

No. 18-881

In The
Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS, et al.,

Petitioners,

v.

JANE O'KEEFFE, et al.,

Respondents.

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

**BRIEF *AMICI CURIAE* OF PACIFIC
LEGAL FOUNDATION, CATO INSTITUTE,
COMPETITIVE ENTERPRISE INSTITUTE,
COMMITTEE FOR A CONSTRUCTIVE
TOMORROW, INSTITUTE FOR ENERGY
RESEARCH, ENERGY AND ENVIRONMENT
LEGAL INSTITUTE, 60 PLUS FOUNDATION,
AND CAPITAL RESEARCH CENTER IN
SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the Oregon Fuel Program—which restricts transportation fuel imports based upon a “life-cycle analysis” that regulates the manner in which the fuels are produced and transported in interstate and foreign commerce—is an impermissible and unconstitutional extraterritorial regulation.
2. Whether the Oregon Fuel Program—which is designed to require and has the effect of requiring out-of-state competitors to subsidize in-state producers—violates the Commerce Clause.

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INTEREST OF AMICI CURIAE¹

Pursuant to Rule 37.2(a), Pacific Legal Foundation, Cato Institute, Competitive Enterprise Institute, Committee for a Constructive Tomorrow, Institute for Energy Research, Energy and Environment Legal Institute (E & E Legal), 60 Plus Foundation, Inc., and Capital Research Center respectfully submit this brief *amicus curiae* in support of the Petitioners.

Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of federalism in the arena of environmental law. PLF's attorneys have participated as lead counsel or counsel for *amici* in several cases before this Court involving the balance between state and federal environmental regulation of commercial activities. *See, e.g., Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597 (2013); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual

¹ Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

The Competitive Enterprise Institute is a nonprofit organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. CEI is concerned that this kind of regulation allows one state to exert extraterritorial influence on other states.

The Committee for a Constructive Tomorrow is a nonprofit organization headquartered in Washington, D.C. For over 30 years, CFACT has promoted free-market approaches to meeting U.S. energy needs and has opposed regulation and litigation aimed at interfering in competitive markets. CFACT believes that Oregon's Low-Carbon Fuel Standard, by asserting extraterritorial power over the nation's fuel supply, is a clear violation of the U.S. Constitution's Commerce Clause.

The Institute for Energy Research is a nonprofit organization that conducts intensive research on the functions, operations, and government regulation of energy markets. IER maintains that freely-functioning energy markets provide the most efficient and effective solutions to today's energy and

environmental challenges, and, as such, are critical to the well-being of individuals and society. IER is funded entirely by tax deductible contributions from individuals, foundations, and corporations. No financial support is sought or accepted from government entities.

The Energy and Environment Legal Institute is a nonprofit organization that champions responsible and balanced environmental policies that seek to conserve the nation's natural resources while ensuring a stable and strong economy through energy dominance. E & E Legal pursued a suit in Colorado regarding their unconstitutional renewable energy standard and see numerous parallels in the present case.

The 60 Plus Foundation is a nonprofit organization incorporated in Virginia and headquartered in Alexandria, Va. The Foundation's mission is to serve the purpose of raising awareness and providing information concerning senior citizens who are disproportionately impacted by public policy issues. A focus is on energy and environmental policies that impact the costs many senior citizens on fixed incomes must pay for energy.

The Capital Research Center is an investigative think tank that studies how activist groups exert their influence over the public policy process. In this case CRC is concerned that a network of special interests and radical environmental activists in one state, organized into different legal entities (including private businesses, state level nonprofit lobbying organizations, national nonprofit issue advocacy organizations, and others), are attempting to leverage their political power to unconstitutionally force the

other 49 states into compliance with their agenda. CRC performs no contract work and accepts no government funds.

This case concerns amici because it implicates the basic principles of federalism as a safeguard for liberty.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Court should grant the Petition because the decision below conflicts with and undermines this Court's Commerce Clause decisions barring extraterritorial state regulation. Relief in this Court is urgent. Without it, Oregon's violation of interstate federalism, and its extraterritorial control of the national fuel supply chain, will become permanent. Worse, the problem is not limited to Oregon; the Ninth Circuit has also approved a virtually identical scheme out of California, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014), and the state of Washington is eyeing a similar approach. Tim Albrecht, *LCFS Matures*, Ethanol Producer Magazine (Sept. 10, 2018), <http://www.ethanolproducer.com/articles/15575/lcfs-matures>. Absent this Court's review, the decision below authorizes significant domestic trade conflict.

