

Nos. 12-15131, 12-15135

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN FARMERS UNION, et al.,
Plaintiffs-Appellees,

v.

JAMES N. GOLDSTENE, in his official capacity as
Executive Officer of the California Air Resources Board, et al.
Defendants-Appellants,

ENVIRONMENTAL DEFENSE FUND, et al.,
Intervenor-Defendants-Appellants.

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

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INTRODUCTION

Heeding its citizens' call expressed in landmark state legislation and consistent with its historic role in the innovative regulation of automotive-related pollution, California has taken decisive action to confront the daunting environmental challenge presented by climate change. In its initial efforts, California successfully pressed to control greenhouse gas ("GHG") emissions from new automobiles sold in California. See *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007). That bold regulation became the model for the nation's control of automobile GHG emissions. See *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011). That was only the first step, however, in curtailing GHG emissions from California's transportation sector. Reducing emissions from vehicle *fuels* is of equally critical importance.

To tackle GHG emissions from fuels, California adopted the Low Carbon Fuel Standard ("LCFS") to reduce GHG emissions from the full lifecycle of transportation fuels consumed in California. Relying on a neutral, widely accepted scientific methodology to assess GHG emissions from the full lifecycle of fuel production, processing, and combustion, the LCFS is intended both to reduce emissions gradually over time, and to create adequate incentives for the development of lower-carbon fuels. The LCFS considers GHG emissions associated with the full lifecycle of fuels consumed in California because that is the

only scientifically valid way to assess the true GHG impacts of fuel use and the only way to establish the necessary incentives to develop cleaner fuels.

But industry groups representing corn ethanol and petroleum companies oppose this effort. They contend in these lawsuits that the LCFS violates the dormant Commerce Clause because, they allege, those standards discriminate against out-of-state producers and improperly seek to regulate conduct occurring entirely outside California. They also contend that the LCFS is in conflict with the federal Renewable Fuel Standard (“RFS”) adopted under Clean Air Act Section 211(o). Apparently perceiving the LCFS as a pretext to protect California’s fuel producers, the district court struck down the LCFS as unconstitutional and issued a preliminary injunction to prevent its implementation. The district court’s decisions should be reversed.

Contrary to the district court’s rulings, there is no discrimination here. The LCFS is intended to create incentives for low-carbon alternatives to petroleum, not the protectionist purpose of benefiting California-produced fuels. The LCFS does not discriminate based on geography: instead, it uses a uniform metric – carbon intensity – that is directly linked to legitimate policy goals. Nor does it result in extraterritorial regulation. Instead, the LCFS governs only California fuel transactions, and any effects on out-of-state actors are indirect and permissible. The absence of discrimination is evident in the fact, for example, that numerous

out-of-state ethanol producers receive lower carbon intensity values for their fuel products than California ethanol producers, despite the added costs of transporting the fuel to California.

The district court also overlooked direction from Congress and EPA that the LCFS not only is consistent with, but positively furthers, federal policy and federal interests. Decades ago the federal Clean Air Act enlisted California as the federal government's partner in discovering innovative solutions to address the harmful impacts of tailpipe emissions and transportation fuel. 42 U.S.C. §§ 7543, 7545(c)(4)(B). The LCFS is not only a lawful exercise of California's police power but a federally sanctioned regulation of transportation fuel that Congress knew would have incidental impacts on interstate commerce. And the district court's finding that Appellees' preemption claims presented "serious questions" overlooked overwhelming evidence of Congressional intent not to preempt the LCFS, including an express provision that the federal RFS program shall not be construed to preclude more protective state environmental regulation.

Appellants respectfully request that the Court reverse the district court's judgments and preliminary injunction and that it direct the district court to allow California to move forward with this vitally important program.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over these consolidated actions under 28 U.S.C. section 1331, because the complaints allege that California's Low Carbon Fuel Standard regulation violates the Supremacy Clause, U.S. Const., Art. VI, para. 2, and the Commerce Clause, U.S. Const., Art. I, sec. 8, cl. 3. On December 29, 2011, the district court granted in part and denied in part plaintiffs' motions for summary judgment and defendants' cross-motion for summary judgment, and granted Rocky Mountain Farmers Union ("RMFU") plaintiffs-appellees' motion for a preliminary injunction. Excerpts of Record ("ER") ER 1:21, 1:46, 1:84.¹ The district court also certified judgments for plaintiffs under Federal Rule of Civil Procedure rule 54(b), even though plaintiffs' preemption claims remained unresolved. *Id.*; see also ER 1:45, 1:82-83. Defendants filed their notices of appeal, and corrected notices of appeal, on January 5, 2012, in compliance with Federal Rule of Appellate Procedure rule 4(a)(1). ER 1:7, 1:13.

This Court has jurisdiction over the Rule 54(b) judgments and the preliminary injunction under 28 U.S.C. sections 1291 and 1292(a)(1) respectively.

¹ Citations to the Appellants' Excerpts of Record are to volume and page number. For example, "ER 1:21" connotes volume 1, page 21.

STATEMENT OF ISSUES

This appeal presents the Court with the following issues:

(1) whether the LCFS is consistent with the Dormant Commerce Clause in that (a) it has a non-discriminatory purpose; (b) it treats ethanol in an even-handed and non-discriminatory way; (c) it treats crude oil in an even-handed and non-discriminatory way; and (d) it lawfully regulates fuels sold in California despite incentives it creates for out-of-state fuel producers;

(2) whether, if any of the questions in (1)(a), (b) or (c) are answered in the negative, the LCFS survives strict scrutiny because it represents the only way for California to achieve its legitimate local purpose of reducing the carbon emissions produced by motor-vehicle fuel sold in California;

(3) whether Clean Air Act section 211(c)(4)(B) insulates California from claims that the LCFS unlawfully burdens commerce;

(4) whether the district court erred in granting RMFU a preliminary injunction because (a) RMFU cannot establish either that it is likely to prevail or that there are serious questions on the merits of either its dormant Commerce Clause or conflict preemption claims; or (b) RMFU failed to demonstrate irreparable injury.

STATEMENT OF THE CASE

This appeal concerns two actions challenging the constitutionality of the Low Carbon Fuel Standard (the “LCFS”)², California Code of Regulations, title 17, sections 95480-90, adopted by the California Air Resources Board (“ARB”). ARB adopted the LCFS under the California Global Warming Solutions Act of 2006 (“AB 32”). *See* Cal. Health & Saf. Code §§38501-38599. Recognizing the adverse impacts of global warming on California's economy, environment and public health, and seizing on California's role as a leader in spurring vehicular technology and fuels innovation, *id.* § 38501(c), AB 32 established a goal to reduce the State’s greenhouse gas (“GHG”) emissions to 1990 levels by 2020. The LCFS is a vital component of the State's program to achieve this goal.

RMFU filed the first action challenging the LCFS on the grounds that it violates the dormant Commerce Clause and is preempted by Clean Air Act section 211(o). ER 13:3258. RMFU includes several trade associations representing ethanol fuel producers. Plaintiffs-appellees National Petrochemical & Refiners Association (n/k/a American Fuels & Petrochemical Manufacturers Association; hereafter “AFPM”) filed a second action on similar grounds. ER 13:3240. AFPM includes trade associations representing crude oil refiners. Collectively, RMFU

² For the Court’s convenience, a Glossary of Terms and Index of Abbreviations is appended to Appellants’ Opening Brief.

and AFPM named ARB's Executive Officer, ARB's board members, California's Governor and California's Attorney General as defendants. ER 13:3258, 13:3240. Defendant-intervenors are Natural Resources Defense Council, Inc., Sierra Club, Conservation Law Foundation and Environmental Defense Fund. Defendants and defendant-intervenors are referred to collectively as "Appellants."

The district court consolidated the two actions for all purposes except judgment and appeal. ER 13:3394, 3349-50. Both RMFU and AFPM filed summary judgment motions. RMFU's motion covered all of their causes of action. RMFU also filed a motion for a preliminary injunction. See ER 13:3394, 3393. AFPM's partial motion for summary judgment covered certain of their Commerce Clause claims. See ER 13:3393. Appellants filed oppositions to Appellees' motions and a cross-motion for summary judgment on all claims.

On December 29, 2011, the district court granted in part and denied in part RMFU's summary judgment motion, and granted AFPM's partial motion, holding that the LCFS violates the dormant Commerce Clause by (1) regulating extraterritorially, (2) discriminating facially with respect to ethanol, and (3) discriminating in purpose and effect with respect to crude oil. ER 1:21-45, 46-80. As to ethanol, the court found that the ethanol pathways in the LCFS are impermissible extraterritorial regulation because they account for GHG emissions from production and transportation outside of California and are facially

discriminatory because they are based on factors that are inextricably intertwined with geographic origin. Regarding crude oil, the court held that the LCFS favorably treats California crude oil sources and discriminates against out-of-state and foreign crude oil in design and effect.

As to Appellants' cross-motion, the court granted summary adjudication on the issue that the LCFS is a control or prohibition respecting a fuel under Clean Air Act section 211(c)(4)(B), and denied summary adjudication on whether section 211(c)(4)(B) insulates the LCFS from the preemption or Dormant Commerce Clause challenges. ER 1:116. On the preemption claim, the district court denied both RMFU's and Appellants' motions without prejudice on the ground that neither party had adequately addressed the appropriate standard of review. ER 1:83, 116.

Finally, the district court granted RMFU a preliminary injunction relying on the rulings that the LCFS violates the Commerce Clause. ER 1:80-82. In addition, the court found that RMFU had raised "serious questions" regarding whether the LCFS conflicts with Clean Air Act section 211(o). ER 1:81. The district court enjoined the State defendants from enforcing the LCFS during this litigation, entered judgment for plaintiffs in both actions, and certified the ruling on the Dormant Commerce Clause claims under Rule 54(b). ER 1:19-20, 45, 83.

Defendants timely appealed. ER 1:7, 13.

After the district court denied Appellants' motion for a stay, this Court granted Appellants a stay of the injunction and judgments on April 23, 2012.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. States Have the Primary Responsibility to Regulate Air Pollution, Including Emissions From Transportation Fuels

It is well recognized that

[a]ir pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation traditionally has been a matter of state authority.

Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 1255 (9th Cir. 2000). Even when Congress mandated that states attain specified, national standards for air pollution, Congress "explicitly preserved the principle: 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State.'" *Id.* (quoting *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975) (discussing history of Clean Air Act and amendments)); *See also*, 42 U.S.C. § 7401(a)(3). Thus, states generally retain regulatory power to control air pollution:

Except as provided in ...[sections 209 and 211(c)(4)] nothing in [the Clean Air Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants, or (2) any requirement respecting control or abatement of air pollution.

42 U.S.C. § 7416. This Court has previously observed that this section “provides a substantial retention of State authority.” *Oxygenated Fuels Assn. Inc. v. Davis*, 331 F.3d 665, 670-71 (9th Cir. 2003).

B. As Recognized By Congress, California Has a Long History of Leadership in Regulating Air Pollutant Emissions, Including from Fuels, and the LCFS Is Part of This Tradition

From the outset of regulatory efforts to control air pollution from the transportation sector, California has led the way. “The states acting after 1965 were Johnnies-come-lately to the field compared to California, which had undertaken statewide efforts as early as 1958.”³ *Motor and Equip. Mfrs. Ass’n v. E.P.A. (“MEMA”)*, 627 F.2d 1095, 1109 (D.C. Cir. 1979). Specifically, California was regulating Reid vapor pressure and lead content in gasoline before the federal government. *See W. Oil & Gas Ass’n v. Orange County Air Pollution Control Dist.*, 14 Cal.3d 411, 414 (1975). California also led the way in later banning lead in gasoline. *See Motor Vehicle Mfrs. Ass’n v. N.Y. State Dept. of Env’tl. Conservation*, 17 F.3d 521, 529 (2nd Cir. 1994).

³ In fact, as the D.C. Circuit noted further, California's interest in pollution control from motor vehicles dates to as early as 1946. *MEMA*, 627 F.3d at 1109, n.26. The Senate Report on the Motor Vehicle Air Pollution Control Act of 1965 observed that California “leads in the establishment of standards for regulation of automotive pollutant emissions.” S.Rep. No. 192, 89th Cong., 1st Sess. 5 (1965). *Id.*

In the 1970 amendments to the Clean Air Act, Congress noted the significance of pollution from automobiles. *See* U.S. Code Cong'l & Admin. News (1970) Vol. 3, p. 5361. To address this significant source, Congress specifically designed the 1970 amendments to target both motor vehicles and motor vehicle fuels. *Id.*

Because California was already the leader in regulating transportation emissions, “Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight.” *Ford Motor Co. v. U.S. Env'tl. Prot. Agency*, 606 F.2d 1293, 1297 (D.C. Cir. 1979); *see also Engine Mfrs. Ass'n v. U.S. Env'tl. Prot. Agency*, 88 F.3d 1075, 1079 (D.C. Cir. 1996). For the control of motor vehicle emissions, Congress provided in Clean Air Act section 209 that California may promulgate and enforce such a control, but only after obtaining a waiver of preemption from EPA. 42 U.S.C. § 7543(a), (b); *Ford Motor Co.*, 606 F.2d at 1297. Other states do not have this authority, but they may adopt California's emission standards via Clean Air Act section 177. *See* 42 U.S.C. § 7507. Over the objections of the automobile industry and cognizant of the potential impacts on commerce, Congress created the dual federal/California system of regulation of motor vehicle emissions in order to preserve California's leadership role as a laboratory for innovation and a driver of improvements in vehicle pollution technology. *Engine Mfrs. Ass'n*, 88 F.3d at 1080.

As to the regulation of motor vehicle fuels, Congress took a similar approach in Section 211, with one important difference. In contrast to section 209, Congress preserved all states' authority to regulate emissions from fuels. Thus, states are not preempted under section 211 unless and until EPA regulates or decides regulation is not necessary. 42 U.S.C. §7545(c)(4)(A)(i), (ii). Even when EPA takes preemptive action, however, California (and only California) remains free to regulate fuels under Section 211(c)(4)(B).⁴ 42 U.S.C. § 7545(c)(4)(B). Congress provided that "California is exempt from federal preemption: it may regulate fuel standards without seeking approval from the EPA." *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 79 F.3d 1298, 1302 (2nd Cir. 1996).

Thus, in fashioning the overall structure of the vehicle pollution program, Congress envisioned a coordinated system of controls on motor vehicles and their fuels. And within that system, Congress explicitly protected California's authority to regulate fuels. "[T]here are overwhelming indications in the legislative history that Congress intended California to enjoy the broadest possible discretion in

⁴ The Senate affirmed that once EPA acts, "States and localities are preempted from presenting or enforcing controls or prohibitions not identical to those of the Federal government California, however, is free to have any regulation of fuels or additives it finds necessary." Sen. Debate Conf. Rep., 1970 Legislative History, vol. 1, 135; *see also* House Debate Conf. Rep., 1970 Legislative History, vol.1, 113; H.R. CONF. REP. NO. 91-1783 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5385 (noting "restrictions will not apply to California"). This "identity" statement presupposes the existence of a federal control against which state standards can be compared.

selecting a complete program of emissions control.” *MEMA*, 627 F.2d at 1108, n.22.

Indeed, when Congress preserved California’s fuels’ authority, it acknowledged that California’s existing standards were already more stringent than the proposed national standards. *See* House Debate Conf. Rep., 1970 Legislative History, vol.1, 113 (“[t]he State is free with regard to fuels,” and “the laws that were put on the books [in 1970] by California...which are stricter and more rigid than the national criteria will not, in fact, be preempted by this legislation.”). The legislative history confirms that Congress intended to preserve California’s ability to exercise its police power in the field of fuel regulation. *Id.* at 113-114.

By regulating GHG emissions from transportation fuels consumed in California, the LCFS is a continuation of California’s tradition of leadership in fuels regulation.

C. Climate Change Presents an Unprecedented Challenge and California Is Again Leading the Charge to Respond

“The harms associated with climate change are serious and well recognized.” *Mass. v. U.S. Env’tl. Prot. Agency*, 549 U.S. 497, 521 (2007).

Finding that “[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California,” in 2006, the California Legislature enacted AB 32. Cal. Health & Safety Code § 38501(a). The

Legislature identified numerous, specific threats facing California as a result of climate change, including “exacerbation of air quality problems, a reduction in the quality and supply of water...from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences,” as well as “detrimental effects on some of California’s largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing and forestry.” *Id.* §§ 38501(a), (b).

Responding to these threats, the Legislature mandated that California reduce its GHG emissions to 1990 levels by 2020 and authorized ARB to adopt regulations to achieve its emissions reduction objectives. *Id.* §§ 38550, 38560. ARB adopted the LCFS under that authority.

D. Emissions From Transportation Are A Major Contributor to Climate Change, And California Is Necessarily Addressing Those Emissions On Several Fronts

Transportation emissions are a significant contributor to GHG emissions: “[c]onsidering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world.” *Mass.*, 549 U.S. at 524. In fact, of all of the sectors in the California economy, the transportation sector is the largest single source of GHGs, comprising almost 40 percent of total GHG emissions statewide. ER 4:767, 3:458 at ¶ 48, 5:921-922.

AB 32 requires ARB to “take into account the relative contribution of each source or source category to statewide greenhouse gas emissions.” Cal. Health & Safety Code § 38561. Given the importance of this sector, ARB has taken a three-pronged approach to reducing emissions from transportation: (1) reducing GHG emissions from motor vehicles by promoting innovation in vehicle technology, including low carbon alternative fuel technology (the “Pavley rule”), (2) reducing vehicle miles traveled (VMT) (SB 375), and (3) reducing emissions associated with transportation fuels (the LCFS). ER 4:767 at ¶ 8, 9:2231-2233.

Pavley Standards. The Pavley rule, adopted by ARB in 2004, established progressively stricter GHG emission standards for new vehicles. Following the Supreme Court's decision in *Massachusetts v. EPA*, two federal district courts upheld the Pavley standards as authorized by Clean Air Act section 209(b), recognizing California's special role in promoting motor vehicle technology innovation. See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D.Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

Lowered VMT: In an effort to reduce vehicle miles traveled and meet the goals of AB 32, California adopted a program under SB 375 to integrate long-range land use, housing and transportation planning at a regional level, with the goal of creating communities that are healthier, more sustainable, and lower-

emitting. ER 9:2242; Sustainable Communities and Climate Protection Act of 2008, SB 375, Ch. 728, Stats. of 2008. SB 375 requires ARB to develop regional GHG reduction targets for the transportation sector for each of the State's 18 metropolitan planning organizations. *See* Cal. Gov. Code § 65080. These metropolitan planning organizations develop plans, subject to ARB review, to meet each of their GHG reduction targets.

As described below, the LCFS is the essential third component of California's approach to reducing transportation sector emissions.

E. The Low Carbon Fuel Standard Is a Scientifically-Valid and Market-Based Fuels Regulation That Controls GHG Emissions from Fuels Consumed in California

1. Development of the LCFS

While California was in the process of successfully defending the Pavley rule, ARB began implementing the fuels prong of the overall program to reduce GHG emissions from the transportation sector, the LCFS. On January 18, 2007, the Governor issued an Executive Order requiring ARB to adopt regulations to reduce the carbon intensity of transportation fuel by 10 percent by the year 2020. ER 5:921-22. The LCFS became effective in two parts, on January 12, 2010, and April 15, 2010.

2. The Goals of the LCFS

As expressly stated in the regulation, the purpose of the LCFS is to reduce GHG emissions from transportation fuels by reducing fuel carbon intensity by at

least 10% by the year 2020. Cal. Code Regs., tit. 17, §§ 95480, 95482 (2010). The LCFS is expected to reduce annual transportation sector emissions by about 16 million metric tons by 2020. ER 9:2197. This is approximately 10 percent of the total reductions required by AB 32, which makes it one of the largest reduction measures. *Id.* The LCFS is designed to accomplish this overall goal by driving development and commercialization of lower-carbon fuels and by creating a stable and lasting market for clean fuel technology. *Id.* Thus, just as the Pavley rule was designed to drive innovation in lower-emitting vehicle technology, ARB intended the LCFS to stimulate the development and production of low-carbon fuels. The development, production and use of these alternative fuels furthers yet another purpose of the LCFS – to reduce California’s dependence on oil and its exposure to oil price shocks. ER 3:470, 9:2197, 5:921-22.

