JON BRUNING, Nebraska State Bar #20351
Nebraska Attorney General
KATHERINE J. SPOHN, Nebraska State Bar #22979
KEVIN L. GRIESS, Nebraska State Bar #22182
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68508
(402) 471-2682
katie.spohn@nebraska.gov
kevin.griess@nebraska.gov

Attorneys for Amicus Curiae State of Nebraska

DEREK SCHMIDT
Kansas Attorney General

WAYNE STENEHJEM
North Dakota Attorney General

BILL SCHUETTE
Michigan Attorney General

MARTY J. JACKLEY
South Dakota Attorney General

CHRIS KOSTER
Missouri Attorney General

[Additional identification information for Amici States listed on signature page]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

ROCKY MOUNTAIN FARMERS UNION, et al.,	)	Lead Case No. 1:09-CV-02234-LJO-DLB, *consolidated with* Case No. 1:10-CV-00163-LJO-DLB
Plaintiffs,	)	
vs.	)	**AMICUS BRIEF OF STATES OF NEBRASKA, KANSAS, MICHIGAN, MISSOURI, NORTH DAKOTA, and SOUTH DAKOTA**
JAMES N. GOLDSTENE, in his official capacity as Executive Director of the CALIFORNIA AIR RESOURCES BOARD,	)	Hearing Date: Hearing Time: Courtroom:
Defendant.	)	Judge: Hon. Lawrence J. O'Neill

TABLE OF CONTENTS

INTRODUCTION 1

INTERESTS OF AMICUS CURIAE 1

ARGUMENT 4

I. California's LCFS discriminates against ethanol produced in Nebraska and other Midwestern states in favor of ethanol produces in California. 4

II. The LCFS is an improper exercise of regulation by one state imposing its will on the rest of the country 6

III. The LCFS directly interferes with the sovereign interests of Amici States. 8

CONCLUSION 10

1 TABLE OF AUTHORITIES

2 Cases

3 *C & A Carbone, Inc. v. Town of Clarkstown*,

4 511 U.S. 383, 390 (1994) 4

5 *C & A Carbone, Inc. v. Town of Clarkstown*,

6 511 U.S. 383, 392 (1994) 4

7 *Edgar v. MITE Corp.*,

8 457 U.S. 624, 643 (1982) 10

9 *H.P. Hood & Sons, Inc. v. Du Mond*,

10 336 U.S. 525, 539 (1949) 4

11 *Healy v. Beer Institute*,

12 491 U.S. 324, 336 (1989) 9

13 Rocky Mountain Farmers Union v. Goldstene,

14 No. 1:09-CV-02234-LJO-DLB (Nov. 1, 2010) 7

15 *Shaffer v. Heitner*,

16 433 U.S. 186, 197 (1977) 10

17 *South Dakota Farm Bureau, Inc. v. Hazeltine,*

18 340 F.3d 583, 593 (8th Cir. 2003) 4

19 Statutes

20 17 C.C.R. § 95486(b) 10

21 17 C.C.R. §§ 95480-90.....1

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

1 **United States Code**

2 42 U.S.C. § 7426 8

3 42 U.S.C. § 7511(c) 8

4 42 U.S.C. § 7545(o)(2) 7

5 42 U.S.C. § 7545(o)(2)(A)(i) .....

6

INTRODUCTION

The States of Nebraska, Kansas, Michigan, Missouri, North Dakota, and South Dakota, file this amicus brief in support of Plaintiffs' challenge of the California Air Resources Board's low-carbon fuel standard (LCFS), 17 C.C.R. §§ 95480-90.

The LCFS 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. It threatens to create a patchwork quilt of inconsistent and contradictory regulations, when Congress has already spoken in the Clean Air Act. Moreover, the LCFS penalizes corn ethanol based on activities occurring *wholly outside of California*. In so doing, it impinges on the sovereign interests of Nebraska, Kansas, Michigan, Missouri, North Dakota, and South Dakota 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 and Supremacy Clauses of the U.S. Constitution.

INTERESTS OF AMICUS CURIAE

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 economy.

Today, 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 2009, over 3.83 billion bushels of corn were produced in Amici States (compared to 28.8 million bushels in California). Amici States' 2009 corn production was worth over $13.3 billion. The 2010 corn crop, which produced over 3.55 billion bushels, was worth over $18.9 billion, due to higher prices. Those dollars multiply as they flow through Amici States' economy, 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 state 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).

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. As of October 2010, Nebraska had 24 ethanol plants operating within the state with total production capacity of 1.98 billion gallons of ethanol.

Just as importantly, the ethanol industry's economic impact is felt across the Amici States. In Nebraska alone, more than 1,300 people are directly employed in the ethanol industry, and the indirect and secondary effects of the industry employ an additional 1,600 people. According to statistics compiled by the Nebraska Public Power District' 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.

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 Nebraska and other Midwestern 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, or threaten to 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 ensure that ethanol for California would be produced in

California. Specifically CARB sought to protect California ethanol interests to the exclusion of out-of-state ethanol in declaring that "Displacing imported transportation fuels with biofuels produced in the state keeps more money in the state." *See* FSOR, PRJN Exh. 4 at 479.

In addition to a discriminatory purpose, the LCFS has a discriminatory effect. The LCFS directly discriminates against out-of-states ethanol production by assigning higher carbon intensity values to ethanol produced in Amici states than it does to 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 from using Amici States ethanol, and instead blatantly curries favor to California ethanol producers.

