

---

---

No. 12-15131

---

In the United States Court of Appeals  
for the Ninth Circuit

---

ROCKY MOUNTAIN FARMERS UNION, ET AL.  
V. GOLDSTENE, ET AL.

AND

NATIONAL PETROCHEMICAL & REFINERS  
ASSOCIATION, ET AL. V. GOLDSTENE, ET AL.

---

On Appeal from the United States District Court for the Eastern  
District of California, Fresno Division  
The Honorable Lawrence J. O'Neill  
Civil Case Nos. 1:09-02234 and 1:10-00163

---

Brief of Amici Curiae States of Nebraska, Illinois, Iowa, Kansas,  
Michigan, Missouri, North Dakota, Ohio, and South Dakota in support  
of Plaintiff-Appellees Rocky Mountain Farmers Union, et al.

---

JON BRUNING, Neb. State Bar #20351  
Nebraska Attorney General  
Katherine J. Spohn, Neb. State Bar #22979  
Kevin L. Griess, Neb. State Bar #22182  
Assistant Attorneys General  
2115 State Capitol  
Lincoln, NE 68508  
(402) 471-2682  
katie.spohn@nebraska.gov  
[kevin.griess@nebraska.gov](mailto:kevin.griess@nebraska.gov)

---

---

LISA MADIGAN  
Attorney General  
State of Illinois

THOMAS J. MILLER  
Attorney General  
State of Iowa

DEREK SCHMIDT  
Attorney General  
State of Kansas

BILL SCHUETTE  
Attorney General  
State of Michigan

CHRIS KOSTER  
Attorney General  
State of Missouri

WAYNE STENEHJEM  
Attorney General  
State of North Dakota

MICHAEL DEWINE  
Attorney General  
State of Ohio

MARTY J. JACKLEY  
Attorney General  
State of South Dakota

TABLE OF CONTENTS

INTRODUCTION..... 1

INTERESTS OF AMICUS STATES ..... 2

ARGUMENT ..... 6

*I. California’s LCFS discriminates against ethanol produced in the Amici States in favor of ethanol produced in California.. 6*

*II. The LCFS violates the Commerce Clause because it is an improper exercise of extra-territorial regulation ..... 10*

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### Cases

<i>C &amp; A Carbone, Inc. v. Town of Clarkstown</i> , 511 U.S. 383 (1994) .....	6,7
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982) .....	13
<i>H.P. Hood &amp; Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949) .....	7
<i>Healy v. Beer Institute</i> , 491 U.S. 324 (1989) .....	11
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977) .....	13
<i>South Dakota Farm Bureau, Inc. v. Hazeltine</i> , 340 F.3d 583 (8th Cir. 2003) .....	7

### Statutes

Neb. Rev. Stat. § 66-1345 (Reissue 2009) .....	3
--	---

### Other Authorities

17 C.C.R. §§ 95480-95490 .....	1
117 C.C.R. § 95486(b), Table 6 .....	12
42 U.S.C. 7547(o)(2)(A) and (B) .....	5
K.S.A. 2011 Supp. 79-34,161 et seq .....	3
Ohio Revised Code 901.13 .....	3

**Rules**

Fed. R. App. P. 29(a)..... 1

Fed. R. App. P. 29(d) ..... 15

Fed. R. App. P. 32(a)(5) ..... 16

Fed. R. App. P. 32(a)(6) ..... 16

Fed. R. App. P. 32(a)(7)(B)(iii)..... 15

## INTRODUCTION

The States of Nebraska, Illinois, Iowa, Kansas, Michigan, Missouri, North Dakota, Ohio, and South Dakota file this amicus brief under Fed. R. App. P. 29(a) in support of the plaintiff-appellees Rocky Mountain Farmers Union, et al.

California's Low Carbon Fuel Standard (LCFS), 17 C.C.R. §§ 95480-95490, poses a significant threat to the markets for Amici States' corn and ethanol and, by extension, to their economies. The LCFS assigns a higher carbon intensity value to ethanol produced in Amici States. The effect of that assignment will be exactly what California intends: it will close the California border to ethanol produced in Amici States in favor of chemically-identical ethanol produced within California, without any legitimate justification.

The LCFS penalizes corn ethanol based on activities occurring *wholly outside of California*. In doing so, it impinges on the sovereign interests of the Amici States to regulate farming, ethanol production, and other activities within their own borders as they see fit. This extra-territorial reach of the regulation violates the Commerce Clause of the U.S. Constitution.

## INTERESTS OF AMICI STATES

For much of history, corn has played an important role in shaping the identity of the Amici States. Corn has been grown in Amici States by Native Americans for hundreds of years, and when settlers arrived its popularity grew. In addition to this cultural component, corn plays a more tangible role in Amici States as a vital part of their respective economies.