3. How the LCFS Works

The LCFS applies to virtually all transportation fuels consumed in California, including gasoline, diesel, biodiesel, ethanol, electricity and natural gas, as well as any new fuels introduced in the future. Cal. Code Regs., tit. 17, § 95480.1(a).⁵ It sets an annual standard for GHG emissions (referred to as “carbon intensity”) from the transportation fuels consumed in California. ER 9:2197. The standard applies

⁵ Fuels not subject to the LCFS include aviation fuels and fuels used in ocean-going vessels. Cal. Code Regs, tit. 17, Sec. 95480.1(d).

to fuels on an average basis across the entire volume of fuel supplied by a regulated party. This means that fuels with carbon intensities higher than the standard must be offset by lower-carbon fuels. Thus, no particular fuel is either prohibited or required.

The annual carbon intensity standard applies to regulated parties who sell transportation fuels in California. Currently regulated parties typically consist of refiners or blenders of gasoline or diesel sold in California. Cal. Code Regs., tit. 17, § 95484(a). A fuel sold in California generates a credit or a deficit, depending on whether its carbon intensity is lower or higher than the target for the year. ER 4:773 at ¶ 29; *see also* Cal. Code Regs., tit. 17, § 95485. Credits may be used for compliance, sold to other regulated parties or carried over into future years. ER 4:773 at ¶¶ 29-30; *see also* Cal. Code Regs., tit. 17, § 95485. Regulated parties may comply by using a mixture of fuels that, in the aggregate, meets or falls below the target and/or by using accumulated or purchased credits to offset deficits. Cal. Code Regs., tit. 17, §§ 95484(b), 95485; ER 4:773-74 at ¶¶ 29, 30, 33.

Beginning in 2011, the average carbon intensity standard decreases each year. *See* Cal. Code Regs., tit. 17, § 95482(b); ER 4:772-73 at ¶¶ 26-28, 5:867.⁶ Reductions grow larger as 2020 nears to allow necessary lead time for the

⁶ For ease of reference to the LCFS tables, Appellants cite the Court to the regulation in the record at ER 5:867.

development and production of new and/or improved fuels and vehicles that demand them. ER 9:2197; *see also*, Cal. Code Regs., tit. 17, § 95482.

The ability to sell LCFS credits, along with the compliance obligation and potential price premiums, are intended to provide incentives for the development and production of lower and very low carbon fuels. ER 9:2197. Investments in next generation fuels were occurring before the LCFS, but more investments are needed. ER 6:1202 at ¶ 10. Thus, the LCFS represents a powerful mechanism to incentivize and reward entities, regardless of location, that bring fuels with the lowest carbon intensity to the market. ER 6:1195 at ¶ 11. In fact, the LCFS is creating a vibrant new market for advanced transportation technologies, with a significant increase in investment nationwide. ER 6:1190 at ¶ 8. Progress toward next-generation fuels “is advanced by regulatory standards [based on lifecycle emissions] such as California’s LCFS.” ER 6:1201-1201 at ¶¶ 8-11.

4. Lifecycle analysis and carbon intensity values

The LCFS is based on the fact that the primary GHGs, carbon dioxide and methane, are global air pollutants. Because these GHGs are well-mixed in the global atmosphere, emissions generated outside of California pose the same risk to California citizens as those generated inside California. ER 5:1024, 11:2704. Thus, one ton of GHGs emitted in Ohio has the same environmental impact as a ton of GHGs emitted in California.

The LCFS also recognizes that fuels have widely varying GHG emissions. *See*, ER 4:768-69 at ¶¶ 12, 16; ER 9:2282-83. To effectively reduce emissions from fuels, ARB designed the LCFS to account not only for the vehicular tailpipe emissions of those fuels but the GHG emissions associated with production, refining and transport with the aim of reducing overall "well-to-wheel" GHG emissions. ER 6:1201 at ¶ 8; ER 4:805-06 at ¶¶ 6-7; ER 4:769 at ¶¶ 14-17; *see also*, Cal. Code Regs., tit. 17, § 95481(a)(11), (28).

Thus, under the LCFS, a scientific method – called a “lifecycle analysis” – is used to determine the carbon intensities of all transportation fuels. ER 9:2198; *see also*, ER 5:1045, 9:2288. Lifecycle analysis quantifies emissions from all stages of the fuel’s production, distribution and use. ER 9:2279; ER 4:769-72 at ¶¶ 14-25.

For example, a lifecycle analysis of ethanol made from corn includes a credit for the absorption of carbon from the atmosphere during photosynthesis as the corn plant grows. ER 9:2288-90, 4:772 at ¶ 23. It is the capacity for corn or other biofuel feedstocks to remove carbon from the atmosphere that creates the potential for these fuels to have carbon emissions and therefore carbon intensity values significantly below those of gasoline or diesel fuel. The LCFS gives full credit for that carbon removed from the atmosphere by setting the tailpipe CO₂ emissions of corn ethanol at zero (CO₂ emitted through combustion equals the CO₂ removed from the atmosphere). ER 4:772 at ¶ 23. This credit is then balanced against

emissions from farming the corn, transporting the corn to the production facility, transforming the corn into ethanol, transporting the ethanol to its point of consumption, and combusting the ethanol in the vehicle. ER 4:769-772 at ¶¶ 15, 21, 23; ER 4:806 at ¶ 7.

Also, under a non-lifecycle model, electric vehicles might appear to be emissions-free because they have no tailpipe emissions. However, electric vehicles are not emissions-free, because the generation of the electricity used in those vehicles typically produces GHG emissions. ER 4:769 at ¶ 16; ER 4:805-06 at ¶ 6. As these examples demonstrate, only a full lifecycle analysis provides an accurate quantification of the GHG emissions from transportation fuels.

This is true because a significant portion of the emissions generated by fuels – and 100% of the carbon-absorption benefits of biofuels – occurs before the fuel is combusted in a vehicle. *See* ER 4:769 at ¶ 16; ER 9:2288-90. Without a lifecycle analysis, there would be no way to determine if an increase in the transportation use of electricity, ethanol, or natural gas produced real reductions in emissions relative to fossil fuels. ER 4:769-70 at ¶¶ 14-17. A fuel's full lifecycle emissions are the only meaningful and effective basis upon which to compare fuels and reduce emissions. ER 6:1201 at ¶ 8; ER 4:769 at ¶¶ 15-16.

Recognizing the importance of lifecycle analysis, the Argonne National Laboratory developed a model to calculate lifecycle emissions from fuels. This

model, known as GREET (Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation), was originally developed in 1996, and has been peer-reviewed and updated several times. ER 4:770 at ¶ 18, n. 9; ER 9:2286. GREET incorporates comprehensive data about the lifecycle GHG characteristics of many different fuels. ER 4:770 at ¶ 18. As a result, GREET has become the standard tool for conducting lifecycle analysis. Accordingly, in designing the alternative fuel technology incentives in the Pavley Rule, ARB applied a GREET-based lifecycle analysis to determine the credit to be accorded to vehicle manufacturers. ER 9:2286. Congress also recognized the importance of this approach when it required EPA to use lifecycle analysis in implementing the Renewable Fuel Standard II (“RFS2”). The RFS is a volume mandate which requires the use of billions of gallons of renewable fuels, including ethanol, in the U.S. fuel supply. Pub. L. 109-58, § 1501, 119 Stat. 594, 1067-1076 (current version at 42 U.S.C. §7545(o)). The Energy Independence and Security Act of 2007 (“EISA”) amended the RFS in several ways. Pub. L. 110-140, 121 Stat. 1492, 1521-1528, § 202. EISA mandated four GHG thresholds within which biofuels would be categorized, and increased the volumes of biofuels required to 36 billion gallons by 2022, with the majority of the increased volume (21 billion gallons) to consist of “advanced biofuels,” such as cellulosic ethanol. 42 U.S.C. § 7545(o)(2), (o)(2)(B)(I-III)). The Act required EPA to set regulations to ensure the reduction

of GHG emissions by applying full lifecycle analysis. Pub. L. 110-140, § 202(a)(1), 121 Sta. 1521-22. In carrying out this directive, EPA utilized the GREET model. ER 4:770 at ¶ 18. The GREET model has also been used by state agencies in New York, Minnesota and Oregon. *Id.*

In preparing the LCFS, ARB relied extensively on GREET to produce a California specific version ("CA-GREET") that calculates the carbon intensities of fuels used in California. ER 9:2286, ER 6:1269. Building on the national model to increase its accuracy, CA-GREET is tailored to reflect conditions on the ground in California, including the impacts of California's environmental regulations. ER 9:2286-88. For example, CA-GREET incorporates California's stringent fossil fuel refining standards as well as its fuel standards for reformulated gasoline and ultra-low-sulfur diesel. *Id.* CA-GREET also includes data about California's electricity mix and the transmission and distribution losses associated with the delivery of both electricity and natural gas. *Id.* CA-GREET ultimately calculates a carbon intensity value ("CI value") for a given fuel's lifecycle. The full lifecycle to which the CI value is assigned is referred to as a "pathway."

Using the CA-GREET model, ARB calculated the average carbon intensities for gasoline and for diesel in the baseline year (2010). ER 4:770-72 at ¶¶ 18, n.9, 26, 15. The CI value for gasoline is 95.86 grams of CO₂ equivalent per megajoule ("gCO₂e/MJ"), and for diesel 94.71 gCO₂e/MJ. ER 5:903-06. The annual carbon

intensity targets represent reductions from those baselines. ER 4:770-72 at ¶¶ 18, n.9, 26, 15. For example, in 2011, a reduction of 0.25% from baseline was required, resulting in a target carbon intensity of 95.61 gCO₂e/MJ for gasoline and its substitutes and 94.47 gCO₂e/MJ for diesel and its substitutes.⁷ Cal. Code Regs., tit. 17, § 95482; ER 4:772 at ¶ 28; *see also*, ER 5:867 (table).

ARB also determined the pathway carbon intensities of a variety of fuels that might be sold in California using CA-GREET. The resulting carbon intensities for those pathways appear in the LCFS regulation as Table 6 (for gasoline and gasoline substitutes) and Table 7 (for diesel and diesel substitutes). Cal. Code Regs., tit. 17, § 95486; ER 5:903-06. These two “Look Up Tables” were not intended to contain every possible fuel, or every possible way of making fuel. In fact, because the LCFS encourages the development of new fuels and reductions in carbon intensities for existing fuels, the tables were designed to grow. ER 7:1714, 1730.

The LCFS provides two mechanisms – Method 2A and Method 2B – by which fuel producers can apply for individualized carbon intensity values. ER 4:780-82 at ¶¶ 57-64; *see also* Cal. Code Regs., tit. 17, § 95486(c), (d). Approved

⁷ GHG emissions are generally measured in grams of carbon dioxide equivalent or “gCO₂e.” Carbon intensity is measured in grams of carbon dioxide equivalent per megajoule of energy delivered from the fuel or “gCO₂e/MJ”. See Cal. Code Regs., tit. 17, § 95481(11).

values ultimately become part of Table 6 or 7 in the regulation. *Id.* While the regulatory process unfolds, fuel producers may use individualized values after receiving preliminary approval. ER 4:739 at ¶ 19; ER 4:781-82 at ¶ 63. More than 80 pathways for ethanol have been at least preliminarily approved through Methods 2A and 2B and are available for use. ER 2:165-197. Most of these are for out-of-state ethanol. *Id.*

Once a fuel producer has determined the appropriate CI value for its fuel pathway – either from the existing Lookup Tables or through Method 2A or 2B – the producer may register for that carbon intensity.⁸ Registration requires the producer to demonstrate a physical pathway – the means by which the fuel will travel from the producer to the state – by providing a map of the route of travel and a bill of lading or similar document from a sale that has already occurred. *See* 2:133-34 at ¶¶ 18-19; Cal. Code Regs., tit. 17, § 95484(d)(2). The producer need only provide that information once, unless there is a material change to the physical pathway. Cal. Code Regs., tit. 17, § 95484(d)(2). ARB last provided the district court with the Biofuel Registration List in June of 2011, at which time

⁸ Ethanol producers and other alternative fuel producers are not generally regulated parties under the LCFS, because such producers typically sell their fuels to refiners or blenders who then become the regulated party. Cal. Code Regs., tit. 17, § 95484(a)(1)(C). The registration process and list is made available to these entities for their convenience.

more than 70 ethanol producers were registered, most of them from out-of-state.
ER 2:165-97.

5. Ethanol

Although all fuel ethanol is produced via fermentation and distillation, it can be made from a variety of feedstocks and through a wide range of processes that differ substantially in terms of GHG emissions. *See* 75 Fed. Reg. 14670, 14744-14745 (March 26, 2010); ER 5:999; ER 10:2575-78. Currently, most ethanol used in transportation fuel is made from starch (corn) or sugar (sugarcane). 75 Fed. Reg. at 14744, 14746-47. Different feedstocks vary significantly in the amount of GHG emissions as they are grown and converted into ethanol, with sugarcane-based ethanol, for example, having significantly fewer emissions than corn-based ethanol. ER 10:2577. In addition, the thermal energy used to transform the feedstock into ethanol can be generated by burning natural gas, coal, or biomass or by other means which differ in their GHG emissions. 75 Fed. Reg. at 14745. Ethanol plants also have widely varying levels of efficiency in their use of both thermal energy and electricity. *See, e.g.*, 3:376, 380-81, 5:1055, 4:676, 619. As already mentioned, ethanol benefits under the lifecycle analysis due to the credit it receives for the atmospheric carbon that the feedstock absorbs during photosynthesis. In addition, ethanol production often results in “co-products,” such as an animal feed called distillers’ grains with solubles (“DGS”). ER 4:771-

72 at ¶ 22. Because co-products displace other products and the energy that would have been required to produce them, co-products also generate credits in the LCFS lifecycle analysis. *Id.* DGS can be sold wet or dry. ER 4:774 at ¶ 34. Wet DGS generates a higher credit than dry DGS due to the energy consumed by drying. *Id.*

All of these factors, and more, impact net GHG emissions, resulting in a wide range of carbon intensity values for ethanols. The initial range of values under the LCFS for all ethanols was 58.40 to 120.99 gCO₂e/MJ, with Brazilian sugarcane ethanol at the lowest end. ER 5:903 (Table 6). Now, after the development of additional, tailored pathways under Method 2A and 2B, the range is 56.56 to 120.99 gCO₂e/MJ, with many additional values falling in the 70's and 80's, and with out-of-state ethanol made from a mixture of grains at the lowest end.⁹ ER 2:165-96; *see also*, Appellants Request for Judicial Notice (“RJN”), Exh. A at pp. 47-42 (Table 6).¹⁰

Most ethanol consumed in California is produced outside of California. *See* 75 Fed. Reg. 14670, at 14745; ER 5:1009. The Midwest and Brazil are the two main sources of ethanol worldwide. *See* <http://www.afdc.energy.gov/afdc/data/fuels.html> (Global Ethanol Production link).

⁹ Applications for new CI values continue to be submitted to and processed by ARB. The values described herein reflect what was in the record before the district court in mid-2011.

¹⁰ A copy of the LCFS, as amended on February 2, 2012, is provided for the Court's convenience.

The four California corn ethanol plants registered under the LCFS import raw corn from the Midwest. ER 4:777 at ¶ 45. The transport of this corn to California generates more carbon emissions than the emissions generated by the transport of the finished product ethanol from the Midwest to California. *Id.*

Beginning in January 2011, when the LCFS went into full effect, a private service that tracks ethanol prices in multiple markets began tracking and reporting California prices for ethanol by CI value. ER 2:131 at ¶ 6. The two CI values tracked – 90.1 gCO₂e/MJ and 98.4 gCO₂e/MJ – both correspond to Midwest ethanol pathways. *Id.* During 2011, ethanol with a carbon intensity of 90.1 received a price premium of 1-2 cents/gallon compared to ethanol with a carbon intensity value of 98.4. ER 2:131 at ¶¶ 6-8. As intended, then, the LCFS created incentives for ethanol plants to produce lower carbon ethanol.

6. Crude Oil

Crude oils are refined into “CARBOB” and then blended with an oxygenate (usually ethanol) to form the gasoline sold at the pump. *See* ER 4:775 at ¶ 37. Most of the variance in carbon intensity among crude oils comes from emissions from the extraction and transportation components of the lifecycle which are at issue here. ER 4:790 at ¶ 92; ER 5:903.

Crude oils are assigned carbon intensities somewhat differently from the method used for alternative transportation fuels, although the lifecycle analysis is

still the fundamental methodology. *See* ER 4:789-792. The different approach to crude oil reflects the primary goal of the LCFS to reduce GHG emissions. *See* ER 4:789 at ¶¶ 88, 91. To meet this ambitious objective, new and very low-carbon fuels are required. “[F]uels having carbon intensities from 50 to 80 percent less than gasoline are expected to be needed.” ER 6:1359. Thus, the emphasis is on the development of these lower carbon *alternatives* to petroleum. ER 4:789 at ¶ 88; ER 9:2332.

Accordingly, the LCFS does not reward reductions in carbon intensity of crude oil, as it does for alternative fuels, because crudes cannot produce the significant carbon intensity reductions sought by California. *See* ER 6:1359; ER 6:1233-1234. Instead, the objective is to prevent significant *increases* in the carbon intensity of crudes in California’s fuel pool. ER 4:789 at ¶ 91. Significant increases are possible because newer sources of crude oil tend to require more energy to extract than older sources, resulting in higher GHG emissions. *Id.* at ¶ 89; ER 6:1235. For example, extracting oil from oil sands – a newer source – requires several times more energy than extracting oil from conventional sources. ER 4:789 at ¶ 91. The production of oil from oil sands doubled between 2000 and

2006, in contrast to many older sources of crude, including those in California¹¹, which are already depleted or in decline. *Id.*; ER 4:790 at ¶ 99.

In order to prevent these increases in emissions, the LCFS, as promulgated, differentiated between emerging high carbon intensity crude oils (“emerging HCICOs”) and all other crude oils. ER 6:1234; ER 4:789 at ¶ 89. A high carbon intensity crude oil (“HCICO”) is one for which production and transport processes generate more than 15.0 gCO₂e/MJ in GHG emissions. Cal. Code Regs., tit. 17, § 95486(a)(2)(A). In contrast, California’s 2006 baseline crude oils had an average carbon intensity of 8.07 gCO₂e/MJ for production and transport. ER 4:790 at ¶ 92. An *emerging* HCICO meets two criteria: (1) its carbon intensity exceeds 15 gCO₂e/MJ; and (2) it represents a newer source for California because it constituted less than 2% of California’s baseline 2006 crude mix. Cal. Code Regs., tit. 17, § 95486(a)(2)(A)(1). Emerging HCICOs were required to use their actual carbon intensity values (which would be higher than 15). ER 4:790 at ¶ 95; Cal. Code Regs., tit. 17, § 95486(a)(2)(A)(2)(a). All other crudes were required to use the baseline average value of 8.07. ER 4:790 at ¶¶ 94, 95; Cal. Code Regs., tit. 17, § 95486(a)(2)(A)(1). This category of “other crudes” includes more than ninety-five percent of the crudes supplied to California in the baseline year of 2006, as

¹¹ California crude sources are in decline. ER 4:792 at ¶ 99. As a result, California’s share of the state’s crude market has also been declining. ER 4:792 at ¶ 99; *see also* ER 11:2698, 2703.

well as more than 160 out-of-state crudes that were determined in 2011 not to be HCICOs. ER 6:1234, ER 2:124-128.

Assigning crude oils an average value for production and transportation emissions ensures that in order to comply with the LCFS, suppliers of crude oils must supply or buy credits from suppliers of low carbon alternative fuels (rather than looking for minor and fundamentally limited opportunities to reduce the carbon intensity of the crude oil fuels)—thus driving the development and deployment of alternative low-carbon fuels. *See* ER 6:1233. Assigning HCICO fuels their actual carbon intensity requires suppliers of these exceptionally high-carbon fuels to deliver a commensurate quantity of emission reductions—by supplying or buying credits from suppliers of low carbon alternative fuels. *See* ER 4:791 at ¶ 96. This design prevents these sources from driving up the carbon intensity of transportation fuels in California.

Crudes from many locations were represented in the 2006 baseline, including California, Alaska, Saudi Arabia, Ecuador, Iraq, Brazil, Mexico, and Angola. ER 11:2698-2699. The California crudes were extracted using four different methods, one of which has a carbon intensity greater than 15. ER 11:2699, 2702. That HCICO – California TEOR (produced from thermal enhanced oil recovery) – constituted 14.8% of the 2006 baseline and was the only HCICO that was not an “emerging HCICO.” ER 6:1234-1235; 11:2698-2699.

