In the United States Court of Appeals

for the Ninth Circuit

ROCKY MOUNTAIN FARMERS UNION, et al., Plaintiffs-Appellees, vs. JAMES 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.	No. 12-15131 (E.D. Cal Nos. 09-CV-02234 & 10-CV-00163)

BRIEF OF AMICUS CURIAE WESTERN STATES PETROLEUM ASSOCIATION AND OREGON PETROLEUM ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE AMERICAN FUELS & PETROCHEMICAL MANUFACTURERS ASSOCIATION AND AFFIRMANCE

PILLSBURY WINTHROP
SHAW PITTMAN LLP
KEVIN M. FONG
50 Fremont Street
San Francisco, CA 94105
Telephone: (415) 983-1000

Attorneys for Amici Curiae
WESTERN STATES PETROLEUM
ASSOCIATION and OREGON
PETROLEUM ASSOCIATION

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Western States Petroleum Association ("WSPA") does not have any parent corporation, and no public company owns 10% or more of WSPA stock.

Amicus curiae Oregon Petroleum Association ("OPA") does not have any parent corporation, and no public company owns 10% or more of OPA stock.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure,[1] the Western States Petroleum Association ("WSPA") and the Oregon Petroleum Association ("OPA") respectfully submit this amicus brief in support of plaintiff-appellee American Fuels & Petrochemical Manufacturers Association and affirmance.[2]

WSPA and OPA support the position of the AFPM Plaintiffs that the district court should be affirmed. WSPA and OPA submit, however, that there is need for additional argument, as provided in this brief. As discussed below: (1) the challenges to the LCFS crude oil provisions are not moot, (2) Section 211(c) of the Clean Air Act does not insulate LCFS from challenges under the Dormant

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, WSPA and OPA state that: (A) there is no party or counsel for a party in the pending appeal who authored this amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than WSPA, OPA, and their members.

All parties have consented to the filing of amicus briefs that are timely and that otherwise comply with Rule 29.

[2] Plaintiffs-Appellees American Fuels & Petrochemical Manufacturers Association, American Trucking Associations, The Center for North American Energy Security, and the Consumer Energy Alliance (collectively, "AFPM Plaintiffs") filed their appellees' brief ("AFPM Br.") on August 6, 2012.

Commerce Clause, and (3) Section 211(c)(4)(B) would not apply to LCFS regulations adopted by other States.

A. Western States Petroleum Association.

The Western States Petroleum Association is a non-profit trade association that represents more than twenty companies that explore for, develop, produce, refine and transport petroleum and petroleum products in the six western states of Arizona, California, Hawaii, Nevada, Oregon and Washington. Founded in 1907, WSPA is the oldest petroleum association in the United States. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible.

Many WSPA members are directly affected by the Low Carbon Fuel Standard ("LCFS") regulations that are at issue in this case. WSPA and its members have a strong interest in the need for policies that can realistically and practically reduce greenhouse gas emissions without jeopardizing fuel supplies, eliminating jobs, and destabilizing fuel markets. WSPA members have a direct interest in LCFS and the issues in this case.

In addition, WSPA has actively participated in the rulemaking process regarding the LCFS regulations. WSPA actively participated in every meeting of the California Air Resources Board's ("ARB") LCFS High Carbon Intensity Crude Oil ("HCICO") Screening

Workshop held during 2010 and 2011. Most recently, WSPA provided public comment to ARB prior to, during, and after ARB's December 16, 2011 hearing concerning proposed amendments to the LCFS.

B. Oregon Petroleum Association.

The Oregon Petroleum Association is an Oregon association of fuel distributors, retailers, commercial fueling and heating oil marketers. OPA has over 140 fuel marketer, dealer and associate members; OPA members account for more than 65% of all petroleum products sold in Oregon. During the past several years, OPA and its members have been deeply involved in policy debates on proposals for adopting a low carbon fuel standard in Oregon. OPA is particularly concerned that adoption of such standards by individual States would create a Balkanized patchwork of state regulations that would disrupt the national market for fuel and lead to higher fuel prices in Oregon.

Oregon is highly dependent on the national market for fuel — thus, any loss of California's refining capacity and disruption to the California market caused by California's LCFS would inevitably have an adverse impact on Oregon, OPA, and its members. Conversely, the demand in Oregon for fuel is itself an important part of the national fuel market. If Oregon were to follow California's lead in adopting some type of LCFS program, the national fuel market would

be well on its way to disintegrating into a patchwork of boutique state fuel markets — each with its own fuel "specially designed" for that state. The end result could be disastrous for OPA, and Oregon and other states.

