Nos. 12-15131, 12-15135

United States Court of Appeals for the Ninth Circuit

ROCKY MOUNTAIN FARMERS UNION, ET AL.,
Plaintiffs-Appellees
v.
JAMES N. GOLDSTENE, ET AL.,
Defendants-Appellants

On Appeal from the United States District Court for the Eastern District of California, Fresno Division (O'Neill, J.)
Civil Case Nos. 1:09-02234 and 1:10-00163

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees Rocky Mountain Farmers Union; Redwood County Minnesota Corn and Soybeans Growers; Penny Newman Grain, Inc.; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Rex Nederend; Growth Energy; and the Renewable Fuels Association make the following disclosures:

1. Rocky Mountain Farmers Union ("RMFU") is a cooperative association representing family farmers and ranchers in Wyoming, Colorado, and New Mexico. RMFU has no parent company, and no publicly-held company has a 10% or greater ownership interest in RMFU.

2. Redwood County Minnesota Corn and Soybeans Growers ("Minnesota Grower's Association") is a not-for-profit corporation located in Redwood County, Minnesota. Minnesota Grower's Association has no parent company, and no publicly-held company has a 10% or greater ownership interest in Minnesota Grower's Association.

3. Penny Newman Grain, Inc. ("Penny Newman") is a leading merchant in the market for grains and feed by-products, headquartered

in Fresno, California. Penny Newman has no parent company, and no publicly-held company has a 10% or greater ownership interest in Penny Newman.

4. Fresno County Farm Bureau ("FCFB") is a non-profit membership organization based in Fresno County. FCFB has no parent company, and no publicly-held company has a 10% or greater ownership interest in FCFB.

5. Nisei Farmers League ("Nisei") is a farmer and grower-support organization headquartered in Fresno, California. Nisei has no parent company, and no publicly-held company has a 10% or greater ownership interest in Nisei.

6. California Dairy Campaign ("CDC") is a non-profit corporation based in Turlock, California. CDC has no parent company, and no publicly-held company has a 10% or greater ownership interest in CDC.

7. Rex Nederend is an individual farmer and rancher who owns a dairy near Tipton, California, and ranches near Wasco and Lemoore, California. The disclosures required under Rule 26.1 are inapplicable to Mr. Nederend.

8. Growth Energy is a non-profit corporation whose members include firms that produce ethanol, as well as other companies who provide equipment and technology used to produce ethanol from corn. Growth Energy has no parent companies, and no publicly-held company has a 10% or greater ownership interest in Growth Energy.

9. The Renewable Fuels Association ("RFA") is a non-profit trade association representing companies that produce fuel ethanol for purposes of marketing that product to blenders and marketers of gasoline. RFA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in RFA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Treatise

INTRODUCTION

The question presented in this case is whether California can use its economic power to coerce wholly out-of-state behavior by industry located beyond its borders, and to penalize out-of-state businesses in order to build its local economy at the expense of other states. The answer is plainly no.

As the District Court correctly held, California's Low Carbon Fuel Standard ("LCFS") blatantly violates several tenets of the dormant Commerce Clause by regulating extraterritorially and discriminating against interstate commerce. Through the LCFS, the California Air Resources Board ("CARB") purports—in its own words—to "assume[] legal and political responsibility for emissions of carbon resulting from production and transportation, *regardless of location*, of transportation fuels actually used in California." ER15:3597 (CARB's Cross-Mot. for Summ. J.) (emphasis added).[1] Unlike true motor vehicle fuel standards,

[1] Citations to the Excerpts of Record and the Supplemental Excerpts of Record will be to "ER[Vol.]:[Page]," followed by parenthetical identification of the record document cited. Record references to CARB, *Initial Statement of Reasons in Support of Proposed Rulemaking—Low-Carbon Fuel Standard* (Mar. 5, 2009), are abbreviated as "ISOR." Record references to CARB, *Final Statement of Reasons—Low-Carbon*

(Continued…)

the LCFS has nothing to do with types of fuel or fuel additives permitted in California, nor even with emissions from those fuels when used *in California*. Rather, the LCFS is aimed "not so much [at] what is contained in a fuel, but [at] *how was that fuel made*," regardless of the state or country in which the fuel is produced. ER10:2360 (ISOR) (emphasis added). That is a breathtaking assertion of power over purely out-of-state activity.

At the same time, CARB conveniently stacks the deck to favor fuels made in California over those made in the Midwest. Simply put, when comparing identical products made from identical processes head-to-head under the LCFS, the fuel made in California automatically receives approximately a ten percent advantage over Midwest competition—an advantage large enough that CARB projects that Midwest producers will be completely driven out of the California ethanol market by 2018. This is no accident. CARB explained from the beginning that the LCFS was designed to "reduc[e] the volume of transportation fuels that are imported from other states," ER7:1689

Fuel Standard (Dec. 2009), are abbreviated as "FSOR." The LCFS, which is codified at 17 Cal. Code Regs. §95480 *et seq.*, will be cited as "LCFS §[Section]."

(FSOR), and thereby improve California's "business competitiveness." ER7:1684 (FSOR). In particular, by CARB's own admission, the LCFS will drive Midwest ethanol out of California and replace it with "biofuels produced in the State," thereby "keep[ing] more money in" state. ER7:1689 (FSOR).

CARB attempts to justify its novel, first-of-its-kind regulation in the name of controlling the emissions of greenhouse gases ("GHGs") that are linked to global warming. But it is undisputed that California's efforts will have no effect on global warming. The *only* anticipated result of the LCFS, in fact, is economic protection for California's parochial businesses against out-of-state competition. Even if the LCFS were a partial remedy for global warming, CARB has chosen to export the burden of reducing GHG emissions to *other* states and their industries, rather than undertaking it at home. The Framers of the Constitution determined long ago—and the Supreme Court has repeatedly confirmed—that if our national economic union is to be preserved, regulations such as the LCFS must not be allowed to stand.

One of the central purposes of creating the constitutional Union in 1787 was to establish one of the world's first and largest free trade zones, in which each state would have unhindered authority to govern economic activity within itself, but no power to impede trade with other states, either out of disagreement with policies and practices in those states or the desire to favor in-state industries. Unhindered trade across state lines, coupled with equal opportunities for businesses in one state to compete anywhere else in the Nation, still forms the bedrock of the national economic system.

While, in our system of federalism, states are free to be "laboratories of innovation," they may not take their experiments on the road. If large states could impose their wills on their smaller counterparts, or export their economic burdens by setting up obstacles to trade and discriminating against other states (or both, as CARB has attempted here), the Nation would be subject to the same "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979). The dormant Commerce Clause thus undergirds the national economic union, and "the solidarity and prosperity of this Nation" depends on courts continuing to give it force. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *see Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (observing that the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

Permitting the LCFS to stand would be to abandon these fundamental constitutional principles. However laudable CARB's goals for reducing GHG emissions *that occur in other states*, they are for Congress or those states, not California, to pursue.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants agree with CARB's statement of jurisdiction.

STATEMENT OF ISSUES

1. Whether the LCFS regulates extraterritorial conduct in violation of the dormant Commerce Clause by penalizing sales of physically and chemically identical ethanol based on, *inter alia*, production and transportation activities occurring outside California.
2. Whether the LCFS discriminates against Midwest ethanol relative to identical California ethanol made using the same materials and processes, in violation of the dormant Commerce Clause.

3. Whether Congress intended to give CARB authority to discriminate against interstate commerce and to interfere with lawful conduct in other states when adopting a preemption savings clause in Section 211(c)(4)(B) of the Clean Air Act.

STATEMENT OF THE CASE

CARB adopted the LCFS on November 25, 2009, as an "early action" item for implementing the Global Warming Solutions Act of 2006 (A.B. 32). The stated goal of the LCFS is to reduce the "carbon intensity" ("CI") of transportation fuels used in California and thereby address worldwide global warming. CI includes not just the amount of GHGs produced when a fuel is used in a vehicle in California, but also the "lifecycle" GHG emissions purportedly generated in the course of producing and transporting the fuel—most of which occurs *outside* California.

By regulating CI through the LCFS, CARB uses California's market power as a purchaser of ethanol and other fuels made in other states to force changes in production techniques in those states. CARB does so despite the fact that those production techniques have no effect on the fuel itself or on the emissions that occur when the fuel is consumed in California. ER10:2360 (ISOR); ER9:2160-61 (FSOR); *see also* ER14:3431 (Proposed Amendments to the Low Carbon Fuel Standard) (discussing factors related to calculating carbon intensity). In so doing, CARB categorically favors California producers over otherwise-identical producers elsewhere in the country. In fact, CARB expressly conceded that even though the LCFS will not have any discernible effect on global warming, it would drive Midwest ethanol producers out of the California market by 2018. *See* ER11:2728-31 (ISOR) (showing zero use of Midwest ethanol after 2017).[2]

A coalition of farming interests and organizations representing farmers and ethanol producers—Rocky Mountain Farmers Union, Redwood County Minnesota Corn and Soybeans Growers, Penny Newman Grain, Inc., Fresno County Farm Bureau, Nisei Farmers League, California Dairy Campaign, Rex Nederend, Growth Energy, and the Renewable Fuels Association (collectively "RMFU")—filed action No. 1:09-cv-02234 (E.D. Cal.) on December 23, 2009. A second action challenging the LCFS, No. 1:10-cv-00163 (E.D. Cal.), was filed by

[2] Midwest corn ethanol is called "MW Av. Corn EtOH" in the cited tables.

the National Petrochemical & Refiners Association (now American Fuels & Petrochemical Manufacturers Association), American Trucking Associations, Center for North American Energy Security, and The Consumer Energy Alliance (collectively "AFPM") on February 2, 2010, and the two actions were partially consolidated. Both Plaintiff groups advanced four theories for invalidating the LCFS: that the LCFS (1) impermissibly regulates extraterritorial fuel production processes, (2) facially discriminates between Midwest and California ethanol, (3) unduly burdens interstate commerce in contravention of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and (4) is preempted by Section 211(o) of the Clean Air Act, 42 U.S.C. §7545(o), which establishes a federal Renewable Fuel Standard.

CARB and the intervening defendants (collectively "CARB"), moved to dismiss the complaints, asserting that through Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. §7545(c)(4)(B), Congress has authorized California to adopt laws and regulations that would otherwise violate the dormant Commerce Clause or be preempted under ordinary preemption principles. The District Court denied that motion.

Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170 (E.D. Cal. 2010).

Thereafter RMFU moved for summary judgment on each of the four theories advanced in the complaint. RMFU also moved for a preliminary injunction, pointing to the ongoing irreparable harm to the ethanol industry caused by the LCFS and the utter lack of any harm to California. CARB opposed both motions, arguing, *inter alia*, that the *Pike* claim was not ripe and that the preemption claim should be deferred because it depended on disputed facts. CARB cross-moved for summary judgment, again arguing that Section 211(c)(4)(B) gives California plenary authority to violate the dormant Commerce Clause and to trump ordinary conflict preemption principles. CARB also sought summary judgment on the merits of Plaintiffs' discrimination and extraterritoriality claims. And CARB argued that, regardless of Section 211(c)(4)(B), other statutory savings clauses in the Clean Air Act foreclosed Plaintiffs' preemption claims.

In a series of opinions issued on December 29, 2011, totaling nearly 100 pages, *see* ER1:21; :46, :84,[3] the District Court (O'Neill, J.) granted RMFU's motion for summary judgment in part and denied CARB's cross-motion, finding that the LCFS both discriminated against interstate commerce and constituted extraterritorial regulation in violation of the dormant Commerce Clause. The court did not reach Plaintiffs' *Pike* claim, and it denied summary judgment on the preemption claim without prejudice. The court certified its decision on the dormant Commerce Clause pursuant to Fed. R. Civ. P. 54(b).

The District Court also granted RMFU's motion for a preliminary injunction, holding that Plaintiffs had shown a likelihood of success on the merits. The court "found that the LCFS violates the Commerce Clause," and additionally that "Plaintiffs' preemption claim raises 'serious questions' as to whether the LCFS conflicts with section 211(o) of the Clean Air Act." ER1:80-81 (Dist. Ct. Op.). In assessing the remaining preliminary injunction factors, the court noted that CARB's claims of harm were "too attenuated" and that "the LCFS will cause

[3] The relevant opinions are available at 843 F. Supp. 2d 1042, 843 F. Supp. 2d 1071, and 2011 WL 6936368 (slip op.).

real, concrete harm to the United States ethanol industry." ER1:81 (Dist. Ct. Op.).

STATEMENT OF THE FACTS

As CARB made clear in adopting the LCFS, the challenged regulation addresses the "*production process*" for motor vehicle fuel wherever it occurs, and not the chemical or physical properties of the fuel or its effects on vehicle emissions. ER10:2357-58 (ISOR) (determining that "The LCFS Regulation Does Not Establish a Specification for Motor Vehicle Fuels"). Few of the GHG emissions targeted by the LCFS occur in California; instead, most occur in the course of ethanol production located outside California (or even after the ethanol is made), including work performed on farms in the Midwest and what CARB predicts will be the actions of land developers all over the world resulting from corn use in the United States. *See, e.g.*, ER9:2295 (ISOR); ER8:1841 (FSOR). The LCFS thus penalizes fuels based on how and where they are made. The effect of that penalty will ultimately be to drive Midwest corn ethanol from the California fuels market, as CARB itself predicts, and to substantially harm the Midwest ethanol industry, while producing no discernible environmental benefits. Indeed, the only stated benefits from the LCFS are to California industry.

A. Ethanol And Its Relevant Properties

Ethanol has been used as motor fuel since the early Twentieth Century. Its use provides significant environmental benefits, such as reducing emissions of smog-forming and carcinogenic air pollutants. In 2008, approximately nine billion gallons of ethanol were produced in the United States for use in gasoline.

Ethanol is a "renewable" fuel because it is made from corn and other plant material that can be quickly regrown to capture the energy of the sun, an essentially unlimited source of energy—making it unlike petroleum, which cannot be renewed once it has been extracted, refined, and burned. At present, approximately 98 percent of U.S. ethanol is made from "feed corn" grown in the United States.[4] A succession of federal statutes dating from the 1970s has encouraged or mandated the use of ethanol in gasoline, both to foster the goal of energy independence and to support the Nation's farm economy and rural

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[4] Feed corn is not the type of "sweet corn" sold for human consumption. ER14:3466 (Whiteman Decl.).

communities. *See* ER13:3264 (2d Amend. Compl.) (citing the Energy Tax Act of 1978, Clean Air Act amendments of 1990, the Energy Policy Act of 2005, and the Energy Independence and Security Act of 2007).

