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-GSA and 1:10-cv-00163-LJO-GSA
The Honorable Lawrence J. O'Neill, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Low Carbon Fuel Standard ("LCFS") is a vital part of California's comprehensive, pioneering effort to reduce the State's greenhouse gas ("GHG") emissions and the grave threats they pose to the State's people, economy and natural resources. The transportation sector is the largest contributor to California's GHG emissions, and California has determined that transforming the array of fuels it consumes is a necessary step to mitigate serious climate change risks for the State.

The feature of the LCFS that Appellees attack – the lifecycle analysis as a means of quantifying a fuel's GHG emissions– reflects basic physical realities of both fuels and their emissions and is a necessary feature of any effective program to reduce GHG emissions. Lifecycle analysis is the only way to recognize the contributions of biofuels, like ethanol, to reducing GHG emissions. Only lifecycle analysis allows biofuels to receive credit for emissions reductions from photosynthesis and co-products.

Appellees' attacks on the LCFS are largely based upon fundamental mischaracterizations of the program. They portray the LCFS alternatively as an elaborate scheme to benefit California companies at the expense of outside firms, or as an officious effort to impose California's environmental "preferences" or "views" on other states. Both characterizations are false.

The LCFS has nothing to do with imposing California's "preferences" on other states. It has everything to do with the urgent and legitimate goal of spurring innovation in new transportation fuels that can power California's economy without continuing to degrade its climate and natural resources. To achieve that overriding goal, the LCFS offers incentives for cleaner, alternative fuels to inventors, engineers, and fuel producers without regard to location. The LCFS does not "penalize" or "control" activities in other states, but identifies the carbon intensity – the harmfulness to the climate – of fuels to be sold and used in California, so that California can provide the incentives necessary to encourage innovation. Appellees' complaints about the LCFS's quantification of carbon emissions as a misguided attempt at cross-border regulation are misconceived.

Both Appellees lead with arguments that the LCFS, by incorporating lifecycle analysis, constitutes prohibited extraterritorial regulation. These arguments depend upon dramatically expanding the extraterritoriality doctrine under the dormant Commerce Clause – a doctrine the Supreme Court has pointedly confirmed to be very narrow in scope. The LCFS does not *control* conduct occurring *wholly* outside California, as required to violate this narrow doctrine. The LCFS may affect out-of-state commercial decisions, but those effects are legally indistinguishable from the effects of

state laws analyzed under the *Pike* balancing test and routinely upheld as constitutional.

Appellees' other major theme is equally unfounded: They depict this complex, ground-breaking, and scientifically-sound regulation as a pretext to benefit California businesses at the expense of out-of-state competitors. This claim is wrong: The LCFS is part of a comprehensive suite of emissions-reduction policies, and it addresses the single largest-emitting sector of California's economy. The LCFS is focused on reducing the risks to California from climate change by transforming California's fuel market, not on protecting California firms from competition.

And contrary to Appellees' claims, the LCFS is nondiscriminatory. Appellees mischaracterize the LCFS's purposes and its basic operation, ignoring fundamental facts that are inconsistent with their disparaging view. For example, in their attempts to portray lifecycle emissions as discriminating against out-of-state producers, they ignore that the ethanol pathways with the best CI values correspond to ethanols from the Midwest and Brazil, not California. In the end, though, Appellees never seriously question the scientific validity of lifecycle analysis or the fact that differences in CI value correspond to real differences in GHG emissions.

In addition, Congress has explicitly affirmed, in broad terms, the authority of states to regulate transportation fuels, carving out a special role for California as a laboratory of experimentation in this field. The LCFS continues California's historic role as a regulatory innovator.

The dormant Commerce Clause does not prohibit California from taking on the challenge of carbon pollution through this non-discriminatory regulation, or from creating incentives for entrepreneurs (wherever located) to develop cleaner fuels. The LCFS is constitutional, and the district court's decision must be reversed.

I. THE LCFS IS NOT AN EXTRATERRITORIAL REGULATION

An extraterritorial regulation is one that "directly controls commerce occurring wholly outside the boundaries of [the regulating] State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). In arguing that the LCFS is such a regulation, Appellees ignore the governing case law, including recent Supreme Court precedent, and advocate for an expansion of this narrow doctrine that would invalidate numerous lawful exercises of state authority. Their arguments should be rejected.

A. Appellees Advance A Sweeping Expansion Of The Extraterritoriality Doctrine, Using Arguments Already Rejected By The Supreme Court

The extraterritoriality doctrine – which imposes a rule of *per se* invalidity stricter even than the prohibition against discrimination – applies only in very limited circumstances. State laws often burden interstate commerce through out-of-state effects. *See, e.g., Dep't of Revenue of Ky. v. Davis* ("*Kentucky*"), 553 U.S. 328, 338 (2008). But those effects are scrutinized under the *Pike* balancing test which "[s]tate laws frequently survive." *Id.* at 338-39; *see also* Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp.of Amer. & Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev 1865, 1878 (1987) ("[Prohibition of] all state laws that have substantial extraterritorial effects … would invalidate much too much legislation.").

In fact, the Supreme Court has invalidated state laws as extraterritorial regulations in just three cases, all involving price controls. *See Healy*, 491 U.S. 324; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).[1] In

[1] Other Supreme Court cases cited by RMFU and AFPM are not extraterritoriality cases. *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391-92 (1994) (discrimination); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988) (same); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951) (same); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (*Pike* (majority opinion)); *BMW of N. Amer., Inc. v. Gore*, (continued…)

Healy, the Court emphasized that price control laws are the clearest form of extraterritorial regulation: "[A] State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states." *Healy*, 491 U.S. at 336 (internal quotation omitted). In its most recent extraterritoriality decision, the Court suggested that this doctrine may be limited to price control laws. *Pharm. Research & Mfrs. of Amer. v. Walsh*, 538 U.S. 644, 654 (2003).

That case involved an extraterritoriality challenge to a Maine law that strongly encouraged pharmaceutical manufacturers to enter into rebate agreements favorable to Maine consumers. *Id.* at 654. If a manufacturer did not enter into such an agreement, its drugs would be subject to "prior authorization" requirements before they could be prescribed under the state's Medicaid program. *Id.* Prior authorization requirements would reduce a manufacturer's sales and market share. *Id.* at 656-57. The manufacturers argued that the rebate provision controlled the sales terms between manufacturers and distributors, which occurred outside Maine. *Id.* at 650,

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(…continued)
517 U.S. 559 (1996) (Fourteenth Amendment); *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592 (1881) (Full Faith and Credit Clause).

656, 669; *see also Pharm. Research & Mfrs. of Amer. v. Concannon*, 249 F.3d 66, 82 (1st Cir. 2001). The Court rejected that argument:

> Petitioner argues that the reasoning in [*Baldwin* and *Healy*] applies to what it characterizes as Maine's regulation of the terms of transactions that occur elsewhere. But, … unlike price control or price affirmation statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices. … *The rule that was applied in Baldwin and Healy accordingly is not applicable to this case.*

Walsh, 538 U.S. at 669. (internal quotation omitted; emphasis added). The two Justices who declined to join in this language rejected the claim based upon categorical objections to the dormant Commerce Clause doctrine.[2] Not only have Appellees failed to distinguish *Walsh* from the present case , they never even mention it.

Walsh demonstrates that Appellees' arguments lack merit. First, Maine's law regulated aspects of pharmaceuticals that do not manifest in the

[2] *See id.* at 674-75 (arguing that the doctrine,"having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated") (Scalia, J.); *id.* at 683 (arguing that doctrine has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.") (Thomas, J.).

physical drugs. Just as one cannot tell by looking at a gallon of ethanol how it was produced, one cannot tell by looking at a pill whether its manufacturer participated in Maine's rebate program. The dormant Commerce Clause does not limit state regulations to a product's physical properties. *See also Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 632-33 (6th Cir. 2010). Neither Appellee cites a single case for their "physically identical products" rule, even though it is a centerpiece of their arguments. *See* Brief of Rocky Mountain Farmers Union Appellees ("RMFU") at 49, 56, 64, 66; Brief of the AFPM Plaintiffs-Appellees ("AFPM") at 38, 45, 53-54.

Second, and more importantly, Maine's law presented stark choices for pharmaceutical manufacturers intending to participate in Maine's market. Manufacturers would have to provide significant rebates or be placed at a serious competitive disadvantage by prior authorization requirements. The manufacturers described Maine's law in terms similar to those used here, asserting that it "coerce[d]" out-of-state manufacturers with "unique" threats. *Walsh*, 538 U.S. at 662; *see also* RMFU at 1, 52-53. The Supreme Court rejected these arguments, despite the law's impacts on out-of-state manufacturers. Appellees' expansion of the extraterritorially doctrine to

render all such out-of-state effects *per se* unconstitutional should be rejected as well.

B. The LCFS Does Not Control Commerce Occurring Wholly Outside California

As *Walsh* confirms, the LCFS is not a "textbook example of an extraterritorial regulation," because even Appellees do not allege it controls prices in other states. *Cf.* AFPM at 34. The circuit courts have applied the extraterritoriality doctrine outside the context of price control laws, but those applications have been limited to two types of state laws: those that, like price control laws, control the terms of transactions with no nexus to the regulating state; and those that impose specific policies on other jurisdictions.

The first category is illustrated by *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), in which this Court invalidated a Nevada law that forced the NCAA "to apply Nevada's procedures to enforcement proceedings throughout the country." *Id.* at 639; *see also* Opening Brief at 70 (discussing rule as summarized by First, Second and Eighth Circuits). The second category is illustrated by *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer* ("*Meyer II*"), 165 F.3d 1151 (7th Cir. 1999), in which the Seventh Circuit invalidated a Wisconsin law because it prohibited importation of waste from other states unless they adopted Wisconsin's standards for treating waste. *Id.* at 1153.

Appellees mostly attempt to place the LCFS in the first category of state laws, although they also suggest that the LCFS imposes California's policy preferences on other states. In fact, the LCFS bears no resemblance to either category.

The LCFS's practical effects – the "critical inquiry" under the extraterritoriality doctrine – are not meaningfully different from those of numerous laws upheld as constitutional. *See Healy*, 491 U.S. at 336.

