shipping fuels with higher scores to more lenient states. Sperling, *supra*, at 19 ("The potential for differential treatment of individual fuels under multiple state and regional policies could … increase incentives for shuffling fuels between jurisdictions on the basis of their treatment under respective policies."). Producers of certain fuels may even be effectively shut out of some markets, depending on

the producers' location, the maximum carbon-intensity levels set by various state regulations, the variables that go into each carbon-intensity formula, the mechanics of each "credit" system in effect, and the severity of the penalties imposed.

Alternatively, if fuel producers generally found one state to have the most stringent regime—or to have the most economic clout—they might try to produce and distribute *all* of their fuel consistent with that state's requirements. That state's laws would thus "control the [producers'] operations both within and without the regulating state." *S. Pac. Co.*, 325 U.S. at 773. This outcome, too, is inconsistent with basic principles of state sovereignty. "The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond*, 131 S. Ct. at 2364. And it is "[t]he essence of federalism" that the states "be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431.

CONCLUSION

The Court should grant the petition for certiorari.

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APPENDIX

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The signatories listed below appear on their own behalf. Institutional affiliations are listed for identification purposes only.

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