This Court has consistently struck state laws that control actions in other states as Commerce Clause violations. But Ninth Circuit precedent allows Oregon to use a methodology called life-cycle analysis to evade those precedents. *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 917 (9th Cir. 2018) ("Because the [Oregon Clean Fuels] Program

does not legislate extraterritorially, American Fuel’s claim fails . . .”).

This Court has consistently struck down state laws that impede the interstate flow of goods based on out-of-state conduct rather than on features of the goods themselves. *Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978) (collecting cases); *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989). The Fuels Program does not change the composition or physical attributes of the ethanol or finished gasoline it ostensibly regulates. Rather, it uses life-cycle analysis as a legal fiction to assign out-of-state greenhouse gas emissions, resulting from the *production* of transportation fuel, to the fuel itself. A life-cycle analysis estimates the greenhouse gas emissions associated with *making* a consumer product—such as fuel—regardless of where they occur. Since the emissions from making fuel cannot be measured by examining the fuel, the only way for a state to regulate out-of-state emissions from fuel production is to assign them—fictionally—to the fuel itself. See *O’Keeffe*, 903 F.3d at 908–09. But if life-cycle analysis is a valid means for states to regulate out-of-state conduct, as the Ninth Circuit has held, then any state can use it to circumvent this Court’s cases barring (i) interference with out-of-state purchase contracts, and (ii) import/export bans based on point of origin or destination.

The Court should grant the Petition because the decision below violates a fundamental principle of interstate federalism. The Framers of the Constitution expressly sought to prevent states from acting against each other through import duties, point of origin restrictions, and other trade restraints which the Articles of Confederation too freely permitted. The

decision below enables such trade restrictions contrary to the Framers' vision, and foments rather than quells bad trade relations among the states.

The Court should also grant the Petition to address Oregon's foray into national control of fuel production, and to protect the nation's fuel supply chain from Oregon's interference. The Ninth Circuit holds that a state does not regulate extraterritorially when it uses its market power to coerce changes in conduct beyond its borders, conduct that it cannot regulate directly.

Finally, the Court should grant the Petition because the decision below invites domestic trade conflicts. Life-cycle analysis models require simplification and policy judgment to be used as regulatory tools. States can easily exploit this malleability to impose a range of barriers to trade in milk, beer, liquor, coal, and other goods against their neighbors.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW UNDERMINES THIS COURT'S COMMERCE CLAUSE PRECEDENTS BY PROVIDING A TEMPLATE FOR EVADING THEM

A. The decision below holds that states may use life-cycle analysis to regulate out-of- state fuel production and shipping

Oregon has already taken ambitious steps toward the reduction of greenhouse gas emissions from sources in the state. Barry G. Rabe, *Greenhouse & Statehouse: The Evolving State Government Role in Climate Change* 30 (Nov. 2002).

But it is not content to stop there: it seeks to control greenhouse gas emissions beyond its borders. As one among equals, Oregon lacks the police power to regulate emissions in other states. *New York Life Insurance Co. v. Head*, 234 U.S. 149, 161 (1914). But where police power is lacking, coercion through market power may suffice. Together, the states in the Ninth Circuit account for more than 17% of the national market for liquid transportation fuels.² Manufacturing and shipping that fuel encompass an enormous variety of commercial activity in many states all over the nation and the world, which in turn produces out-of-state emissions that Oregon (and California, and others) would like to regulate. The state's control of its fuel market gives it market power to control out-of-state emissions which it cannot control through its police power.

In order to regulate emissions outside Oregon, the Fuels Program uses life-cycle analysis to fictionally assign out-of-state emissions generated during the production of the fuel to the fuel itself. *AFPM v. O'Keeffe*, 134 F. Supp. 3d 1270, 1275 (D. Or. 2015). This legal fiction is referred to as a fuel's "carbon intensity." *Id.* Life-cycle analysis estimates the greenhouse gas emissions that result from each of the production steps in making fuel or other consumer products. For soybean biodiesel, as an example, these

² The Ninth Circuit states (Alaska, Arizona, California, Hawaii, Nevada, Idaho, Montana, Oregon, and Washington) consume 6,224.1 trillion Btu of petroleum fuels; the United States consumes 36,070.2 trillion. U.S. Energy Info. Admin, State Profiles and Energy Estimates, Table C1, Energy Consumption Overview: Estimates by Energy Source and End-Use Sector (2016), available at <https://www.eia.gov/state/seds/data.php> (last visited Jan. 31, 2019).