1. The LCFS's Effect On Market Conditions In California Is Not Extraterritorial Regulation

Appellees argue that LCFS controls out-of-state commerce because it places higher-carbon fuels "at a substantial commercial disadvantage in California." *E.g.,* AFPM 40. Thus, they argue, the LCFS requires producers of such fuels to choose between 1) abandoning the California market; 2) competing at a disadvantage; or 3) changing their out-of-state activities. AFPM at 40, 50-51; RMFU at 52, 61 n.18. Setting aside whether Appellees' characterization of the LCFS's effects is accurate, the courts have consistently rejected this argument. For example, in challenging a New Jersey law governing travelers checks sold in the state, American Express argued that the law regulated extraterritorially because it forced American Express to choose between abandoning New Jersey's market; selling at a

competitive disadvantage; or charging additional fees, possibly throughout the country. *Amer. Exp. Travel Related Serv., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 373 (3rd Cir. 2012). The Third Circuit, like the Supreme Court in *Walsh*, rejected the notion that changing market conditions in such a fashion constituted extraterritorial regulation. *Id.* at 373-74.

Laws that set conditions of importation, including packaging and labeling laws, present even starker choices. Such laws force manufacturers to comply with fixed requirements or abandon the state's market, a decision no fuel producer faces here. Yet, such laws are constitutional. *E.g., Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 472 (1981) (requiring specific packaging as condition of importation); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2nd Cir. 2004) (requiring manufacturers join Master Settlement Agreement or pay into escrow account as condition of importation); *Nat'l Elec. Mfrs. Ass'n v. Sorrell* ("*NEMA*"), 272 F.3d 104 (requiring mercury labeling as condition of importation).

Appellees do not persuasively distinguish permissible state laws that, like the LCFS, change the competitive conditions of in-state markets in ways that alter the decisions of firms wishing to compete in those markets. Attempting to distinguish packaging and labeling cases, Appellees argue that the LCFS impermissibly forces changes to out-of-state production methods.

RMFU at 65; AFPM 53-54. But the Commerce Clause does not protect specific "methods of operation." *Exxon*, 437 U.S. at 127. And, further, packaging and labeling laws are often based on production processes. For example, Minnesota's rejection of plastic packaging was based partially on concerns about the consumption of natural gas and petroleum in the production of plastic containers. *Clover Leaf*, 449 U.S. at 468; *see also Boggs*, 622 F.3d at 633 (concerning labeling of milk produced using rbST although rbST could not be detected in the milk); *Hampton Feedlot v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) (upholding law encouraging beef "producers [to] make better genetic decisions [and] raise better quality animals").

At bottom, Appellees' complaint is that the LCFS "interfere[s] with the natural functioning of the interstate market … through burdensome regulation." *Exxon Corp.*, 437 U.S. at 127 (internal quotation omitted); *see also* AFPM at 43 ("[T]he LCFS will effectively erect an embargo on some high-carbon fuels."); RMFU at 53 (predicting the exclusion of high-CI ethanol). Appellees' bleak scenarios lack evidentiary support. *Infra,* at Sec. III.E. But even if the LCFS "will surely change the market structure by weakening [higher carbon fuel producers]," that is not a dormant Commerce Clause violation, *Exxon Corp.*, 437 U.S. at 127, let alone a *per se*

unconstitutional extraterritorial *control*. *See* Br. of Amici Curiae Professors of Environmental Law in Support of Appellants ("Env. Law Profs.") at 31-33.

2. The Lifecycle Analysis Does Not Control Wholly Out-Of-State Commerce

Appellees also attempt to distinguish the LCFS from permissible state laws that affect the decision-making of out-of-state businesses by referencing certain features of the lifecycle analysis. None of these arguments establishes that the LCFS, or the lifecycle analysis itself, controls commerce occurring wholly out-of-state.[3]

First, Appellees assert that the LCFS "penalizes" certain activities included in the lifecycle analysis. RMFU at 47, 49, 50, 51, 52, 56, 57, 62, 65; AFPM at 36, 40. Every regulatory burden could be recast as a "penalty," but that terminology does not make the burden unconstitutional, let alone impermissibly extraterritorial, as the cases demonstrate. For example, the fundamental premise of labeling laws is that they will shift demand, "penalizing" producers of less-favored products. *See Boggs*, 622 F.3d at 633

[3] Under Appellees' view, EPA is regulating production processes, transportation, and land use in foreign countries, like Brazil, from which the United States imports renewable fuels, because EPA applies a lifecycle analysis to those fuels. EPA correctly concluded otherwise. ER 5:1024 (75 Fed Reg. 14669, 14766).

(noting growing demand for "milk from non-rbST-treated cows"). Minnesota's milk-packaging law "penalized" those milk producers who preferred the prohibited plastic containers, as well as the producers of raw materials that had been used to make those containers. *Clover Leaf*, 449 U.S. at 473. Maryland "penalized" petroleum refiners by prohibiting them from operating retail service stations in the state. *Exxon*, 437 U.S. at 119; *see also NEMA*, 272 F.3d 104 (2nd Cir. 2001) (labeling lamps containing mercury). Yet, all these laws, and their out-of-state effects, were found to be constitutional.

As these cases demonstrate, states may set standards for products sold within their borders, regardless of whether such standards induce out-of-state actors to change their conduct in order to remain in the state's market. Like the laws upheld in these cases, the LCFS applies its regulatory mechanism – the lifecycle analysis – only to fuels sold in California. And the entire point of the lifecycle analysis is to account for emissions that result from the consumption of a particular gallon of ethanol *in California*. This is what was meant by ARB's assertion before the district court that California desires to take responsibility for the GHG emissions resulting from *its* consumption of transportation fuel. *See* RMFU at 1, 17, 47; AFPM at 34, 39. The LCFS and its lifecycle analysis do not reach *wholly* out-of-

state conduct but, rather, permissibly account for the stream of conduct connected directly to the gallon of ethanol consumed in California. *See Freedom Holdings, Inc.*, 357 F.3d at 220 (noting routine "upstream pricing impact of a state regulation"); *see also Clover Leaf*, 449 U.S. at 473 (considering upstream effects on producers of raw materials); *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1191 (9th Cir. 1990) (upholding law that forced out-of-state banks to process transactions because they were triggered by in-state ATM withdrawal).

Second, Appellees allege that the LCFS "polices" what ethanol producers do with co-products that result from ethanol production. RMFU at 51. Co-products, like other elements of the lifecycle, are not wholly out-of-state commerce. *See* RMFU at 51 (admitting the co-products, like distillers grain, are produced simultaneously with the ethanol and from the same corn). RMFU itself has embraced the direct connection between a gallon of ethanol and its co-products by attributing environmental and economic benefits from co-products to ethanol. ER 4:627. Further, the decision whether to dry distillers grain is left to the fuel producer. It is true that once a seller voluntarily represents a CI value for its fuel – including a lower CI value based on selling the grain wet, that seller must act in accordance with representations made to the buyer. That is basic

contracting, not extraterritorial regulation. *See Valley Bank*, 914 F.2d at 1190 ("[States may make] rules to which commercial contracts with non-state resident parties must conform.").

Third, Appellees claim that the LCFS is regulating land use in other states and other countries. *E.g.*, RMFU at 51 n.15; AFPM at 38-39; Br. of Amici Curiae States of Nebraska, *et al.* ("Nebraska") at 11-12. The notion that the LCFS is controlling land-use decisions throughout the world is not credible. Moreover, because the land-use factor is identical for all corn ethanol, land-use *cannot* be controlled by the lifecycle analysis. *See* RMFU at 121 (arguing that the LCFS does not control tailpipe emissions because those emissions are identical for all ethanols).

The LCFS sets no standard for any of the myriad lifecycle activities that Appellees allege the LCFS controls, including farming practices, land use, crop yields, the efficiency of fuel production plants, the sources of thermal energy (such as coal, natural gas and biomass), and the co-products a fuel producer chooses to make. *See, e.g.,* AFPM at 37-38; RMFU at 46-47. That, and the fact that the lifecycle analysis applies only to fuels sold in California, distinguish the LCFS from extraterritorial regulations. Nevada's procedural statute impermissibly set standards to which enforcement proceedings throughout the country would have to adhere. *NCAA*, 10 F.3d

at 639. Price control statutes impose maximum prices for sales in other states. *E.g., Healy*, 491 U.S. at 338. And the law in *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), relied on by Appellees, prohibited firms from engaging in any business in Burma if they wanted to do business with the State of Massachusetts. *Id.* at 46.

Instead, like the laws upheld in *Walsh*, *Clover Leaf*, and *Valley Bank*, among other cases, the LCFS applies only to in-state sales and results in permissible effects out-of-state. It does not control any commerce occurring wholly outside California.

C. The LCFS Does Not Impose California's Policy Preferences On Other Jurisdictions

As noted above, there is a line of extraterritoriality cases invalidating state laws that impose specific policies on other jurisdictions. Appellees imply that the LCFS does so as a condition of importation. RMFU at 48-49 (suggesting California is imposing "its idea of good public policy on other states"), 55, 60; AFPM at 40-43. Appellees mischaracterize this line of cases as "squarely holding that a state may not attach restrictions to imports in an effort to control commerce in other states." *E.g.,* AFPM at 52. These cases actually hold that "[n]o state has the authority to tell other polities

what laws they must enact." *Meyer II*, 165 F.3d at 1153; *see also Hardage v. Atkins*, 619 F.2d 871, 873-74 (10th Cir. 1980).

Appellees also rely on portions of *Carbone* and *Baldwin*, although neither is a pure extraterritoriality case. In both cases, the Court found the challenged laws discriminatory and then rejected the justifications proferred for them. In *Carbone*, the town could not "justify the [discriminatory] flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment." *Carbone*, 511 U.S. at 393. Thus, the town could not set waste disposal standards or determine appropriate levels of risk for other jurisdictions.

In *Baldwin*, the Court similarly rejected New York's extra-jurisdictional concerns as justification for a protectionist price control measure. There, the Court concluded that the connection between the law's effects – higher prices obtained by dairy farmers – and the proferred purpose – improved sanitary conditions on dairy farms – was "too remote and indirect." *Baldwin*, 294 U.S. at 524. In contrast to the laws in *Carbone* and *Baldwin*, the LCFS is non-discriminatory, *infra*, at Secs. III, V.B., imposes no policies on other states, and employs the lifecycle analysis as the only effective means to reduce the emissions, and their in-state harms, from the fuels Californians consume.

Appellees vastly overstate the rule from these cases, asserting that California may not "require parties in other states and countries to change their extraterritorial conduct as a condition of importation or favorable treatment." AFPM at 52. That is not the law. Milk producers had to conform packaging to Minnesota's standards as a condition of importation, *Clover Leaf*, 449 U.S. at 459, and out-of-state pharmaceutical companies had to agree to make satisfactory rebate payments as a condition of favorable treatment in Maine, *Walsh*, 538 U.S. at 669. The LCFS sets no standards for out-of-state conduct and imposes no conditions of importation. In providing strong incentives for fuel producers to reduce emissions and invest in next-generation fuels, it is, in effect, indistinguishable from *Walsh*.