The effect will be clear – 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. California's protectionist approach will rob Amici States of billions in ethanol sales if allowed to stand. The LCFS's discriminatory effect will rob 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 has failed to establish that it lacks alternative means to advance a legitimate state purpose, LCFS should be struck as an impermissible regulation under the Dormant Commerce Clause of the United States Constitution.

It is no answer to say, as California does, that individual producers in Amici States can apply to change the LCFS and have individual "pathways" approved. That a regulation may be changed is no defense of that regulation. Regardless, the deck remains stacked: An ethanol plant in California that is in all material respects the same as an ethanol plant in Nebraska, will have a lower carbon-intensity penalty based on its geography. And even considering the pathways applied for to date, California ethanol plants retain a systemic advantaged over otherwise similarly-situated Midwest ethanol plants due to geography. Such discrimination is prohibited by the Commerce Clause.

II. The LCFS is an improper exercise of regulation by one state imposing its will on the rest of the country.

The LCFS should further be struck down as it violates the Supremacy Clause of the United States Constitution. The LCFS purports to address a problem of global

concern, yet reflects the judgments and compromises of just one state. Those judgments, reflected in the LCFS and the carbon intensity values assigned to various fuels, will have a ripple effect across the country. If allowed to stand, California's LCFS will lead to a patchwork quilt of conflicting regulations covering the nation, imposing a host of divergent, competing requirements on individuals, businesses, and states. Indeed, what one state decides is good for addressing global warming may be quite different from what another state decides. The LCFS assigns penalties based on a highly controversial and undeveloped theory of "indirect land use change." Other states may come to different conclusions about what fuels are good or bad for reducing carbon emissions and work directly at cross-purposes in attempting to address what is fundamentally a global, *not local*, issue.

Instead, the issue of greenhouse gas emissions begs for a more unified approach – which is exactly what Congress accomplished with the enactment of the Energy Independence and Security Act of 2007. The Act increased the required volume of renewable fuels for sale in gasoline, including ethanol. *See* 42 U.S.C. § 7545(o)(2). In Congress' judgment, the ethanol industry played a vital role in the economy of the entire nation, as well as in individual states such as Amici. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 24, n.15, Rocky Mountain Farmers Union v. Goldstene, No. 1:09-CV-02234-LJO-DLB (Nov. 1, 2010) (collecting quotations from various Congressmen expressing support for, and acknowledging importance of, the ethanol industry). To protect it, Congress

exempted many existing ethanol facilities from the Act's various emission requirements. 42 U.S.C. § 7545(o)(2)(A)(i).

Where Congress has enacted a comprehensive law on a topic with nationwide implications, the Supremacy Clause prohibits states from adopting laws which conflict with such law and unilaterally eviscerating the intent of Congress. The only proper means for California to seek controls on greenhouse gas emissions sources in other states is through the interstate regulatory mechanisms provided by the Clean Air Act. *See, e.g.*, 42 U.S.C. § 7426 (interstate pollution abatement); § 7511(c) (regional control of pollutants contributing to ozone formation).

Ignoring the requirements of the Clean Air Act, in adopting LCFS, California attempts to regulate a type of emissions that is simply not susceptible to regulation by a single state or group of states. Any attempts to address the global issue of greenhouse gas emissions should be accomplished on a national level, with proper input from all interested parties across the nation, rather than be decided by a single state. Accordingly, California's LCFS should be struck down.

III. The LCFS directly interferes with the sovereign interests of Amici States.

Finally, the LCFS is an attempt to thwart Congress' intent and impose the views of one large state – California – on the other 49 states. As sovereign states, Amici 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, across 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. That extraterritorial regulation further violates the Commerce Clause.

The LCFS assigns penalties to ethanol based not only on where it is produced, but also on *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 ability to regulate ethanol production and other activities within their borders as they see fit. 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 directly influence or deter out-of-state activities that give rise to the production of ethanol.

For 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. The penalty is also affected by California's views about various "farming practices." FSOR at 514-17. California is, thus, seeking to change out-of-state "farming practices" based on its views of what is "more sustainable." *Id.* Again, it is none of California's business

how farmers in Nebraska choose to grow their corn. California may not seek to effectively regulate out-of-state farming policies by penalizing the only thing imported into California—the ethanol end-product—based on those out-of-state activities that have no bearing on the make-up of the end-product itself.

California is also effectively forcing many Midwest corn ethanol plants to convert from producing a dry distillers' grains co-product into a wet distillers' grains co-product, because it penalizes ethanol producers for the energy used in drying this *wholly separate product*. *See* 17 C.C.R. § 95486(b), Table 6; FSOR at 508; 825. Dry distillers' grains, however, are a more valuable commodity, which can be stored longer and shipped longer distances. *See* EPA RIA at 93-94. 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. 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

For all the reasons expressed by Plaintiffs in support of their Motion for Summary Judgment, Amici States urge this Court to strike down California's discriminatory LCFS.

Dated: March 1, 2011.

/s/ Kevin L. Griess
JON C. BRUNING, Nebraska State Bar #20351
Nebraska Attorney General
KATHERINE J. SPOHN, Nebraska State Bar #22979
KEVIN L. GRIESS, Nebraska State Bar #22182
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68508
Telephone: (402) 471-2682
Facsimile: (402) 471-1929
katie.spohn@nebraska.gov
kevin.griess@nebraska.gov

Attorneys for Amicus Curiae States

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

BILL SCHUETTE
Michigan Attorney General
P. O. 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 Avenue
Bismarck, ND 58505-0040
Telephone: (701) 328-2210
Facsimile: (701) 328-2226

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