During 2011, while developing the screening method to determine which crudes were HCICOs, ARB allowed all crude oils to be reported at the average baseline value, subject to year-end review. *See* ER 2:120. In July 2011, ARB published a list of 160 out-of-state crude oils that had been determined not to be HCICOs. ER 2:124-128. Those 160 crude oils, along with the numerous crudes that constituted more than 2% of California's baseline, would all use the 8.07 value. ER 2:121. Other non-screened crudes would remain "potential-HCICOs." ER 2:122. ARB also announced a more flexible approach to regulating crudes. At the end of the year, regulated parties that reported use of potential-HCICOs could (1) continue to use the baseline value of 8.07 and surrender any net credit balance for 2011; (2) use the crude's actual carbon intensity value, as approved by ARB through Method 2A or 2B; or (3) use a default HCICO value of 20.0. ER 2:120-22. Under the last two options, the regulated party would retain any net credit balance.

Well before the district court's decision, ARB had begun the process of amending the LCFS's treatment of crude oil, intending the changes to take effect beginning in 2012. RJN, Exh. B at p. 1 (noting proposed amendments were released for public comment in October 2011). Under the new approach, all crude oils will be assigned the average carbon intensity value for crudes supplied to the California market in that year, or in 2010, whichever value is higher. RJN, Exh. C

at p.35. The average carbon intensity of the fuels supplied will be calculated using lifecycle analysis. The categorization of potential or emerging HCICOs is eliminated under the proposed amendments. This is the approach in effect today under a Regulatory Advisory issued on December 30, 2011. RJN, Exh. B at p.2.

SUMMARY OF ARGUMENT

The LCFS's purpose is to create incentives for the development and commercialization of low-carbon alternatives to petroleum; it is not designed to protect California-produced fuels from competition. To accomplish its non-discriminatory purpose, the LCFS applies neutral scientific methodology to reduce GHG emissions from the full lifecycle of transportation fuels consumed in California. It then distinguishes among fuels based on their lifecycle emissions. The LCFS does not discriminate in purpose, on its face, or in its effects on the basis of origin.

In addition, the LCFS regulates only fuel sales in California, and it has only permissible, indirect effects out-of-state. And it does not "Balkanize" the fuels market. The LCFS is not an extraterritorial regulation.

Based on pending regulatory amendments, the crude oil portion of this appeal may be moot. Regardless, the design and effects of the LCFS's crude oil provisions prevent significant increases in the carbon intensity of California's crude

mix by distinguishing between crudes that threaten such increases and crudes that do not. This does not constitute discrimination in either purpose or effect.

In addition, RMFU failed to make the requisite showing that the LCFS produces an excessive burden on interstate commerce. Weighed against the significant benefits to California and Californians from the emissions reductions gained under the LCFS, RMFU cannot prevail on its *Pike* claim.

Moreover, while strict scrutiny should not be applied, even if it were, the LCFS should be upheld because it serves a legitimate local purpose and that purpose cannot be adequately served by other available means.

The LCFS is also well within California's traditional regulatory authority over emissions from fuels, specifically recognized by Congress in Clean Air Act Section 211(c)(4)(B). If anything remains of plaintiffs' dormant Commerce Clause claims, this insulates the LCFS from challenge. For these reasons, judgment should be entered in favor of Appellants on the dormant Commerce Clause claims.

Finally, because there is no dormant Commerce Clause violation and because there is no conflict between the LCFS and Clean Air Act Section 211(o) due to the existence of savings clauses that provide specific intent to preserve more environmentally protective state laws such as the LCFS, RMFU cannot prevail on either of their claims. Accordingly, the district court erred in issuing the preliminary injunction.

Because the LCFS represents the only manner in which California may accomplish its legitimate local purpose and because it is a lawful exercise of California's police power, the LCFS is a constitutional exercise of California's fuels authority. Accordingly, Appellants respectfully request that the district court's judgments and preliminary injunction be reversed, and that the district court be directed to enter judgment in favor of Appellants on the dormant Commerce Clause claims.

STANDARD OF REVIEW

The Court reviews a district court's ruling on cross-motions for summary judgment *de novo*. *CRM Collateral II, Inc. v. Tricounty Metro. Transp. Dist. of Or.*, 669 F.3d 963, 968 (2012). Evidence is viewed in the light most favorable to the nonmoving party to determine “whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Id.* (citation and internal quotation marks omitted). When the district court disposes of a case on cross-motions for summary judgment, the Court may review both the grant of the prevailing party's motion and the corresponding denial of the opponent's motion, and on remand may direct that the district court enter summary judgment in favor of appellant. *Id.* at 968, 974.

The district court's grant of a preliminary injunction in favor of RMFU is reviewed for “abuse of discretion” and should be reversed if the district court based

“its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Storman’s Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (quoting *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211–12 (9th Cir. 2004)). A finding of fact is “clearly erroneous if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it.” *Id.* (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005)). The district court’s interpretation of the underlying legal principles, however, is subject to *de novo* review. *Id.* (citing *Cal. Pharmacists Ass’n v. Maxwell–Jolly*, 563 F.3d 847, 849 (9th Cir. 2009)).

ARGUMENT

I. THE LCFS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Under the dormant Commerce Clause, discrimination against out-of-state entities can manifest itself “in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.” *Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown* (“*LensCrafters*”), 567 F.3d 521, 525 (9th Cir. 2009). Laws found to be discriminatory are invalid unless they pass strict scrutiny. *Id.* at 524. State laws are also *per se* unconstitutional if they regulate extraterritorially – in other words, if they directly regulate “commerce that occurs entirely outside the state.” *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003); *see also Healy v. Beer Inst., Inc.* (“*Beer Inst.*”), 491 U.S. 324, 336-37

(1989). State laws that neither discriminate nor regulate extraterritorially are reviewed under a balancing test referred to as the *Pike* test and are upheld unless the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *See Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008). “State laws frequently survive this *Pike* scrutiny.” *Id.* at 339.

The district court held that the LCFS facially discriminates and regulates extraterritorially with respect to ethanol, and that it discriminates in purpose and in effects against out-of-state crude oils. The LCFS, however, does not violate the dormant Commerce Clause under any test.

The purpose of the LCFS is not to protect California businesses from out-of-state competitors but, rather, to protect all Californians from the significant threats posed by climate change. On its face, the LCFS distinguishes among ethanols on the basis of their contribution to climate change and does not discriminate on the basis of origin. The LCFS has had, and will have, the effect of reducing GHG emissions associated with California's fuel consumption, not of shifting market-share away from out-of-state ethanols, as is evident from the lower CI values and price premiums obtained by those fuels. The LCFS regulates only fuel sales in California, and its lifecycle analysis and incentives have only permissible, indirect effects out-of-state. Finally, the crude oil portion of this appeal may be moot, as discussed below, but, in any event, the design and effects of the LCFS's crude oil

provisions prevent significant increases in the carbon intensity of California's crude mix by distinguishing between crudes that threaten such increases and crudes that do not. The district court should be reversed because the LCFS does not violate the dormant Commerce Clause.

A. The LCFS Is a Science-Based Response to a Serious Threat and Is Designed to Spur Innovation and Diversification in California's Fuel Markets Without Discrimination

California faces substantial threats from climate change. These include reduced water supplies, rising sea levels, and displacement of coastal businesses and residents, along with other devastating effects to the natural environment and some of California's largest industries. *See* Cal. Health & Saf. Code § 38501(a), (b); ER 9:2231. These are real and cognizable injuries to California. *Massachusetts*, 549 U.S. at 521-23. Given the enormity of the problem and the significance of the threats, California committed itself to a multi-faceted, comprehensive approach to reducing its contributions to climate change. *See* Cal. Health & Saf. Code § 38560. That approach must include the transportation sector. ER 5:921, 9:2231-2233. And the science of lifecycle analysis must be the bedrock for any effort to address emissions from transportation fuels, because tailpipe emissions alone are an insufficient basis for measuring reductions. ER 6:1201 at ¶¶ 7-8; 4:769-770 at ¶¶ 14-18; 4:805-806 at ¶¶ 6-7. The full lifecycle is,

thus, the only accurate way to compare GHG emissions from different fuels. ER 6:1201 at ¶¶ 7-8; 4:769-770 at ¶¶ 14-18; 4:805-806 at ¶¶ 6-7.

A cutting-edge regulation, the LCFS combines sound science, market incentives, and flexible compliance mechanisms to tackle the unique and enormous challenge presented by climate change and the GHG emissions that cause it. *See* ER 9:2197-2199. The innovativeness of the LCFS, of course, does not make it suspect. To the contrary, courts have often recognized the valuable role states play as laboratories for experimenting with approaches to new and difficult problems. *See, e.g., Oregon v. Ice*, 555 U.S. 160, 171 (2009). The circumstances confronting California – new threats to important state interests combined with evolving science and emerging fuel technologies – are precisely the circumstances to which the “laboratories of the States” are best suited. *Smith v. Robbins*, 528 U.S. 259, 275 (2000) (“[Courts should] not cavalierly impede the States’ ability to serve as laboratories for testing solutions to novel problems.”) (internal quotation omitted).

Although the LCFS is an innovative regulation, resolution of this case can and should be determined under established dormant Commerce Clause principles. *See, e.g., Pharm. Research & Mfrs. of Am. v. Concannon* (“PhRMA”), 249 F.3d 66, 80 (1st Cir. 2001) (applying existing case law to “novel legislative approach to one of the serious problems of our time,” namely, ensuring affordability of prescription drugs). One of those principles is that courts “should be particularly hesitant to

interfere with [regulation] under the guise of the Commerce Clause [where the regulation governs a field that is] both typically and traditionally a [state] government function.” *United Haulers*, 550 U.S. at 344; *see also Beer Inst.*, 491 U.S. 324, 333-36 (1989) (noting “Constitution’s special concern both with ... interstate commerce and with the autonomy of the individual States within their respective spheres”). Reducing air pollution falls easily within the sphere of traditional and legitimate state authority. *See Massachusetts*, 549 U.S. at 521-26. The dormant Commerce Clause does not disable states from taking action against threats such as the one posed by GHG emissions.

“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about ‘economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” *Davis*, 553 U.S. at 337-38 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)); *see also S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001) (“The ‘central rationale’ of the dormant Commerce Clause ‘is to prohibit state or municipal laws whose object is local economic protectionism.’”) (quoting *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994)).

The LCFS is not economic protectionism. As discussed in detail below, the LCFS – part of a larger effort to reduce California’s GHG emissions – treats lower

carbon fuels more favorably than higher carbon fuels, regardless of origin. In fact, many of the lowest carbon fuels originate outside of California. See RJN, Exh. A at pp. 47-52 (Table 6); ER 2:165-197. Further, the LCFS is designed to encourage innovation leading to the production of even lower carbon fuels, including fuels that do not exist today. E.g., ER 9:2197. Economic protectionism would be inimical to this future of diverse and innovative fuels, particularly since many next-generation fuels (low-carbon fuels not yet in commercial production) are being developed outside of California. ER 10:2594-2609; ER 2:211 (noting 17 states with advanced biofuel facilities); ER 5:1011-1014 (describing locations of cellulosic ethanol development). Favoring those fuels is not protectionism.

B. The Non-Discriminatory Purpose of the LCFS Is to Reduce GHG Emissions From California's Transportation Fuels Consumption By Encouraging the Production and Use of Next-Generation Fuels

“Absent discrimination for the forbidden purpose” of protectionism, state laws are upheld unless they fail the *Pike* balancing test. *Davis*, 553 U.S. at 338. That the LCFS's purposes are non-discriminatory is readily apparent. Its purposes are to reduce emissions, drive innovation, and reduce dependency on oil. The district court erred in concluding otherwise. Appellees did not meet their burden to prove that the LCFS's true purpose is economic protectionism. *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); see also *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d

1186, 1196 (9th Cir. 1990). In fact, ARB has “advanced several non-protectionist motives, while [Appellees] have asserted no plausible protectionist ones.” *See Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005).

The district court erroneously found that the LCFS purposefully discriminates against out-of-state crude oil. ER 1:39-41; *see also* Sec. F (discussing crude oil). The district court did not reach this question with respect to ethanol. ER 1:63 at n.6. However, the district court denied Appellants’ cross-motion on this issue because it declared the LCFS to violate the dormant Commerce Clause on other grounds. ER 1:82-83. “When the district court disposes of a case on cross-motions for summary judgment, [this Court] may review both the grant of the prevailing party’s motion and the corresponding denial of the opponent’s motion.” *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 672 (9th Cir. 2011).

1. The Legitimate Purpose of the LCFS Is Both Express and Clear

The LCFS’s stated purpose is to “reduce greenhouse gas emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel pool used in California.” Cal. Code Regs., tit. 17, § 95480. The legitimate purpose of the LCFS, thus, “can be found within the four corners of the [regulation] itself.” *See Gwadosky*, 430 F.3d at 38. This is not a case where the state’s “avowed purpose” was to increase the competitiveness of local firms or products. *See West Lynn*

Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994); *see also Carbone*, 511 U.S. at 385, 394; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984).

There is also no evidence that “rebut[s] the evenhandedness of the [regulation’s] plain language.” *Valley Bank*, 914 F.2d at 1196. First, no “clear pattern of discrimination emerges from the effect of the state action.” *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007) (summarizing factors in discriminatory purpose cases). Out-of-state fuels compete easily with in-state fuels under the LCFS, with many of them receiving equal or more favorable CI values compared to their in-state competitors. *See* Secs. C (ethanol), F (crude oil). This is not “ingenious” discrimination. *See West Lynn Creamery*, 512 U.S. at 201.

Second, the historical background of the LCFS and the “specific sequence of events leading up” to its adoption are wholly consistent with the non-discriminatory purpose of reducing GHG emissions. *Abbott*, 495 F.3d at 160. As required by AB 32, the LCFS is part of a larger, multi-faceted approach to reducing GHG emissions across numerous sectors of California’s economy and activities. *See* Cal. Health & Safety Code § 38560 (requiring “maximum technologically feasible and cost-effective greenhouse gas emission reductions from sources or categories of sources”); *see also* ER 5:921-922 (calling for emissions reductions through a LCFS).

Third, the “administrative history of the state action” supports the LCFS’s legitimate purpose. *See Abbott*, 495 F.3d at 160. ARB’s statements during the rulemaking repeatedly and consistently described the intent to reduce emissions by spurring innovation in lower carbon fuels and reducing California’s dependence on petroleum. *E.g.*, ER 9:2197, 9:2199, 9:2225, 6:1323, 6:1389, 7:1714, 8:1823, 8:1834-35.

The legitimate purpose of the LCFS to reduce emissions could not be clearer.

2. Isolated Phrases From the Rulemaking Documents Do Not Alter the LCFS’s Purpose

Disregarding these facts and ARB’s repeated, straightforward statements of the LCFS’s legitimate purpose, the district court erroneously relied on isolated phrases from ARB’s rulemaking documents and concluded that “the LCFS was designed, in part, to protect and promote California’s ethanol, crude oil and energy markets.” ER 1:42 at lns. 9-21; *see also* ER 1:23-24; *see also* ER 1:49 at lns. 10-23. The First Circuit’s decision in *Gwadosky* illustrates the errors in this approach. In a challenge to a Maine law prohibiting a particular surcharge on new vehicle sales, plaintiffs alleged a discriminatory purpose based on statements, in a legislatively-commissioned report, that the surcharge created an “unfair advantage” for out-of-state competitors. *Gwadosky*, 430 F.3d. at 36. Plaintiffs also noted that adoption of the prohibition followed “an intense lobbying campaign.” *Id.* The court rejected plaintiffs’ “strained attempt to piece together isolated bits of

evidence [that] ignor[ed] the larger context.” *Id.* at 37. It noted that the surcharge prohibition was part of Maine’s “fully integrated” vehicle franchise law which had the “manifest” purpose of preventing “frauds, imposition and abuses.” *Id.* at 37-38. Similarly, in *Valley Bank*, this Court considered legislators’ comments in their context and held that “minor” comments neither “rebut[ted] the ... legislation’s plain language” nor were “[in]consistent with [the State’s overall regulatory] approach.” *Valley Bank*, 914 F.2d at 1195-96; *see also Abbott*, 495 F.3d at 161 (rejecting “stray protectionist remarks of certain legislators” because of extensive evidence of legitimate concerns).

Appellees’ attempt to piece together “isolated bits of evidence” is no less strained here than in *Gwadosky*, *Valley Bank of Nevada*, or *Abbott*, and the district court should have similarly rejected it. For example, ARB assumed, for the purposes of assessing potential environmental impacts, that the federal RFS2 and the LCFS “*may* [create] incentives for bringing some of [California’s] existing and permitted corn ethanol facilities back on line, as well as incentives for constructing other biofuel facilities.” *See* ER 10:2396-2397 (emphasis added). ARB also stated that “approximately 25 new biorefineries *could* be built in California” based on the quantities of “potential feedstocks” for possible next-generation biofuels. ER 10:2425 (emphasis added); *see also* ER 10:2390, 7:1709. These assessments of what *might* occur were part of analyses of potential environmental and economic

impacts required by California law. ER 10:2390, 10:2395-2405, 10:2409-2419, 10:2426; *see also* Cal. Govt. Code § 11346.3; Cal. Health & Saf. Code § 57005. These assessments were explicitly described as uncertain, because fuel providers and the market, not the LCFS, will determine the actual mix of fuels in California's fuel pool. ER 10:2389, 10:2427, 10:2470. The uncertainty of other potential outcomes was also expressly acknowledged: “*To the extent* that California can produce more of its own transportation fuel, lower the amount of money spent on imported oil or petroleum products, and lower dependence on out-of-state biofuels, business competitiveness should be improved overall in the State.” ER 10:2470-2471 (emphasis added).

Statements like these cannot support a conclusion that the LCFS has a protectionist purpose. First, it is neither unreasonable nor impermissible for California to anticipate that *some* next-generation fuel producers *might* develop in the state, particularly since RFS2 requires a nationwide increase in production of such fuels. *See* 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(7)(D). Second, it defies logic that ARB would undertake a rulemaking this complex, lengthy and involved on the basis of a mere possibility that new biorefineries “*could* be built in California.” Third, “far stronger statements of intent can be gleaned from official [regulatory] sources,” including the express statement of purpose in the regulation itself. *See Gwadosky*, 430 F.3d. at 39. And, finally, ARB is not required to be blind to

economic impacts of its regulations on California. *See Gwadosky*, 430 F.3d at 39; *Valley Bank*, 914 F.2d at 1196 (“[P]redictable concern for [state] residents does not rebut the evenhandedness of the legislation’s plain language.”).

As in *Gwadosky*, *Valley Bank*, and *Abbott*, the overriding purpose of the LCFS is manifest, and it is not protectionism. Appellees have not met, and cannot meet, their burden to show otherwise.

3. Unlike State Laws Found To Be Protectionist, The LCFS Does Not Alter Conditions of Competition In Favor Of In-State Competitors

Further demonstrating the absence of protectionism, the LCFS does not alter competitive conditions to favor fuels produced in-state over those produced out-of-state. This alone distinguishes the LCFS from the cases relied on by the district court. The LCFS does not provide a tax exemption only to certain in-state fuels in order to foster a new local industry, as in *Bacchus*, 468 U.S. at 265, 269. It does not redistribute funds from out-of-state competitors to in-state firms, as in *West Lynn Creamery*, 512 U.S. at 190-91. Nor does it limit access to California’s market to one local business, as in *Carbone*, 511 U.S. at 392. It cannot be over-emphasized that, under the LCFS, many out-of-state fuels receive identical or more favorable carbon intensity values compared to their in-state competitors. For example, numerous out-of-state ethanols have carbon intensities lower than California ethanol. ER 2:165-197; *see also* Sec. C.1. In addition, more than 160

out-of-state crude oils were assigned exactly the same carbon intensity as California crudes in 2011. ER 2:124-128, 11:2699 (table C12-2); *see also* Sec. F. This is hardly “a history of hostility ... towards out-of-state companies.” *See Abbott*, 495 F.3d at 161.

There is no reason to think that the conditions of competition in California’s future fuels market would look any different. Just as current alternative fuel producers have already obtained lower CI values than California competitors, producers of next-generation fuels may do so as well. Notably, next-generation fuels are developing in locations across the country and around the world. ER 10:2594-2609. For example, ARB identified lignocellulosic ethanol as one of four low carbon fuels that could be available “in the 2015 timeframe.”¹² ER 10:2594. Yet, none of the operational, or under construction, lignocellulosic plants were in California, and only two of seventeen planned plants were located in-state. ER 10:2600-2603; *see also* ER 2:211 (describing cellulosic operations “in at least 17 states”). The LCFS controls only the aggregate carbon intensity of California’s fuel pool, not which fuels make up that pool. That approach is wholly inconsistent with the goal of protecting local industry.

¹² Lignocellulosic ethanol uses feedstocks other than starch or sugar, such as prairie grasses, woody trees, municipal solid waste, wood waste from furniture manufacturing, etc. ER 10:2595.

In sum, the LCFS does not “squelch[] competition ... leaving no room for investment from outside.” *Carbone*, 511 U.S. at 392. Rather, the LCFS rewards lower carbon fuels, regardless of origin.