ARGUMENT

I. THE CHALLENGES TO THE LCFS CRUDE OIL PROVISIONS ARE NOT MOOT.

Appellants erroneously argue that the challenges to the LCFS crude oil provisions are moot because those provisions "are being amended." Appellants' Opening Brief ("App. Opn. Br."), p. 83. Appellants assert that "ARB anticipates the amendments would become effective January 1, 2013" *if* finalized and approved. App. Opn. Br., p. 84. In fact, as Appellants tacitly recognize, ARB's administrative process is ongoing and far from complete.[3]

At its December 16, 2011 hearing concerning proposed amendments to the LCFS, the ARB Board adopted Resolution 11-39 ("Board Resolution"). *See* http://www.arb.ca.gov/regact/2011/lcfs2011/res%2011-39.pdf. In its

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[3] Moreover, as discussed by the AFPM Plaintiffs in their appellees' brief, ARB will assign "credits" and "deficits" based on the current LCFS, and those "credits" and "deficits" can be carried over to future years. *See* AFPM Br., pp. 82-83. Thus, this Court's resolution of the challenges to the LCFS crude oil provisions will, at a minimum, affect those "credits" and "deficits."

Board Resolution, ARB directed the Executive Officer of ARB to take a series of actions, including conducting a further public comment period, conducting further environmental analysis and making further modifications to the proposed amendments considered by the ARB Board on December 16, 2011. For example, regarding crude oil, the ARB Board directed the Executive Officer to continue to work with interested stakeholders to "develop additional calculation methodologies, accounting procedures, or other measures that can further refine the provisions addressing the carbon intensity of petroleum crude oils, blendstocks, intermediates, and finished products either refined in California or imported into the State …." *See id.*, p. 9.

There are numerous steps (and opportunities for changes) before final amendments to the current LCFS regulations could become effective. *See id.*, p. 9. First, the Executive Officer must complete the numerous tasks mandated by the Board Resolution to work with interested stakeholders such as WSPA. That consultation process entails, at a minimum, additional ARB staff workshops and ARB reviews of stakeholder input. Thus far, the ARB staff has conducted two public workshops to discuss lifecycle assessment of crude oil production within LCFS — one on March 19, 2012 and another on July 12, 2012. *See* http://arb.ca.gov/fuels/lcfs/lcfs_meetings/lcfs_meetings.htm (ARB

website with links to meeting notices, staff presentations, and public comments).

ARB has received numerous public comments on the proposed amendments (most recently in April 2012). *See* http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=lcfs2011. California law specifically sets forth the "basic minimum procedural requirements" for amending administrative regulations. Cal. Govt. Code § 11346(a). Particularly relevant here, California law requires an agency such as ARB to prepare "[a] summary of each objection or recommendation" made in the public comments "together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." Cal. Govt. Code § 11346.9(a)(3). Thus, ARB has a duty not just to allow public comment—ARB must actually consider changing its proposed amendments in response to the comments of WSPA and others who submitted public comments.

Once the Executive Officer develops new proposed LCFS amendments following stakeholder input, he must publish the new language, followed by another public comment period of 15 days. Cal. Govt. Code § 11346.5(a)(18). At the conclusion of the public comment period, the Executive Officer must prepare a final statement of reasons addressing any public comments on the ARB analysis of the LCFS amendments. Cal. Govt. Code § 11346.9.

The final step is transmission by the Executive Officer to the Office of Administrative Law for approval. *See* Cal. Govt. Code § 11349.3. The Office of Administrative law may approve regulations only if they meet the statutorily mandated standards of necessity, authority, clarity, consistency, reference, and non-duplication. Cal. Govt. Code § 11349.1.

Thus, the administrative process is far from complete. ARB itself has recognized that the administrative process is ongoing. On August 9, 2012, ARB issued a "Second Notice of Public Availability of Modified Text." *See* http://www.arb.ca.gov/regact/2011/lcfs2011/15daynotice.pdf. In that notice, which specified certain proposed modifications related to the LCFS crude oil provisions, ARB stated:

> "[S]taff intends to propose additional modifications related to the crude oil provisions in a subsequent notice of modified regulatory text. Accordingly, it remains ARB's intent to develop additional calculation methodologies, accounting procedures, and other measures to further refine the provisions that address the carbon intensity of petroleum crude oils, blendstocks, intermediates, and finished products refined in California or imported into the State.

> Staff intends to bifurcate adoption of the regulatory amendments presented at the December 2011 Board hearing...."

Id. Obviously, the administrative process is far from complete.