D. Appellees' Remaining Arguments Also Fail

Appellees unsuccessfully advance three other arguments. First, they repeatedly assert that the *purpose* of the LCFS is to reduce emissions outside of California and, therefore, the LCFS must regulate extraterritorially. *See, e.g.,* RMFU at 47, 53, 60; AFPM at 34, 39-40, 41, 45, 48, 54. However, the "critical inquiry" is the law's "practical effects," not its purpose. *Healy*, 491 U.S. at 336; *see also* RMFU at 48, 54, 59, 62; AFPM at 35, 40, 42, 49. Regardless, Appellees' characterization of the LCFS's purpose is wrong. The LCFS aims to spur the transformation of California's fuels market to

reduce the in-state harms caused by GHG emissions resulting from the state's own fuel consumption. *Infra* Sec. IV; *see also* Opening Brief at 41, 48. There is nothing extraterritorial, or impermissible, about that purpose.

Second, AFPM suggests that the LCFS's carbon intensity standard applies directly to out-of-state fuel producers, in an apparent attempt to invoke *Healy*'s prohibition against "the application of a state statute" to wholly out-of-state commerce. *Healy*, 491 U.S. at 336; *see also* AFPM at 40, 50. But the LCFS sets one standard – the aggregate, average carbon intensity for *California's* transportation fuel for a given year – and that standard applies only to California's refiners and blenders who sell finished fuel in the state.[4] LCFS §§ 95482, 95484.[5]

Further, the LCFS does not control the CI value of any particular fuel, because compliance is based on an average of fuels for the year and may also be achieved through accumulated or purchased credits. LCFS §§ 95482, 95484(b), 95485(c); ER 4:773 at ¶¶ 29-31. Thus, refiners and blenders may import or produce fuels with various CI values, including CI

[4] Responding to requests from out-of-state fuel producers, ARB proposes to amend the LCFS to allow out-of-state producers to *opt-in* as regulated parties and accumulate LCFS credits. Appellants' Request for Judicial Notice ("RJN") Exh. C at 15 (DktEntry: 64).

[5] The LCFS regulation can be found at Cal. Code Regs., tit. 17, § 95480, et. seq. and is Exhibit A to Appellants RJN (DktEntry: 64).

values *higher than* the standard for that year. For example, in 2011, the CI standard was 95.61, yet ethanol with a CI value of 98.4 flowed into California from the Midwest. *See* ER 2:165-197 (showing many producers registered to sell 98.4 ethanol); ER 4:737 at ¶¶ 9-11. The LCFS does not apply to, let alone *control*, the CI of any particular fuel.

Third, unsupported by any legal authority, Appellees also advance the proposition that state regulations are limited to a product's "physical attributes." RMFU at 49, 56, 64, 66; AFPM at 38, 45, 53-55. Numerous permissible state laws regulate products independent of their physical attributes. *Walsh*, 538 U.S. at 670 (pharmaceutical rebates); *Exxon Corp.*, 437 U.S. at 127 (business structures); *Sidamon-Eristoff*, 669 F.3d at 373 (travelers check terms); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2nd Cir. 2007) (gift card terms).

None of these arguments has merit.

E. Appellees' Interpretation Of The Extraterritoriality Rule Usurps The *Pike* Test And Threatens Numerous, Permissible State Laws

Appellees advocate for an incredibly broad reading of the word "control" that would capture state actions that "incentivize," "influence," "encourage," "account for," and "burden" out-of-state commerce. RMFU at 48 ("'Control' may, for example, take the form of influencing private

conduct."); *see also id.* at 46, 52, 55, 62, 63, 66-67; AFPM at 39. Appellees also read the word "wholly" out of the phrase "wholly outside." In so doing, Appellees conflate impermissible extraterritorial regulation with burdens on interstate commerce that are routinely analyzed under the *Pike* balancing test. RMFU at 62 ("If states were free to burden interstate commerce – on the theory that burdens create 'incentives' rather than 'controls' – there would be little left of the principle of a national free trade zone."); *see also id.* at 58. That is not the law: "[A] state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). If, as Appellees suggest, plaintiffs need only show that a state law burdens or affects interstate commerce in order to obtain a ruling that the law is *per se* unconstitutional, there would be little left of state regulatory authority. *See id.* at 1151 n.8 ("Countless non-discriminatory regulations affect the ability of some out-of-state entities to compete….").

In truth, extraterritorial regulations do precisely what AFPM asserts is difficult to imagine – they "purport to regulate conduct that has no nexus to the regulating state." *See* AFPM at 50. That is why these state laws are invalid *per se*: they involve an extreme overreach of a state's jurisdiction.

The classic examples – price control statutes – illustrate this, as they control prices for entirely separate, out-of-state sales. *Healy*, 491 U.S. at 338; *Brown-Forman*, 476 U.S. at 582; *see also Edgar*, 457 U.S. 624, 642 (1982) (plurality) (invalidating law regulating "interstate-securities transactions in stock even if not a single one of the target company's shareholders was a resident"); *NCAA*, 10 F.3d at 639; *Natsios*, 181 F.3d at 46 (invalidating restrictions on state procurement based on unrelated business in Burma); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer* ("*Meyer I*"), 63 F.3d 652, 658 (7th Cir. 1995) ("[A]ll persons in that non-Wisconsin community must adhere to the Wisconsin standards.").

The case law demonstrates that the relevant question is not whether a state law makes doing business in the state more difficult, or even impossible, for some businesses. *See Exxon Corp.*, 437 U.S. at 119 (upholding state law prohibiting refiners from operating retail stations); *Harris*, 682 F.3d at 1148. Rather, the question under the extraterritoriality doctrine is whether firms must abandon the state's market in order to avoid being *controlled* in a *wholly separate* market. *See Healy*, 491 U.S. at 337-38 (holding that Connecticut's law "has the practical effect of controlling Massachusetts prices"); *Natsios*, 181 F.3d at 69; *Meyer I*, 63 F.3d at 658. The LCFS does not impose that choice.

In sum, California is not controlling any out-of-state conduct, let alone any conduct *wholly* outside the state. The expansion of the extraterritoriality doctrine advanced by Appellees is not necessary to address either the Clause's core concern with economic protectionism or the risks of excessive burdens on interstate commerce. Expanding the extraterritoriality doctrine beyond its narrow domain would severely impede one of the central virtues of our federal system – state policy innovation – and convert matters properly the subject of democratic debate and legislative action into matters of federal court superintendence. The LCFS is not an extraterritorial regulation, and the district court's decision should be reversed.

II. APPELLEES' CLAIMS OF MARKET BALKANIZATION ARE WITHOUT MERIT

Appellees and their amici assert that the LCFS and similar regulations in other states will produce conflicts in the national market – a phenomenon often referred to as "Balkanization." AFPM at 46-48; RMFU at 100-109; Br. of Amici Curaie Chamber of Commerce of the United States of America, *et al.* ("Chamber") at 17-19; Br. of Amici Curiae Law Professors In Support Of RMFU ("Law Profs.") at 18-23. These arguments fail. First, the alleged conflicts are speculative and contradicted by the evidence. Second, Appellees rely on inapplicable case law involving direct regulation of the

movement of goods. Third, as they did below, Appellees have acknowledged that Congress was aware of the risk of Balkanization when it adopted Section 211(c)(4) of the Clean Air Act, yet allowed California to regulate fuels, without any possible pre-emption by EPA. *See* RMFU at 112 n.31. This precludes Appellees' Balkanization argument. *Infra,* at VII.B.

A. If Adopted, LCFS Regulations In Multiple States Would Produce No Conflict

To establish their Balkanization claim, Appellees must demonstrate both that other states will adopt LCFS-like regulations and that these regulations would create unworkable regulatory conflict. Neither of these findings can be speculative. *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 470 (9th Cir. 2001). Appellees and their amici focus much of their attention on *proposed* programs in other states. RMFU at 105; AFPM at 47-48; Chamber at 17-21; Law Profs. at 20-21. None of those proposed programs represents an actual conflict with the LCFS.

Appellees allegations of conflict reduce to the possibility that a gallon of fuel might be assigned different CI values in different states. *E.g.,* Chamber at 18-20 (noting differences in values assigned by states). But different CI values in different markets would not create a regulatory conflict, even if the fuel's CI value were reflected in its price. Fuel prices

fluctuated and varied between states before the LCFS. ER 2:131-32 at ¶¶ 9-14. Even under multiple LCFS regulations, then, a fuel producer would make the same decision it does today – choosing to sell its fuel where it can make the highest profit.

AFPM's suggestion that approving the LCFS would mean approving state laws imposing "inconsistent regulatory obligations" on nuclear facilities in other states, AFPM at 47, is meritless for reasons beyond the fact that Congress has expressly preempted state nuclear safety regulation, *see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). The LCFS does not impose "regulatory obligations" on out-of-state actors. And it is based on the *quantification* of GHG emissions, which do not vary based on "policy judgments" about health and safety risks.

States often adopt non-uniform regulations regarding products sold in their states without Balkanizing national markets. *E.g., Clover Leaf*, 449 U.S. 456 (milk packaging); *NEMA*, 272 F.3d at 110-11 (lamp packaging); *SPGGC, LLC*, 505 F.3d 183 (gift card terms). Fuels are no different. The fuels market was not uniformly regulated before the LCFS. *Compare, e.g.,* Ill. Admin. Code tit. 35, § 215.585 (setting state-specific Reid vapor pressure standards) *and* Cal. Code Regs. tit. 13, § 2262.4 (same). Further,

by definition, any LCFS will reward lower-carbon fuels. Thus, even non-uniform regulations will create incentives that point in the same direction – toward the production of lower-carbon fuel. There is no reason to fear economic dis-integration here.

B. The LCFS Neither Interferes With A Need For National Uniformity Nor Violates The "Internal Consistency" Test

To support their Balkanization argument, Appellees rely on inapplicable case law, beginning with cases concerning laws "regulat[ing] *those phases* of the national commerce" that require "national uniformity." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) (emphasis added); *see also* RMFU at 101. But the "phases of national commerce" that require true uniformity are limited to physical restrictions on modes of transportation. *See, e.g., Union Pac. R. Co. v. C.P.U.C.*, 346 F.3d 851, 870-73 (9th Cir. 2003) (striking down train configuration standards but upholding fines for train safety violations); *see also S. Pac. Co.*, 325 U.S. at 771 (train lengths); *id.* at 780-81; *Valley Bank*, 914 F.2d at 1192 (noting the "different obstacles" posed by physical transportation regulation); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994). The LCFS has no effect on train

or truck configurations or any other aspect of commerce that requires national uniformity, and these cases are inapposite.[6]

RMFU reaches even farther, relying on the "internal consistency test" from *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 282-83 (1987). But that test applies to tax cases and is inapplicable here. *See id.* at 284. Further, *American Trucking* involved a flat tax applied to the movement of goods and thus resembles the equally inapplicable "transportation" cases. *Id.* Finally, even if the "internal consistency" test applied, it would require that emissions be directly apportioned to the relevant in-state activity. *See id.* at 283-84. The LCFS does this, because it calculates the GHG emissions attributable only to the fuel sold in California.