C. The LCFS Does Not Facially Discriminate Against Out-of-State Ethanol

The district court held that the LCFS facially discriminates “among ethanol pathways based on origin (Midwest vs. California) and activities intertwined with origin.” ER 1:58 at lns. 26-27. In reaching that holding, the court erroneously concluded that “the variables within the [lifecycle] formula favor California ethanol producers.” ER 1:59 at ln. 3. The court also improperly compared the CI values of only a highly selective subset of ethanol pathways. ER 1:59 (table). Neither the court’s holding nor its approach have any support in the law or the record.

State laws facially discriminate when their plain text “discriminate[s] against an article of commerce by reason of its origin or destination out of state.” *Carbone*, 511 U.S. at 390. Thus, the Supreme Court has “easily found [state laws] to be facially discriminatory” when the “determinant for which [treatment] applies ... is whether or not the [product] was generated out-of-state” and the law benefits in-state interests and burdens out-of-state interests. *Or. Waste Sys., Inc. v. Dept. of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994). For example, higher fees for the disposal of out-of-state waste compared to in-state waste can be facially

discriminatory. *See id.* at 99-100. Similarly, this Court struck down Arizona’s law that required only out-of-state adoptive parents to reimburse the State for the costs of prenatal care and delivery. *Birth Hope Adoption Agency, Inc. v. Az. Health Care Cost Containment Sys.*, 218 F.3d 1040, 1044 (9th Cir. 2000). Under the LCFS, the same, scientifically validated lifecycle analysis applies to all ethanols. LCFS § 95486(a)(2), (b)(1), (b)(2)(B), (c), (d). And the “determinant” of an ethanol’s carbon intensity – and, thus, the determinant of whether it produces a credit or a deficit – is the fuel’s lifecycle emissions, not its origin. *Id.* That is not facial discrimination.

1. On Its Face, the LCFS Applies the Lifecycle Analysis to All Ethanols, and Under That Analysis Out-Of-State Ethanols Have Received the *Most Favorable* Carbon Intensity Values

On its face, when the LCFS was first adopted, the ethanols that received the lowest, and therefore the most favorable, carbon intensity values were out-of-state ethanols. Specifically, California ethanol pathways ranged from 77.44 and 88.90, and out-of-state ethanol pathways ranged from 58.40 and 120.99. ER 5:903. Because lower carbon intensity values can translate into price premiums, this range of CI values alone illustrates the absence of facial discrimination. This is not “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *United Haulers*, 550 U.S. at 338 (quoting *Or. Waste Sys.*, 511 U.S. at 99 and *Limbach*, 486 U.S. at 273). Neither Appellees nor

the district court cited a single case in which a dormant Commerce Clause violation was found where, as here, some out-of-state firms obtained competitive advantages over in-state competitors.

The absence of facial discrimination is further demonstrated by the availability, through Methods 2A and 2B, of CI values lower than those provided in the initial tables. *See* Cal. Code Regs., tit. 17, § 95486(c), (d). In fact, using Methods 2A and 2B, seven Midwest ethanol producers have obtained and registered for CI values lower than or equal to 80.70, the CI value for almost all California ethanol. ER 2:169 (facility ID 70247), 2:170 (facility ID 70117), 2:177 (facility ID 70079), 2:182 (facility ID 70032), 2:183 (facility ID 70031), 2:190 (facility ID 70134), 2:192-194 (facility ID 70038)). The lowest CI value for any ethanol in the record (56.56) belongs to a Midwest producer. ER 2:193. This expansion in the range of CI values was fully intended. ER 7:1714 (“Methods 2A and 2B included in section 95486 of the regulation allow technology innovations to be recognized and be assigned appropriate CI values.”); ER 6:1350, 7:1730.

The ability for out-of-state competitors to obtain more favorable CI values, which was readily apparent in the regulation’s text and fully intended by ARB, wholly undermines any claim of facial discrimination. The district court disregarded Methods 2A and 2B, erroneously concluding that the effect of these procedures on the LCFS was speculative and that the procedures favor California

producers. ER 1:62-63. As described above, however, these procedures have already produced CI values for out-of-state ethanol that are lower than any CI value assigned to a California ethanol.¹³ The existence of Methods 2A and 2B provides an independent basis for the denial of Appellees' claim. *See Scariano v. Justices of Supreme Ct. of Ind.*, 38 F.3d 920, 926-27 (7th Cir. 1994) (finding "existence of an alternative means" to secure the desired treatment fatal to discrimination claim).

In sum, on its face, the LCFS provides some out-of-state ethanols a competitive advantage over in-state competitors and establishes a mechanism through which other producers can obtain, and have obtained, similar or greater competitive advantages by producing lower carbon fuels. These fuels obtain an advantage based not on origin but on lower lifecycle emissions, as determined by a scientifically validated model. These facts directly contradict any definition of discrimination or protectionism.

2. The LCFS Distinguishes Among Ethanols on The Basis of Carbon Intensity, Not Origin

The rule that states may not discriminate based on a product's origin does not mean that states must *ignore* origin entirely when regulating. Rather, it means

¹³ The first round of amendments to the regulation's table of CI values were approved by California's Office of Administrative Law in February 2012. Exh. A at pp. 47-42 (Table 6); *see also* Cal. Code Regs., tit. 17, § 95486 (Table 6). Table 6 of the LCFS now includes more out-of-state ethanols with lower CI values.

there must be a “reason, apart from ... origin” for differential treatment. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). For example, Oregon could not charge a higher fee for waste disposal simply because the waste originated out-of-state. But higher fees would have been permissible if out-of-state waste “impose[d] higher costs on Oregon.” *Or. Waste Sys.*, 511 U.S. at 101 n.5; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (finding protectionism where differential treatment was “based *solely* on [product’s] origin”) (emphasis added).

Notably, many states treat shipments of goods differently if they originate in a region that is infested with a dangerous pest. *See, e.g.*, Haw. Admin. R. §§ 4-70-36, 4-70-37 (requiring “approved treatment” and “certificate of treatment” for importation of “any pine plant ... branches [or] twigs” from states listed as “European pine shoot moth infested areas”); La. Admin. Code 7:XV:109. The dormant Commerce Clause does not require states to ignore facts on the ground, simply because there is a nexus between those facts – such as pest infestations – and geographic boundaries. In fact, in some cases, ignoring geography can actually violate the dormant Commerce Clause. For example, where Washington’s apple growers paid approximately \$2.75 million each year for a state-imposed apple grading, inspection and marketing scheme, it was unconstitutional for North Carolina to strip away the advantages produced by that investment. *Hunt v. Wash.*

State Apple Adver. Com'n, 432 U.S. 333, 336, 351-52 (1977) (striking down law prohibiting state grades on apple cartons).

Under the LCFS, carbon intensity, determined through a scientifically validated lifecycle analysis, is the reason for the differential treatment of fuels. Distinguishing higher carbon fuels from lower carbon fuels is not discrimination. The use of higher carbon fuels, by definition, results in greater GHG emissions which, in turn, impose higher costs on California. *See Mass.*, 549 U.S. at 522-23 (noting “[r]emediation costs alone [for Massachusetts] could run well into the hundreds of millions of dollars”). The LCFS is, thus, the type of non-discriminatory law described as permissible in *Oregon Waste*. Put another way, the LCFS expresses California’s legitimate “hostility to [high carbon fuel] itself, not to merely interstate shipments” of fuel. *Chem. Waste Mgmt.*, 504 U.S. at 347 n.11 (internal quotation omitted).

3. The Use of Geographic References in Some Pathway Descriptions Does Not Demonstrate Discrimination Based on Origin

The geographic references in some fuel pathway descriptions, including those highlighted by the district court, do not change the fact that the LCFS distinguishes among fuels based on lifecycle emissions, not origin. *See* ER 1:59 (table). Geographic labels in the pathway descriptions neither determine a fuel’s CI value nor discriminate. The pathways with the lowest initial CI values were “Brazilian,”

not “California[n].” *See* ER 5:903 (Table 6). Further, pathways with the same geographic label vary significantly in CI value. There is, for example, a substantial range in CI values among the pathways labeled “Midwest.” *See* ER 5:903 (Table 6) (showing “Midwest” pathways from 86.8 to 120.99); *see also* ER 2:165-197 (showing a “Midwest” pathway as low as 56.56). And “Midwest” pathways have CI values both lower and higher than pathways labeled “California” or “Brazilian.” ER 2:135 at ¶¶ 21-24, 2:165-197. In sum, geographic labels are not determinative of a pathway’s CI value in either an absolute or relative sense.

The geographic labels simply provide a shorthand way to identify real differences in emissions. For example, California corn ethanol has higher transportation emissions than Midwest corn ethanol, *see* ER 4:777 at ¶ 45; and Brazilian ethanol production is particularly efficient, at least in part because sugarcane requires less energy to break down than other feedstocks, *see* ER 9:2258, 9:2259. These differences are real and are part of the scientifically validated, peer-reviewed lifecycle model. Notably, Appellee Growth Energy accused ARB of *insufficiently* addressing regional differences in GHG emissions

from ethanol production. *See* ER 7:1727 (Comment K-21). Recognizing actual differences in carbon intensity is not discrimination.¹⁴

As discussed, differential treatment is permissible when there is a “reason, apart from ... origin” for it. *City of Philadelphia*, 437 U.S. at 627; *Or. Waste Sys.*, 511 U.S. at 101 n.5. That reason here is carbon intensity, and the use of geographic shorthands in some fuel pathways does not transform permissible distinctions into discrimination.

4. Individual Variables in the Lifecycle Analysis Do Not and Cannot Discriminate Against Out-Of-State Ethanol

The district court incorrectly held that the LCFS assigns discriminatory “transportation, electricity and other penalties” to Midwest corn ethanol. ER 1:61 at lns. 19-22. Among other flaws, this conclusion improperly disregards all other variables which are also “parts of an integrated regulation.” *See West Lynn Creamery*, 512 U.S. at 201. Even if these single variables disfavored Midwest ethanol (which they do not), the court should have considered the *result* of the full lifecycle analysis, not selected variables buried within it.¹⁵ *See id.* at 202 (noting

¹⁴ Further, as discussed in more detail below, the initial pathways, which contain geographic labels, were developed and included as a convenience for both the regulated community and ARB. *See, infra*, § C.5.

¹⁵ The district court noted that facial discrimination ordinarily does not require looking “beyond the text.” ER 1:57 at lns. 17-18. Nonetheless, it found the transportation and electricity emissions variables facially discriminatory, although such values appear nowhere on the face of the regulation. Indeed,

(continued...)

that discriminatory regulations “*result* in a disadvantage” for out-of-state firms) (emphasis added). That result – total carbon intensity – is the “determinant” of whether a fuel generates credits or deficits under the LCFS. *See Or. Waste Sys., Inc.*, 511 U.S. at 99. The “determinant” is not “whether ... the product was generated out-of-state.” *See id.*

The district court’s analysis of individual variables suffers from other fundamental flaws as well. First, it ignores that the *full*, rather than *partial*, lifecycle approach to measuring a fuel’s GHG emissions is well-established and scientifically sound. Appellees themselves even lauded the lifecycle approach. For example, Appellee Renewable Fuels Association’s (“RFA”) claim that ethanol reduces GHG emissions is expressly based on lifecycle factors, including the uptake of carbon dioxide during feedstock cultivation and the efficiency of ethanol production. ER 2:225; *see also* ER 5:1061 (Appellee AFPM “commend[ing EPA] for its scientific approach and diligence in examining the full gamut of potential impacts from the production and use of various biofuels.”); 5:1055; 5:1045. All of the variables included in the CA-GREET model, including those selected by the court, are regularly included in lifecycle analyses of fuels, as noted by Appellees,

(...continued)

emissions from electricity are among the variables that many fuel producers guard as confidential business information. *See e.g.*, ER 2:166 (facility ID 70355).

among others. ER 5:1045 (Appellee RFA’s lifecycle emissions graphic); *see also* ER 9:2286-2290, 4:769 at ¶¶ 15-19, 21.

Second, the district court downplayed and disregarded the established science that underlies the utilization of the full lifecycle analysis. ER 1:60 at ln. 6 (“CARB attributes the differences in carbon intensity values to multiple ‘scientific’ factors.”); *see also* ER 1:60-61 (referring to “assumptions”). But these lifecycle variables are, in fact, integral parts of a peer-reviewed, scientific lifecycle modeling tool specifically designed to calculate emissions from transportation fuels. *E.g.*, ER 9:2286, 4:769-772, 10:2588-2590 (discussing electricity data), 6:1269 (discussing peer review of LCFS science). As one peer reviewer commented, “The [LCFS’s] calculation of the direct GHG emissions from production of corn-derived and sugar-derive[d] ethanol is ... consistent with a well-developed body of scientific research.” ER 6:1286. Notably, the two variables upon which the district court focused – transportation and electricity – are encompassed in those “direct” emissions. ER 5:1045, 9:2288. The district court’s characterization of these variables as “assumptions” is unsupported.

Based on sound scientific assessments of emissions, the lifecycle variables, including transportation and electricity, do not discriminate. Neither transportation nor electricity emissions favor in-state ethanol producers as a group. As to California and Midwest corn ethanol producers, California producers are the ones

disadvantaged by the inclusion of transportation emissions. ER 4:777-778 at ¶ 45. This is because California grows very little corn, and transporting imported corn generates more emissions than imported ethanol. *Id.*; *see also* ER 7:1732, 3:541 at ¶ 29. As a result, total transportation emissions for California plants are 8.1, compared to 4.8 for Midwest plants. ER 4:777-778 at ¶ 45. There is no transportation *penalty* for Midwest producers, and the district court erred in concluding otherwise.

Likewise, emissions from electricity do not penalize out-of-state ethanol producers and are determined by several factors, primarily how much electricity is used to produce a gallon of ethanol and how that electricity was generated. The former is largely a matter of plant efficiency, which in turn reflects unique plant designs and process improvements, many of which are considered confidential business information. ER 7:1727 (Appellee Growth Energy noting impact of “bio-refinery design” on emissions); ER 4:734 (Appellee RFA noting variation and import of production processes); ER 2:165-197 (pathway descriptions indicating confidential information). In addition, some ethanol plants generate some or all of their own electricity, which generally results in lower emissions. *E.g.*, 2:166 (facility ID 70355), 2:169 (facility ID 70247), 1:170 (facility ID 70117). Given this variation between plants, the district court’s conclusion that electricity emissions are “inextricably intertwined with origin” is mistaken. *See* ER 1:58 at

Ins. 26-27. As with transportation emissions, differences in electricity emissions reflect scientific analysis, not discrimination.

A review of pathway descriptions and their corresponding CI values reveals that no single variable independently determines a fuel's carbon intensity. *See* ER 2:165-197. No single variable could, therefore, discriminate against out-of-state ethanol. Indeed, to the extent that certain variables “penalize” out-of-state producers, other variables must “penalize” in-state producers more severely. Otherwise, out-of-state ethanols would not receive the lowest and most favorable CI values.

Removal of some variables from the lifecycle – as could be required under this part of the district court's decision – is unscientific and would not allow for an accurate comparison of fuels. *See* ER 9:228, 4:769-770 at ¶¶ 14-18, 5:1045. A partial lifecycle would also undermine the LCFS's incentives and, thus, the goal of reducing the emissions that threaten Californians. The exclusion of electricity emissions, for example, would eliminate the incentive for producers to increase energy efficiency or to generate some of their own electricity, because no LCFS benefit would obtain from any such reductions.

This discussion confirms that a fuel's full lifecycle emissions, not its origin or any single lifecycle variable, are the reason for different CI values. The LCFS applies the same science-based, peer-reviewed lifecycle analysis to all alternative

fuels, including all ethanols. The result is that many out-of-state ethanols receive lower CI values than in-state competitors. The LCFS does not facially discriminate.

5. Discrimination Cannot Be Established By Considering Only a Tiny Fraction of Competing Ethanols

Although the LCFS provides its most favorable treatment to out-of-state ethanols, allows fuel producers to apply for individualized CI values, and distinguishes among ethanols on the basis of carbon intensity, not origin, the district court nonetheless found that it facially discriminates. The district court reached this conclusion by “comparing [only] plants with the same feedstock and production processes.” ER 1:59 at ln. 1; *see also* ER 1:59 (table). Specifically, the court wrote, “Because the LCFS makes production process, feedstock and origin relevant, comparing pathways with different production processes or feedstocks is a red herring.” ER 1:62 at lns. 7-9. The LCFS makes *total carbon intensity* relevant, not individual factors of the lifecycle analysis. In any event, a narrow and selective comparison like this cannot support a finding of discrimination.

“[A]ny notion of discrimination assumes a comparison of substantially similar entities.” *United Haulers*, 550 U.S. at 342 (quoting *Tracy*, 519 U.S. at 298). “Substantially similar” encompasses the products or firms that compete in the relevant market, because “the Clause protects the interstate market, not particular interstate firms.” *Exxon*, 437 U.S. at 127. The threshold question of

which entities are “substantially similar” rarely arises and is not implicated here. This is not a case where “the allegedly competing entities provide different products [which] may mean that the different entities serve different markets.” *Tracy*, 519 U.S. at 299; *see also Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (excluding canned fish from analysis of fresh fish regulation). Here, everyone agrees that ethanol is a fungible commodity. *E.g.*, ER 4:580 at ¶ 60. The district court’s exclusion of significant numbers of ethanol pathways from its analysis is therefore unjustified.

Further, the proper comparative framework cannot be determined by factors made “relevant” by the challenged law. For example, in *Bacchus*, the law at issue distinguished a subset of alcoholic beverages (those made from either pineapple or the local ti plant) from all other alcoholic beverages. *Bacchus*, 468 U.S. at 265. Because of competition in the market, the Court compared the treatment of *all* alcoholic beverages, not only those beverages made from the same “feedstock,” although the law made that factor relevant. *Id.* at 268-69; *see also Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (comparing competing products not mentioned in the regulation).

In contrast, the district court here considered only six ethanol pathways, although there were more than 80 in the record. ER 1:59 at lns. 8-22, 2:165-197. There is no evidence that the seventy-plus pathways disregarded by the district

court “provide different products” or “serve different markets.” *See Tracy*, 519 U.S. at 299.

In reality, the initial fuel pathways, a subset of which were considered by the district court, were included in the regulation for the convenience of both ARB and fuel producers. As ARB explained, “[The approach of including default pathways in the regulation] avoids the need for individual producers using the same feedstocks and processing technology from having to establish their own carbon intensity values.” ER 6:1372. This way, only those producers with lower-than-average carbon intensities – those producers who might actually benefit from an individualized value – need apply for one. *See* ER 6:1324, 6:1374, 6:1382. The benefit of the initial “default” pathways was apparent to fuel producers. *See, e.g.*, ER 6:1323 (Comment C-21 requesting pathway for cellulosic ethanol); 6:1326 (Comment C-27 requesting additional natural gas pathways); 6:1328 (Comment C-30 requesting additional ethanol pathways). In addition, more than sixty ethanol producers have registered for one or more of the initial pathways, further demonstrating their value and convenience. *See* ER 2:165-197.

These useful “default” pathways are not, however, the only pathways the court should consider. Notably, the number of individualized ethanol pathways, obtained through Method 2A or 2B, substantially exceeds the number of “default” pathways created by ARB. Yet, the district court ignored both the significance of

the existence of Methods 2A and 2B and the pathways that have already resulted from those procedures. As in *Bacchus*, the proper analysis must consider the full range of products that compete in the market – in other words, the full range of ethanol pathways. See also *Exxon*, 437 U.S. at 127. It must also consider “the entire program” rather than merely “parts of an integrated regulation.” *West Lynn Creamery*, 512 U.S. at 201.

The district court’s narrow framework is unsupported. The “entire program” of the LCFS repudiates protectionism. Carbon intensity is the guiding factor, not whether a product was produced in California. Further, whether the relevant market here is the ethanol market or a broader market encompassing all transportation fuels, out-of-state fuels have received equal, and in some cases more favorable, CI values than their in-state competitors. That is not discrimination.

D. The LCFS Has No Discriminatory Effects On Out-Of-State Ethanols

RMFU also moved for summary judgment on the grounds that the LCFS has discriminatory effects on out-of-state ethanol. Although the district court did not reach this issue, ER 1:63 at n.6, this court may. *Degelmann v. Adv. Med. Optics, Inc.*, 659 F.3d 835, 840 (9th Cir. 2011); see also *Delaye v. Agripac, Inc.*, 39 F.3d 235, 237 (9th Cir. 1994).