Unless and until the LCFS crude oil provisions are amended, LCFS will continue to violate the Dormant Commerce Clause. Even if the LCFS crude oil provisions are ultimately amended sometime in the future, Appellants have not shown that any amendments will cure the violations of the Dormant Commerce Clause identified by the district court.

Thus, the issues are far from "moot."

II. SECTION 211(C) OF THE CLEAN AIR ACT DOES NOT INSULATE LCFS FROM CHALLENGES UNDER THE DORMANT COMMERCE CLAUSE.

A. Appellants are wrong in asserting that Section 211(c)(4)(B) gives California "unqualified authority" and "insulates" California's fuel regulations from attack.

Appellants erroneously assert that Section 211(c)(4)(B) of the Clean Air Act gives California "unqualified authority" and "insulates" California's fuel regulations from challenges under the Dormant Commerce Clause. App. Opn. Br., pp. 104, 108. In other words, Appellants argue that LCFS may not be challenged under the Dormant

Commerce Clause even if it discriminates against out-of-state commerce and regulates extraterritorially. *See* App. Opn. Br., pp. 108-109.

The district court correctly rejected Appellants' argument, holding that "Section 211(c)(4)(B) provides no express or unambiguous authority for California to violate the Commerce Clause." Appellants' Excerpts of Record ("ER"), p. 115. "Section 211(c)(4)(B) exempts California from federal preemption in regulating fuels and fuel additives for the purposes of motor fuel vehicle emissions control only. That statute provides no explicit authority to regulate interstate and foreign commerce through a fuels provision." ER 115.

While claiming that Congress has "'unambiguously' insulated state regulations from dormant Commerce Clause attack" (App. Opn. Br., p. 105), Appellants avoid addressing the actual language of Section 211(c)(4)(B). *See* App. Opn. Br., p. 105. Under Section 211(c)(4)(B), California (identified as any state for which application of 42 U.S.C. § 7543(a) has been waived under 42 U.S.C. § 7543(b)) "may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any

fuel or fuel additive."[4] 42 U.S.C. § 7545(c)(4)(B). That is all that Section 211(c)(4)(B) says. Nothing in the language of Section 211(c)(4)(B) satisfies "the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984); *see Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982).

The U.S. Supreme Court has explained the compelling reasons for requiring an "unmistakably clear" showing of congressional intent to insulate state laws from scrutiny under the dormant Commerce Clause:

- When a State's regulations impose a burden upon persons outside the State, such legislative action "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *Wunnicke*, 467 U.S. at 92.

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[4] Section 211(c)(4)(B) is an exception to the express preemption provision in Section 211(c)(4)(A), which provides that "[e]xcept as otherwise provided in subparagraph (B) or (C), no State … may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or vehicle engine" if the EPA has promulgated a control or prohibition or found that none is necessary. 42 U.S.C. § 7545(c)(4)(A).

- In contrast, when Congress acts, "there is significantly less danger that one state will be in a position to exploit others. *Id.*

- "A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce. *Id.*

Here, Section 211(c)(4)(B) does not contain such "unmistakably clear" congressional intent.

Rather than addressing the language of Section 211(c)(4)(B), Appellants chose to focus on the legislative history of *another* provision of the Clean Air Act, Section 209(b), which deals with California's authority to set motor vehicle emission standards if authorized by EPA. App. Opn. Br., pp. 106-107. What is significant is that Appellants do not claim that anything in the legislative history of *Section 211(c)(4)(B)* makes it "unmistakably clear" that Congress intended to insulate California's fuel regulations from the reach of the Dormant Commerce Clause.

"[T]he sole purpose of [Section 211(c)(4)(B)] is to waive for California the express preemption provision found in [Section 211(c)(4)(A)]." *Davis v. U.S. E.P.A.*, 348 F.3d 772, 786 (9th Cir. 2003). The District Court properly noted that "[a] federal statute that merely exempts state law from the preemptive effect of another

federal provision does not authorize a violation of the Commerce Clause." ER 114-115; *citing New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982). Appellants have failed to show any purpose of Section 211(c)(4)(B) beyond exempting California from the preemptive effect of Section 211(c)(4)(A) of the Clean Air Act. Certainly, Appellants have failed to establish that it is "unmistakably clear" that Congress intended to insulate California's fuel regulations from challenges under the Dormant Commerce Clause.

B. Appellants' erroneous view would essentially give California carte blanche to regulate without limitation from the Dormant Commerce Clause.