Amici States lead the nation in total corn production. According to statistics from the United States Department of Agriculture's National Agricultural Statistics Service, in 2011 more than 8.35 *billion* bushels of corn were produced in Amici States (compared to 27.8 million bushels in California). Amici States' 2011 corn production was worth more than \$51.6 billion. Those dollars multiply as they flow through Amici States' economies, creating and supporting a host of other agricultural and non-agricultural industries.

The uses of corn are diverse, but one particular use in Amici States has been carefully nurtured and grown: the production of ethanol. In the early 1970s, leaders in the Amici States saw an economic development opportunity created by conditions of high energy

prices, foreign oil dependence, and grain surpluses. In 1971, the Nebraska Legislature created the Nebraska Ethanol Board, the first state agency in the nation devoted solely to the development of the ethanol industry – an industry that scarcely existed at the time. The obstacles facing these boards were significant: no production facilities, limited knowledge and research regarding ethanol’s potential use as an automotive fuel, undeveloped markets, regulatory obstacles, and political opposition from those with vested interests in the status quo. To help overcome those obstacles, some Amici States created incentive funds designed to attract increased ethanol production in the state. *See e.g.*, Neb. Rev. Stat. § 66-1345 (Reissue 2009); K.S.A. 2011 Supp. 79-34,161 et seq.; Ohio Revised Code 901.13.

Today, Amici States, through their ethanol boards and other state agencies, focus on production and industry support, market development, research and technology issues, and public policy development. The results have been impressive—10.4 billion gallons of Midwestern corn-based ethanol produced annually in the Amici States. As of December 2011, Iowa alone had 41 ethanol plants operating within the state with total production capacity of 3.7 billion gallons of

ethanol – ranking first in the country in each category. Nebraska, with its 24 ethanol plants and total production capacity of 1.98 billion gallons of ethanol (as of October 2010), ranked second in each category. Combined, the Amici States are home to 132 of the nation’s approximately 209 ethanol plants with more planned or under construction.

Just as importantly, the ethanol industry’s economic impact is felt across the Amici States—an overwhelming portion of the \$42.9 billion that the ethanol industry nationwide contributes to GDP. In Nebraska, more than 1,300 people are directly employed in the ethanol industry, and the indirect and secondary effects of the industry support an additional 1,600 jobs. According to statistics compiled by the Nebraska Public Power District’s Economic Development Department, ethanol production boosts the price of corn by \$0.05-0.10 per bushel, thereby boosting farmers’ incomes. In fact, the Nebraska Public Power District estimates that the direct and indirect effects of the ethanol industry increase household income in Nebraska by \$241 billion and produce \$31 million in tax revenues. A May 2011 study published by the Iowa State University Center for Agricultural and Rural Development found that

the past decade of growth in ethanol production reduced gasoline prices in the Midwest region by \$0.39 per gallon.

The effects of California's LCFS will only intensify in the future in the Amici States due to increases, including mandatory increases, in the use of renewable fuels. *See* 42 U.S.C. 7547(o)(2)(A) and (B). The U.S. Energy Information Administration (EIA) estimates that ethanol blended into gasoline will rise from 4.3 percent of the total gasoline pool by volume in 2007 to 7.6 percent in 2030. The capital cost to meet these rising fuels needs supplied by corn-based ethanol plants is also estimated by the EIA at \$67 million for a single 50-million gallon per year ethanol facility.

CARB's effect on the Amici States does not stop with concerted economic impact. It extends into how the States regulate their own corn-based ethanol markets. Some Amici States (Iowa, Kansas, Missouri, Ohio) have state-based fleet fuel purchase requirements. Others (Illinois, Iowa, Kansas, Michigan, Missouri, Nebraska, North Dakota, Ohio, South Dakota) have retail pump incentives for ethanol blends. Missouri, North Dakota, Ohio, and South Dakota have adopted producer incentive programs. How CARB's LCFS affect these state-

specific regulatory programs will vary, but the fact that the LCFS reach into the State programs illustrates the distance its tentacles stretch, highlighting the super-regulatory impact of the LCFS.

Given all of the above, any regulations impacting the ethanol industry are likely to be felt by citizens of all Amici States. That is particularly the case where the regulations occur in California because of California's importance as a destination and market for Amici States' ethanol. Nebraska alone exports approximately 31 percent of its ethanol produced to California. The value of Nebraska ethanol sold in California is \$1.3 billion annually. California's enactment of the LCFS directly places that \$1.3 billion in jeopardy, and, indirectly, untold billions more across the Amici States.