steps include the cultivation and harvesting of soybeans; transportation to the fuel production facility; distillation of the soybeans into biodiesel (accounting for the efficiency of the process as well as the fuel used in production); and transportation of the resulting biodiesel to market. Or. Dep't of Env'tl. Quality, *Final Report: Oregon Low Carbon Fuel Standards, Advisory Committee Process and Program Design* 123 (Jan. 25, 2011) [hereinafter *Advisory Final Report*] (“The direct carbon intensity of a fuel is calculated by adding up greenhouse gas emissions from each step in the fuel production process.”).³

The Fuels Program does not distinguish any physical attribute of the finished fuel it purports to regulate. Pet. App. 125a (Compl. ¶ 43). It only assigns an estimate of the emissions that a mathematical model says resulted from making it and moving it around. The variation in the carbon intensity of different batches of ethanol or other fuel results from differences in the emissions from its manufacture and shipment to Oregon. *Id.* The Fuels Program thus differentiates between manufacturing and transportation processes, without making any distinction in the physical attributes of the resulting fuel itself. *Advisory Final Report, supra* at 40.

The Fuels Program does not change or regulate the characteristics, formulation, or any other real attribute of the fuel itself. It does not reduce any emissions that occur in Oregon; regardless of any given imported fuel's life-cycle production emissions, all fuels of each type (gasoline, diesel, ethanol, etc.) have identical emissions from burning them in

³ Available at <https://www.oregon.gov/deq/FilterDocs/LCFSreportFinal.pdf> (last visited Jan. 31, 2019).

vehicles in Oregon. Put another way, the only difference in life-cycle analysis of different batches of gasoline or ethanol results from activity in other states. In approving this method of cross-border control, the decision below contradicts and undermines this Court's precedents.

B. This Court has consistently struck down state laws that impede interstate trade without reference to features of the goods themselves

The Fuels Program uses life-cycle analysis to measure out-of-state emissions resulting from making and shipping ethanol to Oregon, and then assigns those emissions to otherwise identical shipments of ethanol when they arrive in Oregon. Could similar methodologies be used to control out-of-state transactions, sources, or production methods for goods like milk, beer, liquor, solid waste, or coal? The Court should grant the Petition to consider whether life-cycle analysis is a constitutional means for a state to extend its police power beyond its borders and beyond this Court's case law.

Where states impede interstate trade in goods without reference to any physical attribute of the goods themselves, this Court has consistently held such laws to violate the Constitution. *See, e.g., Healy*, 491 U.S. at 337. State efforts to limit the import or export of goods based on actions that occur outside the state and which are not manifest in the goods themselves have been uniformly held unconstitutional. *Philadelphia*, 437 U.S. at 626–27 (citing cases). Excepting only those fields in which states grant regulatory monopolies to public utilities, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997)

(natural gas), or where the state itself is a market participant, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008) (municipal bonds), Amici are unaware of any decision of this Court to the contrary.

The decision below relies on *Rocky Mountain Farmers Union v. Corey*, but neither the *O'Keeffe* court nor the *Rocky Mountain* court cites any case in which this Court upheld a state law regulating goods in interstate commerce that did not relate directly to some physical attribute of the goods. See *O'Keeffe*, 903 F.3d at 916–17 (citing *Rocky Mountain*, 730 F.3d at 1101); *Rocky Mountain*, 730 F.3d at 1101–03 (distinguishing this Court's Commerce Clause cases on the basis that California's Low Carbon Fuel Standard uses life-cycle analysis instead of direct price controls or import conditions). In fact, the decision below radically conflicts with—and undermines—this Court's Commerce Clause precedents.