None of Appellees' cases have any bearing here, and the LCFS does not threaten the national fuels market. "[I]nconsistent state laws on [carbon intensity of fuels] can coexist without conflict as long as each state regulates only its own [sales of fuel]." *See Valley Bank*, 914 F.2d at 1192. Appellees' Balkanization claim fails.

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[6] Appellees' amici assert that multiple LCFS regulations would require "multiple parallel distribution systems." Chamber at 19; Law Profs. at 21. But individual ethanol plants shipped to multiple destinations before the LCFS. *See* ER 16:3764-3765 (filed under seal); *see also* ER 2:133 at ¶¶ 15-16 (noting increase in exports).

III. THE LCFS DOES NOT DISCRIMINATE AGAINST OUT-OF-STATE ETHANOL

"[T]he 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." *Kentucky*, 553 U.S. at 337-38 (internal quotation omitted). The Clause prohibits "economic barrier[s] to competition" that protect in-state businesses. *Limbach*, 486 U.S. at 275. It does not, however, prohibit states from protecting their citizens by distinguishing among products, or the companies that sell them, based on relevant characteristics such as different risks they pose to the state. *E.g., Clover Leaf*, 449 U.S. at 459-60, 474 (upholding state's packaging distinctions based on conservation and disposal concerns); *Exxon Corp.*, 437 U.S. at 119, 121, 127 (upholding state prohibition against refiner-operated retail stations in response to inequitable gasoline distribution).

Thus, a state may not "discriminat[e] against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *United Haulers Ass'n. v. Oneida-Herkimer Solid Waste Auth.*, 550 U.S. 330, 366 (2007) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). Here, the LCFS treats fuels

differently for a reason – GHG emissions – that has nothing to do with origin and everything to do with risks to California's citizens, land, industries, and natural resources. This is readily apparent from the broader context of California's efforts to reduce emissions across its economy, ER 9:2202; from the adoption of a rigorous scientific approach to measuring GHG emissions from fuels, ER 9:2286-2327; and from the very favorable CI values obtained by out-of-state fuels, ER 2:165-197.

Nonetheless, Appellees argue that the LCFS facially discriminates against out-of-state ethanols. But in contrast with facially discriminatory laws, the determinant of treatment under the LCFS is a fuel's lifecycle emissions, not its origin. *Cf. Or. Waste Sys., Inc. v. Dept. of Env. Quality*, 511 U.S. 93, 99 (1994). Appellees advance two arguments to the contrary.

First, they assert that only fuels with similar production and transportation methods are "similarly situated" such that their treatment can be compared. RMFU at 42, 72, 73, 75, 84, 85, 88; AFPM at 59 (table); *see also Gen'l Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities."). Appellees then point to pathways with similar descriptions but different CI values as evidence that the LCFS discriminates against Midwest ethanol and in favor of California ethanol. *E.g.,* RMFU at 73. Second, Appellees assert

that discrimination based on origin is built into several of the lifecycle variables. *E.g.,* RMFU at 73, 91; AFPM at 64-68. Neither argument is supported.

A. The LCFS Cannot Protect California Ethanol, Because The Most Favorable CI Values Correspond To Out-of-State Ethanols

Appellees assert that "the LCFS facially handicaps the market in favor of California ethanol producers." RMFU at 73; *see also* AFPM at 59-60. It does not, as the twenty-nine ethanol pathways with CI values at or below California corn ethanol (80.70) demonstrate:

Pathway[7]	Origin	CI
ETHGW013	Midwest	56.56
ETHGW015	Midwest	58.86
ETHGW010	Midwest	59.76
ETHGW012	Midwest	62.06
ETHGW007	Midwest	62.96
ETHGW014	Midwest	64.86
ETHGW009	Midwest	65.26
ETHGW004	Midwest	66.16
ETHGW011	Midwest	68.06
ETHGW006	Midwest	68.46
ETHGW001	Midwest	69.36
ETHGW008	Midwest	71.26
ETHWB001	California	71.40
ETHGW003	Midwest	71.66
ETHG003	Midwest	73.39

Pathway	Origin	CI
ETHGW005	Midwest	74.46
ETHC004	Midwest	76.22
ETHC036	Midwest	76.75
ETHGW002	Midwest	77.66
ETHC056	Midwest	77.88
ETHC055	Midwest	78.56
ETHC054	Midwest	79.23
ETHC032	Midwest	79.80
ETHC053	Midwest	79.91
ETHC037	Midwest	80.17
ETHC038	Midwest	80.31
ETHC052	Midwest	80.66
ETHC008	California	80.70
ETHC033	Midwest	80.70

[7] This data comes from the LCFS Biofuel Producer Registration list. ER 2:165-197.

There are ten other similar out-of-state pathways, including several from Brazil, for which no registration is apparent in the record. *See* RJN Exh. A at 49-50 (LCFS Table 6) (pathways ETHC030, ETHC033, ETHC034, ETHC035 and six sugarcane pathways)

RMFU asserts that "the relative CI of competing fuels determines which will remain viable competitors in the California market." RMFU at 72. Assuming that is true, Midwest ethanol is well-positioned to outcompete and outlast California ethanol. That is not economic protectionism.

Further, the absence of any pattern connecting CI values to origin underscores that it is GHG emissions, not location, that determine a fuel's treatment. *Cf. Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 504 U.S. 353, 361 (1992) (invalidating distinctions among waste based on "no reason, apart from its origin"); *Limbach*, 486 U.S. at 274; *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Dean Milk*, 340 U.S. 349; *BFI Medical Waste Systems v. Whatcom County*, 983 F.2d 911 (9th Cir. 1993).

Despite the undisputed CI values displayed above, RMFU asserts that Midwest ethanol producers "simply cannot lift" the burden of the LCFS, RMFU at 83; that "the most advantaged ethanol producer under the LCFS is a California producer using California feedstocks," RMFU at 89; and that

the LCFS creates strong incentives for refiners and blenders not to buy Midwest ethanol, RMFU at 76. Those statements are wrong.

In turn, AFPM argues that the LCFS strips away the competitive advantages of Midwest producers, citing *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 351 (1977). AFPM at 68, 75. This case is not *Hunt*. The LCFS does not "insidiously operate[] to the advantage" of California business by stripping Midwest ethanol producers, or any other entities, of marketing advantages in which they have invested millions of dollars. *See Hunt*, 432 U.S. at 351-52. Also, unlike the law in *Hunt*, the LCFS can hardly be said to target Midwest ethanols for discrimination when the lowest CI values to date are for precisely those fuels. *Cf.* AFPM at 71 (citing *Hunt* and *Carbone*, 511 U.S. at 392).

Neither Appellee cites a single case finding economic protectionism where, as here, out-of-state firms obtain more favorable treatment than their in-state competitors. Instead, they argue that it is "of no relevance" that "various out-of-state ethanol producers… actually may enjoy *better* access to the California fuel market." RMFU at 87-88 (emphasis added); AFPM at 70-71. But access to, and the ability to compete in, a state's market is of central relevance to the dormant Commerce Clause's prohibition against economic protectionism. *E.g., Kentucky*, 553 U.S. at 337-38. Notably,

better access is, by definition, not available under a facially discriminatory law.

Arguing that CI values favoring out-of-state fuels only reduce the degree of discrimination, Appellees rely on inapplicable cases. RMFU at 88; AFPM at 70, 74. The LCFS does not reserve a portion of California's fuels market for California businesses. *Cf. Wyoming v. Oklahoma*, 502 U.S. 435, 455-56 (1992). The LCFS does not require other states to adopt laws that favor California businesses before products from those states can compete on equal footing. *Cf. Limbach*, 486 U.S. at 271. Nor does the LCFS favor only one local operator or one local industry. *Cf. Carbone*, 511 U.S. at 391; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984). Again, none of Appellees' cases involve a law, like the LCFS, under which out-of-state competitors receive the most favorable treatment. There is no question of degree here. The LCFS does not protect California ethanol producers.

B. The Dormant Commerce Clause Protects The Market, Not Methods Of Production And Transportation

Disregarding the favorable CI values obtained by out-of-state ethanols, Appellees argue that the Commerce Clause requires California to treat ethanol identically when it is produced by what Appellees characterize as the

same means. RMFU at 72, 75, 84, 92; *see also* AFPM at 59, 60, 62, 68 (emphasizing corn as feedstock). Without support, they assert that these ethanols are the only ones "similarly situated" for purposes of the dormant Commerce Clause and, therefore, the only ones the Court should compare in its analysis. *E.g.,* RMFU at 84; AFPM 59 (table). But the dormant Commerce Clause protects the market as a whole, not particular "methods of operation" and "not particular interstate firms." 437 U.S. at 127-28. Thus, all competitors in the market are similarly situated for purposes of the Clause and should be considered in the Court's analysis. *Tracy*, 519 U.S. at 299 (holding that "allegedly competing entities" are not similarly situated when they do not, in fact, compete); *see also* Opening Brief at 61-64.

For example, in *Exxon*, the Court rejected a challenge to Maryland's prohibition against refiners operating retail gas stations, because the Maryland market would remain available to other in-state and out-of-state firms. *Exxon*, 519 U.S. at 125-26. It was not discriminatory to ban certain out-of-state organizations from the state's market, based on their contribution to the in-state problem of gasoline distribution, because other out-of-state organizations still had market access. *Id.* If the Court had disregarded one group of competitors, it could not have concluded that "interstate commerce is not subjected to an impermissible burden simply

because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* at 127; *see also Clover Leaf*, 449 U.S. at 472-73 (upholding law where "there is no reason to suspect that gainers will be [in-state] firms, or the losers out-of-state firms").

No case stands for, or even suggests, the rule Appellees advance here. As the Supreme Court did in *Exxon*, courts look to the participants selling fungible goods and to the competitive conditions in the relevant market. *See* Opening Brief at 61-64; *see also Bacchus*, 468 U.S. at 268-69. There is no reason to veer from this well-established analytical framework

The parties agree that all fuel ethanols are fungible and compete with one another. RMFU itself admits that Brazilian ethanol producers are "the chief rivals to U.S. producers," RMFU at 13, although it later claims Brazilian ethanol is "meaningless" to this analysis, RMFU at 88 n.27. This competition among all ethanols defines "similarly situated" for purposes of the dormant Commerce Clause, and ethanols from Brazil, the Midwest, and California must all be part of the analysis here. Considering all competitors in the ethanol market, including the low CI values discussed above, the LCFS does not "benefit[s] in-state interests by burdening out-of-state competitors." *Kentucky*, 553 U.S. at 338.