Ethanol can be produced from "feedstocks" other than feed corn. For instance, the chief rivals to U.S. producers in the global ethanol industry are Brazilian manufacturers, who distill ethanol from sugar cane through programs backed by the Brazilian government. In the United States, private industry and the federal government are spending billions of dollars to develop technologies that can produce ethanol from "cellulosic" materials, which can include discarded wood products, corn cobs, corn stalks, corn husks, switchgrass, and other types of biomass. Much of the Nation's investment in cellulosic ethanol is being financed by the members of the ethanol industry trade association plaintiffs in this action. They are using the revenues from the sale of corn-based ethanol to fund efforts to commercialize ethanol from non-grain feedstocks, as the federal government envisions. Referring to corn ethanol as the "first-generation biofuels industry," President Obama has explained the importance of corn-based ethanol as follows:

> Combined with improved energy efficiency, *biofuels are the primary near-term option for insulating consumers against future oil price shocks and for lowering the transportation sector's carbon footprint*. The direct consumer benefit has been well documented and producing and using more biofuels today means an immediate reduction in oil imports in addition to an immediate increase in domestic employment … My Administration is committed to moving as quickly as possible to commercialize an array of emerging cellulosic technologies so that tomorrow's biofuels will be produced from sustainable biomass feedstocks and waste materials rather than corn. *But this transition will be successful only if the first-generation biofuels industry remains viable in the near-term*[.]

ER15:3750 (Ltr. President B. Obama to Govs. J. Hoeven and C. Culver) (emphasis added).

Whatever feedstock is used in the production process, there are no physical or chemical differences in the resulting ethanol or in the vehicular emissions when it is used as a motor fuel. ER10:2360 (ISOR); ER9:2160-61 (FSOR). A gallon of ethanol made from corn is physically and chemically identical to a gallon of ethanol made from sugar cane, wood pulp, or any other feedstock. Likewise, a gallon of ethanol made by one production process is physically and chemically identical to a gallon made by an alternative process. Nor does the place where ethanol is made have any effect on the ethanol's physical or chemical properties. CARB's staff recognized these facts early in the LCFS rulemaking:

> [A] gallon of ethanol made from corn grown and processed in the Midwest will, under a microscope or other analytical device, look identical in every material way to a gallon of ethanol processed from sugar cane grown in Brazil. Both samples of ethanol will have the same boiling point, the same molecular composition, the same lower and upper limits of flammability—in other words, *both will have identical physical and chemical properties because both products consist of 100% ethanol*.

ER10:2360 (ISOR) (emphasis added). As CARB conceded below, and in its opening brief, "ethanol is a fungible commodity." CARB Br. 62; ER15:3585 (CARB's Opp. to RMFU Mot. for Summ. J.).

Likewise, CARB concedes that the "emissions produced when ethanol is burned in a motor vehicle engine do not vary based on (1) the feedstock used to make the ethanol, (2) the production of the feedstock, (3) the production of the ethanol, (4) the type or quantity of distillers grains [co-product] produced along with the ethanol, or (5) the location of the ethanol production facility." ER15:3588 (CARB's Resp. to RMFU Stmt. of Material Facts); ER10:2360 (ISOR); ER9:2161 (FSOR). The key point is that no matter where or how the ethanol is made, the emissions produced by motor vehicles using the same quantities of ethanol blended into the same specific gasoline products in a specified manner will not vary.

B. The California LCFS Regulation

CARB does not even pretend that the LCFS is aimed at emissions occurring in California or that specifically affect California. As CARB concedes, "GHGs are well-mixed in the global atmosphere [and] emissions generated *outside of California* pose the same risk to California citizens as those generated inside California." CARB Br. 19 (emphasis added). The LCFS is not a traditional *method* of environmental regulation either. ER15:3594, :3596 (CARB's Cross-Mot. for Summ. J.) (explaining that "regulation of greenhouse gases is relatively new territory" and the LCFS is "the world's first low carbon fuel standard"). California had other options for seeking to reduce GHG emissions in California. As CARB's own expert acknowledged to the District Court, CARB could "adopt a tax on fossil fuels" to "reduce greenhouse gas emissions associated with California's transportation sector." ER4:805 (Babcock Decl.). Likewise, CARB claimed it could reduce GHG emissions from transportation in California, for example by "increasing vehicle efficiency" or "reducing the number of vehicle miles traveled," all of which would directly reduce in-state GHG emissions. ER6:1284 (FSOR). The costs of these measures would be borne by California's own citizens.

The LCFS takes the opposite approach: it seeks to force reductions in GHG emissions *in other states* (and countries), using the ultimate sale of a portion of the finished product in California as its regulatory hook. As CARB readily acknowledged, it has "essentially assumed legal and political responsibility for emissions of carbon resulting from production and transportation, *regardless of location*, of transportation fuels actually used in California." ER15:3597 (CARB's Cross-Mot. for Summ. J.) (emphasis added).

1. "Carbon intensity" and CARB's lifecycle emissions analysis

The LCFS requires companies that market transportation fuels in California to reduce the carbon intensity of the fuels they sell by 10 percent between 2011 and 2020. ER5:921-22 (Cal. Exec. Order S-01-07); LCFS §95482 (setting out schedules for CI reductions by 2020). As noted above, the term "carbon intensity" does not mean the amount or proportion of carbon in a given fuel, which would be released upon use of that fuel in California. Instead, it reflects a calculation of the "lifecycle" greenhouse gas emissions *attributed* by CARB to the fuel but that are supposedly emitted (1) in the course of producing and transporting the fuel; (2) from processing wholly separate animal feed products (after the fuel is produced) for sale outside of California; or (3) from supposedly reduced carbon "sinks" in foreign countries—almost all of which occurs outside California. According to CARB, "[c]arbon intensity is not an inherent chemical property of a fuel, but rather it is reflective of the *process* in making, distributing, and using that fuel." ER9:2161 (FSOR) (emphasis added); *see also* ER10:2360 (ISOR) ("[A] fuel's carbon intensity is inferred from the various steps taken to produce that fuel and the relative impacts to climate change associated with each step (vis-à-vis the steps' carbon intensity).").

The LCFS assigns CI scores for fuels, which are embodied in the "Lookup Table" included in Section 95486 of the regulation. LCFS §95486, Table 6. Even though ethanol is a "fungible commodity," *see* CARB Br. 62, CARB's tailored "lifecycle" approach does not treat it that way, instead penalizing ethanol depending on how and where it is made. ER10:2360 (ISOR) ("[T]he relevant inquiry with carbon intensity [as devised by CARB] is *not so much what is contained in a fuel*, but *how was that fuel made, distributed and used*.") (emphasis added). All *unblended* gasoline sold in California is treated the same under the LCFS's Lookup Table, and it is assigned a specific default CI score (which can change if "high carbon-intensity" crude is used). LCFS §95486, Table 6; §95486(b)(2). For corn ethanol, however, the LCFS takes a very different approach.

The LCFS assigns corn ethanol to dozens of different so-called production "pathways" bearing different CI scores. Numerous distinctions are drawn among different categories of corn ethanol producers. As CARB summarized it, "individual pathways for corn ethanol in the Lookup Table are differentiated based on four factors; location of the production facility (California or Midwest), type of corn milling (wet or dry), type of distillers grains produced (wet or dry), and source of fuel for heat energy and co-generated electrical power (natural gas, coal, or biomass)." ER7:1718 (FSOR). Thus, the LCFS assigns a CI penalty to corn ethanol based on CARB's assumptions about various stages of corn cultivation and ethanol production, including, *inter alia*, "Farming practices … [;] Crop yields[;] Harvesting of the crop[;] Collection and transportation of the crop[;] Type of fuel production process[;] Fuel used in the production process … [;] Energy efficiency of the production process[;] The value of the co-products generated … [; and] Transport and distribution of the fuel," regardless of where they occur, and despite the fact that they have no effect on the fuel itself or on the emissions that occur when the fuel is burned in California. ER14:3431 (Proposed Amendments to the Low Carbon Fuel Standard).

Other distinctions among different corn ethanol pathways in CARB's Lookup Table have nothing to do even with the emissions created by the production, transportation or use of ethanol. For example, many corn ethanol facilities also produce, in addition to ethanol, an animal nutrient called "distillers grains." Distillers grains emerge from the ethanol production process as a mash, and can be sold "wet" or "dry." *See* ER9:2259 (ISOR). Only dry distillers grains can be shipped for long distances, *see* ER9:2259 (ISOR); ER8:1993 (FSOR), and so most ethanol facilities in the Midwest that sell distillers grains for animal feed dry their grains for long-distance shipment, including to overseas markets. The drying process for these co-product grains has nothing to do with the production of ethanol itself—in fact, the process of drying or leaving wet the distillers grains occurs only after the ethanol is produced, and the decision whether to dry them may be based on the immediate customer demand. The production of saleable distillers grains may even occur after the ethanol has left the production facility and the destination of those grains is wholly unrelated to the destination of the ethanol. But because heating the distillers grains to dry them is assumed to be "energy intensive," CARB assigns higher CI scores to ethanol facilities that dry distillers grains than it does to facilities that sell distillers grains locally in the "wet" form. ER9:2259 (ISOR); *see also* ER4:774 (Scheible Decl.) LCFS §95486, Table 6 (compare pathway ETHC004 with pathway ETHC008).[5]

Each year, regulated parties (*i.e.*, producers, importers, and distributors of fuels used in California, LCFS §95481(a)(36)–(a)(37), (a)(23)–(a)(25)) must determine their fuels' aggregate CI, LCFS

[5] Relatedly, although the LCFS awards a CI credit for generating distillers grains, it does not do so evenhandedly. The LCFS accords California producers a larger credit than Midwest producers generating the same product, on the theory that distillers grains produced in California are consumed in-state, "meaning there are fewer emissions involved in transporting the distillers grain from the plant to point of consumption." ER4:778-79 (Scheible Decl.).

§95486(a), and must compare it with the statewide average carbon intensity level for that year. If a party's score is below the statewide average, the party may generate credits, provided it has obtained credit-generation approval from CARB. LCFS §95484(d)(2). If the party's CI score is above the statewide average level, the party will generate deficits, which must be canceled by either retiring accumulated credits or purchasing credits from others. LCFS §95485.

For a California fuel distributor attempting to comply with the LCFS, fuels with lower CI scores have greater value than fuels with higher CI scores. As CARB stated during the rulemaking, "[b]y its nature, the LCFS discourages the use of higher-carbon-intensity fuels." ER7:1687 (FSOR).[6] Accordingly, some alternative fuels currently sold in California will be "displaced" by lower-CI fuels, based on the assigned

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[6] In contrast, when CARB chose to assign an average CI to most gasoline rather than differentiate based on individual pathways, it did so in order "to *reduce* the incentive for regulated parties to comply with the LCFS by shifting to less carbon-intensive crude oils or refinery operations." ER6:1233 (FSOR) (emphasis added). This creates a curious inconsistency in the LCFS. What CARB's different approaches to ethanol and gasoline have in common—as discussed below and in the brief of the AFPM appellees—is that they both have the effect of favoring in-state producers over out-of-state producers.

CI scores in the Lookup Table and the costs of purchasing the alternative fuels from various sources. ER7:1689 (FSOR).

Two additional aspects of the lifecycle analysis are significant. First, CARB applied an economic theory called the "indirect land-use change" (or "ILUC") theory to its evaluation of corn ethanol. Under that controversial theory, ethanol used in California is assigned a CI score based not only on production practices in places as far-flung as Iowa and Brazil, but also on presumed indirect effects that corn growth and consumption in the U.S. will have on land use decisions in numerous foreign countries. ER9:2279, :2295 (ISOR); ER8:1841-43 (FSOR).

Applying the ILUC theory, the LCFS assumes that production of corn ethanol requires the dedication of cropland to grow the necessary corn. The dedication of cropland for production of corn for ethanol is, in turn, assumed to require increased crop acreage for production of corn and grains for animal nutrition, thus releasing further GHGs and reducing the "carbon sinks" available to absorb atmospheric carbon dioxide. *See* ER9:2279, :2295 (ISOR); ER8:1842-43 (FSOR). CARB's modeling of ILUC emissions resulting from corn ethanol production is hotly disputed, ER8:1922-24, :1950-52 (FSOR), but CARB relies on it to assign all corn ethanol listed in the Lookup Table an "indirect emissions" penalty of thirty grams of carbon-dioxide-equivalent emissions per megajoule of energy ("30 gCO_2e/MJ"). LCFS §95486, Table 6. The result of this hefty penalty is that the LCFS assigns many ethanol pathways CI scores comparable to, or even greater than, the CI scores of petroleum.

Second, CARB's version of lifecycle analysis is unique. The LCFS does not use the "GREET" model described at pages 21-23 of CARB's opening brief, which was developed by Argonne National Laboratory and was one of many models used by EPA as part of the national renewable fuels standard rulemaking. Instead, CARB created its own model, the "CA-GREET" model, which includes numerous California-centric modifications and assumptions that have never been fully documented in a manner that could be audited by EPA or any other external entity. ER6:1226 (FSOR); ER4:770 (Scheible Decl.) (stating that "CA-GREET uses a California specific electricity mix for in-State fuel production reflecting the California mix of electricity generation which is quite different (and lower carbon) than the national average"); ER9:2287 (ISOR) (noting that "CA-GREET modifications" include "incorporating California-specific conditions, parameters, and data"). As discussed below, many of those changes serve to stack the deck in favor of California industry and interests.

2. CARB's treatment of Midwest ethanol versus California ethanol

CARB's regulation of ethanol production through the LCFS systematically favors in-state producers over similarly situated out-of-state producers. CARB assigns different CI scores to what it calls "California" and "Midwest" corn ethanol pathways, even when the underlying production processes are otherwise identical, and then applies presumptions that favor California pathways and disfavor Midwest pathways.