The record demonstrates that this claim has no merit. To establish discriminatory effects, this Court requires “substantial evidence of an *actual*

adverse effect,” namely “the *practical effect* of favoring in-state economic interests over out-of-state interests.” *Black Star Farms*, 600 F.3d 1228, 1231 (9th Cir. 2010) (internal quotation omitted) (emphasis in original). Other circuits agree. *E.g.*, *Kleinsmith*, 571 F.3d at 1042-43 (10th); *Cherry Hill Vineyard*, 505 F.3d 37 (1st Cir. 2007). Yet, as in *Black Star Farms*, RMFU offered no evidence that the LCFS had any effect on the market share of out-of-state ethanol. *See Black Star Farms*, 600 F.3d at 1231, 1233; *see also Valley Bank*, 914 F.2d at 1193-94 (rejecting discrimination claim in absence of any evidence of disproportionate impact); *Kleinsmith*, 571 F.3d at 1042.

Further, out-of-state ethanol, particularly Midwest ethanol, continues to flow into California under the LCFS. The vast majority of ethanol producers registered under the LCFS are out-of-state. *See* ER 2:165-197. Many Midwest producers applied for individualized carbon intensity values under Method 2A or 2B, presumably because they anticipate selling ethanol in California. *See id.* In addition, the Oil Price Information Service (“OPIS”), which tracks ethanol prices nationwide, is tracking *only* CI values that correspond to Midwest ethanol. ER 4:737 at ¶¶ 10-11. There is no evidence that the LCFS “impede[s] the flow of” out-of-state ethanol into California. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993 (9th Cir. 2000).

At most, then, RMFU is left with allegations that the LCFS burdens interstate commerce. Those allegations should be analyzed under the *Pike* test, not as a discriminatory effects claim. *Cherry Hill Vineyard, LLC*, 505 F.3d at 39; *see also Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 500 (5th Cir. 2011) (rejecting definition of discrimination that included “all instances in which a law, in effect, burdens some out-of-state interest while benefitting some in-state interest”).

E. The LCFS Does Not Regulate Extraterritoriality

The district court also erroneously held that the LCFS is an extraterritorial regulation. Extraterritoriality is a *per se* violation of the dormant Commerce Clause and is reserved for a narrow category of laws that exceed the limits of a state’s authority by “directly contro[ling] commerce occurring wholly outside the boundaries of a State.” *Beer Inst.*, 491 U.S. at 336.¹⁶ The direct control of wholly out-of-state commerce is impermissible whether it is exercised through direct regulation or through the regulation’s practical effects. *Id.* “The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Id.* The extraterritoriality doctrine also protects interstate

¹⁶ The district court’s application of strict scrutiny in this context was erroneous. *See* ER 1:67 at lns. 8-11.

commerce against inconsistent and conflicting state laws – an effect often referred to as “Balkanization.” *Id.* at 336-37.

The burden of proof for Appellees on this claim is particularly high, since their challenge is a facial one. *S.D. Myers*, 253 F.3d at 467. Thus, the LCFS is an extraterritorial regulation “only if the [LCFS] must necessarily be read as directly regulating interstate commerce.” *Id.* at 468. In conflict with that precedent, the district court erroneously stated that Appellants “improperly focus[ed] on whether or not the LCFS directly regulates ... out-of-state entities.” ER 1:65 at lns. 2-3.

Although the LCFS applies only to fuels sold in California, Cal. Code Regs., tit. 17, § 95480.1(a), the district court found that the LCFS regulates extraterritorially in multiple ways. It does not. In fact, the LCFS bears no resemblance to the narrow category of laws that have been struck down as extraterritorial regulations. Rather, the LCFS is highly analogous to other state laws that have incidental and indirect effects on interstate commerce and are appropriately analyzed under the *Pike* balancing test.

1. The LCFS Does Not Regulate The Channels Of Interstate Commerce

The district court held that the LCFS “directly regulates the channels of interstate commerce,” because it requires fuel producers to provide a map and other documentation to demonstrate how their fuels arrive in California. ER 1:65-66; *see also* Cal. Code Regs., tit. 17, § 95484(d)(2). This information is required to

verify the accuracy of the CI value claimed for the fuel. In other words, if the fuel producer claims a CI value that includes the use of railcars, it must demonstrate that it is using railcars rather than, say, higher-emitting trucks. *See* Cal. Code Regs., tit. 17, § 95484(d)(2)(D). This information need only be provided once, unless the fuel producer makes a change that is material to the CI value of its fuel. *Id.* This does not force fuel producers to seek ARB's approval before undertaking a transaction in another state, as the district court mistakenly concluded. ER 1:66 at lns. 10-12. ARB is not approving the selection of particular transportation methods; it is simply verifying that the CI value claimed by the party seeking to generate credits in California is accurate.

The case relied on by the district court is inapposite. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986), involved New York's price affirmation law that required distillers to provide a price schedule to the state each month, listing the prices for each item they intended to sell in New York that month. *Id.* at 575. The distillers were also required to affirm that they would not sell those items in other states at lower prices during that month. *Id.* at 576. Thus, the law impermissibly required distillers to obtain New York's permission in order to lower prices in, say, Connecticut. *Id.* at 582. Those facts bear no resemblance to the LCFS's informational requirements to verify the accuracy of the CI value of a fuel sold in California.

The LCFS is also entirely distinct from laws that have been held to regulate the channels of interstate commerce. As this Court has noted, these “transportation laws pose ... obstacles to entities engaged in interstate commerce.” *Valley Bank*, 914 F.2d 1192. They impose train length requirements on railroads, or equipment requirements on truckers, that would force burdensome changes when crossing state lines. *See id.* The LCFS poses no such obstacles. In fact, the LCFS’s informational requirements do not even rise to the level of a franchise fee for the use of channels of interstate commerce – fees that this Court has analyzed under a reasonableness test. *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1059 (9th Cir. 1987); *see also Western Oil & Gas Ass’n v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984). Mere informational requirements, such as those at issue here, certainly do not regulate the channels of interstate commerce in a manner that constitutes a *per se* violation of the Constitution. *See Kleenwell Biohazard Waste & Gen’l Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (“We reject Kleenwell’s contention that the state may not impose a certification requirement upon a firm engaged in interstate commerce.”).

There is no basis for the district court’s finding that the LCFS directly regulates the channels of interstate commerce.

2. The LCFS Controls The Aggregate Carbon Intensity of Transportation Fuels Consumed in California And Has Only Permissible, Indirect Effects On Out-Of-State Commerce

The district court also erroneously held that that the LCFS has the practical effect of controlling conduct occurring wholly outside of California. ER 1:65 at lns. 12-13. However, courts have consistently refused to find extraterritorial regulation where regulations do not impose a direct regulatory burden out-of-state, and the LCFS does nothing of the kind. The district court's decision dangerously expands the extraterritoriality doctrine, threatening countless state laws that have permissible incidental and indirect effects on interstate commerce.

The *per se* violation of extraterritoriality is reserved for laws like the Nevada statute that would have forced the National Collegiate Athletic Association “to apply Nevada’s procedures to enforcement proceedings throughout the country.” *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993). Thus, as the First, Second and Eighth Circuits have summarized the rule, extraterritorial regulations “*necessarily require*[] out-of-state commerce to be conducted according to in-state terms.” *Nat’l Elec. Mfrs. Ass’n v. Sorrell* (“*NEMA*”), 272 F.3d 104, 110 (2nd Cir. 2001) (emphasis added) (quoting *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995)); *Pharm. Research & Mfrs. of Am. v. Concannon* (“*PhRMA*”), 249 F.3d 66, 79 (1st Cir. 2001) (quoting *Cotto Waxo*), *aff’d Pharm. Research & Mfrs. of Amer. v. Walsh* (“*Walsh*”), 538 U.S. 644 (2003). This Court has characterized the distinction between extraterritoriality and simple burdens on commerce (that would

be analyzed under the *Pike* balancing test) as the difference between “direct[] regulat[ion]” and “indirect effects.” *S.D. Myers, Inc.*, 253 F.3d at 465.

Courts have relied on direct *control* as a limiting principle in the extraterritoriality doctrine because innumerable valid state laws have indirect effects on out-of-state conduct. *See, e.g., Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) (“[T]he question is not whether what Virginia has done will restrict appellants’ freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens”); *Freedom Holdings*, 357 F.3d at 220-21 (recognizing that “any state regulation of a product” might result in out-of-state pricing impacts) (citing *Osborn*, 310 U.S. at 62).

States have impermissibly controlled out-of-state activity in one of two ways, neither of which is relevant to the LCFS. The first, and most common way, is when the practical effect of a regulation is to control the terms – often the price – of out-of-state transactions or proceedings. The price affirmation law invalidated in *Brown-Forman*, and the Nevada procedural statute struck down in *NCAA*, are classic examples. *Brown-Forman*, 476 U.S. at 582-83; *NCAA v. Miller*, 10 F.3d at 639; *see also Beer Inst.*, 491 U.S. at 337-38; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 520-24 (1935); *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 661 (7th Cir. 1995). In fact, the Supreme Court recently rejected an extraterritorial regulation challenge precisely because the state was neither dictating out-of-state

prices nor tying in-state prices to out-of-state prices. *Walsh*, 538 U.S. at 669. The second way states have impermissibly controlled out-of-state conduct is by requiring other states or communities to adopt specific laws as a condition of importation or favorable treatment.¹⁷ See *New Energy Co.*, 486 U.S. at 271; *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 165 F.3d 1151, 1152 (7th Cir. 1999); *Hardage v. Atkins*, 619 F.2d 871, 873 (10th Cir. 1980).

In contrast with these narrow categories of state laws, numerous cases have upheld state laws that *affect*, but do not control, out-of-state commerce – even pricing. For example, New York required cigarette manufacturers either to make payments according to a Master Settlement Agreement or to make allegedly higher payments into an escrow account. *Freedom Holdings*, 357 F.3d at 212-13. If manufacturers did neither, their cigarettes could not be sold in New York. *Id.* at 213-15. The plaintiffs, who purchased cigarettes for resale, alleged that these laws forced them to pay “artificially high prices” for their out-of-state purchases from compliant manufacturers. *Id.* at 220. The Second Circuit rejected this extraterritoriality claim, noting that the alleged effect “amounts to no more than the upstream pricing impact ... [that] might result from any state regulation of a product.” *Id.* Such effects are not controls. *Id.* at 221 (distinguishing *Baldwin*,

¹⁷ The LCFS has no such conditions, as is apparent from the face of the regulation. The uninterrupted flow of out-of-state fuels into California under the LCFS confirms this point.

Brown-Forman, and *Beer Inst.* as price controls). In another example, Maine created powerful incentives for pharmaceutical manufacturers to participate in a rebate program designed to lower the retail cost of prescription drugs for Maine residents. *PhRMA*, 249 F.3d at 71-72. The manufacturers alleged that the law would regulate the prices of, and profits from, their out-of-state sales to wholesalers. *See id.* at 81-82. The First Circuit upheld the law, distinguishing between permissible *effects* on prices and profits and impermissible *regulation* thereof. *Id.* at 81-82.

Further, out-of-state effects are plainly permissible from the regulation of commerce that occurs at least partly in the state. For example, this Court upheld a Nevada law that required ATM networks to allow Nevada banks to charge an ATM-usage fee to non-customers precisely because the ATM and the person using it would be in Nevada at the time of the transaction. *Valley Bank*, 914 F.2d at 1188, 1191. Thus, although the ATM user's bank might well be located out-of-state, this was not commerce occurring *wholly* outside of Nevada, and Nevada could regulate it. *Id.* at 1191. Similarly, here, the regulated sales of fuel take place in California. Cal. Code Regs., tit. 17, § 95480.1. Those sales may well have effects out-of-state, as did Nevada's ATM law, but the LCFS does not regulate wholly out-of-state commerce.

The LCFS is designed to encourage fuel producers to reduce carbon intensity and to develop and commercialize lower carbon fuels, regardless of their location. It does not, however, *control* any decisions that fuel producers make, in-state or out-of-state. It controls, instead, the aggregate, average carbon intensity of California's transportation fuel pool. Regulated parties *choose* how to comply with the carbon intensity standard. Nonetheless, the district court erroneously concluded that that the LCFS, in its practical effect, regulates extraterritorially in two specific ways: by including out-of-state activities in the lifecycle and by creating incentives to reduce GHG emissions. ER 1:65 at lns. 1-27. Both conclusions are wholly unsupported.

a. Inclusion of Out-of-State Activities in the Lifecycle Analysis Is Not Control

Through the lifecycle analysis – the scientifically-validated method for capturing a fuel's GHG emissions – California is quantifying the GHG emissions that result from its consumption of transportation fuels, because those emissions are harmful to the state and its citizens. Lifecycle analysis can, and often does, include consideration of activities that occur outside of California. The district court erroneously held that considering and accounting for such activities *controlled* those activities. ER 1:65 at lns. 1-27. However, courts have upheld a wide variety of regulatory schemes in which states consider out-of-state actions. For instance, cigarette manufacturers' decisions whether to participate in a

settlement agreement or make payments to an escrow account were permissibly considered by New York in determining whether to allow them to be sold in New York. *Freedom Holdings*, 357 F.3d at 212. And Maine permissibly considered pharmaceutical manufacturers' decisions whether to participate in Maine's rebate program when determining Maine's treatment of the drugs. *PhRMA*, 249 F.3d at 71-72. But neither New York nor Maine *controlled* those decisions.

Similarly, inclusion of an activity in the lifecycle analysis does not control that activity. For example, the carbon dioxide absorbed during corn's photosynthesis, which occurs outside of California, is included in the lifecycle of corn ethanol as an offset to tailpipe emissions. ER 9:2290, 7:1732. Land use changes that result from the production of biofuel feedstocks are also considered in the lifecycle analysis. Yet, it cannot be credibly argued that California controls either photosynthesis or global land use decisions through the LCFS. Notably, EPA also included land use in its lifecycle analysis of renewable fuels and rejected the notion that consideration of global land use change was a form of regulation: "Considering international emissions in determining the lifecycle GHG emissions of the domestically-produced or imported fuel does not change the fact that the actual regulation of the product involves its use solely inside the U.S." ER 5:1024 (75 Fed Reg. 14669, 14766.) The scope of "control" the district court assigned to the LCFS is staggering. It includes farming practices, crop yields, harvesting

practices, collection and transportation of crops, land use changes, and fuel production methods. ER 1:65 at lns. 6-12. There is no evidence that the LCFS has anything more than indirect effects on any these activities.

Like the lifecycle analysis, labeling requirements often consider and reflect out-of-state activities, including production processes. Yet labeling requirements have been upheld against claims of extraterritoriality. For example, Ohio adopted a law regulating milk labels describing use of the hormone rbST. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 634 (6th Cir. 2010). And Vermont adopted label requirements for lamps containing mercury. *NEMA*, 272 F.3d at 107. Both labels reflected decisions made and actions taken during production processes, at least some of which occurred out-of-state. Just as milk producers choose whether or not to use rbST, and lamp manufacturers choose whether or not to use mercury, ethanol producers choose between sources of thermal energy (coal, natural gas, biomass); between feedstocks; and between drying, partially drying, or not drying distillers grain as a co-product, to name just a few choices. The reflection of these decisions in a fuel's carbon intensity is no different in kind than the reflection of milk producers' or lamp manufacturers' decisions in the labels assigned to their products. *See Boggs*, 622 F.3d at 648; *NEMA*, 272 F.3d at 110. Like those labeling laws, the LCFS, "by its terms, is indifferent to whether [fuels] sold anywhere else in the United States are [low carbon] or not." *NEMA*, 272 F.3d at

110; *see also Boggs*, 622 F.3d at 647 (“[T]he Ohio Rule’s labeling requirements have no *direct* effect on the Processors’ out-of-state labeling conduct.”) (emphasis added).

It is abundantly clear that extraterritorial regulations are those that control, rather than indirectly affect, conduct occurring wholly out-of-state. Consideration of out-of-state conduct – whether through a lifecycle analysis, a label, or another mechanism – is not control, even if it results in incidental effects out-of-state.

b. Incentives Are Not Extraterritorial *Regulation* Even When They Influence Out-Of-State Activities.

Like numerous state regulations, including those upheld in *Freedom Holdings*, *PhRMA*, *NEMA*, and *Boggs*, the LCFS changes the market conditions under which producers make decisions and provides incentives to make certain choices over others. The district court erroneously concluded that these incentives control conduct beyond California’s boundaries. ER 1:65 at lns. 14-17. But incentives are not controls. Incentives, by definition, are less controlling than mandates, including mandates that have been upheld under the dormant Commerce Clause. For example, Minnesota banned “the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitt[ed] such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons.” *Clover Leaf*, 449 U.S. at 458. Although Minnesota’s packaging mandate affected decisions made during production and packaging, some of which occurred out-of-

state, and although the law might have caused some shift in the purchases of raw materials in favor of in-state firms, no one alleged that the law regulated extraterritorially. *See id.* at 472 n.16, 473. The Court upheld the law under a *Pike* analysis. *See id.* at 473-74. If *mandating* a change in packaging does not control out-of-state conduct, incentives to reduce carbon certainly do not.

The Eighth Circuit upheld Missouri's price disclosure law for feedlot sales of cattle, which was adopted, in part, to encourage "producers [to] make better genetic decisions [and] raise better quality animals." *Hampton Feedlot v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001). Missouri's law, like the LCFS, was designed to produce incentives for both in-state and out-of-state producers. That out-of-state cattle producers were among the targets of these incentives did not make the law an extraterritorial regulation. *See id.* at 819 (noting that "cattle travel from many states" to Missouri's feedlots). Like Missouri's law, the LCFS creates incentives for fuel producers to make different production decisions but directly regulates only the sale of goods in the state.

Many state regulations permissibly create incentives for out-of-state conduct. The Second Circuit pointed this out, holding that Vermont's lamp-labeling law was not extraterritorial even though it might lead manufacturers to "modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps." *NEMA*, 272 F.3d at 110. Virtually any products

regulation will incidentally create incentives for in-state and out-of-state manufacturers to take the steps necessary for compliance or favorable treatment. Labels identifying rbST in milk or mercury in lamps can create incentives for producers to stop using those materials in order to obtain more favorable labels. Maine's pharmaceutical regulations intentionally encouraged manufacturers to offer rebates. *PhRMA*, 249 F.3d at 71-72. New York's cigarette regulations created strong incentives to join the master settlement agreement. *See Freedom Holdings*, 357 F.3d at 211-12. And state laws that provide marketing flexibility only to small wineries likely create incentives for these wineries not to exceed the production levels that permit them to qualify. *See Black Star Farms*, 600 F.3d at 1227; *Cherry Hill Vineyards*, 505 F.3d at 31. All these laws were upheld as constitutional.

Producers who choose to make high carbon fuels do not have an inherent right to some share of California's fuel market, and a regulation that rewards other producers for making different decisions does not regulate extraterritorially. "[A] state may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause." *LensCrafters*, 567 F.3d at 527. Because compliance is based on an aggregate average of fuels' carbon intensities, the LCFS does not prevent even higher carbon fuels from participating in California's market. It simply requires that sufficient

lower carbon fuels be used to offset the emissions from higher carbon fuels and reach the target for the year. This is clearly permissible. “[T]he commerce clause does not give an interstate business the right to conduct its business in what it considers the most efficient manner.” *Valley Bank*, 914 F.2d at 1193; *see also id.* at 1190 (“States ... may enact legislation that affects the interdependent relationships constituting commercial activity.”).

The district court’s radical expansion of the scope of the extraterritoriality doctrine would invalidate countless state laws, including any regulation that results in any change to out-of-state operations. The district court’s unprecedented approach also eliminates the distinction between extraterritorial regulations and laws analyzed under the *Pike* test, which is designed to consider the indirect effects of state regulation on interstate commerce. Notably, even under *Pike*, “[e]vidence that interstate ... commerce is in some way affected by the regulations is not enough” to prevail. *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). The district court erred in holding that the LCFS’s indirect effects amount to a *per se* violation of the dormant Commerce Clause.

3. The LCFS Will Not Balkanize The Fuels Markets

As noted above, the dormant Commerce Clause protects commerce against “inconsistent legislation,” which is often referred to as “Balkanization.” The district court’s conclusion that the adoption of similar regulations by other states

would “Balkanize the ethanol market” and, thus, “interfere with free trade” is mistaken and must be reversed. *See* ER 1:66. First, Congress authorized a nonuniform fuels market for purposes of controlling emissions. *See infra*, pp. ___. California has not Balkanized the market, as discussed below. But even if the Court disagrees, there is still no Commerce Clause violation because Congress authorized all states to adopt their own fuel regulations, regardless of effects on commerce, absent an explicit action by EPA (which has not occurred here). *Id.* And California has the authority to adopt its own fuels regulations, even where EPA has pre-empted other states from doing so. *Id.*

Second, there is no “evidence that conflicting legislation is already in place or that the threat of such legislation is both actual and imminent.” *S.D. Myers*, 253 F.3d at 470; *see also SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2nd Cir. 2007) (“There must be actual conflict between the challenged regulation and those in place in other states.”). “[T]he Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation.” *S.D. Myers*, 253 F.3d at 470. That is what the district court did here.