C. Neither The Lifecycle Analysis, Nor Its Individual Variables, Discriminates On The Basis Of Origin

At its core, Appellees' argument is that the LCFS discriminates impermissibly when it distinguishes ethanols based on their lifecycle emissions. These emissions are the basis for the distinction between pathways Appellees deem to be similar. Appellees do not dispute that lifecycle analysis is the only meaningful way to compare GHG emissions across fuels, and they even utilize the lifecycle analysis for their own purposes. *E.g.,* ER 2:225 (using GREET model to laud ethanol's benefits); *see also* ER 5:1061. Appellees do not dispute that the differences in CI values reflect real emissions differences.[8] It is those emissions, not out-of-state fuels, to which the LCFS is "hostile." *See Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 347 n.11 (1992).

A lifecycle analysis is the only means by which biofuels – like ethanol – receive credit for their carbon-reducing lifecycle events, like photosynthesis and co-product generation. ER 4:771-772 at ¶¶ 22-23.

[8] Appellees assert that the indirect land use component of the lifecycle analysis is suspect. *See also* RMFU at 23; AFPM at 9; Br. of Amici Curiae Scientific Experts in Support of Appellees 1-15. This factor is irrelevant to Appellees' discrimination claim, or any other legal issue in this case, because it is identical for all corn ethanol (and *higher* for sugarcane ethanol). *See* LCFS § 95486(b) (Table 6).

Appellees' repeated use of the words "penalty," "punish," and "sanction," RMFU at 47, 49, 50, 51, 52, 56, 57, 62, 65; AFPM at 36, 40, is therefore misleading.

Unable to dispute the LCFS's scientific merits, Appellees imply that ARB manufactured some internal values, referring to them repeatedly as "assumptions," "presumptions" or "theory." RMFU at 19, 21, 23, 24, 25, 29, 30, 51, 72, 73, 82, 89-90; AFPM at 15, 65. But these repetitious assertions do not invalidate the underlying science. The base lifecycle model (GREET) has been subjected to extensive reviews; the California-modified model (CA-GREET) was itself subject to extensive peer-review and public comment; and the data in both models comes from publicly available, credible sources. *E.g.*, ER 9:2286-88; ER 6:1269-1313 (LCFS peer review); 7:1725-26 (describing data sources); ER 4:770. *cf.* RMFU at 93; AFPM at 63.

Ignoring this, Appellees focus selectively on the factors in the lifecycle that they dislike, particularly electricity and transportation.[9] This isolated

[9] RMFU also alleges that California plants are "presumed" to be more efficient. RMFU at 82-83. It is not a presumption, but a fact, that the *average* plant in California is more efficient than the *average* plant in the Midwest. *See* ER 7:1725-26 (describing data sources), 4:778 at ¶¶ 46-47.

focus on any single lifecycle variable is unsupported, because it is the full lifecycle that determines a fuel's competitiveness. *See* Opening Brief at 56-57. In addition, Appellees' discussion of their selected variables is also misleading. For example, in discussing emissions from electricity usage, Appellees attempt to link those emissions with geography by focusing exclusively on electricity *generation*. AFPM at 66-67. This ignores electricity *consumption* (or efficiency), which is disconnected from geography. Appellees also ignore that some ethanol plants produce their own electricity, making regional electricity mixes irrelevant. *See* ER 2:166, 169, 170; *see also* Amicus Curiae Br. of Brazilian Sugarcane Industry Ass'n ("UNICA") at 17-18. Finally, neither Appellee disputes that California's electricity mix contains lower carbon sources compared to that in some other states.

Similarly, when discussing transportation emissions, Appellees focus exclusively on distance, *see* AFPM at 63-65, ignoring other important variables such as the transportation method and the nature of the goods being transported. *See* UNICA at 14-16. Notably, transporting corn by rail from the Midwest to California results in more emissions than transporting ethanol the same distance by the same means, a factor that disadvantages California corn ethanol producers. *See* ER 4:777-78 at ¶ 45. These other

variables are highly relevant to transportation emissions and have no nexus to location.

Appellees rest their transportation discrimination theory on their claim that a hypothetical California ethanol plant using hypothetical California feedstocks would have lower transportation emissions than any other fuel. RMFU at 83, 89. As noted above, that would depend on the other factors relevant to transportation emissions. The constitutionality of a state statute under the dormant Commerce Clause does not turn on "hypothetical possibilit[ies]." *See Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 654 (1994). In truth, Midwest plants have the lowest total CI values, and the lowest transportation emissions, and that Brazilian ethanol has some of the lowest CI values of any ethanol, all despite the alleged discrimination against the distance ethanol travels.

Further, none of Appellees' allegations about the lifecycle – including AFPM's mischaracterization of it as ARB's justification for discrimination, AFPM at 61-62 – alters the fact that the LCFS distinguishes among fuels based on actual emissions, not origin. Nor do the allegations about specific variables change the fact that total carbon intensity determines competitiveness. Transportation and electricity emissions are just two factors in overall carbon intensity. That some Midwest producers have CI

values more than 20 points below their California competitors demonstrates that carbon intensity is not a proxy for origin.

In sum, the inclusion of a fuel's full lifecycle and the calculation of emissions at each lifecycle stage reflect a scientific process of accounting for the emissions from California's fuel consumption. No single variable determines a fuel's treatment under the LCFS. And neither the lifecycle as a whole, nor any variable within it, discriminates based on origin.

D. Methods 2A And 2B Confirm The Absence Of Discrimination

Appellees also challenge Methods 2A and 2B, the procedures by which alternative fuel producers may obtain individualized CI values. *E.g.,* RMFU at 81 (referring to individualized values as "no more than a sleight of hand"). Appellees make several inaccurate and unsupported allegations.

First, RMFU asserts that Methods 2A and 2B only make ethanols "temporarily competitive." RMFU at 81. This assertion ignores the potential for lower CI values in the future, even though the ethanol industry itself touts its carbon-reducing activities. *E.g.,* ER 2:225; ER 2:211. In any event, if Methods 2A and 2B only temporarily ensure competitiveness, then California ethanol – with its higher CI value – will be eliminated from the

market before numerous Midwest ethanols with lower CI values. That is not discrimination.

Second, RMFU asserts that Methods 2A and 2B discriminate, because only out-of-state producers are burdened by them. RMFU 85-86. That is untrue. One California producer has already obtained an individualized value through Method 2B. ER 2:194. And, California producers will have to reduce emissions and use these procedures to remain competitive with the low CI values obtained by Midwest and Brazilian producers. *See, supra,* at III.A.

Third, Appellees overstate the burden imposed by Methods 2A and 2B. RMFU at 82, 85-86; AFPM at 75. These alleged burdens did not dissuade more than 20 ethanol producers from applying for more than 70 individualized pathways in the LCFS's first six months. *See* ER 2:165-197.

RMFU's assertion that CI values of Midwest producers "inevitably suffer" under Methods 2A and 2B, RMFU at 83, is meritless.

E. Appellees' Bleak Predictions For Midwest Ethanol Have Been Disproven

Although Midwest producers have registered for the lowest CI values, Appellees allege that the LCFS will lead to the demise of Midwest ethanol. RMFU's argument relies on the predictive analyses introduced in support of

its preliminary injunction motion. RMFU at 33-34, 53, 75. These analyses erroneously presumed that, beginning in 2011, the LCFS would cause a decline in the demand for, and price of, ethanol. *E.g.,* ER 12:3095-3096. The opposite occurred, however. ER 2:253; 2:132-133. RMFU's analyses also ignored that the LCFS conferred the lowest CI values on Midwest ethanol. *See* SER 14:3511 at ¶ 5 (noting 73.2 as "lowest" value). This Court should disregard RMFU's analyses.

Appellees also rely on compliance scenarios ARB developed during its rulemaking to analyze the LCFS's environmental and economic effects. RMFU at 7, 34, 35-36, 53, 75, 89, 125; AFPM at 68 n.20. Appellees incorrectly characterize these as ARB's "predictions." *E.g.,* RMFU at 76, 34, 36; *see also* ER 4:782-784; ER 7:1644; 7:1548-49; 7:1576. Rather than predicting the future, these scenarios demonstrated that compliance with the LCFS was possible, by illustrating several ways that might occur. *Id.* These illustrations used a Midwest pathway with a CI value of 99.4, representing an average of then-known Midwest CI values, ER 4:783 at ¶ 67, and indicate nothing about the future of Midwest ethanol with CI values like 73.39 or 56.56 or lower. As ARB noted, these scenarios say nothing definitive about any fuel's future in California, because the market, not the LCFS, will

determine that. *E.g.,* ER 7:1576. Appellees' bleak predictions for Midwest ethanol are unsupported.

In sum, the LCFS distinguishes fuels based on actual lifecycle emissions in order to accurately account for and reduce emissions from California's consumption of fuels and to spur innovation of next-generation, lower-carbon fuels. It does not distinguish on the basis of origin. In fact, the most favorable CI values correspond to out-of-state ethanols from the Midwest and Brazil. The LCFS does not discriminate.

IV. THE PURPOSE OF THE LCFS IS TO REDUCE THE EMISSIONS THAT RESULT FROM CALIFORNIA'S CONSUMPTION OF TRANSPORTATION FUELS

Appellees allege that the LCFS purposefully discriminates with the goal of protecting California's ethanol industry. RMFU at 76-80; AFPM at 65-67.[10] RMFU asks this Court to reach this claim, although the district court did not. RMFU at 77 n. 23, 80 n.24. ARB cross-moved for summary judgment on this issue and respectfully requests a remand for entry of judgment for ARB, because this argument is meritless. *See Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1192-94 (9th Cir. 2009) (reversing and

[10] AFPM's arguments regarding the LCFS's purpose with respect to crude oil are discussed, *infra*, Sec. V.B.

remanding with instructions to grant summary judgment on grounds not decided by the district court).

Although RMFU claims "the administrative record is filled with damning statements," RMFU at 77, RMFU cites to only six pages of the voluminous record. *Id.* at 78; *see also* AFPM at 66. These statements are "easily understood, in context, as economic defense of [a regulation] genuinely proposed for environmental reasons." *Clover Leaf*, U.S. at 463 n.7; *see also Valley Bank*, 914 F.2d at 1196 (noting that concern for state residents is "predictable"); Opening Brief at 42-47. Further, many of the statements quoted repeatedly by Appellees concern the *combined* effects of the LCFS and the federal RFS2 mandates and do not evidence the LCFS's purpose. *E.g.*, ER 7:2469; *see also* AFPM at 66 (block quote).