For example, CARB penalizes Midwest ethanol for the GHG emissions associated with transporting finished fuel to California—an integral aspect of interstate commerce. ER9:2289-90 (ISOR); *see also* ER8:1923 (FSOR). Likewise, it makes assumptions about "the average efficiency of the equipment at facilities in the Midwest versus California," and about "the average greenhouse gas emissions associated with the electricity used at the facilities in the Midwest and California," in each case favoring California entities. ER15:3589

(CARB's Resp. to RMFU Stmt. of Material Facts); ER6:1274 (FSOR); ER4:781 (Scheible Decl.). Indeed, using its home-grown CA-GREET "to model the greenhouse gas emissions associated with electricity for the Midwest and California corn ethanol pathways" CARB treats "the greenhouse gas emissions per K Wh in California … lower than for the Midwest." ER15:3591 (CARB's Resp. to RMFU Stmt. of Material Facts). Tellingly, CARB does not "expect ethanol produced using coal power to be used in California under the LCFS." ER7:1731 (FSOR); ER8:1812 (FSOR). As CARB put it, "[t]he carbon intensities of some California-produced fuels do benefit from shorter transport distances and lower carbon intensity electricity sources." ER8:1923 (FSOR).

The below data, excerpted from the Lookup Table, illustrate the differential treatment. In the Table, "Dry Mill" and "Wet Mill" refer to two different methods of preparing corn for use in the production process. "DGS" refers to distillers grains, and the two methods of processing distillers grains ("wet" or "dry," as explained above). "NG" refers to natural gas used in the ethanol production process, and "biomass" refers to alternative sources of combustion or heat for use in the production process.

Midwest and California Corn Ethanol Carbon Intensity Levels, Compared to Gasoline

Fuel	Pathway Description		Carbon Intensity Values (gCO_2e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
Gasoline			95.86	0	95.86
Ethanol from Corn	1.	ETHC004 Midwest; Dry Mill; Dry DGS, NG	68.40	30	98.40
	2.	ETHC009 California: Dry Mill; Dry DGS, NG	58.90	30	88.90
	3.	ETHC008 Midwest; Dry Mill; Wet DGS, NG	60.10	30	90.10
	4.	ETHC003 California; Dry Mill; Wet DGS, NG	50.70	30	80.70
	5.	ETHC011 Midwest; Dry Mill; Wet DGS; 80% NG; 20% Biomass	56.80	30	86.80
	6.	ETHC013 California: Dry Mill; Wet DGS; 80% NG; 20% Biomass	47.44	30	77.44

Two points are noteworthy. First, and most obviously, the California producers are *always* assigned lower CI scores than the Midwest producers for identical processes—with California production receiving a preference of almost 10 gCO_2e/MJ, or more than ten percent. Given a choice, a California fuel distributor subject to the LCFS would always choose California ethanol over identical Midwest ethanol in order to meet its GHG emissions reduction targets, because use of

California ethanol confers a larger CI credit. *See also* LCFS §95485 (providing for accounting of CI reduction target credits and deficits).

Second, Midwest corn ethanol pathway ETHC004 (shown in Row 1 of the above corn ethanol pathways table) has been assigned a CI score of 98.40 gCO_2e/MJ, which is actually higher than the 95.86 gCO_2e/MJ score that the Lookup Table assigns to typical California unblended gasoline. ER15:3590 (CARB's Resp. to RMFU Stmt. of Material Facts). A gasoline marketer that blended ethanol from an ETHC004 ethanol producer into its gasoline would be treated under the LCFS as having *increased*, not reduced, the CI of its fuel. Corn ethanol from such a producer has zero positive value, and indeed a negative value, for a gasoline marketer trying to meet the CI requirements of the LCFS.

That is especially remarkable because, according to CARB, "*[m]ost* corn ethanol produced in the United States" falls into ETHC004, the Row 1 category. ER15:3590 (CARB's Resp. to RMFU Stmt. of Material Facts) (emphasis added). That means that under CARB's framework most Midwest corn ethanol—a renewable fuel—will produce deficits, not credits, under the LCFS, and that a regulated party will not be able to continue to use it and comply with the LCFS but would be better off selling unblended gasoline. At the same time, *all* California ethanol has a calculated CI score less than the baseline for California gasoline, and so all California ethanol generates credits under the LCFS. LCFS §95486, Table 6.

The upshot is that CARB assigns penalties to Midwest corn ethanol producers based on the fuel they use to power their ethanol plants, the electrical power they use, the milling process they use, the separate co-product grains they choose to make, and the indirect effects of their land use decisions—all of which occurs entirely outside California, and has no impact on the physical or chemical properties of the ethanol they may ship into California.

CARB does permit fuel producers to apply for individualized pathways. Whereas California ethanol producers get the benefit of assumed efficiencies and "clean" electricity, Midwest ethanol producers claiming such features must make an affirmative demonstration to CARB proving it.[7] "Method 2A" and "Method 2B" of the LCFS set forth

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[7] CARB assumes that in-state producers will "use California electricity regardless of the existence of the LCFS," and thus builds that benefit (Continued…)

administrative procedures through which a party may seek to amend the Lookup Table to add additional fuel pathways. LCFS §95486(c)-(f). This is no small task. It involves submission of scientific proof including "data, calculations, and other documentation, including but not limited to, flow diagrams, flow rates, CA-GREET calculations, equipment description, maps, and other information that the Executive Officer determines is necessary to verify the proposed fuel pathway and how the carbon intensity value proposed for that pathway was derived." LCFS §95486(e)(1), (3)(A), (f)(1).

Producers seeking an alternative pathway under Method 2A must further demonstrate that the CI for their pathway is at least 5 gCO_2e/MJ lower than the levels the Lookup Table presumed, and that the producer expects to provide 10 million gasoline gallon equivalents of ethanol per year in California alone. LCFS §95486(e)(2)(A), (B). Meanwhile, new plants built in California are automatically presumed to have improved energy efficiency relative to Midwest facilities, resulting in a CI 3.1 gCO2e/MJ less than Midwestern facilities, even

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for them into the Lookup Table. ER15:3586 (CARB's Opp. to RMFU Mot. for Summ. J.).

without an application, *see* ER4:778 (Scheible Decl.), and in the aggregate California plants are presumed to have approximately a 10 gCO2e/MJ advantage, *see* LCFS §95486, Table 6. All the information submitted to CARB by applicants is deemed public unless specifically identified as a trade secret. LCFS §95486(f)(2)(A). After a new pathway is approved, the producer must keep CARB informed of any "material change" in its methods, including substitution of methods of transportation. LCFS §95484(d)(2)(D). The pathway is invalidated if the producer does not inform CARB within 30 days. *See id.*

Shortly after RMFU filed its motion for a preliminary injunction—tendering evidence demonstrating that the LCFS would have a devastating impact on U.S. corn ethanol producers, their suppliers, shareholders, and workers if it took effect, costing them more than $100 million—CARB directed the Executive Officer to allow lower CI scores, proposed by certain ethanol producers to apply to their processes, to go into effect upon submission, *prior to the required notice-and-comment rulemaking and public hearing*. ER5:948 (CARB Resolution 10-49) ("Regulated parties may use proposed draft carbon intensity values for pathways that have been evaluated by ARB staff and posted for public review prior to formal adoption.”). By any measure, this was an extraordinary step.[8] As a result of permitting these proposed CI values to take effect immediately, some Midwest producers obtained a temporary reprieve that allowed them to continue competing in California. And although some Midwest ethanol producers were able to obtain CI scores lower than those assigned to California producers, based on the technologies they use in their facilities, the fact remains that otherwise identical plants are treated differently based on geography.

In adopting these measures, the LCFS does not “purport to control the ‘chemical or physical properties’ of fuel used in California.” *Rocky Mountain Farmers Union v. Goldstene*, 719 F. Supp. 2d 1170, 1191 (E.D. Cal. 2010) (citing FSOR (ER9:2161); ISOR (ER10:2360)). Rather, as explained above, the LCFS regulates out-of-state ethanol production practices. ER9:2161 (FSOR); *see also* ER10:2360 (ISOR).[9] Thus, under

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[8] CARB’s unorthodox actions suggest it may have been concerned about this case, including the evidence marshaled in support of the preliminary injunction, and therefore sought to change the facts on the ground.

[9] In fact, CARB concluded that “the LCFS regulation, unlike other existing California regulations, does not establish prescriptive fuel

(Continued…)

the LCFS, fuels or additives with "the same molecular composition, the same lower and upper limits of flammability," with "identical physical and chemical properties" will be treated differently based on production and distribution activities that occur outside California. ER10:2360 (ISOR).

3. Impacts of the LCFS on Midwest ethanol

By design, and by CARB's own admission, the LCFS will close the California market—the largest market for ethanol in the nation, representing 10% of the U.S. market, ER15:3592 (CARB's Resp. to RMFU Stmt. of Material Facts)—to all but a handful of non-California ethanol producers by the end of the decade.

Conservatively estimated, the LCFS will cost the domestic corn ethanol industry *at least* tens of millions of dollars in annual losses and will make it impossible for some ethanol plants to obtain critical credit facilities they need to survive and compete. *See* ER12:3112 (David Decl.); ER14:3551 (Harden Rebuttal Decl.); ER12:3127-28, :3140-41 (Brian Decl.). Indeed, the regulation already has reduced the value of

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specifications," and was therefore exempt from the relevant state environmental reviews. ER10:2361 (ISOR).

investments in many ethanol plants across the Midwest. *See* ER12:3077 (Harden Decl.); ER14:3551 (Harden Rebuttal Decl.).

This comes as no surprise, as CARB itself predicted that the LCFS regulation would result in *the total elimination of Midwest corn ethanol from the California market by 2018*.[10] In allowing a number of Midwest ethanol producers to apply for and immediately benefit from individualized CI scores, CARB has postponed, but not averted judgment day. Even using the new CI scores for some Midwest corn ethanol, the LCFS will require a net reduction in the importation of Midwest corn ethanol in California *by no later than 2015*. ER14:3513-14 (Lyons Rebuttal Decl.); ER14:3524-25 (David Rebuttal Decl.). Under the LCFS, the question is not *if* Midwest corn ethanol will be banned from California, but *when*.

Moreover, the LCFS has already affected ethanol prices, creating a differential that penalizes Midwest ethanol producers, depending on the production process they use. As CARB notes, during 2011, ethanol with a CI of 90.1 received a 1-2 cents/gallon greater price compared to

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10 *See* ER11:2728-31 (ISOR). Midwest corn ethanol, called "MW Av. Corn EtOH" in the cited tables, contributes no volume to the California market after 2017.

ethanol with a CI value of 98.4. CARB Br. 28. As CARB itself touted below, this is a market "adjust[ment] to the LCFS" whereby price is tied to "different carbon intensity values." ER14:3570 (CARB's Supp. Opp. to RMFU Mot. for Prelim. Injunction). While *every* California ethanol producer stands to benefit from this price differential, all of the ethanol producers on the losing end were Midwest facilities.[11] LCFS §95436, Table 6.

4. The LCFS benefits California industry.

The price differential created by the LCFS is not the only benefit to California industry. Nor are the competitive benefits to California ethanol producers over Midwest producers accidental. In its regulatory analysis of the LCFS proposal, CARB touted those competitive benefits as the anticipated and intended results of the new regulations. CARB projected that the LCFS would produce a steady market for California corn ethanol producers, while at the same time reducing Midwest corn ethanol sales in California and eventually causing a complete exodus of non-California corn ethanol producers from the State. *See, e.g.,*

[11] CARB misleadingly calls this price differential a "premium," but the price available to most Midwest producers is now actually lower than it would be without the LCFS. ER14:3523-24 (David Rebuttal Decl.).

ER11:2728-31 (ISOR) (predicting steady demand for 300 million gallons of corn ethanol produced by California facilities through 2020). Indeed, the clear and immediate beneficiaries of the LCFS are the few businesses located within California that produce corn ethanol, and which are sheltered from interstate competition by the regulation.

Unsurprisingly, CARB views implementation of the LCFS as a boon to the California ethanol industry. CARB has predicted that some 25 new biorefineries would be built in California. ER7:1709 (FSOR); ER10:2425 (ISOR). As CARB put it, "[d]isplacing imported transportation fuels with biofuels produced in the State keeps more money in the State." ER7:1689 (FSOR).

CARB could not have been more clear that its expectation and objective was to aid the California economy at the expense of Midwest ethanol producers: "To the extent that California can produce more of its own transportation fuel … and lower dependence on out-of-state biofuels, business competitiveness should be improved overall in the State." ER7:1684 (FSOR). CARB expected that "imported blendstocks" would be the first fuels to be "displaced" and that the LCFS will "reduce[e] the volume of transportation fuels that are imported from other states" and encourage the building of in-state biorefineries that "will provide needed employment, [and] an increased tax base for the State[.]" ER7:1689 (FSOR).

As the administrative record shows, CARB intentionally "developed the LCFS in a manner that minimizes costs and maximizes the total benefits to California." ER7:1686 (FSOR). And in so doing, CARB was careful not to drive out Midwest ethanol before California industry could rise up to take its place. Instead, "[t]he LCFS compliance schedule allows time for future investments to be made in California-based biofuel technologies and related jobs." ER7:1686 (FSOR).

5. The LCFS produces no discernible environmental benefits.

The direct economic benefit to California industry is the only real benefit that California can hope to gain from the LCFS. There will be *no* measurable environmental gain. During the LCFS rulemaking, CARB was provided with scientific analysis showing that even if the LCFS were implemented *not only in California but nationwide*, the reduction in global temperature would be "undetectable"—about 0.0015 degrees Celsius—a change so small it can only be shown in computer models, and far too small to affect health or the environment.[12] CARB did not contest that scientific analysis. *See* ER7:1552 (FSOR).

To the contrary, CARB readily conceded that the LCFS will have no discernible impact on global warming. As CARB put it, "GHG emission reductions by the LCFS alone *will not result in significant climate change*." ER7:1552 (FSOR) (emphasis added).[13] The LCFS will have no perceptible impact on temperatures, sea level, rainfall levels, flora, fauna, snowpack, or any other climate, health, or environmental-quality metric in California because, as CARB admits, "[w]ithout the wider adoption of fuel carbon-intensity standards" there will be "little or no net change in fuel carbon-intensity on a global scale." ER7:1687 (FSOR); *see also* ER8:1925 (FSOR). Thus, while the LCFS may serve symbolic purposes in CARB's regulatory efforts aimed at global

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[12] The analysis was contained in an April 8, 2009, report submitted to CARB by Sierra Research, Inc., an environmental consulting firm. *See* Austin et al., *Preliminary Review of the CARB Staff Analysis of the Proposed Low Carbon Fuel Standard (LCFS)*, ER15:3755-56.