For example, in *Baldwin v. G.A.F. Seelig, Inc.*, the Court struck down a New York statute that imposed minimum milk prices that dealers had to pay to dairies, whether in New York or in neighboring states such as Vermont. 294 U.S. 511, 519 (1935). In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, the Court struck down another New York statute, this one conditioning access to the state's liquor market on distillers' affirmation that their prices to New York wholesalers were no higher than the lowest prices the distillers charged to wholesalers anywhere else in the nation. 476 U.S. 573, 575 (1986). This Court held that the statute controlled out-of-state transactions and thus violated the Commerce Clause. *Id.* at 580–82. In *Healy v. Beer Institute*, this

Court invalidated a Connecticut law that required importers of beer to affirm that they charged Connecticut wholesalers no more than they charged in other states. 491 U.S. at 326. This law had the practical effect of controlling “commercial activity occurring wholly outside the boundary” of the state, *id.* at 337, and discriminated “against brewers and shippers of beer engaged in interstate commerce[.]” *id.* at 340. And in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Nat. Res.*, the Court struck down a Michigan statute that prohibited private landfill operators from accepting solid waste that originated outside the county in which the landfill was located. 504 U.S. 353, 355 (1992).

Each of these unconstitutional state laws impeded the interstate flow of an article of trade without reference to any attribute of the article itself. The three price control cases regulated out-of-state sales between producers and wholesalers. *Baldwin*, 294 U.S. at 519; *Brown-Forman*, 476 U.S. at 575; *Healy*, 491 U.S. at 326. *Fort Gratiot* banned disposal of (more or less) fungible solid waste based only on its point of origin. 504 U.S. at 355. *Baldwin* and *Healy* applied to transactions in immediately neighboring states. *Baldwin*, 294 U.S. at 519 (milk purchased outside New York state); *Healy*, 491 U.S. at 326 (beer prices in specified neighboring states). The New York law in *Brown-Forman* expressly regulated conduct nationwide, 476 U.S. at 575, while the imported waste ban in *Fort Gratiot* had the effect of restricting commerce within Michigan as well as between that state and its neighbors, 504 U.S. at 361. Compare *Hughes v. Oklahoma*, 441 U.S. 322, 336–37 (1979) (striking law that banned export of minnows while allowing their use in state), with *Maine v. Taylor*, 477

U.S. 131, 148 (1986) (upholding ban on import of live bait fish based on likely impact of nonnative fish on local species).

C. Under the decision below, life-cycle analysis allows states to evade this Court's Commerce Clause precedents

If Oregon directly legislated that ethanol made in coal-fired plants, or crude oil produced from the oil sands of Alberta, could not be used in Oregon, that law would be struck down under *Healy, Baldwin, Brown-Forman*, and *Fort Gratiot*. See also *Wyoming v. Oklahoma*, 502 U.S. 437, 461 (1992) (state cannot require that a percentage of coal used in power plants serving the state be mined in the state). The state should not be able to do indirectly what it is constitutionally forbidden from doing directly. The Ninth Circuit's ruling raises the important question of whether these precedents can now be evaded by using a life-cycle analysis model, rather than the cruder and more obvious Twentieth Century methods of extraterritorial regulation.

To illustrate, New York could identify out-of-state activities involved in the production of milk. New York's minimum wage is higher than the federal requirement, while neighboring Pennsylvania's equals the federal government's.⁴ New York might argue that Pennsylvania's lower wage puts New York dairies and milk processors at a disadvantage. See, e.g., Debra Burke, et al., *Minimum Wage and Unemployment Rates: A Study of Contiguous*

⁴ See U.S. Dep't of Labor, *Minimum Wage Laws in the States — January 1, 2019*, <https://bit.ly/2UHkLkI> (last visited Jan. 31, 2019).

Counties, 46 Gonz. L. Rev. 661, 678–80 (2011) (describing employment effects of different minimum wage laws in state border areas of Washington and Idaho). New York could then employ a life-cycle analysis model that estimates economic inputs into milk production, similar to the manner in which the life-cycle analysis in the Fuels Program estimates emissions from fuel production. Using that life-cycle analysis, New York could assign a “minimum wage effect” to all milk sold in-state, and require that sellers with a lower assigned minimum wage enter into contracts with their out-of-state suppliers to increase the wages of the producer’s employees.

Using this approach, the Ninth Circuit’s decision affirming the Fuels Program is a template for New York and Massachusetts to re-erect their price controls on out-of-state transactions in milk, beer, and liquor, merely by fictionally assigning some production or shipping input (a lower state minimum wage, for example) to the imported product at the state border. Oklahoma and Michigan can revive their barriers to imported coal and waste by attributing safety standards for mining or trash collection to the imported goods. Under *American Fuels & Petrochemical Manufacturers v. O’Keeffe* and *Rocky Mountain Farmers Union v. Corey*, these states could achieve the results that this Court struck down in *Baldwin*, *Healy*, *Brown-Forman*, *Fort Gratiot*, and *Wyoming v. Oklahoma* by developing a suitable life-cycle analysis model to achieve the desired results.