The LCFS's legitimate purpose – to reduce the GHG emissions from California's transportation sector by incentivizing development of new, dramatically cleaner fuels – is on the face of the regulation and throughout the administrative record. LCFS § 95480; *see also* Opening Brief at 44 (citing sampling of record cites). These articulated objectives should be taken at face value "unless an examination of the circumstances forces [the Court] to conclude that they could not have been a goal of the

[regulation]."[11] *Clover Leaf*, U.S. at 463 n.7 (internal quotation omitted); *see also Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). The larger circumstances, including California's other climate change actions under California's Global Warming Solutions Act ("AB 32"), confirm the LCFS's legitimate purpose. *See Valley Bank*, 914 F.2d at 1195-96 (finding challenged law consistent with overall, nondiscriminatory regulatory approach).

Finally, Appellees' allegations of protectionist purpose are not credible in light of the market conditions actually engendered by the LCFS in which out-of-state ethanols have obtained the most favorable CI values. *See, supra,* Sec. III.A.; *cf. Bacchus*, 468 U.S. at 265, 269. Appellees' implausible allegations of discriminatory purpose should be rejected. *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th. Cir. 2005).

V. THE DISTRICT COURT'S ORDER REGARDING THE CRUDE OIL PROVISIONS SHOULD BE DISMISSED AS MOOT AND VACATED OR REVERSED

A. AFPM's Challenge To The Crude Oil Provision Is Moot

[11] Appellants do not, as AFPM suggests, argue that the Court "must accept the LCFS's stated purpose at face value." AFPM at 62 n.18. But a law's stated purpose must be considered, and, here, the stated purpose is consistent with both the surrounding circumstances and the effects of the law.

"The basic question [for mootness] is whether there exists a present controversy as to which effective relief can be granted." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (internal quotation omitted). AFPM does not dispute that the challenged provisions have not applied to a crude oil sale since December 31, 2011. AFPM at 82. ARB has nearly completed the amendments to the crude oil provisions and has allowed regulated parties to use the proposed amendments for 2012 through a Regulatory Advisory. RJN Exh. B at 1-2; Exh. D. ARB currently anticipates submitting the amendments to California's Office of Administrative Law in October 2012. There is no reason to believe that any future sale of crude oil will take place under the original provisions. The crude oil portion of this case is moot.

1. There Is No Present Controversy

This case is analogous to *Pacific Northwest Venison Producers*. While that dormant Commerce Clause challenge was on appeal, the state changed the challenged regulation with respect to one of several species of wildlife (fallow deer). 20 F.3d at 1011. This Court held that the appeal was moot as to that species. *Id.* Here, California has changed the way it regulated one of several fuels (crude oil), and this appeal as to that fuel is similarly moot.

"As a general rule, if a challenged law is repealed or expires, the case becomes moot."[12] *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994); *see also Maldonado v. Morales*, 556 F.3d 1037, 1042 (9th Cir. 2009). "The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Noatak*, 38 F.3d at 1510 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Thus, the Court considers the motive for the change and the likelihood that the allegedly offensive provisions would be re-enacted. *Noatak*, 38 F.3d at 1510.

"Based on feedback from regulated parties" and "lessons learned since implementation began," ARB is amending the LCFS "to reflect current market realities" and the "continuum of crude oil carbon intensities." RJN Exh. C at ES-2, ES-5; *see also id.* at ES-8 (noting evolution of petroleum market since the original 2009 rulemaking). The amendments to the LCFS are not "maneuvers designed to insulate a decision from review." *See Knox*, 132 S. Ct. at 2287. In fact, no decision on the LCFS had been rendered

[12] None of AFPM's cases involve a change in law. *See Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012) (two private parties); *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (citizen suit against private party); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169 (9th Cir. 2009) (regulatory deadlines).

when ARB first publicly proposed these amendments in October of 2011. *See* RJN Exh. C. ARB's behavior here is not suspect.

There is no reason to believe that ARB would re-enact the challenged provisions at another time. First, the amended provisions would achieve the LCFS's stated goal, and ARB has "no motive to re-enact" the challenged provisions. *Outdoor Media Group*, 506 F.3d at 901. Second, ARB staff have concluded that continuing with the original provisions "is not feasible." RJN Exh. C at ES-8.

There is no present controversy here, and there is no reason to expect the controversy to reoccur.

2. No Effective Relief Can Be Granted

All of the injuries AFPM alleged involve the LCFS's effects on crude oil sales. ER 13:3247 at ¶ 47; 3249-50 at ¶¶ 61, 63 (Complaint); *see also* AFPM at 78 (alleging "direct commercial advantage" for California crude and thwarting of competition). The only interstate trade affected by the 2011 crude oil provisions has already occurred. If California crude had an advantage in 2011, as AFPM alleges, nothing this Court or ARB does now can change that. Further, if a foreign HCICO producer sold less crude into California than it otherwise might have (or obtained a lower price for its crude), there is similarly no way to remedy that now.

AFPM claims relief can be granted because the credits and deficits being assigned to sales made in 2011 "remain relevant" to future compliance. AFPM at 82-83. But the "assignment" of credits and deficits based on past purchases and cost-benefit analyses is not an injury. Regulated parties purchased HCICOs, or did not, based on economic conditions, including prices and the risk of LCFS deficits. The assignment of accurate credits and deficits based on those past sales, made with full information, cannot properly be characterized as an injury.

Further, the "remedy" of eliminating all credits and deficits from 2011 is not a realistic or just option and would cause great uncertainty in the regulated community. Numerous transactions, including fuel sales and sales of LCFS credits, have already occurred on the basis of existing credit balances. Those transactions have no connection to the 2011 crude provisions, yet would be upset by the remedy AFPM seeks here.

Any alleged market-based injuries for 2011 have already occurred and cannot be remedied.

3. The Proposed Amendments Assign Each Crude Its Actual CI Value, Eliminating The Alleged Commerce Clause Violations

AFPM makes one final argument against mootness – that the amended crude oil provisions are themselves unconstitutional. AFPM at 84-87. The

constitutionality of the amended provisions has not been briefed either before the district court or this Court, and this Court should not decide that question. *See, e.g., Pac. Nw. Venison Producers*, 20 F.3d at 1011.

AFPM appears to argue that the amended provisions are similar enough that a decision on the original provisions is warranted. *See* AFPM at 84-87. AFPM ignores the second step in the amended provisions, in which *actual CI values* are applied to all crudes to calculate the average for the year. This eliminates both disparities about which AFPM complained.[13] RJN Exh. C at ES-5. This portion of the appeal is moot. *See Outdoor Media Group*, 506 F.3d at 901 (finding mootness where new law cured alleged constitutional deficiencies).

4. The District Court's Order Should Be Vacated

If this Court agrees that this portion of the appeal is moot, the district court's order should be vacated. ARB did not pursue the amendments for the purpose of mooting the case, as explained above. Indeed, ARB is simultaneously pursuing amendments concerning crude oil, opt-in capabilities for out-of-state producers, improvements to Method 2A and 2B

[13] AFPM, inexplicably, focuses on the July 2011 advisory, which applied only during 2011 and has no bearing on the proposed amendments or the law governing 2012. *See* AFPM at 85; *see also* RJN Exh B at 2.

procedures, and credit trading. RJN Exh. C at ES-3-5; *see also* LCFS § 95489 (expressly anticipating amendments). ARB did not voluntarily forfeit the remedy of vacatur. *See Alvarez v. Smith*, 130 S.Ct. 576, 583 (2009). To hold otherwise would deter states from making appropriate and needed changes to programs during litigation.

Further, vacatur here would "prejudic[e] none by a decision which … was only preliminary." *Alvarez*, 130 S.Ct. at 581. As discussed above, there is no remedy that can alter the crude oil sales that occurred in California in 2011. Leaving the district court's order in place will not remedy any purported injury. Instead, because credit balances are a factor in ongoing sales of both fuels and LCFS credits, retaining the district court's order will introduce uncertainty into ongoing commerce and undermine completed transactions that have no connection to 2011 crude sales. Vacatur here would be "most consonant to justice." *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994). ARB respectfully requests this Court to "follow [the] ordinary practice" and vacate the lower court's order. *Alvarez*, 558 U.S. at 583.

B. The 2011 Crude Oil Provisions Were Constitutional

If the Court reaches the question, it should find the 2011 crude oil provisions constitutional. They were not designed to protect California

crude oil producers. In fact, as AFPM concedes, one of the LCFS's objectives is to displace crude-oil fuels with lower-carbon fuels. *See* AFPM at 81; ER 10:2467, 6:1234, 9:2197 (noting need for fuels with CI values 50 to 80 percent lower than gasoline); ER 6:1359; ER 7:1689. This objective is inconsistent with protecting California crude. It is entirely consistent, however, with two legitimate goals of the LCFS: spurring innovation in non-petroleum fuels technologies and reducing the risks of oil price shocks to California's economy. *See* ER 9:2197, 5:921; *see also* ER 5:1027 (EPA's discussion of energy security).

AFPM nonetheless alleges that the LCFS is designed to provide a "direct commercial advantage" to California crude oil that "thwarts" outside competition. AFPM at 78. But under the 2011 provisions, more than 160 out-of-state crude oils, from three other states and at least thirty-five countries, obtained the exact same CI value as all California crudes. Opening Brief at 89; *see also* ER 11:2698-99 (2006 baseline mix); ER 2:124-128 (list of pre-screened non-HCICOs). This is hardly "ingenious" protectionism. *Cf.* AFPM at 78. And AFPM does not identify any way in which Alaskan light crude – and 160 other out-of-state crudes – were burdened by receiving the same CI value as all California crudes. *See* AFPM at 79, 81 n.27. Conclusory statements that "artificially high" CI

values "mak[e] it more difficult for regulated parties to comply," AFPM at 79, cannot support a finding of discrimination.

The 2011 crude provisions did differentiate one set of crudes – emerging HCICOs – because they threaten to significantly increase overall carbon intensity. *See* Opening Brief at 87-89. That threat is the non-discriminatory reason "apart from their origin" for the differential treatment of emerging HCICOs. *See United Haulers*, 550 U.S. at 365 (internal quotation omitted); *see also* Opening Brief at 87-88. AFPM does not dispute that emerging HCICOs alone pose this threat.

AFPM's legal authorities are distinguishable. The LCFS does not ban out-of-state fuels nor place geographic restrictions on imports. *Cf. Fort Gratiot*, 504 U.S. 353; *Dean Milk Co.*, 340 U.S. 349; *Brimmer v. Rebman*, 138 U.S. 78 (1891). Nor does the LCFS single out one purely local firm or one purely local industry as the exclusive recipient of favorable treatment. *Cf. Carbone*, 511 U.S. at 391; *Bacchus*, 468 U.S. at 270.