[13] As noted in the declaration of Professor John Christy, the Distinguished Professor of Atmospheric Science and Director of the Earth System Science Center at the University of Alabama in Huntsville, submitted in support of RMFU's Opposition to CARB's stay motion, "the estimated impact of LCFS on global surface temperature is negligible." ER14:3457 (Christy Decl.).

warming, its only concrete value to California will be to advantage in-state industry over Midwest ethanol producers.

Even if the LCFS could theoretically reduce GHG emissions enough to affect environmental conditions, it will not do so in practice. CARB admits that "fuel producers are free to ship lower-carbon-intensity fuels to areas with [LCFS] standards, while shipping higher-carbon-intensity fuels elsewhere. The end result of this fuel 'shuffling' process is *little or no net change in fuel carbon-intensity on a global scale*." ER7:1687 (FSOR) (emphasis added); *see also* ER8:1925 (FSOR). The effect of shuffling would instead be a substantial transportation cost penalty on Midwest ethanol producers and their consumers, and an increase in GHG emissions. ER14:3522 (David Rebuttal Decl.).

Such "fuel shuffling" is not speculative. CARB found that it was "*highly likely* that supplies of ethanol with the lowest carbon intensity will be sent to California with the remaining 'high intensity' ethanol being sold outside of California. The LCFS does not account for this market-mediated effect which obviously benefits producers of low carbon intensity ethanol but does not result in reductions in greenhouse gas emissions on a global scale." ER7:1451 (FSOR) (emphasis added).

In arguing at the preliminary injunction stage that Midwest ethanol producers would not be irreparably harmed by the regulations, CARB asserted that "alternative marketing opportunities are available for ethanol producers who do not sell their product in California." ER14:3569 (CARB's Supp. Opp. to RMFU Mot. for Prelim. Injunction). And CARB specifically opined that "the LCFS will not affect demand for Midwestern corn ethanol at all." ER15:3582 (CARB's Obj. to David Decl.); *see also* ER4:832, :836-37 (Babcock Decl.); ER4:785 (Scheible Decl.); ER4:739 (Waugh Decl.).

In other words, even if lower-CI fuel is consumed in California, so long as Midwest ethanol producers (and other fuel producers) can ship their goods somewhere other than California, there is no reduction in GHG emissions—and the LCFS accomplishes nothing other than to disturb natural shipping patterns, increase transportation emissions, and impose substantial additional transportation costs for Midwest producers. ER14:3524 (David Rebuttal Decl.). Forcibly redirecting ethanol into new markets while causing "little or no net change in fuel carbon content on a global scale," ER8:1925 (FSOR), imposes significant burdens without creating benefits.

SUMMARY OF ARGUMENT

The LCFS violates the Commerce Clause in two distinct ways.

First, the LCFS regulates extraterritorial conduct, reaching beyond California's borders to penalize lawful activity occurring in other states. Simply put, CARB seeks to use California's economic muscle as the Nation's largest purchaser of ethanol to change how ethanol producers make their product, how they prepare a nutrient co-product that may or may not be sold in California, and how farmers grow the corn used for making ethanol (including the farmers' land use decisions)—activities that have no effect on the physical or chemical properties of the ethanol ultimately sold—all based on the mere fact that an ultimate end-product is shipped into California for sale. This it may not do. The dormant Commerce Clause serves to prevent one state from exporting the burden of its policy choices to its sister states. If the LCFS is permitted to stand, then there is no end to the extraterritorial regulation that any state may impose in the name of global warming or other shared national (and international) concerns. Under our constitutional order, it is for *Congress*, not California, to set our national standards.

None of CARB's justifications for its extraterritorial regulation withstands scrutiny. The LCFS does not simply require product labeling, nor does it regulate the properties of the product actually sold in-state. Rather, chemically and physically identical ethanol is treated differently solely based on how and where it was made. As a result, the District Court properly invalidated the LCFS and this Court should affirm.

Second, the LCFS discriminates against out-of-state ethanol producers and in favor of similarly situated in-state ethanol producers. That discrimination is apparent on the face of the regulation. And it is also embedded in CARB's purposes in adopting the LCFS. Indeed, by design, the LCFS favors ethanol that is supposedly produced using California electricity and that need not be transported over the Rocky Mountains. CARB argues in vain that it does not really discriminate, but the factors CARB has chosen for penalizing transportation fuels are inextricably intertwined with geography and are therefore impermissible under the Commerce Clause. And CARB's half-hearted attempt to justify the LCFS as surviving strict scrutiny review—making arguments it never made below—fares no better.

By CARB's own admission, the LCFS produces no discernible environmental benefits. CARB concedes that the LCFS will have no impact on global temperatures, global sea levels, or any other metric. Instead, the LCFS will simply lead to "fuel shuffling"—whereby lower CI fuels are shuffled into California and higher CI fuels are shuffled out—the upshot of which means there is no reduction (and possibly an increase, ER14:3524 (David Rebuttal Decl.)) in GHG emissions. Although achieving no environmental benefits, the LCFS does serve California's protectionist aims. As CARB made clear in adopting its regulation, the LCFS will displace Midwest ethanol with California fuels, thereby "keep[ing] more money in" state, "provid[ing] needed employment" and "an increased tax base for the State." ER7:1689 (FSOR). That is rank discrimination and prohibited by the Constitution.

In response to all this, CARB asserts that Congress itself authorized California to engage in this activity through adoption of Section 211(c)(4)(B) of the Clean Air Act, a savings clause that makes no reference to the Commerce Clause and that on its terms applies only to motor vehicle emissions standards. That argument is self-defeating.

And, in any event, this Court has twice already defeated it, both times concluding that Section 211(c)(4)(B) does *nothing* more than exempt California from the specific preemptive effects of Section 211(c)(4)(A). CARB cannot avoid this binding precedent.

Were the LCFS allowed to stand, the result will be the very Balkanization that the Framers lived through under the Articles of Confederation and sought to end through the Constitution. This case involves one important sector of the economy. But if California is allowed to penalize ethanol sales on account of the production methods of ethanol producers in other states, this case will open the door to unprecedented meddling by each state with conduct in the others. A state could penalize the sale of products from states with lower minimum wages, with (or without) right-to-work laws, or any number of other issues the Constitution leaves to each state to regulate within its boundaries. This case thus tests the very premises of our economic union. The LCFS is an unprecedented foray into extraterritorial regulation on a discriminatory basis. CARB has cited no case—and no other law—that remotely resembles this one. CARB evidently hopes that the asserted urgency of national and international action to control global warming will paper over its lack of constitutional authority to enact regulations of this sort. The District Court correctly rejected that plea. This Court should affirm.[14]

STANDARD OF REVIEW

This Court applies *de novo* review to district court orders granting summary judgment, using the same standard applied by the lower court. *Crowley v. Nevada ex rel. Nevada Secretary of State*, 678 F.3d 730, 733 (9th Cir. 2012). "Summary judgment can be affirmed on any ground supported by the record." *Id.* at 734. When a case is resolved on cross-motions for summary judgment, this Court may review both "the

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[14] The Court should have no occasion to address either whether the LCFS fails the dormant Commerce clause balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or whether the LCFS is preempted by Section 211(o) of the Clean Air Act. If the Court affirms the District Court's judgment on the extraterritoriality or discrimination claims, CARB concedes the Court need not reach these issues. Should the Court reverse on these points, the proper course would be to remand. CARB never sought summary judgment on *Pike* balancing—indeed, it opposed the District Court reaching that issue—and the District Court did not address it. Likewise, the District Court only found that there were "substantial questions" presented by RMFU's preemption claims and did not address the merits. Because the District Court relied substantially on its Commerce Clause decision in granting a preliminary injunction, were the Court to reverse the Commerce Clause decision, RMFU concedes the Court should vacate the preliminary injunction.

grant of the prevailing party's motion and the corresponding denial of the opponent's motion." *Id.* However, arguments not presented to the district court in summary judgment briefing are waived on appeal. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000); *see also Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 495 (9th Cir. 2000) (declining to "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").

ARGUMENT

I. The LCFS Impermissibly Regulates Conduct Outside Of California.

Fundamental to our system of interstate federalism is the proposition that "[n]o state can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). States are free to legislate with respect to activities within their own boundaries, but not to use their economic power to influence activities taking place elsewhere. CARB concedes that extraterritorial regulations are *per se* invalid. CARB Br. 66. Yet the very idea of CARB's "lifecycle emissions" test for the CI of ethanol is to use California's economic influence to control how Midwest farmers use their land, how ethanol facilities outside California produce animal feed, and the manner by which ethanol is transported across the country.

Far from mere incidental by-products of the LCFS, these extraterritorial effects are, in fact, the very purpose of the LCFS. CARB brazenly proclaims that the LCFS represents California's decision to "assume[] legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California." ER15:3597 (CARB's Cross-Mot. for Summ. J.) (emphasis added). In other words, CARB has undertaken to regulate GHG emissions that *do not occur in California*, but rather in other states.

However worthy California's environmental priorities may be, CARB's effort to impose California's environmental priorities on the rest of the Nation and around the world is an unconstitutional usurpation of authority reserved to other states and to the federal government. As the District Court held, to attach a penalty to the sale of ethanol based on a retrospective calculation of the GHG emissions that occurred elsewhere during production and transportation is to allow California to regulate commerce outside of its borders. If "lifecycle" emissions are to be regulated in the manner CARB proposes, it must be by Congress. This Court should affirm the District Court's judgment on that ground.

A. The LCFS's Purpose And Practical Effect Is To Control Conduct Outside Of California.

The rule against extraterritorial regulation reflects "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States *within their respective spheres*." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335-36 (1989) (emphasis added). The Commerce Clause therefore categorically prohibits states from burdening interstate commerce where the "practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336. The rule prevents a state from using its economic muscle to impose its idea of good public policy on other states. "Control" may, for example, take the form of influencing private conduct, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521, 524 (1935), or of pressing other jurisdictions to adopt a state's preferred policies, *National Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1154 (7th Cir. 1999) ("*National Solid Wastes II*"). If a state asserts such power, then the offending regulation "exceeds the inherent limits of the enacting State's authority and is invalid[.]" *Healy*, 491 U.S. at 336. The LCFS violates the rule by assigning regulatory penalties to CI scores that are calculated based on out-of-state conduct.

The LCFS places California fuel distributors under heavy and escalating regulatory pressure to lower the total CI of the fuel they sell, including by substituting lower-CI ethanol for high-CI ethanol. *See* LCFS §95482. But all ethanol is chemically and physically identical, and CI "is not an inherent chemical property of a fuel": rather, CI is a retrospective calculation based on activities including "the process in making, distributing, and using that fuel." ER9:2161 (FSOR); ER10:2360 (ISOR). For Midwest ethanol producers, virtually all the activities that go into CARB's calculation of CI scores, and their associated GHG emissions, occur *outside* California. By assigning regulatory consequences to CI scores based on *out-of-state* GHG emissions, the LCFS regulates extraterritorially. *See Healy*, 491 U.S. at 341-42 (price regulations "geared to prices in other States" are impermissibly extraterritorial); *National Foreign Trade Council v.*

Natsios, 181 F.3d 38, 61 (1st Cir. 1999) (striking down regulations that penalized bids on state contracts based on bidder's out-of-state conduct), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

To illustrate, a Midwest ethanol producer's CI score depends on the local farming and harvesting practices, crop yield, and the producer's corn collection and transportation methods. ER7:1718 (FSOR); ER9:2282-83 (ISOR). It also depends on how the producer prepares the corn for fermentation, and how it powers its ethanol facility (*e.g.*, with natural gas, coal, renewable "biomass," etc.). LCFS §95486, Table 6. When the ethanol is generated, the producer's CI score depends next on how the facility ships it from the Midwest to California, including both the method of transit and the specific route traveled. LCFS §95484(d). CARB even admits, for example, that Midwest ethanol producers who use trucks instead of rail to transport their ethanol to California are penalized with higher CI scores. CARB Br. 68. To generate credits under the LCFS, ethanol producers must *prove* to CARB under which pathway their ethanol falls. LCFS §95484(d)(2); CARB Br. 67-68.

CARB also polices what the ethanol production facility does with the distillers grains it leaves after production of the fuel. ER4:774 (Scheible Decl.); ER9:2259 (ISOR). This aspect of the LCFS is particularly remarkable. Rather than dispose of the distillers grains in a landfill or incinerate them, ethanol producers put them to good use by generating high-protein feed for livestock. Because moisture makes the grains susceptible to spoiling in transit, the grains must be dried in some instances so they can be shipped to locations farther from the production facility. But even though that destination would rarely be in California, CARB has determined that the emissions from drying distillers grains—which occurs *after production of the ethanol*—must be attributed to the "emissions" from the fuel. In addition to the regulation of the ethanol production process, then, CARB also regulates the post-production treatment of a product also made from the corn but not part of the fuel.[15]

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[15] Moreover, the LCFS also assumes that simply by producing ethanol, the Midwest producer will encourage farmers to convert non-agricultural land into farmland, which CARB believes emits GHGs. ER9:2295 (ISOR); ER8:1841-43 (FSOR). CARB accordingly assigns a substantial penalty to all ethanol. LCFS §95486, Table 6. The premise of that penalty is to reduce economic incentives to grow biofuel crops, (Continued…)

As to each of these wholly out-of-state activities, Midwest ethanol producers must either bring their out-of-state facilities and practices into compliance with CARB's preferences, or face escalating economic penalties for not doing so. CARB cannot credibly argue that the measures Midwest ethanol producers might take to reduce their CI scores are merely "indirect effects" of the LCFS. CARB Br. 70-76. Rather, the LCFS presents ethanol producers with an ultimatum: choose your production methods, route of transportation, and post-production treatment of distillers grains wisely (in CARB's view), and CARB will reward you with a lower CI score for your ethanol; choose poorly (in CARB's view), and CARB will punish you with a higher CI score that makes it harder, if not impossible, to sell to California fuel distributors and diminishes your access to the California market.