Third, the district court also speculated about the effects that multiple LCFS-like regulations might have on the ethanol market. These speculations are contradicted by the record. There is no evidence of “strong incentives [for a fuel

producer] to either relocate its operations in the State of largest use, or sell only locally to avoid transportation and other penalties.” ER 1:66 at lns. 22-24. In fact, the alleged transportation “penalty” simply does not exist. And out-of-state producers have received lower CI values than in-state producers without relocating, so the alleged relocation incentive is unsupported. Further, no evidence supports the district court’s conclusion that fuel producers would be “hard-pressed” to satisfy the requirement of multiple LCFS-like regulations. ER 1:66. *See SPGGC*, 505 F.3d at 196 (“That SPGGC may not be able to sell its gift cards on exactly the same terms to consumers in all states does not, in itself, demonstrate a regulatory conflict sufficient to establish that [the state’s] law is unconstitutional.”). Rather, the likely effect of multiple LCFS-like regulations would be an increase in the range of ethanol prices, since California’s LCFS appears to have created a price differential based on CI value. ER 4:737-738 at ¶¶ 11-12. But that would not Balkanize the market. This Court held as much in *Valley Bank*, concluding that an ATM transaction fee would not create a lack of market uniformity because it would only change the amount of the transaction. *Valley Bank*, 914 F.2d at 1192. Further, ethanol producers are already accustomed to prices that vary significantly from state-to-state and from day-to-day. ER 4:738 at ¶ 14; *see also* ER 4:815 (Fig. 1). Finally, any LCFS-like regulation would reward the same emissions-reducing behavior, so conflict is difficult to imagine.

In sum, there are no regulations that conflict with the LCFS, and the district court's speculation about potential conflicts is unsupported by both precedent and the record. Moreover, Section 211 of the Clean Air Act explicitly authorizes a market with multiple state fuels regulations. The district court erred in granting summary judgment to Appellees on this issue.

F. The LCFS Has Neither A Discriminatory Purpose Nor Discriminatory Effects With Respect to Crude Oil

The LCFS's purpose is non-discriminatory. Nonetheless, the district court held that the LCFS discriminated – purposefully and in effect – against out-of-state crude oils.¹⁸ ER 1:39-41. Those conclusions are mistaken. As a threshold point, and recognizing the Court's independent obligation to address jurisdictional questions, Appellants also wish to inform the Court that subsequent regulatory developments may have mooted AFPM's claim.

1. The Crude Oil Provisions Are Being Amended, And AFPM's Claims Regarding Them Are Likely Moot

¹⁸ The district court correctly concluded that the LCFS does not facially discriminate against crude oil. ER 1:39 at ln. 4 (noting that crude oil distinctions “appear to be neutral facially). The distinction between emerging crude oils and all other crudes is not “discriminat[ion] against an article of commerce by reason of its origin or destination out of state” but, rather, by reason of the threats it poses to California. *Carbone*, 511 U.S. at 390.

Before the district court ruled, ARB had begun the process to amend the LCFS's crude oil provisions.¹⁹ RJN , Exh. B at p.1. The proposed amendments were released for public review in October 2011 and considered by the Board on December 16, 2011. *Id.* The Board directed ARB's Executive Officer to develop and adopt final regulations consistent with the proposed amendments. RJN, Exh. D at 8-10. And ARB staff has suggested modifications to the proposed amendments which were made available for public comment in April 2012. RJN, at ¶ 5. If finalized by the Executive Officer and approved by California's Office of Administrative Law, ARB anticipates the amendments would become effective January 1, 2013. RJN, Exh. B at p. 1.

Meanwhile, under a Regulatory Advisory, ARB has committed to treat crude oil in accordance with the proposed amendments during 2012. RJN, Exh. B at p. 2. (announcing treatment for 2012 "consistent with the anticipated modifications"). Thus, the crude oil provisions challenged in this lawsuit applied only to "crudes delivered through December 31, 2011." *Id.* In 2012, all crude oils are being reported at the same carbon intensity value. Actual carbon intensities for

¹⁹ These amendments are not admissions that the original provisions were legally defective but, rather, responses to administrative experience of the kind commonly encountered (and entirely appropriate) when an agency is implementing a new (and innovative) regulatory program. RJN, Exh. C at ES-1, ES4-6. Indeed, the LCFS was designed to be reviewed and, as warranted, amended. Cal. Code Regs., tit. 17, § 95489.

those crude oils will be calculated when the full set of 2012 data is available. *Id.* Using actual carbon intensities and actual volumes, ARB will then calculate the aggregate carbon intensity of California's 2012 crude mix. *Id.* All refiners will be assigned an incremental deficit if the average carbon intensity for 2012 was higher than that of 2010. *Id.* All crude oils are subject to this identical process. The district court's concern about allegedly favorable treatment for California HCICO is no longer applicable. ER 1:39-41. An injunction of the provisions that were in effect in 2011 will not change the conditions under which current or future commerce occurs. This part of this appeal and AFPM's claim for prospective, injunctive relief appear to be moot.²⁰ *See e.g., Towery v. Brewer*, 672 F.3d 650, 656-58 (9th Cir. 2012) (holding that state's decision to abandon three-drug protocol mooted any challenge to it).

If the Court agrees that this issue is moot, then the portion of the district court's order concerning crude oil should be vacated. ARB began the amendment process well before the district court ruled, and "[t]his case more closely resembles mootness through happenstance than through settlement." *Alvarez v. Smith*, 130 S.

²⁰ Mootness here does not depend "on the basis of th[e Regulatory Advisory notice] alone." *Cf. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1050 n.6. The Board has preliminarily approved the proposed amendments, and ARB has published and accepted comments on suggested modifications. RJN, ¶ 5. ARB is also already applying the proposed approach in 2012.

Ct. 576, 578 (2009); *see also* *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1175-76 (9th Cir. 2005) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)).

2. The LCFS Has Neither A Discriminatory Purpose Nor Discriminatory Effects With Respect to Crude Oil

If the crude oil issue in this appeal is not moot, the district court's order should be reversed on the merits. The district court held that the LCFS's distinction between emerging HCICOs and all other crude oils was "designed to protect California's TEOR." ER 1:39 at ln. 5. The court also concluded that "the LCFS is designed to eliminate competition [in California's crude oil market] by new entrants." ER 1:40 at ln. 15. These conclusions are wrong.

As described above, the LCFS treats crude oils differently than alternative fuels (such as ethanol, electricity, hydrogen, and biodiesel). The overarching goal of the LCFS is to reduce GHGs from California's transportation fuels by an ambitious 10%. ER 4:789 at ¶ 88, 91; 9:2197. "[F]uels having carbon intensities from 50 to 80 percent less than gasoline are expected to be needed." ER 6:1359. Thus, the LCFS is designed to stimulate production and consumption of those alternative fuels and decrease consumption of petroleum fuels. *See* ER 6:1271, 7:1482, 7:1495, 7:1667.

Although different from the treatment of alternative fuels, the treatment of crude oils is still fundamentally based on the lifecycle analysis. As promulgated,

the LCFS required most crude oils to use the average lifecycle carbon intensity of California's 2006 baseline crude mix (8.07 for production and transport). Cal. Code Regs., tit. 17, § 95486(a)(2)(A)(1); ER 4:790 at ¶ 94; ER 6:1234 (noting that baseline mix included ninety-five percent of California crude supply in 2006). Emerging HCICOs were required to use their actual carbon intensity, which, by definition, would be higher than 15. Because no crude oil can use a CI value below 8.07, emissions reductions under the LCFS must come from alternative fuels. That is essential to the goal of the LCFS to transform California's fuel pool:

This approach [to crude oil] is taken to reduce the incentive for regulated parties to comply with the LCFS by shifting to less carbon-intensive crude oils or refinery operations.... The objective of the LCFS is to stimulate more fundamental changes to the transportation fuel pool, moving towards fuels that meet the much lower carbon intensities needed to meet long-term GHG emissions goals.

ER 6:1233; *see also* ER 6:1273.

For alternative fuels, the goal is to encourage innovation and significant reductions in carbon intensity. For crude oils, on the other hand, the LCFS is focused on preventing significant *increases* in carbon intensity. ER 4:798 at ¶ 91. The distinction between emerging HCICOs and all other crudes furthers that goal. Emerging HCICOs, by definition, threaten to “significantly increase the overall average carbon intensity attributable to crude oil,” because of their higher carbon intensities and because, as new sources, they may potentially become “a significant

part of the crude supply in the future.” ER 6:1234; *see also* ER 4:789 at ¶ 89.

Requiring that emerging HCICOs be recorded at their actual CI value, rather than the baseline, means that any emerging HCICO used in California would create a large deficit and, consistent with the LCFS’s objectives, would require substantial use of lower carbon alternative fuels to generate offsetting credits.

Lower carbon crude oils – extracted by conventional, lower-emitting means – do not pose the same threat as emerging HCICOs. California TEOR also does not pose this threat. *See* ER 4:792 at ¶ 99. It constituted 14.8% of California’s crude mix in 2006 and will constitute a smaller and smaller share of that mix as it continues to decline. ER 6:1234; ER 11:2699. In fact, California crude as a whole – including California TEOR – has constituted a decreasing share of California’s crude mix since at least 2000. ER 4:792 at ¶ 99; 11:2698.

The LCFS’s distinction between emerging HCICO and all other crude oils, like the distinctions between alternative fuels, reflects California’s hostility to increased emissions, not to out-of-state fuels. *Chem. Waste Mgmt.*, 504 U.S. at 347 n.11. The LCFS is designed to reduce the carbon intensity of California’s fuel pool by encouraging lower carbon alternative fuels. To protect the emissions reductions achieved by those fuels, it is critically important to prevent significant *increases* in carbon intensity from petroleum fuels. Emerging HCICOs are the only fuels that present that risk.

That the distinction between emerging HCICOs and all other crudes is not protectionist is readily apparent from the size of the “all other crudes” category. In 2011, that category contained more than 160 out-of-state crudes, all of which were treated identically to all California crudes. These out-of-state crudes include those from Alaska, Saudi Arabia, Ecuador, Iraq, Brazil, Mexico, and Angola that were part of the 2006 baseline crude mix. ER 11:2698-2699. They also include the crude oils that were screened in 2011 and found to be non-HCICOs. ER 2:124-128. That latter group represents crude oils from at least two states and thirty countries. *Id.* Many of these crudes were not represented in California’s 2006 baseline crude mix and, thus, represent precisely the “new entrants” the district court erroneously concluded were barred from entering California’s market. *Cf. id. and* ER 11:2699.

These facts easily distinguish this case from the cases relied on by the district court where a discriminatory purpose was found. In all of those cases, in-state entities were singled out for preferential treatment. *See, e.g., Bacchus*, 468 U.S. at 265 (law providing favorable tax exemption only to several in-state products); *West Lynn Creamery*, 512 U.S. at 194 (law imposing assessment on milk that was offset by subsidies only to in-state producers); *C&A Carbone*, 511 U.S. at 386 (law “depriving competitors ... of access to a local market”). In contrast, in 2011 under the LCFS, more than 160 competing crude oils were assigned precisely the same

CI value as all California crude. In addition, there is no evidence in the record of a discriminatory motive. ARB expressly noted that the market share of California crudes – including TEOR – has been decreasing due to declining production. ER 11:2703. Unlike in *West Lynn Creamery* or *Bacchus*, however, there is no evidence that ARB was concerned about the welfare of California’s crude oil producers, generally, or California TEOR, specifically.²¹ See *West Lynn Creamery*, 512 U.S. at 189-90; *Bacchus*, 468 U.S. at 270; see also *Spoklie*, 411 F.3d at 1060. The LCFS is not protectionism in disguise.

3. The LCFS’s Actual Treatment of Crude Oils Is Not Discriminatory

The district court found discriminatory design and effects based on its view that the assignment of a CI value “substantially lower than [the fuel’s] actual carbon intensity” constitutes favorable treatment. See ER 1:39. Applying that definition, the district court concluded that “the LCFS protects the use [of] California’s TEOR by assigning it an artificially low carbon intensity value.” ER 1:38 at lns. 18-19. The district court’s definition is premised on an assumption that the LCFS should have used the “actual” or “calculated” values. But “the

²¹ There is also no reason to protect California’s crude oil industry. This is not a situation where California wants to protect an industry in decline because it cannot compete without help, as in *West Lynn Creamery*. High carbon crude production in California will inevitably continue to decline in volume, yet remain highly lucrative. ER 4:789, 792 at ¶ 90, 99.

commerce clause does not exist to protect a business's right to do business according to whatever rules it wants." *Valley Bank*, 914 F.2d at 1192; *see id.* at 1193 ("The commerce clause does not prevent states from taking action that may be inconsistent with [Appellees'] concept of business efficiency"); *Exxon*, 437 U.S. at 127 (rejecting "notion that the Commerce Clause protects the particular structure or methods of operation").

Accordingly, courts restrict their analysis to *actual* treatment, not a comparison between hypothetical and actual treatments. *See, e.g., West Lynn Creamery*, 512 U.S. at 202 (focusing on "*result[ing]* disadvantage to" out-of-state firms) (emphasis added). This approach comports with the well-established principle that states "are not required to convince the courts of the correctness of their legislative judgments." *Spoklie*, 411 F.3d at 1059; *Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) ("Even in the context of dormant commerce clause analysis, ... courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.") (internal quotation omitted).

Thus, the issue here is not ARB's choice to assign CI values other than the "actual" or "calculated" ones but, rather, whether the LCFS's treatment of crude oil favors in-state crudes at the expense of out-of-state competitors. Over 160 out-of-state crude oils stood on equal footing with California crudes. ER 2:124-128,

11:2699 (table C12-2). No case law supports a finding of protectionism on such facts, because a level playing field like that cannot protect local interests.

Finally, even under the district court’s view of “favorable treatment,” the LCFS provides the least favorable treatment to a *California* crude, further contradicting any finding of discrimination. California “Primary” crude had a “calculated” carbon intensity of 4.31.²² ER 11:2702. Alaska crude’s “calculated” CI was 4.36. *Id.* Both were assigned the baseline CI value of 8.07. If assigning a higher-than-actual CI is “unfavorable” treatment, California “Primary” crude was harmed the most. That crude represents the single largest category of California crude. ER 11:2699. “The existence of major in-state interests adversely affected ... is a powerful safeguard against legislative abuse,” and powerful evidence that the regulation is not protectionist. *Clover Leaf*, 449 U.S. at 473 n.17.

The threat of increased emissions presented by emerging HCICOs was the “reason, apart from ... origin,” for the non-discriminatory distinction between

²² The numbers the court relied upon as “actual” values were not calculated for use in 2011. Rather they were calculated, using then-available 2006 data, for the purpose of determining California’s baseline carbon intensity for gasoline. ER 11:2698-2699.

those crude oils and all others. *City of Philadelphia*, 437 U.S. at 627; *Or. Waste Sys.*, 511 U.S. at 101 n.5.²³

4. AFPM Has Not Shown any Discriminatory Effects and the Record Demonstrates That Such Effects Are Unlikely

If a state regulation causes local goods to constitute a larger share, and out-of-state goods a smaller share, of the market, “the regulation *may* have a discriminatory effect.” *Exxon*, 437 U.S. 126 n.16 (emphasis added). There is no evidence that the LCFS has had any discriminatory effect, and the district court erred in finding such effects. ER 1:41 at lns. 10-11; *see also Black Star Farms*, 600 F.3d at 1232. As in *Cherry Hill Vineyard*, AFPM has “not shown a single penny of losses attributable to the allegedly discriminatory” LCFS, although the LCFS was in effect for almost an entire year. *See Cherry Hill Vineyard*, 505 F.3d at 37. Nor has AFPM “shown how the [LCFS] alters the competitive balance between” out-of-state crude and in-state crude. *See Kleinsmith*, 571 F.3d at 1042. With California’s crude production already in inevitable decline, out-of-state crudes will constitute an even greater share of California’s crude market over time. *See* ER 11:2698. That those out-of-state crudes would probably not be high carbon crudes is immaterial to the Commerce Clause. *E.g., Exxon*, 437 U.S. at 127

²³ Should this Court conclude otherwise, it should preserve the rest of the regulation under the LCFS’s severability clause. Cal. Code Regs., tit. 17, § 95480.1.

("[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some businesses to shift from one interstate supplier to another.").

In sum, the evidence and precedent support the conclusion that the LCFS has neither a discriminatory purpose nor effects with respect to crude oil.

G. The LCFS Survives *Pike* Balancing Because its Benefits Far Outweigh Any Burden on Interstate Commerce

Despite the fact that the district court did not reach RMFU's *Pike* claim, ER 1:48 at n.2, this Court may still address it. *See Degelmann*, 659 F.3d at 840. The LCFS produces substantial benefits as an integral part of California's climate change initiatives, and produces, at most, slight burdens on commerce.

1. The Alleged Burdens of the LCFS Are Speculative

"Evidence that interstate and foreign commerce is in some way affected by the regulations is not enough...; what is required is evidence that these effects are of a type or an extent that could support a determination that they are 'clearly excessive' in relation to the state's interest." *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). Speculation about possible effects does not suffice. *Nat'l Audubon Society, Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002).

In the district court, RMFU failed to make the requisite showing. There is no evidence of any burden on interstate commerce at all. In fact, numerous out-of-

state ethanols have obtained more favorable treatment than in-state products. And RMFU cannot base its claim on future speculation about the California fuels market, although numerous out-of-state producers appear to be well-positioned to participate in California's market well into the future. ER 10:2594-2609, 2:211.

The Supreme Court's rejection of a *Pike* challenge to Minnesota's milk packaging law is equally applicable here:

The burden imposed on interstate commerce by the [LCFS] is relatively minor. [Fuel] may continue to move freely across the [California] border, and since most [fuel producers sell] their products [to more than one state at more than one price], the inconvenience of having to conform to different [prices] in [California] and the surrounding States should be slight. Within [California], business will presumably shift from manufacturers of [higher carbon fuels] to producers of [lower carbon fuels], but there is no reason to suspect that the gainers will be [California] firms, or the losers out-of-state firms.

Clover Leaf, 449 U.S. at 472-73. Indeed, the burdens imposed by the LCFS, if any, are even more modest than those in *Clover Leaf*, since the LCFS bans no fuels.

Moreover, the burden analysis under the dormant Commerce Clause does not focus on any individual firm. *See id.*; *see also Exxon*, 437 U.S. at 127. Lacking any evidence of burdens on interstate commerce, RMFU's claim fails.

2. The Benefits Of The LCFS Are Legitimate And Significant

In addition, the benefits of the LCFS clearly outweigh any alleged burdens. The California legislature found that “[g]lobal warming poses a serious threat to

the economic well-being, public health, natural resources and the environment of California.” Cal. Health & Saf. Code § 38501(a). “That these climate-change risks are ‘widely shared’ does not minimize [California’s] interest” in reducing them. *See Mass.*, 549 U.S. at 522. The LCFS represents an important part of California’s efforts to reduce the GHG emissions that are producing these threats. ER 9:2197. Thus, the reductions from the LCFS are of significant local benefit to California.

RMFU has not met its “burden of proof in establishing the excessive burden in relation to the local benefits.” *LensCrafters*, 567 F.3d at 528. Indeed, the evidence of cognizable and significant benefits to California and the absence of any evidence of burdens on interstate commerce more than suffices to pass the “minimal scrutiny” of the *Pike* test. *See Black Star Farms*, 600 F.3d at 1231. RMFU’s cannot prevail on its *Pike* claim.

H. If Strict Scrutiny Applied, the LCFS Would Satisfy It Because the Regulation Serves a Legitimate Local Purpose, That Cannot Be Met By Other Means

The LCFS neither discriminates nor regulates extraterritorially and is, therefore, not subject to strict scrutiny applicable to state regulations that do. But the LCFS would satisfy this test if it applied. The LCFS “serves a legitimate local purpose” and that purpose cannot be adequately served by available nondiscriminatory means. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

1. The LCFS Serves A Legitimate And Non-Protectionist Local Purpose

As the district court found, the LCFS clearly serves a local and legitimate interest in reducing the carbon intensity of California's transportation fuels, promoting innovation and protecting California's environment and public health against grave threats. *See* ER 1:42 at lns. 13-15; 1:67 at lns. 24-27. Lowering the carbon intensity of transportation fuels is a key ingredient to California reaching its ambitious goal of reducing statewide GHG emissions to 1990 levels by 2020, and to 80 percent below that by 2050. *See* ER 4:766-767 at ¶6. California is relying on the LCFS to secure roughly 16 million metric tons of reductions per year by 2020, nearly 10 percent of the reductions needed to meet its overall goal. ER 9:2197.