## ARGUMENT

### I. *California's LCFS discriminates against ethanol produced in the Amici States in favor of ethanol produced in California.*

The central purpose behind the Commerce Clause's prohibitions of discriminatory measures is to proscribe state laws "whose object is local economic protectionism." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The vision of the Framers of the Commerce Clause was that "every farmer ... shall be encouraged to produce by the

certainty that he will have free access to every market in the Nation.” *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Free access to markets is denied when states adopt regulations which grant a competitive advantage upon local business vis-à-vis out-of-state competitors. Such regulations are per-se invalid unless the state “can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest.” *Hazeltine*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

California’s LCFS is a textbook example of the type of regulation prohibited by the Commerce Clause. In the rulemaking process, CARB detailed its intent to discriminate against interstate commerce in recognizing that one goal of the LCFS regulation was to “[d]isplac[e] imported transportation fuels with biofuels produced in the state,” in order to “keep more money in the state.” Excerpts of Record (ER), volume 7, page 1689. By shutting the door to biofuels produced in Amici States, “[t]he biorefineries expected to be built in the State [of California] will provide needed employment, an increased tax base for

the State [of California], and value added to the biomass used as feedstock. These benefits will be more important in rural areas of the State [of California] that are short on employment but rich in natural resources.” *Id.* California expressly acknowledged that the unprecedented scale of its sweeping regulation would rapidly decrease Midwestern corn-based ethanol use to zero by 2017-2018, only to be replaced by Brazilian sugarcane-based ethanol and other products. ER, volume 10, page 2379.

In addition to a discriminatory purpose, the LCFS facially discriminates against out-of-state ethanol production by assigning higher carbon intensity values to ethanol produced in Amici states than it does to chemically identical ethanol produced in California.

The LCFS regulation assigns the highest carbon intensity levels to Midwest corn ethanol production methods, including production from natural-gas-powered dry mills located in Amici States. In fact, the LCFS assigns carbon intensity levels for some Amici State corn ethanol facilities that are *higher* than the carbon intensity level that CARB has assigned to gasoline. This means that a company selling gasoline in California and attempting to comply with the LCFS regulation has no

incentive – and to the contrary, is discouraged – from purchasing corn ethanol using the production methods that CARB has decided to disfavor. By doing so, California has created a significant disincentive for California fuel producers and importers to use Amici States ethanol, and instead blatantly favors California ethanol producers.

The effect will be clearly devastating – ethanol produced in Midwestern states will no longer be welcome in the California market – with considerable negative impact on the Amici States’ economies. Nebraska alone exports 31 percent of the ethanol produced within its borders to California. While California has argued that individual producers in Amici States can apply to change the LCFS and have individual “pathways” approved, that argument is unavailing here. That a regulation may be changed is no defense of that regulation. The deck remains stacked: An ethanol plant in California that is in all material respects the same as an ethanol plant in Nebraska, and whose product has an identical effect on the environment, will have a lower carbon-intensity penalty based on its state of origin. Such discrimination is prohibited by the Commerce Clause.

California's protectionism will rob Amici States of billions in ethanol sales if allowed to stand. The LCFS's discriminatory effect will deprive Amici States of their inherent competitive advantage in producing corn and ethanol. California's enactment of the LCFS seeks to bar Amici States' ethanol from the state in favor of ethanol produced within its own borders. Because California's regulatory regime facially discriminates against out-of-state products, LCFS should be struck as an impermissible regulation under the Dormant Commerce Clause of the United States Constitution.

II. *The LCFS violates the Commerce Clause because it is an improper exercise of extra-territorial regulation.*

The LCFS is an attempt to impose the views of one large state – California – on the other 49 states. As sovereign states, Amici States recognize California's ability to regulate conduct that occurs wholly within its borders, such as imposition of stricter emission limits on ethanol producing facilities and other activities *within* California. But here, the LCFS reaches out, over the Rockies and into the Plains, to regulate Amici States' ethanol industry, corn farming, and a host of activities that are far-removed from California and any legitimate interests it has in regulating. All corn-based ethanol is chemically

identical, and use of Midwest-produced ethanol in California emits no more greenhouse gases than use of California-produced ethanol. The only difference is how ethanol is produced in other states, which is not California's right to decide.

The LCFS assigns penalties to ethanol based on *where* and *how* it is produced – even though such production occurs hundreds or thousands of miles away, and even though the end-product is chemically the same, no matter how it is produced. Such regulation is impermissibly extraterritorial, because it interferes with Amici State's own ability to regulate ethanol production and other activities within their borders. 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 Institute*, 491 U.S. 324, 336 (1989). Here, the whole premise of California's approach is to use California's economic power to control out-of-state activities.

In a particularly egregious example, California assigns a penalty based on "indirect land use change" – the theory being that out-of-state lands will have to be cultivated to produce corn for ethanol (or to

produce replacement crops). California wants to discourage such activity because it believes it contributes to global warming. But Amici States may want to encourage cultivation and other economic activity. That is our decision to make.