California is the largest fuel market in the Nation, ER15:3592 (CARB's Resp. to RMFU Stmt. of Material Facts), and CARB specifically intends to use California's market power to "encourage" ethanol producers to "reduce carbon intensity" at their out-of-state

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and thereby to influence the use of nonagricultural lands not just in the Midwest, but around the world.

bases of operations. CARB Br. 74. CARB itself predicts that the practical effect of this "encouragement" will be to exclude ethanol producers with high CI scores (read: disfavored production practices), including most Midwest producers, from the California market altogether. ER11:2728-31 (ISOR); ER14:3524-25 (David Rebuttal Decl.); ER14:3513-14 (Lyons Rebuttal Decl.). CARB repeatedly concedes that if the LCFS did *not* affect out-of-state activities, it would not achieve the CI reduction goals that CARB professes to pursue. CARB Br. 61, 74; *see also* ER15:3597 (CARB's Cross-Mot. for Summ. J.). The threat of exclusion from California, in other words, serves as CARB's leverage to force Midwest ethanol producers to conform their Midwest operations to CARB's preferences—even though the composition of the ethanol produced will not change. The LCFS plainly has the "practical effect" of regulating out-of-state conduct, and is therefore invalid.

CARB attempts to escape *Healy*'s "practical effects" test in various ways—none of which is availing. First, CARB asserts that the LCFS must "*directly*" regulate out-of-state commerce in order to run afoul of the extraterritoriality principle. CARB Br. 67. But *Healy* made clear that a regulation that has the "practical effect" of controlling conduct beyond the boundaries of the state is *ipso facto* "direct[]" regulation of out-of-state commerce. 491 U.S. at 336 (whether "a statute ... directly controls [out-of-state] commerce" turns on the "critical inquiry [of] whether the practical effect of the regulation is to control conduct beyond the boundaries of the State"); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion) (anything more than "*incidental* regulation of interstate commerce by the States" is prohibited "direct regulation") (emphasis in original). CARB's own authorities confirm that "the 'practical effect' of a challenged statute is 'the critical inquiry' in determining whether that statute constitutes direct regulation." *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (quoting *Healy*, 491 U.S. at 336). Plaintiffs thus need show no more than that the practical effect of the LCFS is to control out-of-state activity.

Second, CARB seeks to limit *Healy* to the context of price affirmation statutes. CARB Br. 71-72. But "[a]lthough cases like *Healy* … involved price affirmation statutes, the principles set forth in these decisions are not limited to that context." *National Solid Wastes Mgmt.*

Ass'n v. Meyer, 63 F.3d 652, 659 (7th Cir. 1995) ("*National Solid Wastes I*").

If California can impose burdens on interstate commerce to induce changes in Midwest ethanol production practices for the purpose of protecting against global warming, it can impose similar burdens for any purpose whatsoever. Yet the Supreme Court has long held that a state may not "condition importation upon proof of" out-of-state production practices. *Baldwin*, 294 U.S. at 524 (mentioning conditions such as "a satisfactory wage scale in [a] factory or shop, or ... the profits of the business"); *see also Healy*, 491 U.S. at 341-42 (rejecting price regulations "geared to prices in other States"). Likewise, the Seventh Circuit has held that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders." *National Solid Wastes II*, 165 F.3d at 1153 (forbidding state to condition landfill use on adoption of Wisconsin's preferred recycling standards). "[I]t just does not matter" if a state views its own standards as "environmentally sound." *Id.* at 1153. California's LCFS regulation is analytically indistinguishable from regulations that other courts have repeatedly rejected.

To be sure, states have every right to regulate conduct entirely within their boundaries, even when there is an incidental effect on outsiders. *See, e.g.*, *S.D. Meyers*, 253 F.3d at 472 (upholding city ordinance after construing it narrowly to apply only "in the City, on City-owned property, or as to employees working on a City contract"). But where goods in interstate commerce are identical, and will have exactly the same impacts within the state, a state may not penalize or ban their sale because of how they were made elsewhere. *Baldwin*, 294 U.S. at 521 ("New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones."); *cf. National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (upholding California's ban on the sale of a commercial good made by one method—fur obtained from animal leghold traps—as constitutional because it applied only "to furs from animals trapped inside California; it does not apply to furs from animals trapped outside the state").

CARB argues that GHG emissions in the Midwest affect Californians—indeed, the entire world. But under our constitutional system, this does not justify attempts by California to impose what it considers to be "reformed" ethanol production practices in the Midwest, much less to penalize producers of distillers grains not even destined for California based on whether or not they utilize a drying process. Congress, not individual states, has that authority under our system of government. California has the authority to regulate emissions in California, but as to the Midwest, only Midwestern states or Congress may act.

CARB further defends the LCFS on the ground that (1) that the LCFS scheme is one of "incentives" rather than "controls", and (2) that the effect on out-of-state practices is "indirect" rather than "direct." As discussed below, neither defense is persuasive.

B. A System Of Coercive "Incentives" Expressly Designed To Compel Market Participants To Change Their Behavior Constitutes Direct Regulation.

CARB's first defense of the LCFS is essentially semantic—the LCFS does not "regulate" out-of-state conduct, CARB argues, because it merely "incentivizes" rather than "controls" market participants' behavior. "[I]ncentives," CARB claims, "are not controls." CARB Br.

77.[16] But that hairsplitting distinction has no basis in law. After all, every conceivable use of economic leverage to control out-of-state conduct could be described as an "incentive," but this would eviscerate all protection against burdens on interstate commerce short of total prohibition. One person's "incentive" is another person's "penalty." Even though the LCFS is not worded as an express *ban* on Midwest ethanol, the *conditions it places* on access to the California market—the largest fuel market in the Nation—put it squarely within a long line of invalidated state regulations.[17]

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[16] Several amici advance a similar argument. *See* UNICA Amicus Br. 21 ("The district court erred because controls and incentives are not the same."); Oregon *et al*. Amicus Br. 15 (The LCFS "*may* incentivize certain out-of-state fuel producers to reduce their overall GHG emissions[.]") (emphasis in original); Profs. of Envt'l Law Amicus Br. 2 ("At most, [the LCFS] provides a market incentive for fuel producers.").

[17] *Discriminatory* incentives indisputably violate the Commerce Clause. In *Boston Stock Exchange v. State Tax Commission*, the Supreme Court invalidated a tax scheme that incentivized—but did not require—trading on in-state stock exchanges because it had the "practical effect" of diverting "the flow of securities sales ... from the most economically efficient channels." 429 U.S. 318, 334-36 (1977). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997) (fact that statute acted as "a strong incentive" rather than "a total prohibition" was inconsequential to constitutional analysis); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (rejecting state's argument that all the regulation did was "encourage," but not require, discriminatory purchases). As discussed below, the LCFS is

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CARB's distinction between "incentives" and "controls" disregards the Supreme Court's test for extraterritorial regulation: the "critical inquiry" is not how the LCFS is styled, but whether its "practical effect ... is to control conduct" outside California. *Healy*, 491 U.S. at 336. That test is consistent with the language of the Commerce Clause. *See National Fed. of Ind. Businesses v. Sebelius*, 132 S. Ct. 2566, 2586 n.4 (2012) (Roberts, C.J.) (explaining that the most common definition of "regulate" at the time of the Framing was "[t]o adjust by rule or method") (citing 2 S. Johnson, Dictionary of the English Language 1619 (4th ed. 1773)). If the "practical effect" of the LCFS (or any other law) is to control conduct, then it is regulating extraterritorially and must be struck down regardless of whether CARB chooses to label it a "mandate," an "incentive," an "inducement," or anything else, and regardless of CARB's subjective intention. *See Healy*, 491 U.S. at 336; *Natsios*, 181 F.3d at 69.

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invalid on that basis as well. For that reason, CARB's citations to Commerce Clause discrimination analyses in *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), and *Cherry Hill Vineyard LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007), are inapposite. CARB Br. 79.

The "control" that the LCFS exerts on Midwest ethanol producers is indisputable. The very point of the LCFS is to exploit California's market power to compel Midwest ethanol producers to produce and transport their ethanol to California in accordance with CARB's preferences, and thereby reduce out-of-state GHG emissions, or else face exclusion from the California market. That is indistinguishable in practical effect from cases like *Baldwin*, which forbids states to condition access to a state market on out-of-state production practices such as "a satisfactory wage scale in [a] factory or shop, or ... the profits of the business." 294 U.S. at 524. Similarly, the Seventh Circuit struck down a Wisconsin statute that sought to encourage neighboring jurisdictions to adopt better environmental practices by conditioning landfill use on their adoption of Wisconsin's preferred recycling standards. *National Solid Wastes I*, 63 F.3d at 658 ("[T]he Wisconsin statute ... essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce."). In neither case did the regulating state have genuine "control" over the activities in the other states; at most, the out-of-state entities had an incentive to conform to those policies. But that was enough to render those "incentives" unconstitutional.[18]

Other cases make still clearer that an incentive can have the "practical effect" of controlling commerce in other states. In *Natsios*, Massachusetts imposed a 10 percent penalty on state contract bids by companies that did business in Burma. *See* 181 F.3d at 45-46. In other words, the Massachusetts law, like the LCFS, *incentivized* the bidder to change its behavior without *mandating* the cessation of the behavior. The Court of Appeals struck down the law as an unconstitutional attempt at extraterritorial regulation: "Massachusetts may not regulate conduct wholly beyond its borders. Yet the Massachusetts Burma Law—by conditioning state procurement decisions on conduct that occurs in Burma—does just that." *Id.* at 69 (citing *Healy*, 491 U.S.

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[18] It is similarly no answer for CARB to argue that the LCFS does not "control" conduct in the sense that out-of-state firms voluntarily submit to the regulation when they choose to sell ethanol in California. "[E]very discriminatory state law can be avoided by withdrawing from the enacting state." *Natsios*, 181 F.3d at 70. But to permit this excuse, and "allow state laws to stand on this ground, ... would be to read the Commerce Clause out of the Constitution." *Id.* If the only way to avoid an extraterritorial regulation is for a company to totally abandon the single largest market for its product, the "choice" to submit to the regulation is really no choice at all.

at 336).[19] The court thus held that the Burma Law met *Healy*'s "critical inquiry" of a law that had the "*practical effect* of ... control[ling] conduct beyond the boundaries of the State." *Id.* at 69-70 (quoting *Healy*, 491 U.S. at 336) (emphasis added; internal quotation marks omitted). Similarly, the Supreme Court has rejected the argument that states may impose sanctions on out-of-state conduct for the purpose of "induc[ing]" a business to change its "nationwide" business practices. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

The Commerce Clause is about the flow of goods in interstate commerce. 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. And the constitutionality of state laws that undeniably affect interstate commerce should not turn on labels. There is no daylight between CARB's effort to leverage California's market power and the extraterritorial regulations that courts have struck down repeatedly. The practical effect of the LCFS is still to "prohibit introduction" in

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[19] Though the Court of Appeals held that the law violated the foreign Commerce Clause, it expressly relied on domestic Commerce Clause precedents, including *Healy*. *See id.*

California of ethanol identical to what might be produced in-state, simply because CARB does not approve of Midwest producers' methods.

C. The LCFS Is Not Limited To Regulation Of In-State Transactions.

CARB's second defense is based on a distinction between "direct" and "indirect" regulation. But however these protean terms may be defined, LCFS is unequivocally a form of "direct" regulation: the regulations explicitly attach legal consequences to conduct taking place in other states. The real distinction animating the cases on which CARB principally relies is the difference between impermissible regulation of *out-of-state conduct* and permissible regulation of *in-state transactions* that has incidental extraterritorial effects. *See Baldwin*, 294 U.S. at 523 (rejecting state's characterization of its regulation as "a valid exercise ... of its internal police power"); *Healy*, 491 U.S. at 341-42 (rejecting state's defense that its regulation was an in-state regulation "geared to" out-of-state conduct). CARB's authorities do no more than affirm that California has broad authority to regulate the terms of in-state transactions and the specifications of products sold in-state; they do nothing to support the LCFS.

CARB's authorities appear to fall into three main categories, not one of which bears the least resemblance to the LCFS. First, the "labeling cases": *Hampton Feedlot v. Nixon*, 249 F.3d 814 (8th Cir. 2001), *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010), and *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). These non-controlling cases show that CARB could potentially require that in-state transactions come with certain information (subject to other law, including the First Amendment). Disclosures and labels are part of the product sold in-state, even if they describe activities out-of-state, and they do not place a penalty on purchases of labeled products. The real effect of the statutes at issue in these cases is only to standardize the terms of in-state transactions and the form of in-state products.[20] Thus, so long as California did not discriminate or unduly burden interstate commerce, CARB might have opted to keep California consumers informed by placing CI disclosure requirements

[20] CARB characterizes the LCFS's effect on the channels of interstate commerce as "informational." CARB Br. 68-69. Plainly, it is not, as evidenced by the pressure and penalties it places on fuel distributors and Midwest ethanol producers in order to reduce CI. But even if it were purely informational, CARB may not "condition importation upon proof" of out-of-state production practices. *Baldwin*, 294 U.S. at 524.

on in-state ethanol sellers. *See Hampton Feedlot*, 249 F.3d at 819 (statute requiring livestock packers to disclose any price that they paid or offered to pay to sellers of livestock). CARB also might have tried to require labels on in-state gasoline pumps, such that each fuel transaction in California would come with given consumer information about its CI. *See International Dairy Foods*, 622 F.3d at 634 (statute requiring labels showing use of hormone rbST); *National Elec. Mfrs. Ass'n*, 272 F.3d at 110-11 (statute requiring labels on lamps containing mercury).

But CARB did not do those things. If the LCFS simply required ethanol producers to label their products in a particular way, the producers could continue their practices as before, and California fuel distributors and consumers would be free to buy or not to buy. That is not how the LCFS works. Instead, the LCFS's CI reduction standards impose a penalty that will ultimately prevent in-state fuel distributors from purchasing Midwest ethanol at all unless the producers conduct their out-of-state production and transportation on CARB's terms. Far from simply opening the California market to informed decisions, the

LCFS compels fuel distributors and ethanol producers to act consistently with CARB's policy preferences.