By reducing emissions from the lifecycle of transportation fuels, California seeks to avoid a wide range of environmental and other harms, such as “a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, and an increase in the incidences of infectious diseases, asthma, and other human-health related problems.” *See* Cal. Health & Saf. Code § 38501(a); *see also* 74 Fed. Reg. at 66524-66535. While the LCFS may not “by itself *reverse* global warming,” it is a step toward slowing or reducing it, and that is more than sufficient to demonstrate a legitimate local purpose. *See Mass.*, 49 U.S. at 525-26. That climate change is “widely shared” does not diminish California's local

interest. *Id.* at 522. California, like Massachusetts, faces the loss of coastal property and enormous remediation costs, to name only some of the threats. *See id.* at 522-23.

As in *Maine v. Taylor*, “there is little reason in this case to believe that the legitimate justifications the State has put forward for its [regulation] are merely a sham or a ‘*post hoc* rationalization.’” 477 U.S. 131, 149 (1986) (quoting *Hughes*, 441 U.S. at 338, n.20). Based on the express purposes of AB 32, the record supporting the environmental and public health goals of the LCFS, and Supreme Court’s decision in *Massachusetts*, the LCFS serves a local and legitimate interest.

2. The LCFS’s Purpose To Reduce The Carbon Intensity Of Transportation Fuels Cannot Be Achieved By Other Available Means

The LCFS reduces the carbon intensity of transportation fuels. It, therefore, captures emission reductions that cannot be captured by measures requiring GHG reductions from vehicles or fewer vehicle miles traveled. ER 4:767 at ¶ 8. Moreover, the LCFS employs the lifecycle analysis – the only scientifically accepted and effective approach to accurately quantify emissions fuels and increase the use of lower carbon fuels. *See* ER 6:1202 at ¶¶ 8-9. The LCFS also spurs the innovation of next-generation fuels that are necessary to achieve the emissions reductions. No alternative regulation can achieve these objectives.

Appellees suggested and the district court agreed that California could achieve the purposes of the LCFS by “regulating only tailpipe emissions in California.” ER 1:68. That regulation is not a replacement for the LCFS. California already regulates vehicle emissions. Cal. Code Regs., tit. 13, § 1961.1. California has determined – and Appellees have not shown to the contrary – that it cannot secure an additional 16 million metric tons of emissions reductions yearly by solely regulating vehicle emissions and ignoring the types of fuel consumed. ER 9:2199-2200. Just as importantly, regulating tailpipe emissions alone would miss significant sources of emissions from fuel consumption and prevent an accurate determination of which fuels are lower-emitting. There is no way to effectively reduce the carbon intensity of California’s transportation fuels by focusing solely on tailpipe emissions. *See* ER 6:1202 at ¶¶ 8-9; 4:805-806 at ¶¶ 6-7; 4:769-770 at ¶¶ 14-18.

Appellees also speculated, and the district court found, that “an LCFS that does not contain the discriminatory components may be effective in reducing GHG emissions.” ER 1:68. Selectively choosing the elements of a fuel’s lifecycle renders the determination of carbon intensity meaningless, and undermines the ability to achieve real emissions reductions and to promote innovation.

The district court made much of a single statement by Appellants’ expert Bruce Babcock that California could “adopt a carbon tax on fossil fuels....” ER

1:68; 1:42-43. Dr. Babcock’s statement, however, does not support the Court’s conclusion that a tax would equally serve the LCFS’s purposes. For example, some non-fossil fuels, such as ethanol produced by burning coal, have carbon intensities higher than gasoline. A tax on fossil fuels that encouraged the displacement of gasoline with *any* ethanol would, therefore, not further California’s goal to reduce emissions. In addition, such a tax would not provide direct financial incentives, like price premiums under the LCFS, to encourage the development of next generation, low carbon fuels.

The LCFS achieves emission reductions that other policies do not. The district court missed this point when it accepted “increasing vehicle efficiency” or “reducing the number of vehicle miles traveled” as alternatives to the LCFS. ER 1:68. Although the Pavley rule sets GHG emission standards for motor vehicles – *not* vehicle efficiency standards – and the SB 375 program will reduce vehicle miles traveled, the LCFS will still result in additional, necessary emission reductions because vehicles will consume lower carbon fuels than they otherwise would. California’s multiple policies complement each other, but they are not alternatives for one another.

In sum, the LCFS has a clear, non-discriminatory purpose – reducing the numerous and serious threats to California from GHG emissions. To further that legitimate purpose, the LCFS distinguishes between fuels on the basis of their

emissions, not their origin. It does not facially discriminate against out-of-state fuels, and it has no discriminatory effects. The LCFS regulates only fuels sold in California and does not control commerce occurring wholly outside the state. Its incentives to reduce emissions create only permissible, indirect effects on both in-state and out-of-state producers. The LCFS does not Balkanize the ethanol market. The district court erred in finding that the LCFS violates the dormant Commerce Clause.

II. SECTION 211(C)(4)(B) OF THE CLEAN AIR ACT AUTHORIZES CALIFORNIA TO REGULATE ANY FUEL DESPITE RESULTING BURDENS ON INTERSTATE COMMERCE

As set forth above, the LCFS does not violate the Commerce Clause. It has a legitimate, non-protectionist purpose. It does not discriminate, on its face or in its effects. Nor does it regulate extraterritorially or Balkanize the fuels market.

But the LCFS must be upheld for another reason: “The Commerce Clause power ... ‘belongs to Congress, not the courts,’ and the whole objective of the dormant Commerce Clause doctrine is to protect Congress's latent authority from state encroachment.” *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011) (quoting *Fednav, Ltd. v. Chester*, 547 F.3d 607, 624 (6th Cir. 2008)) *pet'n for cert. pending*, No. 10-1555. In Section 211(c)(4)(B) of the Clean Air Act, Congress itself has authorized California to adopt a control respecting its fuel carbon notwithstanding impacts on interstate commerce.

“If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.” *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981); *see also White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983). While Congress’s intent to exempt state laws from some or all of the dormant Commerce Clause scrutiny must be clear, *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *see South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984), it need not be stated expressly. *e.g., Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 169, 174-75 (1985) (finding intent to exempt in legislative history); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (finding implied exemption in overall statutory scheme). In adopting Section 211(c)(4)(B), Congress intended for California to continue its tradition of ground-breaking environmental regulation despite that such regulation would affect interstate commerce. The only court to consider this question before this case rejected a dormant Commerce Clause challenge “[b]ecause Congress has specifically authorized California to enact prohibitions and controls respecting fuels and fuel additives.” *Oxygenated Fuels Ass’n v. Davis*, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001) *aff’d*, 331 F.3d 665 (9th Cir. 2003). The district court’s conclusion to the contrary in this case is erroneous. *See* ER 1:114.

A. Section 211(c)(4)(B) Recognizes California’s Plenary Authority to Implement a Control on Fuel Carbon.

Section 211(c)(4)(B) provides that: “(California) may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.” 42 U.S.C. § 7545(c)(4)(B).

Under this provision, California’s authority to regulate any fuel for the “purpose of motor vehicle emission control” is broad and unqualified. It may act “at any time,” and with respect to “any” fuel or fuel additive. *See Massachusetts*, 549 U.S. at 529 (noting breadth of term “any” in Clean Air Act context); *New York v. U.S. Env’tl. Prot. Agency*, 443 F.3d 880, 889 (D.C. Cir. 2006) (same).

The statutory context underlines the breadth of Congress’s affirmation of California’s authority. The immediately preceding provision, Section 211(c)(4)(A), acknowledges that states retain plenary authority to regulate fuels unless EPA has published a specific finding that control of that fuel characteristic or component “is not necessary,” or EPA has adopted its own regulations under Section 211(c)(1). 42 U.S.C. § 7545(c)(4)(A)(i) & (ii). Section 211(c)(4)(B) allows California to regulate even when EPA has precluded all other states from acting.

The breadth of California’s authority fits well within the general structure of the Clean Air Act which was designed to “provide a substantial retention of state

authority”, *Davis*, 331 F.3d at 670-71, and is consistent with its legislative history. *See* Statement of Facts § B. Thus, California’s “broad grant of authority is unqualified by any requirements in § 7545(c) imposed upon the EPA before it controls or prescribes any fuel and, in this respect, California has a freer hand than EPA.” *Oxygenated Fuels*, 163 F. Supp. at 1184-85.

B. The LCFS Fits Squarely Within Section 211(c)(4)(B)

As the district court correctly ruled, the LCFS falls within the bounds of Section 211(c)(4)(B) because it is “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.” ER 1:104. The LCFS is a “control... respecting” fuel carbon; its very purpose is to reduce GHG emissions from California's use of transportation fuel in motor vehicles. Cal. Code Regs., tit. 17, § 95480; *see also*, ER 9:2197.

C. California’s Fuel Regulations Authorized under Section 211(c)(4)(B) Are Insulated From Dormant Commerce Clause Attack

The explicit, broad authorization in Section 211(c)(4)(B) puts to rest any claim that the courts should intervene to “protect Congress’s latent authority from state encroachment” in this case. *Pacific Merchant*, 639 F.3d at 1177. There is no “latent” Congressional prerogative to be protected here – Congress has acted, and pointedly confirmed that preserving California’s broad power to regulate fuels is in the national interest.

Congress understood that California’s authority could substantially affect interstate commerce. Congress nonetheless confirmed California’s authority, even in cases where EPA adopts its own (different) regulations, or forbids other states to Act. The authority confirmed by Section 211(c)(4)(B) is authority to adopt “controls” or “prohibitions” on “any” fuel or fuel additive. Compare, 42 U.S.C. § 7545(c)(1) (“[t]he Administrator may...control or prohibit the manufacture, introduction into commerce, offering for sale or sale of any fuel or fuel additive...”). This congressional affirmation of a specific form of state authority over interstate commerce is enough to preclude application of judicially-created Dormant Commerce Clause principles.²⁴ The language of Section 211(c)(4)(B) is similar in breadth to the language found to have “unambiguously” insulated state regulations from dormant Commerce Clause attack in *Hillside Dairy v. Lyons* 539 U.S. 59, 66 (2003) . See *id.* at 65 (“Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to affect any law, regulation, or requirement regarding” the percentage and labeling of milk products sold in California.) (quoting 7 U.S.C. § 7254); see also *Northeast Bancorp, Inc. v.*

²⁴ Notably, Section 211(c)(4)(B) contains no phrase that limits California to “such powers and jurisdiction which it now has” or to “lawful authority now exercised.” See *Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 46 (1980); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 n.13 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982).

Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 162 (1985); *Gerling Global Reinsurance Corp. of Amer. v. Low*, 240 F.3d 739, 745 (9th Cir. 2001); *Mabey Bridge & Shore, Inc., v. Schoch*, 666 F.3d 862 (3rd Cir. 2012); *Silver v. Woolf*, 694 F.2d 8, 13 (2d Cir. 1982).²⁵

Further support is found by reference to Clean Air Act Section 209(b), 42 U.S.C. § 7543(b), which is expressly referenced in Section 211(c)(4)(B). Section 209(b) authorizes California to set its own motor vehicle emission standards subject to EPA approval of a waiver. 42 U.S.C. § 7543(b). That section has been held to insulate California motor vehicle emission standards from the Commerce Clause in part because the legislative history demonstrated Congress's awareness that "California regulations [that received a waiver] would substantially burden interstate commerce." *Central Valley Chrysler v. Witherspoon*, 456 F. Supp. 2d 1160, 1185 (E.D. Cal. 2006) (citing *MEMA*, 627 F.2d at 1109-10). Considering the close linkage between the two provisions and Congress's intent for the motor

²⁵ Section 211(c)(4)(B) provides a basis for exemption far different from that asserted by Nebraska in *Sporhase, et al. v. Nebraska* 458 U.S. 941 (1982) and by Alaska in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *Sporhase*, Nebraska argued for insulation from the Commerce Clause by cobbling together 37 federal statutes and a number of interstate compacts that purportedly demonstrated Congress' deference to state water law. 458 U.S. at 960. In *Wunnicke*, Alaska could not point to any federal statute that explicitly authorized the challenged state law. Instead, Alaska argued only that the state law was consistent with a federal *policy*. 467 U.S. at 89-90. These cases, relied upon by the district court, do not apply here.

vehicle emissions and motor fuels programs to work in tandem, this conclusion applies equally to Section 211(c)(4)(B).

While the district court recognized that the LCFS fell within the bounds of Section 211(c)(4)(B), the Court, relying upon an interpretation of this Court's decision in *Davis v. EPA*, 348 F.3d 772 (9th Cir. 2003), concluded that the provision is a mere preemption provision, and did not insulate the LCFS from the Dormant Commerce Clause. But the Court's reliance on *Davis* is misplaced.

The *Davis* court had only a pre-emption question before it. *See Davis*, 348 F.3d at 786.²⁶ Thus, *Davis* stands for the limited proposition that Section 211(c)(4)(B) does not authorize California to relieve gasoline refiners of the obligation to comply with EPA's oxygen requirements for gasoline adopted under Section 211(k). *Id.*²⁷ *Davis* does not change California's authority with respect to other fuel regulations and provides no insight into the relationship between Section 211(c)(4)(B) and the dormant Commerce Clause. *See Gerling*, 240 F.3d at 745

²⁶ The district court in *Davis* ruled that the statute did insulate California's MBTE ban from dormant Commerce Clause scrutiny, 163 F. Supp. 2d at 1188, and the plaintiffs did not appeal that decision.

²⁷ Indeed, in contrast with Section 211(k), in Section 211(c)(4)(B), Congress authorized California to conflict even with federal regulatory standards. *Compare* 42 U.S.C. § 7545(c)(4)(B) *with* 42 U.S.C. § 7545(c)(4)(A). The breadth of the language in 211(c)(4)(B) stands in stark contrast to that in Section 211(k), and to the language in the savings clauses in the cases relied upon by the district court where no Commerce Clause exemption was found.

(noting that prior statutory interpretation cases do not control question of Commerce Clause exemption).

Congress's recognition of California's broad, unqualified authority to prohibit or control fuels suffices to insulate California's regulations from dormant Commerce Clause scrutiny. As noted above, there can be no doubt that Congress was aware that fuels regulations from California, the largest fuels market in the country, would burden interstate commerce in a way that alters market share among fuels on the basis of the fuels' emissions. Because Congress unambiguously decided that California's broad and historic role in fuels regulation is in the national interest, Section 211(c)(4)(B) precludes a *Pike* challenge that the LCFS "unduly burdens" interstate commerce, with its policy-laden balancing of the benefits to California against impacts on interstate commerce. Congress has already resolved that balancing in favor of California's authority.

Section 211(c)(4)(B) and its surrounding provisions also preclude a "Balkanization" claim. Congress consciously accepted the costs of a lack of uniformity in the fuels market, since it authorized all states to regulate "any characteristic or component of a fuel or fuel additive" "for purposes of motor vehicle emissions control," unless and until EPA acts to pre-empt those regulations. 42 U.S.C. § 7545(c)(4)(A). California, of course, remains free from

any EPA preemption, further underscoring that a California fuels regulation, like the LCFS, is not subject to a Balkanization claim. *See* 42 U.S.C. § 7545(c)(4)(B).

In sum, Section 211(c)(4)(B), its context in the Clean Air Act, and its role in maintaining California’s historic authority, demonstrate Congress’s intent to allow California to regulate *any* fuel at *any time*, so long as the regulation is for the purpose of motor vehicle emission control, and even where that regulation results in burdens on commerce. Thus, to the extent the Court finds that the LCFS might otherwise violate the Commerce Clause, it is authorized by Congress.

III. THE PRELIMINARY INJUNCTION MUST ALSO BE REVERSED

The district court abused its discretion by issuing a preliminary injunction against a constitutional state regulation, and that decision should be reversed.

A. RMFU Has Neither Established A Likelihood of Success on the Merits Nor Raised Serious Questions

To obtain the extraordinary remedy of a preliminary injunction, the moving party must establish a likelihood of irreparable injury absent the requested injunction and that the injunction would be in the public interest. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The movant must also raise “serious questions going to the merits” and show “a balance of hardships that tips sharply” in their favor *or* demonstrate that they are likely to succeed on the merits and that the “balance of equities tips in” their favor. *Id.* at 1131, 1135. “The district court should be reversed if it based its decision on an erroneous legal

standard or on clearly erroneous findings of fact.” *Network Automation, Inc. v. Advanced Sys.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (internal quotation omitted). Here, the district court based its order on both erroneous legal standards and erroneous findings of fact.

If the Court affirms the judgments on dormant Commerce Clause grounds, there will be no need to address the preliminary injunction appeal. If the Court reverses the judgments, the Court will necessarily have found that there is no dormant Commerce Clause violation, thereby eliminating that basis for the injunction.

That alone does not necessarily demand reversal of the preliminary injunction, however, because the district court relied on an additional basis, finding that RMFU raises “serious questions” as to whether the LCFS is preempted by Clean Air Act Section 211(o). ER 1:80-81. This conclusion is also untenable.

B. Section 211 (o) Does Not Restrict California’s Authority Under Section 211(c)(4)(B) or California State Law

Although the district court agreed with Appellants that the LCFS is an authorized control of fuel carbon, the court found that RMFU’s conflict preemption claim raised “serious questions.” In this case, RMFU asserts that the LCFS is preempted because it conflicts with the nationwide biofuels volumetric mandate in Clean Air Act section 211(o) and the RFS2 by not providing an exemption for “grandfathered” corn ethanol plants from the LCFS’s requirements.

ER 13:3272-3273 at ¶¶ 68-72. This claim is meritless. There is no preemption here.

As the Supreme Court has repeatedly stressed, the preemption analysis—

must be guided by two cornerstones of our pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case Second, [i]n all pre-emption cases, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal citations omitted). The Supreme Court has recently stated that:

Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law Our precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.

Chamber of Commerce v. Whiting, 131 S.Ct. 1968, 1985 (2011). Appellees cannot meet this threshold.

1. The Savings Clauses in EISA Are Clear Congressional Intent to Preclude Implied Preemption of the LCFS

Any preemption analysis starts “with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*,

331 U.S. 218, 230 (1947). This is particularly true in an area of traditional state regulation, such as pollution control. *Pacific Merchant*, 639 F.3d at 1177.

In enacting EISA, Congress explicitly conditioned the RFS program on savings clauses that limit its preemptive reach. Section 3 of the EISA provides generally that—

[e]xcept to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

42 U.S.C. § 17002.

Congress went beyond this general statement and expressed its intent that EISA’s renewable fuel provisions in particular not preempt more environmentally protective state laws such as the LCFS. In Section 204(b) of EISA, Congress provided that:

Except as provided in section 211(o)(12)²⁸ of the Clean Air Act, *nothing* in the amendments made by this title to section

²⁸ Section 211(o)(12) provides:

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed...to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475 of this title) of this chapter.

42 U.S.C. § 7545(o)(12). Section 211(o)(12) does not limit § 204(b)’s savings clause. Instead, by specifically emphasizing other regulation of GHGs, it

(continued...)

211(o) of the Clean Air Act *shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation.*

Pub.L. 110-140, 121 Stat. 1492, 1529, § 204(b). (emphasis added).

There is nothing ambiguous about this language – the section 211 amendments were not intended to displace environmentally protective state laws. The language of Section 204(b) “necessarily contains the best evidence of Congress’ . . . intent” regarding the relationship between Section 211(o) and state laws. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1977 (2011) (statutory language concerning preemption constitutes best evidence of Congress’s intent). In *Whiting*, the Court rejected a claim that the federal Immigration Reform and Control Act (IRCA) implicitly preempted an Arizona law that authorized the revocation of business licenses for employing unauthorized aliens, noting that Congress included a savings clause in the IRCA that “specifically preserved such authority for the States.” *Id.* at 1981. EISA’s savings clauses prove that Congress intended to prohibit preemption of state laws such as the LCFS.

(...continued)

reinforces the conclusion that Section 211(o) does not operate to preempt more stringent federal or state environmentally protective requirements, such as requirements respecting fuel carbon.

2. EISA’s Legislative History Confirms Congress’s Intent that the Savings Clauses Not Preempt More Protective State Laws

This conclusion is supported by statements made during the debate over EISA. Regarding the savings clause in section 211(o)(12), Representative Dingell stated that it was added to the Clean Air Act:

to clarify that nothing in subsection (o) or rules issued thereunder shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions of the Clean Air Act.