AFPM uses the inevitable decline in California's crude oil production to create the illusion of protectionism. AFPM at 80, 80 n.26. But despite AFPM's patchwork quotations, there is no evidence of any intent to protect California's crude oil industry. *Cf. Bacchus*, 468 U.S. at 270-71; *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 189-91 (1994); *see also, supra,* Sec.

IV. As noted, in fact, California intends to do just the opposite – to reduce its consumption of crude oil and transform its fuel pool. At bottom, it is this transformation to which AFPM objects. But the Commerce Clause does not require California to remain forever dependent on petroleum as a source of fuel. *See Exxon Corp.*, 437 U.S. at 127.

In sum, the crude oil portion of this appeal is moot and the district court's order should be vacated. If this Court reaches the merits, the district court's order should be reversed and judgment should be entered for ARB. The 2011 provisions did not discriminate against out-of-state crude oils. Should the Court conclude otherwise, ARB respectfully requests that this Court selectively sever the offending portion of the crude oil provisions to ensure stability with regards to the LCFS's ongoing operation.[14]

VI. UPHOLDING THE LCFS WILL NOT OPEN A PANDORA'S BOX OF PROBLEMATIC STATE REGULATIONS

[14] AFPM asserts that ARB has waived this request, AFPM at 87 n.29, but there was no briefing (or hearing) on any aspect of remedy below, and this Court generally finds severability waived only in extreme circumstances. *See, e.g., Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 (9th Cir. 2011) (finding waiver where City failed to raise the issue in its briefs or at oral argument). Severability does not "depend on the factual record developed below" and may be considered by this Court. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (internal quotation omitted). Leaving non-offending portions of the crude oil provisions in place would allow the LCFS's credit and deficit mechanism to remain functional.

Appellees urge that upholding the LCFS will open the floodgates to all manner of problematic state regulation and will even end "the Nation's common market." RMFU at 92; *see also id.* at 55, 60, 91-92, 105-109; AFPM at 44-45. Hyperbole aside, the constitutionality of Appellees' hypotheticals can be resolved under the limitations on state authority that are delineated in existing law – limitations that would remain unchanged by upholding the LCFS.

Appellees assert that, if the LCFS is constitutional, states would have free reign to employ lifecycle analysis with a host of products from oranges to automobiles. RMFU at 106; AFPM at 44. But that does not inexorably follow. Transportation fuels produce more GHG emissions than any other sector of California's economy. *E.g.,* ER 4:767 at ¶ 8. Further, the effectiveness of the lifecycle analysis for quantifying GHG emissions from fuels is well-recognized. *See, e.g.,* 42 U.S.C. § 7545(o)(1)(C); ER 2:225. And, the LCFS is expressly designed to spur the development of next-generation transportation fuels, a process that is already underway. *See, e.g.,* ER 2:211-12.

Thus, while the lifecycle emissions of other products can be measured, the benefits of doing so would likely be far less clear. As a result, a lifecycle-based regulation of, say, oranges would appropriately receive

careful scrutiny regarding its purpose – particularly if the state was not regulating industries with greater emissions. *See, e.g., Baldwin*, 294 U.S. at 523-24 (rejecting proffered justification for discriminatory law as insufficiently "direct and certain"). Even if the purpose were not pretextual, the law would still have to survive the balancing of benefits against burdens under *Pike*.

RMFU also argues that upholding the LCFS will "liberate every state to favor in-state producers over out-of-state producers, who necessarily have longer distances to ship." RMFU at 91. But the LCFS neither favors in-state producers over out-of-state competitors nor discriminates among fuels based on the distances they travel. *See, supra*, Sec.III. Upholding the LCFS would not allow Florida to place "a retail surcharge on the sale of oranges transported long distances," because the LCFS does nothing of the kind. *See* RMFU at 92. Further, such a surcharge implicates economic protectionism and would be vulnerable on that basis regardless of the outcome here.

Appellees' other hypotheticals are even more fanciful. They suggest that upholding the LCFS would mean that states could penalize out-of-state products based on differences in minimum wage standards or labor laws. RMFU at 44, 55, 108; AFPM at 45. But states may not impose policies on

other states as a condition of importation. *E.g., Meyer II*, 165 F.3d at 1153. The LCFS does not do so, and upholding it would have no effect on this rule. Further, if California penalized imported products based on wages in other states because "workers in California suffer from competition," RMFU at 107, 44; AFPM at 45, that would be pure economic protectionism and unconstitutional. *See Baldwin*, 294 U.S. at 522 ("[New York may not guard its farmers] against competition").

The dormant Commerce Clause doctrine strikes an important balance between the autonomy of states in our federal system and the interests in a robust, national economy. *Kentucky*, 553 U.S. at 338. The LCFS is entirely consistent with that balance, and affirming its constitutionality will not change the law.

VII. SECTION 211(C)(4)(B) CONFIRMS CALIFORNIA'S AUTHORITY TO ADOPT THE LCFS

As Appellants have demonstrated, the LCFS does not violate the dormant Commerce Clause. Although the LCFS is the first regulation of its kind, this case neither calls for, nor requires, the dramatic expansion in the doctrine advocated by Appellees. *See Walsh*, 538 U.S. at 661 (upholding "unique" regulation under existing precedent).

In fact, state policy innovation in response to complex new problems is one of federalism's signal virtues, and California has a long history of regulatory leadership in the field of air pollution control. *See* Opening Brief at 10-13; Env. Law Profs. at 11-14. California also has an explicit warrant from Congress to continue that leadership role with respect to emissions from transportation fuels. 42 U.S.C. § 7545(c)(4)(B); RMFU at 112 n.18 ("Section 211(c)(4)(B) was added to accommodate [California's regulatory innovation]."). Congress, of course, is the very entity upon whose power California has supposedly encroached.

The LCFS continues the tradition of regulatory innovation that Congress recognized and protected when it "consciously chose to permit California to blaze its own trail with a minimum of federal oversight." *See Ford Motor Co. v. E.P.A.*, 606 F.2d 1293, 1297 (D.C. Cir. 1979) (discussing Clean Air Act Section 209(b) which, like Section 211(c)(4)(B), permits California to set its own standards). Thus, to the extent this case turns on California's decision to adopt a science-driven, non-protectionist and innovative approach to regulating emissions from its fuel consumption, that decision was "within the scope of the congressional authorization." *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652-53 (1981).

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

The LCFS's purpose is to reduce GHG emissions from the transportation fuel used in California motor vehicles. The carbon intensity standard quantifies those emissions, including tailpipe emissions. As the district court correctly held, the LCFS is within the bounds of 211(c)(4)(B), because it is "a control" on fuel carbon adopted "for the purpose of motor vehicle emission control." *See* 42 U.S.C. § 7545(c)(4)(B); *see also* ER 1:104.

Appellees' contrary arguments have no merit. First, unlike the MTBE ban in *Oxygenated Fuels*, the LCFS addresses air pollution. *Cf. Oxygenated Fuels Ass'n, Inc. v. Davis*, 331 F.3d 665, 669 (9th Cir. 2003) (viewing MTBE ban as adopted "specifically and solely for the purpose of protecting ground and drinking water"); *see also* RMFU at 120. In fact, AFPM concedes that "the LCFS was enacted [at least] *in part* for the purpose of motor vehicle emission control." AFPM at 105. That suffices. *See Oxygenated Fuels*, 331 F.3d at 669 (recognizing that laws with multiple objectives still fit under 211(c)(4)(B)).

Second, Appellees' focus on tailpipe emissions is too narrow. *See* RMFU at 120-123; AFPM at 105. Appellees themselves have embraced the lifecycle as the measure of a fuel's GHG emissions. ER 2:225. They are

also wrong to assert that "the LCFS has *nothing* to do with what comes out of California motor vehicles." RMFU at 120; AFPM at 105. Lifecycle analysis incorporates tailpipe emissions into its calculation. ER 4:769 at ¶ 15. Furthermore, the LCFS is designed to transform the fuels landscape in California. For example, it rewards the use of low-carbon electricity that results in zero tailpipe emissions. The LCFS is, thus, designed to affect what goes into, and comes out of, California motor vehicles.

Third, AFPM's argument that carbon intensity is not a "characteristic or component of a fuel" also lacks merit. *See* AFPM at 106-107. A product's characteristics do not have to be physically manifest in order to be properly considered by policy makers, including states. *See, supra*, at p. 8. And Congress itself has recognized lifecycle emissions as a characteristic upon which renewable fuels may be distinguished. *E.g.,* 42 U.S.C. § 7545(o)(1)(B) (defining "advanced biofuel" on the basis of lifecycle emissions).

In any event, the words "characteristic or component" are found in Section 211(c)(4)(A), which applies to all states *except* California, and not in Section 211(c)(4)(B). *Compare* 42 U.S.C. § 7545(c)(4)(A) *and* 42 U.S.C. § 7545(c)(4)(B). This Court did describe these two provisions as "precisely coextensive," as Appellees note, but *held* that if a regulation was not under

subdivision B, it could not fit under A. *Oxygenated Fuels*, 331 F.3d at 670. It does not necessarily follow from that holding that a regulation outside the scope of A is also automatically outside the scope of B. Although Section 211(c)(4)(B) does not limit California to regulating "characteristics or components," this distinction is likely irrelevant because carbon intensity is a characteristic of a fuel.

The LCFS was adopted for the purpose of controlling GHG emissions that result from California's consumption of transportation fuels and fits within the bounds of Section 211(c)(4)(B).

B. Section 211(c)(4)(B) Negates Appellees' Efforts To Expand The Dormant Commerce Clause Doctrine

Appellees contend that even if the LCFS fits within 211(c)(4)(B), that provision is merely a "savings clause" and, therefore, has no bearing on the dormant Commerce Clause. RMFU at 110-19; AFPM at 97-104. But here Congress did "more than leave standing *whatever valid state laws then existed.*" *Wyoming*, 502 U.S. at 458 (internal quotation omitted) (emphasis added); *see also* Opening Brief at 105-107. Rather, Congress intended for California to continue to act as a laboratory for regulatory innovation regarding emissions from transportation fuels and permitted it to do so "at any time" and regardless of any action by EPA. 45 U.S.C. § 7545(c)(4)(B);

see also Opening Brief at 10-13 (describing California's environmental leadership and congressional recognition of it).