Second, CARB can regulate the kinds and specifications of products sold in-state. CARB might, for example, permissibly regulate the kinds of containers required for in-state sales of motor vehicle fuels. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (state law that prohibited the retail sale of milk in plastic nonreturnable, nonrefillable containers). Alternatively, CARB might (subject to the Clean Air Act and other federal limitations) ban use of various gasoline additives by in-state motor fuel distributors. *See Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995) (state ban on petroleum-based sweeping compounds).

The LCFS does not fit into this category either. Ethanol is "fungible," with the same physical and chemical properties, no matter how or where it is produced, and no matter what its CI might be. CARB Br. 62; ER10:2360 (ISOR); ER9:2160-61 (FSOR). The LCFS does not encourage or discourage the use of ethanol *per se*. On the contrary, the LCFS encourages the use of ethanol typically produced in California or Brazil, even as it discourages the use of ethanol produced in the

Midwest. As explained above, although the LCFS nominally applies only to in-state sales, CARB Br. 67, CARB encourages and discourages those sales based on its view of production and transportation methods that take place entirely outside of the state, including even post-production decisions like whether to dry distillers grains. In-state treatment of ethanol is thus impermissibly "geared to" out-of-state activity. *Healy*, 491 U.S. at 341.

Third, CARB can permissibly require businesses to conform their *in-state* operations to in-state business practice requirements. For example, CARB could require licenses for ethanol sellers or producers, *Kleenwell Biohazard Waste & Gen'l Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (state license requirement for waste collectors), or discriminate against ethanol producers that also run fuel stations, *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526-27 (9th Cir. 2009) ("*Lenscrafters*") (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978)). It might also place a special tax or fee on in-state sales of transportation fuels, *see Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186 (9th Cir. 1990) (statute placing fee on non-customer transactions at in-state ATMs), or require all businesses in California to contribute to a fund to mitigate the effects of global warming in the state, *see Pharmaceutical Research & Mfrs. of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001) ("*PhRMA*") (statute incentivizing pharmaceutical companies to participate in a "rebate program" that provided the state's residents with cheaper prescription drugs); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 212 (2d Cir. 2004) (state requirement that cigarette manufacturers pay money according to a Master Settlement Agreement or into an escrow account).[21]

As should be obvious, there is no analogy between the LCFS and this third category of cases either. Midwest ethanol producers have no operations in California to speak of, and the ethanol they produce is identical to ethanol produced anywhere else. The conditions that CARB has placed on their participation in the California ethanol market relate

[21]*PhRMA* and *Freedom Holdings* are also distinguishable on the grounds that the regulations at issue in those cases did nothing to incentivize market participants to change their business practices *outside of the regulating state*. *See PhRMA*, 249 F.3d at 81-82; *Freedom Holdings*, 357 F.3d at 221. This crucial distinction, which CARB entirely ignores, renders those cases inapposite.

not to their in-state business, but their out-of-state production, transportation of fuel, and processing of wholly separate grain products.

CARB's cases allow a wide range of state regulation.[22] What they emphatically do *not* allow, however, is CARB's effort to condition in-state transactions on Midwest ethanol producers changing their lawful out-of-state production practices. *Baldwin*, 294 U.S. at 524; *Gore*, 517 U.S. at 571 (states "may not impose economic sanctions ... with the intent of changing ... lawful conduct in other States"); *National Solid Wastes II*, 165 F.3d at 1154 ("No state has the authority to tell other polities ... how affairs must be conducted outside its borders."). The LCFS thus crosses a constitutional line from a law in which the out-of-state effects are merely external by-products of some otherwise legitimate exercise of the state's internal police power to an unconstitutional attempt to project regulation outside the state.

[22] CARB's cases also contradict CARB's alarmist claim that invalidation of the LCFS would call previously unobjectionable state laws into question. CARB Br. 80. As demonstrated by the cases CARB itself cites, the instant action may be decided on well-settled grounds.

II. California's Low Carbon Fuel Standard Impermissibly Discriminates Against Interstate Commerce.

The dormant Commerce Clause also prohibits states from discriminating against interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). That prohibition means, at a minimum, that states cannot legislate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envt'l Quality of State of Or.*, 511 U.S. 93, 99 (1994). But that is precisely what California has done in enacting the LCFS, which facially discriminates against ethanol produced out-of-state.

CARB has loaded the dice by basing the LCFS's calculation of CI scores, in significant part, on whether ethanol is produced in California or the Midwest. Quite simply, CARB has concluded that it disapproves of transporting fuels such as ethanol—and the raw materials for those fuels—over significant distances from out-of-state, and likewise disapproves of the methods by which ethanol is produced and electricity is generated in its sister states. CARB has enacted that disapproval into law in the name of environmental regulation. California thus gives different treatment to chemically and physically identical products made using the same production process based on where they are made. A more clear violation of the Commerce Clause is difficult to imagine.

Because the LCFS is facially discriminatory, this Court applies strict scrutiny, which CARB cannot survive. *Oregon Waste*, 511 U.S. at 99 ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid."); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). This Court should therefore affirm the District Court.

A. The LCFS Discriminates Between Ethanol Manufacturers On The Basis Of Geography.

The District Court's ruling in favor of RMFU rests on a simple proposition: on its face, and in practical result, the LCFS gives different treatment to similar ethanol facilities producing chemically identical products—indeed, using the same methods and the same raw materials—depending on where the facilities are located. As the District Court recognized, that is a classic violation of the dormant Commerce Clause, and all but *per se* requires that the LCFS be invalidated. *Oregon Waste*, 511 U.S. at 99.

1. The LCFS facially discriminates against Midwest ethanol producers.

The lodestar of the LCFS is the CI of particular ethanol pathways. As the LCFS exerts escalating pressure on fuel distributors in California to reduce the total CI of the fuel they sell, the relative CI of competing fuels determines which will remain viable competitors in the California market. LCFS §95482, §95483. But in a contest for lower CI scores between two identical facilities, one in California and one in the Midwest, producing chemically identical ethanol by the same means, the LCFS ensures that the one in California *always wins*. LCFS §95486, Table 6. That results from, and constitutes, facial discrimination. *Camps Newfound*, 520 U.S. at 575-76 (explaining that a state or local law is facially discriminatory when "[i]t is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce.").

Ethanol has the same chemical and physical properties no matter where (or how) it is produced. ER10:2360 (ISOR); ER9:2161 (FSOR). Yet under the LCFS, ethanol is treated differently based on where it is produced, on the theory that producers outside California release more GHGs. *See* ER6:1274 (FSOR); ER7:1718 (FSOR); ER8:1923 (FSOR); *see* *also* ER9:2287-90 (ISOR). Specifically, CARB presumes that Midwest ethanol facilities use "dirtier" electricity than facilities in California, that they use electricity less efficiently, and that shipment of ethanol from Midwest facilities to the California market releases further GHGs. *See* ER6:1274 (FSOR); ER8:1923 (FSOR); ER4:781 (Scheible Decl.); *see also* ER9:2287-90 (ISOR). As CARB has candidly acknowledged, "[t]he carbon intensities of some California-produced fuels ... benefit from shorter transport distances and lower carbon intensity electricity sources." ER8:1923 (FSOR).

These presumptions appear on the face of the LCFS, which systematically assigns a penalty of almost 10 gCO_2e/MJ to the CI scores of Midwest facilities as compared to similarly situated facilities in California. LCFS §95486, Table 6. The result is that, as the District Court recognized, the LCFS facially handicaps the market in favor of California ethanol producers at the expense of those in the Midwest. ER1:59 (Dist. Ct. Op.) ("Although California applies the same CA-GREET formula to all pathways evenly, the variables within the formula favor California ethanol producers by assigning lower CI scores based on location."). To illustrate, if an Iowa ethanol facility operating under pathway ETHC004 (“Dry Mill, Dry DGS, NG”) were physically picked up and moved to California, it would automatically be reassigned to pathway ETHC009 (“Dry Mill, Dry DGS, NG”), and its CI score would go down from 98.40 to 88.90 gCO_2e/MJ *based solely on the fact that it now operates in California instead of Iowa*.

True, Midwest ethanol is not banned outright under the LCFS, but CARB still anticipated that the results would be severe for Midwest ethanol producers. California fuel distributors pressed to comply with increasingly stringent CI standards naturally have a strong regulation-imposed incentive against purchasing ethanol from ethanol facilities located in the Midwest, and to purchase within California instead. *See* LCFS §95482 (setting out schedules for CI reductions by 2020). Much Midwestern ethanol, unlike all California ethanol, has a CI too high even to reduce the total fuel CI from the gasoline baseline when blended with California gasoline. ER15:3590 (CARB’s Resp. to RMFU Stmt. of Material Facts).

That incentive against the purchase of Midwest ethanol is so strong that CARB has projected that the LCFS would almost immediately exclude ethanol produced using coal-generated electricity—that is, most ethanol produced outside of California—from the California market. ER8:1812 (FSOR); ER7:1731 (FSOR). In fact, CARB's own analysis predicted that *Midwest ethanol would be forced out of the California market altogether* within five to six years: a *de facto*, if not *de jure*, ban. *See* ER11:2728-31 (ISOR). Even the availability of new production pathways can only delay the inevitable for Midwestern facilities. ER14:3524-25 (David Rebuttal Decl.); ER14:3513-14 (Lyons Rebuttal Decl.). By contrast, CARB predicts a steady flow of *California* ethanol in perpetuity. ER11:2728-31 (ISOR); ER7:1689 (FSOR).

The discrimination evident on the face of the LCFS should be virtually conclusive to this Court's analysis. It is well established that a statute is facially discriminatory when, as here, the treatment of like products produced or sold by similarly situated entities depends on geographic origin, where in-state products are benefitted and out-of-state products are burdened. *Wyoming*, 502 U.S. at 455; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). And "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste*, 511 U.S. at 99. Even without an express ban on Midwest ethanol, the "strong incentive for affected entities [in California] not to do business with nonresidents," appearing on the face of the statute, would be more than enough to constitute discrimination. *Camps Newfound*, 520 U.S. at 578; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988) (a law need not "impose an absolute ban" to violate the Commerce Clause); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987) (invalidating a discriminatory tax "because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure"); *see also Miller*, 44 F.3d at 596 (holding an Illinois law violated the Commerce Clause because it "encourage[ed] the use of Illinois coal" thereby "discriminat[ing] against western coal by making it a less viable compliance option for Illinois generating plants"). And CARB's own predictions establish that the LCFS is expected to be a total ban in all but name, and that the LCFS will ultimately exclude Midwestern ethanol producers from the California market.

2. The LCFS discriminates purposefully.

As CARB's own authorities demonstrate, facial discrimination such as that evident in the LCFS renders the LCFS virtually *per se* invalid, whether California intended to discriminate or not. *LensCrafters*, 567 F.3d at 525 (including facial discrimination, along with purposeful discrimination and discrimination in effect, as one of three types of impermissible discrimination). And yet discrimination *is* a purposeful aspect of the LCFS, not merely an incidental effect. California officials were fully aware of it, embraced it, and even publicly justified the LCFS by touting the benefits that would accrue to California's local economy if the importation of Midwest ethanol were reduced.[23]

CARB dismisses what it refers to as "isolated phrases" from its rulemaking documents. CARB Br. 44. But these were not merely one-off comments—the administrative record is filled with damning statements. CARB avoids grappling with them, because it has no real response.

CARB's stated goal for the LCFS is to "[d]isplac[e] imported transportation fuels with biofuels produced in the State," thus

[23] Although the District Court did not reach the issue of whether the LCFS reflects purposeful discrimination, ER1:63 (Dist. Ct. Op), RMFU moved for summary judgment on that basis, and this Court may consider it.

"keep[ing] more money in" California. ER7:1689 (FSOR). Yet CARB was careful not to exclude Midwest ethanol all at once, and intentionally allowed "time for future investments to be made in California-based biofuel technologies and related jobs." ER7:1686 (FSOR). Once the LCFS's escalating restrictions take hold, CARB predicts a California ethanol facility construction boom, with up to 25 new plants being constructed. ER7:1637 (FSOR). CARB intends supply from those facilities, made from local feedstocks, to "reduce[e] the volume of transportation fuels that are imported from other states," and that the new facilities will "provide needed employment, [and] an increased tax base for the State[.]" ER7:1689 (FSOR); ER10:2469-70 (ISOR). CARB thus predicted that by "produc[ing] more of its own transportation fuel … and lower[ing] dependence on out-of-state biofuels," California would improve its "business competitiveness." ER7:1684 (FSOR). CARB "developed the LCFS in a manner that minimizes costs and maximizes the total benefits to California," but at the expense of Midwestern producers increasingly locked out of the California market. ER7:1686 (FSOR).

CARB's own justifications, in short, amount to unmistakable statements of crudely protectionist impulses. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry."). This is all far worse than the situations in cases such as *Allstate Insurance Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), *Alliance of Automobile Manufacturers v. Gwadosk*y, 430 F.3d 30 (1st Cir. 2005), and *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990) —cited by CARB—where courts held that facially neutral laws were not invalidated by incidental comments in legislative or regulatory records. The facial discrimination evident in the LCFS is *consistent* with CARB's protectionist intent, and far from being errant statements by a handful of protectionist legislators, CARB's protectionist language appears throughout its *official statements of reasons* for the LCFS, which it was required to prepare in compliance with California administrative law. *See* CARB Br. 45-46; Cal. Pub. Res. Code §21000; Cal. Gov't Code §11346.4; Cal. Gov't Code §11346.3; Cal. Health & Saf. Code §57005. The protectionist effects of the LCFS— including the effective elimination of Midwestern ethanol from the California market—were plainly within CARB's anticipation all along.

CARB also attempts to discount these protectionist statements, saying that it was not absolutely *certain* that the LCFS's protectionism would benefit California. CARB Br. 45-46. That makes no sense at all: California can act with impermissibly protectionist purpose without being morally certain that its means will actually work as planned. CARB points to no case requiring anything more than intent, which the administrative record amply demonstrates. Regardless, the burdens of the LCFS "fall[] by design in a predictably disproportionate way on out-of-staters"; and that is all that is necessary. *Camps Newfound*, 520 U.S. at 579-80. Even good intentions cannot justify facial discrimination, and CARB's intentions were not good. California intentionally constructed its regulatory scheme to benefit in-state commerce at the expense of interstate commerce. That is never permissible.[24]

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[24] CARB argues that it is entitled to summary judgment on the ground that the LCFS was not purposefully discriminatory. CARB Br. 42. The District Court did not reach RMFU's argument that the LCFS reflected purposeful protectionism and discrimination against Midwestern ethanol. Although the Court may affirm the judgment on this ground, based on the evidence and argument presented by RMFU in the District

(Continued…)

B. CARB's Purported Justifications For Its Facial Discrimination Only Highlight The Flaws In The LCFS.

By definition, California's preference for ethanol produced in-state is discriminatory and protectionist. *Wyoming*, 502 U.S. at 455. CARB offers a number of purported justifications, but none withstands scrutiny.