The penalty is also affected by California's views about various "farming practices." ER, volume 7, page 1724. California is thus seeking to change out-of-state "farming practices" based on its views of what is "more sustainable." *Id.* It is none of California's business how farmers in the Amici States choose to grow their corn. The United States is a common market; California may not blockade out-of-state products in an attempt to force changes in out-of-state farming policies.

Another example: California penalizes Midwest corn ethanol plants for producing one co-product (dry distillers' grains) instead of another (wet distillers' grains), even though this production takes place entirely in our states and the products are not necessarily even sold in California, on the ground that producing dry distillers' grains consumes more energy than producing wet distillers' grains. *See* 17 C.C.R. § 95486(b), Table 6; ER, volume 7, page 1718; ER, volume 8, page 2035. Dry distillers' grains, however, are a more valuable commodity, which

can be stored longer and shipped longer distances. California, thus, is directly interfering with the production process for a valuable co-product that may never be shipped into California, and interfering with the Amici States' prerogative to regulate and encourage industry within their own borders. It is hard to imagine a more blatant attempt to use economic muscle to regulate extraterritorially than to penalize production decisions in other states with respect to products that do not even come to California. California may not adopt regulations that so "offend sister States and exceed the inherent limits of the State's power." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

## CONCLUSION

The Amici States urge this Court to affirm the district court's order and judgment striking down California's discriminatory LCFS.

Dated: August 13, 2012

BY: s/ Kevin L. Griess  
JON C. BRUNING, Neb. State Bar #20351  
Nebraska Attorney General  
Katherine J. Spohn, Neb. State Bar #22979  
Kevin L. Griess, Neb. State Bar #22182  
Assistant Attorneys General  
2115 State Capitol  
Lincoln, NE 68508  
(402) 471-2682  
[katie.spohn@nebraska.gov](mailto:katie.spohn@nebraska.gov)  
[kevin.griess@nebraska.gov](mailto:kevin.griess@nebraska.gov)

Attorneys for Amicus Curiae States

LISA MADIGAN  
Illinois Attorney General  
100 W. Randolph St., 12<sup>th</sup> floor  
Chicago, IL 60601  
Telephone: (312) 814-3000

THOMAS J. MILLER  
Iowa Attorney General  
1305 E. Walnut Street  
Des Moines, IA 50319  
Telephone: (515) 281-5164  
Facsimile: (514) 281-4209

DEREK SCHMIDT  
Kansas Attorney General  
120 SW 10<sup>th</sup> Ave., 2<sup>nd</sup> floor  
Topeka, KS 66612  
Telephone: (785) 296-3467  
Facsimile: (785) 296-6296

BILL SCHUETTE  
Michigan Attorney General  
PO Box 30212  
Lansing, MI 48909  
Telephone: (517) 373-1110  
Facsimile: (517) 373-3042

CHRIS KOSTER  
Missouri Attorney General  
Supreme Court Building  
207 West High Street  
Jefferson City, MO 65101  
Telephone: (573) 751-3321  
Facsimile: (573) 751-0774

WAYNE STENEHJEM  
North Dakota Attorney General  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0040  
Telephone: (701) 328-2210  
Facsimile: (701) 328-2226

MICHAEL DEWINE  
Ohio Attorney General  
30 E. Broad Street, 17<sup>th</sup> floor  
Columbus, OH 43215  
Telephone: (614) 466-4986

MARTY J. JACKLEY  
South Dakota Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501-8501  
Telephone: (605) 773-3215  
Facsimile: (605) 773-4106

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief contains 2,408 words.

I certify that this brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century.

/s/ Kevin L. Griess  
Kevin L. Griess  
Assistant Attorney General

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Amicus Brief of States of Nebraska, et al., was filed electronically on August 13, 2012, and will therefore be served electronically upon all counsel by the Court's CM/ECF system.

In addition, I have mailed a true and correct copy of the foregoing by first-class U.S. Mail to the following participants who are not registered for electronic service by CM/ECF.

Pierre G. Basmaji  
2601 Mission Street  
Suite 502  
San Francisco, CA 94110

Martha Coakley  
One Ashburton Place  
18th Floor  
Boston, MA 02108

Daniel Cullenward Mills  
Legal Clinic Immigrants'  
Rights Clinic  
559 Nathan Abbott Way  
Stanford, CA 94305-8610

Michael W. McConnell  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, DC 20005

Eric T. Schneiderman  
120 Broadway, 26th Floor  
New York, NY 10271

William H. Sorrell  
Office Of The Attorney General  
109 State Street  
Montpelier, VT 05609-1001

/s/ Kevin L. Griess  
Kevin L. Griess  
Assistant Attorney General