153 Cong. Rec. E2666. In addition, Congress was aware of California’s intent to develop and adopt the LCFS at the time EISA was adopted.²⁹ During 2007, several bills were introduced in both houses of Congress proposing a national LCFS program. ER 3:467-468. In light of Congressional awareness of California’s LCFS, it is reasonable to conclude that EISA’s savings clauses were intended to embrace state rules such as the LCFS.

3. The District Court Erred in Holding that EISA’s Savings Clause Is Not Relevant in Analyzing Whether the LCFS Is Implicitly Preempted by the RFS2

²⁹ Then Senator Obama “applauded” California’s efforts saying, “[j]ust as the existing RFS has spurred the construction of ethanol plants, a low carbon fuel standard would incentivize development of new advanced fuels.” 153 Con. Reg. S7704.

The district court, however, concluded “the LCFS is subject to conflict preemption scrutiny notwithstanding EISA’s savings clause.” ER 1:106 at lns. 15-16. The court erred in concluding that EISA Section 204(b) was irrelevant to Appellees’ claims of conflict preemption.

Because Section 204(b) states that the Section 211(o) amendments should not be “construed” to supersede more environmentally protective state laws, it necessarily reflects Congress’s intent that the amendments not *impliedly* preempt state law. That is, because EISA does not have an applicable express preemption provision, section 204(b)’s language regarding more protective state laws would be meaningless if it did not apply to implied preemption. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

Therefore, none of section 211(o)’s provisions, including the provisions regarding “grandfathered” corn ethanol facilities, may be construed to limit the regulatory authority that both EPA and California have under Clean Air Act section 7545(c) to prescribe and enforce controls respecting fuel and fuel carbon such as the LCFS. Appellees cannot prevail on their implied preemption claim.

C. There is No Actual Conflict Between the LCFS and the RFS2

Even if the savings clauses did not apply to Appellees' implied preemption claims, they cannot demonstrate that these claims raise serious questions.

Appellees have alleged obstacle preemption. Under that strain of preemption law, a conflict can be found where “the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Recently in *Williamson*, the Court clarified that in order to be subject to obstacle preemption a state law must interfere with a “significant federal regulatory objective.” *Williamson v. Mazda*, 131 S.Ct. 1131, 1134, 1136-37 (2011). Appellees have not identified any “significant federal regulatory objective” that is impaired by the LCFS.

1. The LCFS is not an Obstacle to the Accomplishment of Any “Significant Federal Objective”

Appellees' core preemption claim is that Congress intended to protect the market share of U.S. corn ethanol producers by exempting them from any GHG standards, and California's failure to provide a similar exemption in the LCFS frustrates the accomplishment of this objective. *See* ER 13:3272-3273 at ¶¶ 68-72. They base this claim on EISA Section 202(a)(1) (codified at 42 U.S.C. § 7545(o)(2)(A)(i)), which exempts ethanol produced in facilities that were either

existing or under construction at the time EISA was enacted from the requirement that biofuels achieve a minimum 20% reduction in GHG emissions.

This “grandfathering” provision was not intended to guarantee U.S. corn ethanol producers any particular market share. First, Congress had significant reservations about the continued expansion of corn ethanol as a transportation fuel and did not wish the RFS to inhibit innovative transportation fuel policies. ER 3:474-475 at ¶ 73. Second, in promulgating the RFS2, EPA stated that it did not view the grandfathering provision as a significant federal regulatory objective of the EISA. There, EPA noted that in the RFS:

there is no ‘specific’ corn-ethanol mandated volume, and [] any advanced biofuel produced above and beyond what is required for the advanced biofuel requirements could reduce the amount of corn ethanol needed to meet the total renewable fuel standard.

75 Fed. Reg. at 14743. EPA underscored this stating that:

Although there is not a set corn ethanol requirement, EISA allows for 15 billion gallons of the 36 billion gallon renewable fuel standard to be met by conventional biofuels. We expect that corn ethanol will fulfill this requirement, *provided it is more cost competitive than imported ethanol or cellulosic biofuel in the marketplace.*

Id. at 14746 (emphasis added). In EPA’s view, this means that corn ethanol is not guaranteed a certain volume and must compete in the fuels marketplace. See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (deferring to agency interpretation).

Given Congress’s concerns, and EPA’s clear statements, it is implausible to conclude that the grandfathering provision reflected a “significant federal objective” to guarantee U.S. ethanol producers a certain share of the market. Corn ethanol, in fact, is not guaranteed any market under the RFS2. See Statement of Facts, § D.4. Instead, EISA caps the volume of corn ethanol that may be included within the RFS2. See EISA Section 202(a)(2), codified at 42 U.S.C. § 7545(o)(2)(B).

EISA’s savings clauses unambiguously preserve state authority to enact more environmentally protective measures such as the LCFS.

2. EPA’s Statements in Promulgating the RFS2 Confirm that There Is No Implied Preemption

The RFS2 administrative record contains numerous statements by EPA that the LCFS and the RFS2 are compatible.³⁰ The Supreme Court has instructed that federal agency statements concerning the relationship of federal and state laws are

³⁰ See e.g., U.S. Env’tl. Prot. Agency, EPA-420-R-10-003, Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, 13-15 (2010), (“we have attempted to structure the RFS2 program so as to be compatible with existing State LCS programs, including coordination on lifecycle modeling.”) available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0161-3188>; Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24904, 25111 (proposed May 26, 2009); accord Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14670, 14862 (Mar. 26, 2010) (EPA concluded that the RFS2 “does not have federalism implications.”).

relevant in considering obstacle preemption claims. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009):

While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

The RFS2 administrative record therefore shows EPA’s intimate knowledge about the LCFS, and EPA’s consistent view has been that the LCFS does not conflict with the RFS2.³¹ Because EPA uniquely understands the RFS2, the agency’s well-informed determination that the LCFS does not pose an obstacle to the purposes and objectives of the RFS2 merits significant weight. *See Wyeth*, 555 U.S. at 577.

EPA’s informed and consistent conclusion that the LCFS is fully compatible with the RFS2, considered in conjunction with Congress’s explicit savings clauses in EISA, confirm that the LCFS does not present an obstacle to any “significant

³¹ *See e.g.*, U.S. Env’tl. Prot. Agency, EPA-420-R-10-003, Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, 13-15 (2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0161-3188> (“in general, CARB and EPA have developed the same methodological approach to assessing the lifecycle impacts of biofuels.”); Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24904, 25021-22, 25033 (proposed May 26, 2009) (stating that EPA has worked closely and will continue to coordinate with California on the lifecycle assessment of fuels).

federal policy objective.” Because Congress designed the scope of section 211(c) broadly to be able to respond to the regulation of future pollutant challenges, the LCFS does not conflict with the RFS. For these reasons, Appellees cannot prevail on their conflict preemption claim.

D. RMFU Has Not Established Any Likelihood of Irreparable Injury

The district court found no irreparable injury to RMFU other than “irreparable Constitutional harm.” ER 1:81. As demonstrated, the LCFS does not violate the Constitution. In any event, RMFU must demonstrate an actual injury, because it is not entitled to a presumptive one. Cases finding presumptive injuries based on allegations of constitutional violations “are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of ... qualitative importance.” *Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997) (race- and sex-discrimination case); *Associated Gen’l Contractors of Ca., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (recognizing presumption is not available in all cases). RMFU has identified no right of such “qualitative importance” here, and the presumption is unavailable.

Further, RMFU has demonstrated no likelihood of actual irreparable injury in the absence of an injunction. RMFU filed voluminous expert declarations in an

attempt to establish such injuries, all of which were based entirely on *possible* scenarios that *might* unfold under the LCFS. *See, e.g.*, ER 12:3095-3096 at ¶ 3 (assuming decline in demand). Speculation cannot support the extraordinary remedy of a preliminary injunction. *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). RMFU's expert opinions were also contradicted by the facts and discredited by Appellants' experts. For example, RMFU's declarant Jesse David concluded that the LCFS would drive down the price of ethanol by reducing demand, leading to lost profits. ER 12:3095-3096, 3112 at ¶¶ 3, 31, 32. It is undisputed that during 2011, with the LCFS in full effect, ethanol demand and ethanol prices both rose. ER 2:253 at ¶¶ 3, 6; 2:132-133 at ¶¶ 13-17. Similar erroneous assumptions, among other flaws, infected RMFU's other declarations. *E.g.*, ER 12:3131 at ¶ 6 (relying on David's conclusion); ER 12:3077-78 at ¶¶ 10, 12 (assuming decline in demand); *see also* ER 4:803-840. All of RMFU's evidence of alleged injuries involved *potential*, not actual, financial harms.

In sum, RMFU identified no irreparable injuries to support its request for this extraordinary remedy.

E. The Balancing of the Equities Tips Sharply In Favor of the Public Interest Underlying the LCFS

Hindering California's historic efforts to reduce GHG emissions would cause serious injuries to the state. *See Mass.*, 549 U.S. at 521-23. Enjoining the LCFS will reduce incentives for fuel producers to lower their carbon intensities and

invest in next-generation fuels, thereby limiting GHG reductions that would otherwise be gained. ER 4:738 at ¶ 12 (noting price premium); 6:1189-1190 at ¶ 6-9, 6:1194-1196 at ¶¶ 7,8,10-12, 16; 6:1202 at ¶¶ 9-11.

Enjoining the LCFS would thwart the will of the people underlying AB 32, as confirmed by the rejection of Proposition 23 (which would have put California's climate change regulations on hold). See ER 5:1114. "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. For Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

Because RMFU cannot establish any of the requisite elements for extraordinary injunctive relief, the preliminary injunction should be denied.

CONCLUSION

For all of the above reasons, the district court's December 29, 2011 judgments and preliminary injunction should be reversed, and the case should be remanded with instructions to enter an order granting judgment to Appellants on the dormant Commerce Clause claims.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 8, 2012

Respectfully Submitted,

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GLOSSARY OF TERMS

Alternative Fuels	Non-petroleum-based fuels, including ethanol, biodiesel, natural gas, hydrogen and electricity. Cal. Code Reg., tit. 17, § 95480.1, subd. (a).
Advanced Biofuels	A term assigned by the Federal Renewable Fuels Standard (RFS) to a category of biofuels that reduce lifecycle GHG emissions at least 50 percent from baseline. 40 C.F.R. § 1100 <i>et seq.</i>
AB 32	The “California Global Warming Solutions Act of 2006.” Assembly Bill 32, Ch. 488, Statutes of 2006, adds Division 25.5 (commencing with Section 38500) to the California Health & Safety Code.
Biodiesel	A diesel fuel substitute produced from nonpetroleum renewable resources that meet the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act. Cal. Code Reg., tit. 17, § 95481, subd. (a)(3).
Biomass	Biological material from living or recently living organisms. See, e.g., Cal. Code Reg., tit. 17, § 95481, subd. (a)(8) (incorporating by reference the definition in the Renewable Energy Program: Overall Program Guidebook, 2nd Ed., California Energy Commission, Report No. CEC-300-2007-003-ED2-CMF, January 2008).
Biofuel	Fuels derived from biomass (crops or wastes). Examples include ethanol, biodiesel, and renewable diesel fuel. ER 9:2252-2253.
Biofuel Producer Registration	A list of biofuel producers, and the carbon intensities that correspond to their fuels, that are registered under the LCFS to sell into California; publicly available from ARB’s website at: http://www.arb.ca.gov/fuels/lcfs/reportingtool/biofuelregistration.htm ; see also ER 2:0165-0197.

CA-GREET model	“California modified Greenhouse gases, Regulated Emissions, and Energy use in Transportation” model; an analytical tool for calculating the direct lifecycle GHG emissions of a transportation fuel. Cal. Code Reg., tit. 17, § 95481, subd. (b)(13).
CARBOB	California Reformulated Gasoline Blendstock for Oxygenate Blending. The petroleum derived component of gasoline in California. ER 9:2211, 9:2340.
gCO ₂ E/MJ	Carbon Dioxide Equivalent per Megajoule. A metric that refers to the amount of GHG emissions that resulted in one megajoule of energy contained in the fuel. Cal. Code Reg., tit. 17, § 95481, subd. (a)(11); see also, ER 9:2279.
Carbon Intensity (CI)	The amount of the lifecycle GHG emissions per unit of fuel energy contained in a transportation fuel (ER 9:2279, 9:2288), expressed in grams of carbon dioxide equivalent per megajoule (gCO ₂ E/MJ). Cal. Code Reg., tit. 17, § 95481, subd. (a)(11); see also ER 9:2208, ER 5:0931.
Cellulosic Ethanol	Ethanol produced from feedstocks containing cellulose, such as trees, grasses, or wood wastes. ER 9:2258, 9:2270.
Cogeneration	The sequential generation of two forms of useful energy from a single primary energy source, such as the use of the residual heat, created when feedstocks are converted into biofuels, to produce electricity. ER 10:2589-2590.
Compliance Scenarios	Examples of hypothetical mixes of fuels among the many which would satisfy the LCFS’s compliance targets in future years. ER 10:2370-2371.
Co-product	Economically valuable materials other than fuel that are also produced during the fuel’s production. ER 9:2290; see, <i>infra.</i> , Distillers Grains with Solubles.
Corn Ethanol	Ethanol produced from corn grains, a starch-based (as opposed to sugar-based or cellulose-based) feedstock. ER 9:2218.

Direct Emissions	GHG emissions resulting, in general, from the sequence of processes set forth at ER 9:2287. Direct emissions and indirect emissions (see below) are the two components of the lifecycle analysis and are summed together to determine a fuel's carbon intensity or CI.
Distillers Grains With Solubles (DGS, WDGS, DDGS)	An animal feed co-product often produced by ethanol plants. DGS may be sold in "wet" (WDGS) or "dry" (DDGS) form. ER 9:2259, 9:2290.
Dry Mill	Milling a grain feedstock into a fine meal without the use of water or other liquids. ER 9:2258; compare Wet Mill.
Ethanol	An alcohol made by fermenting and distilling cellulosic material, starches or simple sugars. ER 9:2258.
Feedstock	The raw material used to produce, in this case, a transportation fuel such as ethanol.
Final Statement of Reasons (FSOR)	Staff's update to the staff report (or ISOR) identifying and providing the rationale for the modifications made to the originally proposed California regulation, and summarizing public comments received on the proposed regulation and responses to those comments. ER 6:1211-9:2185.
Greenhouse Gasses (GHGs)	Include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorocarbons and nitrogen trifluoride. Cal. Health & Saf. Code, § 38505, subd. (g); see also http://epa.gov/climatechange/glossary.html#G .
REET Model	"Greenhouse gases, Regulated Emissions, and Energy use in Transportation" model. Cal. Code Reg., tit. 17, § 95481, subd. (b)(13). The REET Model is an analytical tool used to identify and combine fuel lifecycle data and calculate the direct greenhouse gas emissions of a wide range of fuels. ER 9:2286; see also CA-REET.

GTAP model	Global Trade Analysis Project Model, a computer simulation model that evaluates the worldwide market-mediated land use conversion associated with the production of crops for transportation fuel production. ER 9:2210; see also ER 9:2297-2299.
High Carbon Intensity Crude Oils (HCICO)	Originally defined in the LCFS regulation as any crude oil that has a total production and transport carbon-intensity value greater than 15.00 gCO ₂ e/MJ. Cal. Code Reg., tit. 17, § 95486, subd. (b)(2)(A); but see RJN Exhibit A.
Indirect Land Use Change (ILUC)	An indirect effect on GHG emissions that results from the increased production of feedstocks used for certain fuels. ER 9:2279, 9:2294-2296.
Initial Statement of Reasons (ISOR)	A staff report presenting the basis and rationale for a proposed California regulation, usually published with the proposed regulation at the beginning of a public comment period.
LCFS	The Low Carbon Fuel Standard adopted by California in 2010, pursuant to Health & Safety Code, section 38560.5. The regulation appears at California Code of Regulations, title 17, section 95480, et seq.
Lifecycle Analysis	An analytical method for estimating the quantity of greenhouse gas emissions that result from the production and use of products. See ER 9:2279. The LCFS regulation includes a definition of “lifecycle greenhouse gas emissions” at Cal. Code Reg., title 17, section 95481, subdivision (a)(28).
Lookup Tables	Tables 6 and 7 in the LCFS regulation listing fully approved carbon intensity values (CIs) for fuel pathways, including CIs obtained through Method 2A or 2B. Cal. Code Reg., tit. 17, § 95486, subd. (b). Table 6 provides the CIs for gasoline and its substitutes. Table 7 provides the CIs for diesel and its substitutes.

LCFS Reporting Tool (LRT)	An internet-based application that is used by regulated parties to meet the reporting requirements of the LCFS. ER 10:2475.
Method 2A	The method by which a party may apply for a modified carbon intensity value based on a pathway that already appears in the Lookup Table in the regulation. Specifically, the application must request modification of one or more inputs to the CA-GREET model. Cal. Code Reg., tit. 17, § 95486, subd. (c).
Method 2B	The method by which a party may apply for a tailored carbon intensity value for a fuel that uses a “new pathway” that is not already in the Lookup Table in the regulation. This could be a new production process for an existing fuel or an entirely new fuel. Cal. Code Reg., tit. 17, § 95486, subd. (d).
Oil Price Information Service (OPIS)	A private company that publishes fuel pricing and other information on a subscription basis. See http://opisnet.com/aboutus.asp
Pathway	A quantitative description of a fuel’s full lifecycle, including the steps involved in the production, transportation and consumption of a specific fuel. ER 9:2209.
Physical Pathway	The portion of the total “pathway” having to do with the applicable combination of actual fuel delivery methods, such as truck routes, rail lines, gas/liquid pipelines, electricity transmission lines, and any other fuel distribution methods, through which the regulated party reasonably expects the fuel to be transported under contract from the entity that generated or produced the fuel, to any intermediate entities, and ending at the fuel blender, producer, importer, or provider in California. Cal. Code Reg., tit. 17, § 95484, subd. (d)(2).

Potential HCICO	A term used in 2011 for a crude oil whose CI value under the LCFS is undetermined. ER 2:0119-0128.
Table 6	The Carbon Intensity Lookup Table for Gasoline and Fuels that Substitute for Gasoline found in the LCFS regulation. Cal. Code Reg., tit. 17, § at section 95486, subdivision (b).
Wet Mill	A process of making ethanol from grains that involves steeping the feedstock in a mixture of water and sulfuric acid, as opposed to grinding the feedstock into a meal. ER 9:2259; see also Dry Mill.

LIST OF ABBREVIATIONS

AB 32	Assembly Bill 32, Ch. 488, Statutes of 2006 California Global Warming Solutions Act of 2006
AFPM	American Fuels & Petrochemical Manufacturers, Plaintiffs and Appellees
ARB	California Air Resources Board
ASTM	ASTM International (formerly American Society for Testing and Materials)
CAA	Clean Air Act
CA-GREET	California modified Greenhouse gases, Regulated Emissions, and Energy use in Transportation model
CARB	California Air Resources Board
CARBOB	California Reformulated Gasoline Blendstock for Oxygenate Blending
CI	Carbon intensity
CNG	Compressed Natural Gas
DGS	Distillers grains with solubles
E15	Transportation fuels containing 15% ethanol
E85	Transportation fuel containing 85% ethanol
EIA	U.S. Energy Information Agency
EISA	Energy Independence and Security Act
EPA	U.S. Environmental Protection Agency
FSOR	Final Statement of Reasons

gCO ₂ e/mj	Grams of carbon dioxide equivalent per megajoule
GHGs	Greenhouse gases
REET	Greenhouse gases, Regulated Emissions, and Energy use in Transportation model
GTAP	The Global Trade Analysis Project Model
HCICO	High carbon intensity crude oil
ISOR	Initial Statement of Reasons
LCFS	Low Carbon Fuel Standard
LNG	Liquefied Natural Gas
LRT	Low Carbon Fuel Standard Reporting Tool
NAAQS	National Ambient Air Quality Standard
NG	Natural Gas
NPRA	National Petrochemical and Refiners Association (now AFPM), Plaintiffs and Appellees
OAL	California Office of Administrative Law
OPIS	Oil Price Information Service
RFA	Renewable Fuels Association Plaintiffs and Appellees
RFG	Reformulated Gasoline
RFS	Federal Renewable Fuels Standard
RMFU	Rocky Mountain Farmers Union, Plaintiffs and Appellees

**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 12-15131**

I certify that: (check (x) appropriate option(s))

1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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June 8, 2012

Dated

/s/ Mark W. Poole

Mark W. Poole
Deputy Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case Nos. 12-15131, 12-15135

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **Appellants' Opening Brief**, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 8, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Mark W. Poole

MARK W. POOLE