1. Existence of new custom pathways for out-of-state producers does not remedy discrimination.

In arguing that the LCFS is nondiscriminatory, CARB relies extensively on the opportunity of Midwest ethanol producers to apply for new "pathways" with CI scores lower than those assigned to them by default under the LCFS. CARB Br. 47, 51. This, however, is no more than a sleight of hand, and the authorization of new pathways only highlights the LCFS's underlying discrimination.

To be sure, the LCFS permits some Midwest ethanol facilities, under limited circumstances, to apply to CARB for pathways that make them temporarily competitive in the California market. But they must demonstrate special efforts such as changing the way they raise corn,

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Court, there is no basis for granting *judgment for defendants* on this issue. At most this Court should remand for further proceedings. *See, e.g.*, *United States v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003).

increasing their energy efficiency, or generating their own electricity. CARB Br. 60. Even then (and even if these efforts had already been undertaken before adoption of the LCFS) Midwest producers must *affirmatively apply* for a pathway acknowledging their efforts, while California producers enjoy the benefit of favorable presumptions. LCFS §95486(c)-(f). To say that LCFS provides Midwestern producers with special benefits, as CARB insinuates, is an Orwellian distortion. CARB Br. 47, 51.

Furthermore, Method 2A and Method 2B are not in fact facially evenhanded or nondiscriminatory. Even after ethanol producers marshal the voluminous scientific and technical data necessary for a pathway application, LCFS §95486(e), (f), approval of new pathways remains in CARB's sole discretion, and presumptions unfavorable to Midwest ethanol remain. For example, an ethanol producer cannot apply for a new pathway under Method 2A unless its facility's CI is *substantially* less—by 5 gCO_2e/MJ—than its default pathway, and unless the ethanol producer satisfies minimum production requirements. LCFS §95486(e)(2)(A), (B). In contrast, ethanol facilities in California are automatically presumed to have superior energy efficiency resulting in 3.1 gCO_2e/MJ less CI than Midwestern facilities, *see* ER4:778 (Scheible Decl.)—meaning that simply *building* new California facilities achieves regulatory benefits for which Midwesterners cannot even apply—and California plants are presumed to have approximately a 10 gCO_2e/MJ advantage in total, *see* LCFS §95486, Table 6.

Besides, no matter what Midwest producers do to gain CARB's approval for their agricultural practices, power generation, or anything else, the CI scores of Midwest facilities will inevitably suffer from having to ship ethanol across the country, relative to a California producer using California feedstocks. ER8:1923 (FSOR). That discrimination is inherent in the LCFS, and nothing in CARB's brief shows otherwise. The burden that California places on ethanol facilities that must ship ethanol to the state constitutes a thumb on the scale that Midwestern ethanol producers simply cannot lift.

Implicitly conceding that at least some discrimination exists within the pathways, CARB accuses the District Court of cherry-picking discrimination within a subset of pathways, or variables within the lifecycle analysis. CARB Br. 49, 56. Even if only *some* pathways were discriminatory, the LCFS would violate the Commerce Clause, as there is no *de minimis* exception for dormant Commerce Clause violations. *Limbach*, 486 U.S. at 276; *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 649-50 (1994).

More importantly, it is not "cherry picking" for the District Court to highlight comparable pathways that provide an apples-to-apples comparison between similarly-situated facilities. CARB Br. 61 (dismissing the District Court's "comparison" of "'plants with the same feedstock and production processes'"). CARB admits that ethanol is fungible, and that the LCFS treats different production methods differently. CARB Br. 62. Indeed, as the District Court concluded, the only meaningful way to evaluate the LCFS for discrimination is by looking at comparable pathways where the only difference is location. ER1:62 (Dist. Ct. Op.) ("Because the LCFS makes production process, feedstock and origin relevant, comparing pathways with different production processes or feedstocks is a red herring."); *cf. Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 42 n.9 (1980). Comparing *similar* facilities is what shows the discrimination inherent in the LCFS: if a Midwest ethanol facility using dry mill feedstock, producing dry distillers grains, and getting its power from natural gas were dismantled and reassembled in California, its CI score would go down by 9.5 points. For CARB to *object* to RMFU's comparison of similarly-situated pathways turns the necessary analysis on its head.[25]

Ultimately, even if Midwestern ethanol facilities truly could overcome the LCFS's location-based discrimination by registering individualized pathways, the Commerce Clause analysis would not change. The LCFS requirement that Midwest producers register new pathways in order to be competitive in California is itself a discriminatory burden on interstate commerce. LCFS §95486(c)-(f). The discrimination is inherent in the application requirement, for the LCFS puts the burden on Midwest ethanol producers to prove that they should receive the favorable treatment that California ethanol producers get automatically.

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[25] Notably, no apples-to-apples comparison of similarly situated alternative pathways is even possible. CARB Br. 62-63. Each of the Lookup Table's descriptions of Method 2A and 2B pathways refers to what CARB has decided to treat as "confidential" information about the facility's fuel mix or power use. *See* LCFS §95486, Table 6. The only reliable way to compare pathways is to consider the principal pathways that are not based on Methods 2A or 2B, which systematically advantage California over the Midwest.

Pathway applications require submission of extensive scientific and technical information, LCFS §95486(e)(1), (3)(A), (f)(1), and often proof of minimum CI reductions and production requirements. LCFS §95486(e)(2)(A), (B). Much of the material that must be produced is confidential business information, LCFS §95486, Table 6; CARB Br. 56 n.15, 59, and yet it is presumptively made public, LCFS §95486(f)(2)(A). After a new pathway is approved, the producer must then inform CARB if there is any "material change" in its methods, on pain of having its pathway invalidated. LCFS §95484(d)(2)(D). The burden to establish a pathway is discrimination in itself, and a burden Midwest producers, but not California producers, must face to remain competitive. *See Freeman v. Corzine*, 629 F.3d 146, 160 (3rd Cir. 2010) (finding discrimination in requirement that out-of-state entities, but not in-state entities, must apply for a permit to sell unlimited volumes of wine in-state).

In any event, by arguing that Midwest ethanol producers can equalize the playing field by meeting California's agricultural and energy standards, CARB effectively acknowledges that the LCFS regulates conduct out-of-state. But as explained above, California has no constitutional power to regulate out-of-state conduct, and any efforts to do so violate the Commerce Clause. *Healy*, 491 U.S. at 336. CARB's defense against impermissible discrimination, in other words, amounts to an acknowledgement that the LCFS impermissibly regulates extraterritorially.

2. The fact that some out-of-state producers may benefit relative to some California producers is no answer.

CARB also points to various out-of-state ethanol producers (such as Brazilian producers) that actually may enjoy better access to the California fuel market than some California producers. CARB Br. 54; *see* UNICA Amicus Br.[26] This is of no relevance either, for a long line of cases establishes that states cannot compensate for facial discrimination against some out-of-state entities by benefiting other out-of-state entities at the same time. *Limbach*, 486 U.S. at 274 ("explicitly depriv[ing] certain products of generally available beneficial

[26] CARB claims that the LCFS gives out-of-state ethanol producers CI scores ranging from 58.40 to 120.99. *See* CARB Br. 50. That distorts the true range of scores. Of the 35 corn ethanol pathways in the Lookup Table, only three have CI scores less than 80, and none of those three is denoted a Midwest pathway. LCFS §95486, Table 6. Both of the pathways with CI scores over 100 are Midwest pathways (ETHC005 and ETHC007).

tax treatment because they are made in certain other States" discriminates even though "some out-of-state manufacturers" benefited). The dormant Commerce Clause, again, has no *de minimis* exception. *Id.* at 276; *Lohman*, 511 U.S. at 649-50.[27]

Conversely, because the LCFS explicitly penalizes ethanol from the Midwest, it does not matter whether the LCFS puts some burden on some California producers as well. *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Bacchus Imports*, 468 U.S. at 265, 271 (finding a regulatory exemption for locally-produced products discriminatory "even though it does not apply to all such products"). CARB's suggestion that the LCFS burdens California producers relative to Midwestern producers rings hollow as a factual matter, considering

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[27] CARB provides no explanation for why the Commerce Clause permits it to justify discrimination against ethanol producers in the *Midwest* by conferring advantages on producers in *Brazil*. CARB Br. at 27, 54-55. Comparisons between United States and Brazilian ethanol producers are meaningless for the additional reason that Brazilian producers manufacture ethanol not from corn, but from sugar cane. LCFS §95486, Table 6. Brazilian producers thus are not similarly situated to United States producers. ER1:62 (Dist. Ct. Op.).

that CARB projected a healthy California ethanol industry indefinitely into the future, while Midwest ethanol would be driven from the California market within the decade. ER11:2728-31 (ISOR). As a *legal* matter, CARB's justification only illustrates the severity of California's discrimination against interstate commerce.

According to CARB, the LCFS penalizes California ethanol producers for GHGs emitted when they ship corn from the Midwest and other parts of the country into California. CARB Br. 55, 59. In other words, CARB counters RMFU's claims of discrimination against out-of-state *ethanol* by asserting that California also discriminates against importation of out-of-state *corn*, or perhaps against intra-state shipment of California corn to in-state ethanol facilities, which is itself unconstitutional. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 361-63 (1992) (invalidating restriction on transportation of waste in-state); *Dean Milk*, 340 U.S. at 354 (invalidating restriction on transportation of milk in-state).

At bottom, the most advantaged ethanol producer under the LCFS is a California producer using California feedstocks, because that producer transports the least and gets the benefit of favorable energy generation assumptions. *See* ER8:1923 (FSOR). That CARB doubly discriminates is no justification for its flawed regulation. Two wrongs do not make a right.

3. CARB's repeated insistence that it did not act out of animus against other states or for protectionist motive makes no difference.

CARB also defends the LCFS on the basis that it purportedly had no intent to disadvantage other states or to protect local industry. CARB's protestations are belied by the administrative record, which plainly shows that California *did* intend to give in-state ethanol production an advantage over production in other states and to discourage ethanol imports, all to aid the California economy. ER7:1689 (FSOR). But even giving CARB the benefit of any doubt in that regard, the LCFS is discriminatory on its face, and thus violates the Commerce Clause, whether California intended to discriminate or not. *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious.").

CARB attempts to hide behind the fact that the LCFS nominally regulates transportation or CI, and not state origin.[28] But that distinction is pure sophistry. High CI scores reflect transportation, and the need for some ethanol producers to transport ethanol to California is purely a function of geography. No matter what the product—oranges or ethanol—a penalty on long-distance transport is a *per se* discrimination against interstate commerce. To hold otherwise would liberate every state to favor in-state producers over out-of-state producers, who necessarily have longer distances to ship. *See BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911, 913 (9th Cir. 1993) (rejecting California's argument that discrimination against out-of-state medical waste was justified because it had "travelled many miles"); L. Tribe, 1 American Constitutional Law 1109 (3d ed. 2000) (explaining that discriminating against an "activity which is essential for an out-of-state enterprise but not essential for a competing local business" is

[28] CARB also draws an analogy between the LCFS and regulations intended to exclude "dangerous pest[s]." CARB Br. 53. That analogy fails for the obvious reason that California and Midwest ethanol are physically and chemically identical. To the extent CARB takes that analogy seriously, it can only be because CARB treats out-of-state *activities* including transportation and power generation as "dangerous," and subject to California regulation.

discrimination against out-of-state commerce). As a result, there is no constitutional distinction in this case between discrimination against transportation and discrimination against importation from out-of-state producers. Indeed, discrimination against transportation is forbidden even if in-state. *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361-63; *Dean Milk*, 340 U.S. at 354. All transportation entails emissions. Under CARB's rationale, Florida could fight global warming by placing a retail surcharge on the sale of oranges transported long distances (*i.e.*, California oranges). If states could penalize interstate commerce for reasons inherent in its interstate character, every state could use the rationale of GHG reductions to protect local industry from competition and the Nation's common market would be at an end.

And even if its calculation of CI were nondiscriminatory, CARB acknowledges that CI is not a property of fuel, but a description of activities—many of which occur outside of California or are linked to transporting fuel within California and across state lines. ER9:2160-61 (FSOR). As discussed above, by defending LCFS as nondiscriminatory, CARB acknowledges that it extends to matters outside California's legitimate regulatory reach.

CARB cannot defend its discrimination as "scientific" either. CARB Br. 38-39; *see also* Scientists Amicus Br. Notwithstanding CARB's arguments on appeal, the LCFS and application of the CA-GREET lifecycle analysis to ethanol are deeply controversial as a scientific matter, and CARB's defense of them exceeds what the record justifies. CA-GREET has not even been subject to the same peer review as the national GREET model. ER6:1226 (FSOR); ER4:770 (Scheible Decl.). That does not make the LCFS unconstitutional, but it precludes any possibility that CARB can justify its discriminatory regime by untested assertions of scientific validity. And even if the LCFS were beyond serious scientific question, the fact that California's approach is nominally "scientific" would hardly mean that it is not discriminatory, and would not insulate it from constitutional scrutiny. CARB Br. 58. *National Solid Wastes II*, 165 F.3d at 1153 (explaining that "it just does not matter," for Commerce Clause purposes, if a state views its own standards as "environmentally sound"). Whatever their scientific basis, CARB's lifecycle analysis and the CI metric distinguish between like products made in different places, which the Constitution forbids. CARB Br. 52.

C. CARB Cannot Show That Discrimination In The LCFS Survives Strict Scrutiny.

State statutes that discriminate against interstate commerce are "virtually *per se* … invalid[]" and are subject to the "strictest scrutiny." *Oregon Waste*, 511 U.S. at 100-01 (quoting *Hughes*, 441 U.S. at 337).[29] A law passes strict scrutiny review only when a state or municipality shows that there are "no other means to advance a legitimate local interest," *C&A Carbone*, 511 U.S. at 392, and the local interest must be "unrelated to economic protectionism," *Limbach*, 486 U.S. at 274, 278. CARB cannot meet this heavy burden.