In addition, Congress was cognizant of the interstate fuels market when it adopted Section 211(c)(4)(B), recognizing California's value as a regulatory innovator. *See e.g.*, 42 U.S.C. § 7545(c)(1) (describing commerce in fuels); *see also* RMFU at 112 n.18. Nonetheless, despite inevitable impacts on interstate commerce, Congress intended that California would respond to new pollution challenges – and deploy new regulatory tools – in the future, as it had in the past. That is what California has done with the LCFS. Fuel carbon emissions cannot be measured effectively without a lifecycle analysis. *See* Opening Brief at 19-23. Section 211(c)(4)(B) demonstrates that Congress was counting on California to provide regulatory innovation for transportation fuels, and a holding that the lifecycle analysis inherently violates the dormant Commerce Clause would be inconsistent with congressional intent. Section 211(c)(4)(B) has given California a bright green light to experiment in this area.

ARB does not claim, as Appellees allege, that Section 211(c)(4)(B) provides California with unbridled power with respect to transportation fuels. *E.g,* AFPM at 104. For example, Section 211(c)(4)(B) would not shield a protectionist regulation from dormant Commerce Clause scrutiny,

because it applies only to regulations adopted "for the purpose of motor vehicle emissions control." This Court need not decide the full scope of congressional authorization contained in Section 211(c)(4)(B). This Court need only consider whether the use of the scientifically sound, non-protectionist lifecycle analysis to reduce carbon pollution from California's fuel consumption falls within Section 211(c)(4)(B)'s protection for California's policy innovation. It does.

This conclusion precludes a Balkanization claim, as Appellees' own admissions demonstrate. Appellees argue that "Section 211(c)(4) emerged from the need to ensure that states would not enact a patchwork of regulation themselves." RMFU at 112 n.31. Thus, Section 211(c)(4) precludes a Balkanization claim, because Section 211(c)(4)(A) expressly recognizes that states might adopt different fuels regulations and Section 211(c)(4)(B) authorizes California to maintain its unique standards, even when EPA pre-empts the other states. Appellees concede, as they must, that Congress considered the risk for Balkanization in enacting Section 211(c)(4) and approved California's separate fuels authority anyway. RMFU Br., at 112, n.31. This authorization appears on the face of the statutory provisions and is therefore "unmistakably clear." *See S. Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Thus, the question as to what effect

other states' fuel carbon regulations might have on interstate commerce is not at issue here. Appellees' Balkanization claim has no merit.

Section 211(c)(4)(B) also disposes of Appellees' *Pike* claim.[15] Just as Congress understood the risk of patchwork state regulation, Congress also understood that California's regulations would target particular pollutants, and that some fuels or fuel additives would fare better than others under those regulations, depending on their contributions to the regulated pollutant. That is, Congress considered the burdens and effects RMFU alleges here – that some fuels would become less competitive in California's market. Congress, then, already balanced the interests at stake in the *Pike* test and chose to let California proceed.

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[15] Appellees ask this Court to remand to the district court for application of the *Pike* balancing test, if Appellants prevail on appeal. RMFU at 123-128; AFPM at 88 n.30. RMFU makes no mention of its discriminatory effects claim, which the district court similarly did not reach. ER 1:48. Both Appellees ignore that ARB cross-moved for summary judgment, based on Section 211(c)(4)(B), on *all* dormant Commerce Clause claims. *Cf.* AFPM at 88 n.30; RMFU at 124; *see also* ER 1:85 (noting cross-motion). Appellants respectfully request that this Court grant them summary judgment on RMFU's *Pike* and effects claims, for the reasons described in this section. *See also* Opening Brief at 108, 64-66; *Cornhusker Cas. Ins.*, 553 F.3d at 1192 (remanding to grant judgment on grounds not decided by district court).

In sum, the LCFS is within the scope of 211(c)(4)(B) and is the kind of innovative regulation for which Congress carved out California's special role. That recognition exempts the LCFS, at a minimum, from Appellees' Balkanization and *Pike* claims and protects the use of the lifecycle analysis as the only means by which fuel carbon can effectively be controlled.

VIII. THE LCFS SURVIVES STRICT SCRUTINY

A. ARB Did Not Waive Its Strict Scrutiny Argument

RMFU argues that ARB waived its strict scrutiny argument by failing "to dispute this issue below" and "is not entitled to judgment now." RMFU 94. RMFU relies on *Kassenbaum v. Steppenwolf Prods. Inc.*, 236 F.3d 487, (9th Cir. 2000), in which this Court noted it "should not reverse a summary judgment and order judgment for a non-moving party based on an issue that the movant had no opportunity to dispute in the district court." *Id.* at 495. But here the district court decided the strict scrutiny issue based on both parties' arguments. ER 1:41-44, 1:67-68.[16] This issue is squarely before this Court.

[16] Following Circuit Rule 30-1.5, Appellants excluded briefs from the excerpts of record. If needed, Appellants' briefs discussing strict scrutiny can be found in the district court's docket (ECF 139 at 12-13; ECF 173 at 11).

B. The Supreme Court Has Established That The Effects of Climate Change Are Indisputably Local

Turning to the merits, RMFU claims, in essence, that no state law seeking to lower GHG emissions can withstand strict scrutiny, because the problem of climate change is global, not local. RMFU 95-96. RMFU's position misses the Supreme Court's point in *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007): that "climate change risks are widely shared" does not minimize their local impacts. The climate change effects that California seeks to diminish – harms to its water supply, to its lands, and to the health of its residents –are indisputably local.

C. The LCFS's Legitimate Purpose To Reduce The Carbon Intensity Of Its Transportation Fuels Is Unrelated to Economic Protectionism

In AFPM's view the entire LCFS is a pretext to advantage California's oil and ethanol industries over foreign competition. AFPM 89-92. But the LCFS's legitimate purpose is manifest. California created the LCFS in order to reduce the carbon intensity of California's transportation fuels and thereby reduce its emissions by 16 million metric tons in 2020, ER 9:2197, to promote innovation and development of low carbon fuels, *id.*, and to protect California's environment and public health, ER 9:2231-2233. *See also* Br. of the States of Oregon, *et al.* as Amici Curiae in Support of

Appellants at 16-18; Br. of Amici Curiae Ken Caldeira, *et al.* at 19-25. Regardless of origin, low carbon fuels stand to gain under the LCFS. ER 2:165-196; RJN, Exh. A at 47-42 (Table 6). These legitimate goals are unrelated to economic protectionism. *See also, supra,* Sec. IV.

RMFU incorrectly argues that the LCFS has no legitimate purpose, because it will not by itself reduce global warming. Actions to "slow the pace of global emissions increases" are themselves significant. *Mass. v. EPA*, *supra*, 549 U.S. at 525-526.[17] And the LCFS slows that pace by reducing emissions from California's largest-emitting sector.

Appellees both argue that the LCFS will produce only fuel "shuffling," in which low carbon fuels are shipped to California and high carbon fuels go elsewhere. RMFU 96-97, AFPM 93-94. Appellees argue that this "shuffling" of fuels will produce no emissions reductions and will, in fact, result in *higher* emissions. There is no evidence that the LCFS will produce higher emissions, particularly since substantial "shuffling" was occurring before the LCFS. *See* ER 16:3764-65 (sealed). These contentions further miss the mark, because they ignore that the development of much lower

[17] RMFU also inappropriately offers as "fact" arguments of an industry research group (Sierra Research) and statements by commenters in the rulemaking process. RMFU 96 (citing ER 15:3755-56, 7:1687).

carbon fuels will be necessary to meet the LCFS's standard in the later years. ER 4:785 at ¶ 72, 9:2197, 9:2218-19, 9:2226. Even if some shuffling were to occur in the early years, the ultimate transformation of California's fuel pool – strongly aided by the LCFS's incentives – will result in real and significant emission reductions.

D. The Rulemaking Record Demonstrates That The LCFS's Purpose Cannot Adequately Be Served By Nondiscriminatory Means

The transportation sector is responsible for nearly 40% of California's GHG emissions, ER 4:767, and California cannot achieve its ambitious goals of reducing statewide GHG emissions while giving any part of the transportation sector a free ride – be it vehicles, drivers or fuels. *See* Cal. Health & Saf. Code, § 38561; *see also* ER 4:767 at ¶ 8, 9:2231-2233. Thus, California has adopted laws and regulations, including the LCFS, that target reductions from all these sources. *See* Cal. Code Regs., tit. 13, § 1961.1; S.B. 375, 2007-2008 Leg., Reg. Sess. (Cal. 2008), § 1; Cal. Code Regs., tit. 17, §§ 95480-90. Appellees' "lack of necessity" argument places the full burden of transportation emissions reductions on vehicle manufacturers and drivers. Taken to its logical extension, Appellees' argument would allow any contributor of GHG emissions to evade regulation by demanding that California squeeze more reductions out of another sector of the economy.

Appellees' other arguments fare no better. RMFU argues that California has rejected other alternatives because it wishes to export its burden. RMFU 98. It is far from certain that out-of-state firms "must inevitably be the ones to bear [any LCFS] costs." *SPGGC*, 505 F.3d at 194; *see also* AFPM at 26. Further, California's enormous effort to reduce its GHG emissions, of which the LCFS is an integral part, belies any claim that California is attempting to shift the burden of addressing climate change onto others. Appellees also argue that a tax on fossil fuels would reduce GHG emissions, RMFU 98, AFPM 94-95, but such a tax, without a basis in lifecycle emissions, provides no incentive for major innovations in next-generation, lower carbon fuels. That innovation is one of the LCFS's primary objectives, and the LCFS's emission reductions goals are by all indications impossible without it.

California's legitimate interest cannot be met by alternative means. And, by establishing a flexible compliance mechanism, including credit-trading, that does not ban any particular fuels, the LCFS does not "needlessly obstruct interstate trade." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

IX. THE PRELIMINARY INJUNCTION SHOULD BE REVERSED AND VACATED WITH GUIDANCE FOR REMAND PROCEEDINGS

The parties agree that the preliminary injunction must be reversed and vacated if Appellants prevail on their dormant Commerce Clause appeal. Appellants' Opening Brief demonstrated the serious error of the district court's preemption analysis, Opening Brief at 109-120, and its conclusion that RMFU's allegations of constitutional violations, under the Commerce and Supremacy Clauses, constituted *per se* irreparable injuries, *id.* at 120. ER 1:81. Appellants respectfully request that this Court clarify these legal issues on remand. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1142 (9th Cir. 2009).

CONCLUSION

For all of the above reasons, and those set forth in our opening brief, Appellants respectfully submit that 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.

Dated: September 6, 2012 Respectfully submitted,

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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.

STATEMENT OF RELATED CASES

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

Dated: September 6, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 12-15135

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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September 6, 2012
Dated

/s/ M. Elaine Meckenstock
M. Elaine Meckenstock
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 electonically filed **APPELLANTS' REPLY 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 **September 6, 2012.**

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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