This Court should grant the Petition to decide whether life-cycle analysis is indeed a constitutional means for states to circumvent precedent and to engage in cross-border regulation.

II.**SIGNIFICANT EXTRATERRITORIAL STATE ACTION VIOLATES THE BASIC PRINCIPLE OF FEDERALISM AND CREATES AN URGENT BASIS FOR THIS COURT'S REVIEW**

Policies like Oregon's Fuel Program and California's Low Carbon Fuel Standard represent extraterritorial state action of unprecedented scope. Absent this Court's review, the Ninth Circuit's holdings that such programs neither discriminate against interstate commerce nor regulate extraterritorially will become the law of the land, not just of the Ninth Circuit: by their nature, extraterritorial state regulations have effects outside of the state which imposes them, and yet evade political accountability in those "invaded" states.

Although "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions," *Mass. v. EPA*, 549 U.S. 497, 519 (2007), Oregon is using economic coercion to force greenhouse gas emission reductions on its fellow states. But the Framers sought to prevent economic warfare among the states just as surely as they meant to inhibit the then-real possibility of armed conflict among the states. *The Federalist* No. 7 (Hamilton) (describing the potential of both armed and economic conflict among the states under the Articles of Confederation); *The Federalist* No. 8 (Hamilton) (detailing the potential sources of armed conflict among the states under the Articles); *The Federalist* No. 11 (Hamilton) (describing the benefits of good trade relations among the states under the proposed Constitution). Alexander Hamilton underlined the Articles' failure to support good trade relations among the states:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they become no less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

The Federalist No. 22. See also *The Federalist* No. 42 (Madison) (describing the harms of import duties imposed by the states against each other, and the deeper divisions likely to come under the Articles).

Allowing states to leverage their market power to reach beyond their borders (and the limits of their police power) and control activity that is properly the subject of direct regulation by other states undermines the basic principles of federalism on which this nation was founded. And it does so in a manner that leaves the invaded states with no legal or political recourse.⁵ See 1 Laurence H. Tribe, *American Constitutional Law* § 6-5 (3d ed. 2000) (“The checks on which we frequently rely to curb the abuse of legislative power—election and recall—are simply

⁵ The Ninth Circuit’s approval in *Rocky Mountain* of California’s “legal and political responsibility for emissions in other states” suggests that the lower court found this to be a strength of their respective programs, not a constitutional weakness. See 730 F.3d at 1105–06 (quoting *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1092 (E.D. Cal. 2013)). Of course, neither state’s officials are legally or politically responsible to any electorate outside those states’ borders.

unavailable to those who have no effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state's borders.”).

III.

THE DECISION BELOW CREATES GRAVE, IMMEDIATE IMPLICATIONS FOR NATIONAL FUEL MARKETS

A. The Fuel Program imposes one state's control over a national fuel market of crucial significance to every American

The Court should grant the Petition to address this unprecedented foray into national control of fuel production, and to protect the nation's foundational transportation fuel market from interference.

Gasoline and diesel fuel are the basic energy inputs that provide most of the mobility and commerce in American life and culture. It is difficult to picture any significant part of the nation that does not depend, daily, on a reliable market for transportation fuel. It is also hard to imagine anyone who is not harmed by the intentional manipulation or the balkanization of that market. Fuel production is an enormous and complex foundation of our economy. When states like California and Oregon use their market powers as a lever to exert control over the foundational fuel supply chain in every other part of the national market, then the states are no longer equals. The Court should grant the Petition because the Ninth Circuit ruling allows states to micromanage the national fuel supply chain.

B. The decision below encourages other states to use malleable life-cycle analysis to regulate beyond their borders

The Court should grant the Petition to prevent multiple states from using life-cycle analysis to engage in extraterritorial and discriminatory trade conflicts. Washington State has investigated the development of its own version of the Fuels Program. Life Cycle Associates LLC, *A Clean Fuel Standard in Washington State: Revised Analysis with Updated Assumptions* (Dec. 12, 2014).⁶ And a coalition of 11 states in the Northeast and Mid-Atlantic regions are jointly developing their own regional low carbon fuel standard. See Ne. States Ctr. for a Clean Air Future, *Introducing a Low Carbon Fuel Standard in the Northeast* (July 2009).⁷