Appellants argue that California has "broad, *unqualified* authority to prohibit or control fuels" and that Congress has chosen "to insulate California's regulations from dormant Commerce Clause scrutiny." App. Opn. Br., p. 108 (emphasis added). Quite simply, Appellants' view is that even if a California statute "might otherwise violate the Commerce Clause, it is authorized by Congress." App. Opn. Br., p. 109.

Under Appellants' erroneous view, *any* action taken by California to regulate motor vehicle fuel for emission control purposes would be insulated from a Dormant Commerce Clause challenge. California would be free in such regulations to expressly discriminate

against out-of-state interests, directly regulate extraterritorially, or significantly burden interstate commerce—California would essentially have carte blanche to regulate without limitation from the Dormant Commerce Clause.

For example, under Appellants' erroneous view of Section 211(c)(4)(B), California would be free to require motor vehicle fuel to contain a minimum percentage produced from California crude oil. Or, under Appellants' view, California would be free to require motor vehicle fuel to contain a minimum percentage of ethanol produced from feedstock grown in California. Appellants' view of Section 211(c)(4)(B) would even allow California to ban motor vehicle fuel from out-of-state sources, based on a purported purpose of emission control.

In enacting Section 211(c)(4)(B), Congress did not express an intent to authorize any such violations of the Dormant Commerce Clause by California. Appellants have failed to establish that it is "unmistakably clear" that Congress intended to insulate California's fuel regulations from challenges under the Dormant Commerce Clause.

C. In any event, Section 211(c)(4)(B) would not apply to LCFS regulations adopted by other States.

In their amicus brief supporting Appellants, several States (led by the State of Oregon) assert that "low carbon fuel standards such as

California's are an important means of reducing greenhouse gas emissions" and that California "is not alone in its efforts to reduce greenhouse gas emissions through an LCFS." Brief of the States of Oregon, et al., as Amici Curiae in Support of Appellants ("Oregon Amicus Br."), pp. 1, 3-4. What the Oregon Amicus Brief fails to mention, however, is that Section 211(c)(4)(B) would not apply to LCFS regulations adopted by other States.

Section 211(c)(4)(B) by its terms applies only to California. This Court has recognized that "California is the only state permitted by the Clean Air Act to 'prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.' 42 U.S.C. § 7545(c)(4)(B)." *Davis*, 348 F.3d at 777; *accord*, *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1080, n.9 (D.C.Cir. 1996) ("California is the only state that qualifies for the waiver, because it was the only state that had adopted emissions control standards prior to March 30, 1996").

Without Section 211(c)(4)(B), LCFS regulation by those States would be expressly preempted under the Clean Air Act. This Court has recognized that "[t]he structure of [Section 211(c)(4)] makes it clear that the sole purpose of [Section 211(c)(4)(B)] is to waive for California the express preemption provision found in [Section 211(c)(4)(A)]." *Davis*, 348 F.3d at 786. The express preemption provision in Section 211(c)(4)(A) governs "any control or prohibition

respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine." 42 U.S.C. § 7545(c)(4)(A).

Regardless what impact Section 211(c)(4)(B) might have on California's LCFS, Section 211(c)(4)(B) would not apply to LCFS regulations adopted by other States.

CONCLUSION

For the reasons stated above, amici curiae Western States Petroleum Association and Oregon Petroleum Association respectfully submit that the district court should be affirmed.

Dated: August 13, 2012.

PILLSBURY WINTHROP
SHAW PITTMAN LLP
KEVIN M. FONG

By: s/ Kevin M. Fong
Kevin M. Fong
Attorneys for Amici Curiae
WESTERN STATES PETROLEUM ASSOCIATION and OREGON PETROLEUM ASSOCIATION

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, WSPA and OPA identify the following related cases pending in this Court, which arise out of the same case in the district court:

Rocky Mountain Farmers Union, et al. v. James Goldstene, et al., No. 12-15131.

Rocky Mountain Farmers Union, et al. v. James Goldstene, et al., No. 12-15135

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 2,998 words.

Dated: August 13, 2012.

s/Kevin M. Fong
Kevin M. Fong

9th Circuit Case Number(s) 12-15131

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Signature (use "s/" format) [s/Kevin M. Fong]

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

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

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

Douglas F. Gansler, Maryland Department of the Environment,1800 Washington Boulevard, Baltimore, MD 21230

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

Peter F. Kilmartin, OFFICE OF ATTORNEY GENERAL, State of Rhode Island, 50 South Main Street, Providence, RI 02903

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

William H. Sorrell, OFFICE OF THE ATTORNEY GENERAL, 109 State St., Montpelier, VT 05609-1001