States can use life-cycle analysis to achieve any purpose desired. Using such analysis to assign carbon intensity values entails significant uncertainty, generalization, simplification, and policy judgment. Alexander Farrell & Daniel Sperling, U.C. Davis Inst. of Transp. Studies, *A Low Carbon Fuel Standard for California* § 2.8.2, at 41 (2007) (“The present generation of transportation fuel [life-cycle analysis] models . . . produce . . . values for each fuel pathway, but these values must be understood as both incomplete and, in many cases, highly uncertain.”). One of the sources of “incompleteness and uncertainty” is “[i]nherent variability and limited quality in the data.” Drs. Farrell and Sperling identify an important qualification to life-cycle analysis:

⁶ Available at <https://bit.ly/2ULIYXj> (last visited Jan. 31, 2019).

⁷ Available at <https://bit.ly/2Su2SbB> (last visited Jan. 31, 2019).

In general GREET⁸ follows widely accepted methods but significant uncertainties and omissions remain and current methods are not considered adequate by all experts. No single approach may be able to address all concerns. For instance, there is an important trade-off between detail and breadth, typically manifested in the choice between detailed engineering-type process-specific [Life Cycle Assessments] of limited extent and extensive economy-wide analyses of limited detail. It is not clear how to resolve this tradeoff, and a highly-detailed, economy-wide analysis may be impracticable.

A Low Carbon Fuel Standard for California, supra, § 2.8.2, at 41 (citations omitted).

Due to these limitations, states like California and Oregon make numerous policy decisions about life-cycle analysis in implementing their programs. As a regulatory tool, life-cycle analysis will always be fraught with uncertainty and will require policy decisions that the technical methodology alone does not support. For example, California decided to attribute emissions from land clearing (in Brazil and elsewhere) to the production of ethanol in the United States. Cal. Air Res. Bd., *Proposed Regulation to Implement the Low Carbon Fuel Standard, Volume I*,

⁸ “GREET” refers to a methodology for calculating carbon intensity developed by Argonne National Lab and used by California in its Low Carbon Fuel Standard. Oregon made adjustments to this methodology to suit their particular purposes, resulting in a modified methodology called OR-GREET. *Advisory Final Report, supra*, at VII.1.E.

Staff Report: Initial Statement of Reasons § IV.C (Determination of Carbon Intensity Values, Indirect Effects Analysis) (2018). By contrast, Oregon determined that the science was too inconclusive to include such effects in the Fuels Program. *Advisory Final Report, supra*, § VII.2.A. California and Oregon will always be able to manipulate any life-cycle analysis to enforce discriminatory policy preferences over those emission sources that otherwise fall outside of the states' police power. Interstate discrimination is an intended feature of the Fuels Program, not a bug.

Under the Ninth Circuit's ruling, California and Oregon would be far from alone in wielding this power. The malleability of life-cycle analysis models, and the need to simplify and generalize their results and fill in their gaps in order to use them as regulatory tools, allows any state the freedom to retaliate against Oregon (or discriminate against their neighbors) in many ways. For example, Midwest states could act against their Pacific counterparts by deciding to apply the same life-cycle analysis model to only the U.S. shipping emissions for consumer goods sold in their states. The carbon penalties resulting from long ground transport from the West (or East) Coast to the Mississippi Valley would likely impede such trade, to the benefit of Gulf Coast ports. This could have a significant extraterritorial impact on port activity in many of the same states that are currently considering programs similar to the Fuels Program. *See generally* U.S. Dep't of Transp., Research & Innovative Technology Admin., Bureau of Transp. Statistics, *Special Report: The Changing Tide of U.S.-International Container Trade: Differences Among the U.S. Atlantic, Gulf, and Pacific Coasts* (Dec. 2011)

(describing differences between the markets served by the three coastal port regions).⁹

This type of domestic trade war is the antithesis of federalism among the states, *see* pp. 14-16, *supra*, but is precisely what the decision below allows unless the Court grants the Petition in order to cabin the states' extraterritorial use of life-cycle analysis.

CONCLUSION

This Court has consistently held that within our system of federalism, states may not control actions wholly outside their borders. This Court (rather than the one below) should decide whether states may constitutionally unravel this framework by using life-cycle analysis as a means of extraterritorial regulation.

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Respectfully submitted,

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⁹ Available at <https://bit.ly/2MPV5ji> (last visited Jan. 31, 2019).