To begin with, CARB has waived the argument that the LCFS survives strict scrutiny. In its cross-motion for summary judgment and its opposition to RMFU's motion, CARB argued that the LCFS was not discriminatory, but not that it would survive scrutiny if it were. Since CARB failed to dispute this issue below, CARB is not entitled to judgment now. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 495 (9th Cir. 2000).

[29] If this Court finds that the LCFS constitutes extraterritorial regulation, CARB concedes that this Court should find it *per se* invalid without applying strict scrutiny. CARB Br. 66.

Assuming *arguendo* that CARB may present its argument at all, the LCFS still fails strict scrutiny. *First*, as CARB acknowledges in its brief, the LCFS addresses not a local problem, but a global one. To qualify as a local problem, global warming must be "local in character and effect." *Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 (1945). Global warming is neither. Whatever the in-state effects of global warming might be, CARB claims that California is affected by *global* GHG emissions, not just those in-state, and that GHG emissions in California affect the entire world in turn. CARB Br. 19. California is not, in other words, working to solve a legitimate "*local*" problem, but a shared, generalized problem affecting the whole world.

Such purposes, however laudable in theory, do not qualify as important local problems for purposes of strict scrutiny under the Commerce Clause. CARB cites *Massachusetts v. EPA*, 549 U.S. 497 (2007), but that case stands only for the proposition that the threat of global warming is sufficient to give states standing *to ask the federal government to regulate* GHG emissions. Nowhere does it hold that the Commerce Clause permits a state to independently (and discriminatorily) regulate GHG emissions itself. To the contrary, under the Commerce Clause, California cannot "isolate itself from a problem *common to several States* by raising barriers to the free flow of interstate trade." *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992) (emphasis added).

Second, even if global warming counterfactually qualified as a legitimate local purpose, the LCFS does not actually do anything to address it. CARB refers to the LCFS as "a step toward slowing or reducing" global warming, CARB Br. 97, but that "step" confers no benefit at all, either locally or globally. CARB has conceded that the LCFS, by itself, will have no significant impact on global warming, and that "GHG emission reductions by the LCFS alone *will not result in significant climate change*." ER7:1552 (FSOR) (emphasis added). Far from it; an independent analysis submitted to CARB indicated that the effect would not even be *detectable*. ER15:3755-56 (Sierra Research Report). This is not only because of the infinitesimally small GHG emission reductions contemplated, but because of the predicted "shuffling" of regulated fuels to other markets. ER7:1451 (FSOR); ER6:1287 (FSOR), ER8:1925 (FSOR). Shuffling, in fact, would *increase* GHGs emitted from fuel transportation. ER7:1687 (FSOR); ER8:1925

(FSOR). Nor is LCFS an incremental "step" California might legitimately take toward more effective GHG regulations in the future, for CARB admits that there will be "little or no net change in fuel carbon-intensity on a global scale" "[w]ithout the *wider* adoption of fuel carbon-intensity standards"—*i.e.*, in *other* states and countries beyond California's reach. ER8:1925 (FSOR) (emphasis added); ER7:1687 (FSOR).

Whatever benefits California might achieve from a *global* reduction in GHG emissions, it achieves none from LCFS. *See* CARB Br. 97. And in the absence of any "discernible contribution" to the problem, the LCFS cannot be CARB's means to a local end—indeed, it cannot count as a means at all. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978).

Third, the LCFS is not *necessary*, in any real sense, to address the issue of global warming. If California were serious about limiting its *own* GHG emissions, it would not be trying to export its perceived problem—and the cost of solving it—to other states. California could legislate further GHG emission reductions without placing protectionist burdens on interstate commerce simply by regulating in-state power generation, fuel standards, and tailpipe emissions, as it does now. *See e.g.*, 13 Cal. Code Regs. §1961.1. California's decision to regulate GHGs through the LCFS thus represents a choice between means, not ends. Its selection of a *discriminatory* means merits no deference.

CARB's own expert acknowledged that California could "adopt a tax on fossil fuels" to "reduce greenhouse gas emissions associated with California's transportation sector." ER4:805 (Babcock Decl.). CARB has also admitted that it could directly reduce in-state GHG emissions by "increasing vehicle efficiency" or "reducing the number of vehicle miles traveled." ER6:1284 (FSOR).

Of course, these measures would impose costs on Californians, not on Midwest farmers and producers, and it would require changes in the behavior of Californians, not Midwesterners. That is the rub. One can see why California regulators might prefer the LCFS. But the Commerce Clause does not allow states to export the costs of their policies. Even if such measures would be a blunter instrument for GHG regulation than the LCFS—or costlier to Californians and the California economy—the Commerce Clause does not guarantee California the right to pursue "a legitimate goal ... by the illegitimate means of isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

Because any benefit conferred by the LCFS is almost exclusively symbolic, California would achieve nearly the same practical effect on global warming if its legislature had passed a strongly-worded resolution calling on all the world to apply a full lifecycle CI analysis to fuels everywhere. *See Natsios,* 181 F.3d at 61 & n.18 (finding that Massachusetts restriction on foreign commerce with Burma was invalid under the Commerce Clause and reserving the question of whether state could pass a nonbinding resolution on the same subject instead). The federal government and other nations would be free to consider adopting California's approach, as they are now; meanwhile, interstate commerce would not be burdened and Midwest ethanol producers would not be faced with exclusion from the California market.

Besides, CARB's asserted reason for preferring the LCFS's lifecycle approach is precisely to reach out-of-state GHG emissions, which, as explained above, violates the Commerce Clause's restriction on extraterritorial regulation. The real difference between restricting GHG emissions that actually occur in California and applying the LCFS is that the LCFS penalizes out-of-state conduct—over which California has no legitimate power, and which California cannot burden.

If California wishes to address global warming, it must do so *in-state*, not by exporting its burdens to citizens of other states. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) ("Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States."). Yet through the LCFS, California believes it has found such a way to export the costs of reducing global GHG emissions to, *inter alia*, Midwest farmers and ethanol producers while importing opportunities for California businesses. This it may not do.

III. The LCFS, If Allowed To Stand, Will Lead To Economic Balkanization.

The LCFS's extraterritorial regulation and its discrimination against out-of-state producers fall precisely within the core of dangers that the Commerce Clause is designed to prevent. The Commerce Clause was born out of the need to prevent the "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes*, 441 U.S. at 325-26. Yet, as the District Court correctly observed, such impermissible Balkanization of the United States into separate economic and regulatory spheres is precisely what would result from the proliferation across the states of regulations like the LCFS. ER1:66-67 (Dist. Ct. Op.).

Whether this Court characterizes the LCFS's Balkanization problem as arising from its discrimination or from its extraterritoriality, the result is the same: difficulties for companies located in one part of the Nation to do business elsewhere, a burdensome patchwork of overlapping and potentially conflicting regulation, and—as the floodgates are opened to similar legislation in other contexts—an unprecedented transfer of interstate regulatory authority. It is not only permissible for this Court to consider these effects, it is essential to the Constitutional analysis. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) ("[I]f one state or political subdivision may enact such rules, then so may any other[.]"); *Southern Pac.*, 325 U.S. at 775 (similarly considering the ill effects of potential multiplication of like regulation across the states).[30]

A. The LCFS Fails The "Internal Consistency" Test.

In *American Trucking Associations v. Scheiner*, the Supreme Court held that a state law violated the Commerce Clause because it did not pass the "internal consistency test"—that is, that "if [similar regulations were] applied by every jurisdiction there would be [an] impermissible interference with free trade." 483 U.S. at 284 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). Here, the adoption of different lifecycle-based fuel regulations in different states would create

[30] CARB argues that the LCFS reflects California's role as a "laboratory for innovation." CARB Br. 11. Similarly, CARB's state amici urge that "it has fallen to the states to take the lead" on reducing global warming. Oregon *et al.* Amicus Br. 3. They cite *Gonzales v. Raich* in support of their claim: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments[.]" *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (internal quotation marks omitted)). But *Raich* also presumes that this "experiment[ation]" will be effectuated "without risk to the rest of the country," which is where the LCFS fails. *Raich*, 545 U.S. at 42. Indeed, as explained above, the LCFS is not simply California regulating within its borders. Instead, both the purpose and effect of the LCFS is that California exerts control over activities occurring wholly outside the state and with no connection to California. This is the "risk" of which the Court disapproved in *Raich*. *Id.*

a complicated web of potentially conflicting regulatory regimes that would "divide and disrupt" the ethanol market. *Id.* at 285. Likewise, if every state penalized products that were transported long distances over identical products made and consumed locally, the Nation would tend not toward greater economic integration, but toward *dis*integration into state and local economies. Notwithstanding that CARB finds these results "difficult to imagine," CARB Br. 82, they are the logically inescapable result of the principle that the LCFS represents.

As the District Court found, ethanol producers "would be hard-pressed to satisfy the requirements of 50 different LCFS-like regulations which may require[] 50 different levels of reductions over 50 different time periods." ER1:66 (Dist. Ct. Op.). Such economic gridlock is precisely what the Commerce Clause was designed to protect against. *Healy*, 491 U.S. at 337 ("[T]he practical effect of [the challenged] law, in conjunction with the many other ... laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.").

CARB argues that when deciding whether the LCFS regulates extraterritorially, this Court need not "speculat[e]" about conflicting state regulations. CARB Br. 81 (internal quotation marks omitted). But the Supreme Court has explained that "the practical effect of [a] statute must be evaluated ... by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and *what effect would arise if not one, but many or every, State adopted similar legislation*." *Healy*, 491 U.S. at 336 (emphasis added). CARB cites *S.D. Myers*, 253 F.3d 461, and *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007), for the proposition that the Court can consider only *actual* conflicts between the challenged regulation and those in place in other states. But neither of those cases addresses the internal consistency test and, in each case, the courts merely declined to consider the effect of potentially conflicting regulatory regimes where they had already concluded that there was no regulation of extraterritorial activity.

Moreover, *S.D. Myers* itself recognized that legislation under active consideration in another state could establish the "conflict" warned of in *Healy*. *S.D. Myers, Inc.*, 253 F.3d at 470 (citing *NCAA*,10

F.3d at 639-40 (recognizing that "Nevada is not the only state that has enacted or could enact [this type of] legislation" and noting that similar legislation had been adopted or introduced in several other states)). That is exactly what is happening here, as CARB's own amici point out. *See* Oregon *et al.* Amicus Br. 4 (noting that Oregon has already approved and will promulgate a carbon-emissions regulation similar to the LCFS before the end of 2012, and also highlighting steps taken in that direction by at least 12 other states); Profs. of Envt'l Law Amicus Br. 10 (similar). Thus the threat of inconsistent LCFS-like regulations multiplying across the country is imminent, not merely imagined as CARB would have this Court believe.

B. Sustaining The LCFS Would Radically Alter The Balance Of Interstate Regulatory Authority.

There is no reason why the Balkanization brought about by the LCFS would be limited to the ethanol market, because there is no reason the LCFS must be limited to motor vehicle fuels. The manufacture and importation of every good sold in California (and every other state, for that matter) involves the release of GHGs. Thus, if the LCFS is constitutionally permissible, there is nothing to prevent a state from enacting a CI standard with regard to any imported product.

On CARB's theory, California might just as easily discriminate against cars made in Detroit and sent to the state, and it could discriminate even more heavily against imported foreign cars shipped cross-country from our Atlantic ports, which presumably generate even more lifecycle GHG emissions. If California determined that Japanese-made Lexuses disembarking at the Port of Los Angeles have a lower CI than German-made BMWs arriving in Houston or Baltimore, California's theory may even allow it to impose special taxes on the latter, or (in an even more precise analogy to the LCFS) to compel California car dealers to buy credits if they sold too many BMWs.

The same might apply not only to industry, but to agricultural products if California determined that out-of-state agricultural practices, or shipment of out-of-state produce, are more carbon intensive than local production and consumption. If California can discriminate against Midwest corn and ethanol based on GHGs emitted during shipment, it might just as easily discriminate against Midwestern vegetables and livestock. California may next contend that its lifecycle analysis permits it to discriminate against apples grown in Washington, and even more heavily against peaches from Georgia (which regulation would have the added benefit of favoring California farmers). As long as California could justify the law as having environmental benefits—real or imagined, local or global—the "intervention [would] be upheld as a valid exercise by the state of its internal police power," notwithstanding its purpose and effect of "directly burden[ing] the prosecution of interstate business." *Baldwin*, 294 U.S. at 522-23 (internal quotation omitted).

If California can impose burdens on interstate commerce to induce changes in Midwest ethanol production practices for the purpose of protecting against global warming, it can impose similar burdens for any purpose whatsoever. Today, CARB asserts that it can discriminate against ethanol manufactured in states that it believes rely more heavily on fossil fuels for electricity generation than does California. Tomorrow, California might conclude that global wage rates are too low, that workers in California suffer from competition from other places where the minimum wage rate is not as high as it is in California, and that the state can ban or penalize the sale in California of goods produced in other states where the workers are paid less than the California minimum wage. *See Baldwin*, 294 U.S. at 524 (prohibiting states from "condition[ing] importation upon proof of ... a satisfactory wage scale in [a] factory or shop"). There is no evident basis in law or logic for treating such regulations differently from the LCFS.

Upholding the LCFS would effectively entitle California and other large states to force other states to comply with their policy preferences by conditioning access to their markets. *Wunnicke*, 467 U.S. at 97 (plurality) (rejecting argument that the Commerce Clause permits a state "to impose any conditions that the State has the economic power to dictate"); *Baldwin*, 294 U.S. at 524. But there is no limiting principle that would prevent this sweeping infringement on the Commerce Clause, which would allow any State to regulate extraterritorially as it sees fit, using as its "hook" the mere importation of a product—"a local event at the end of interstate commerce." *Boston Stock Exch.*, 429 U.S. at 332 n.12.

In sum, CARB misses the larger point when it comes to Balkanization. The problem is not merely that the LCFS and similar regulations enacted by other states will Balkanize the market for transportation fuels (though, as explained above, they surely will); it is that laws of this ilk have the potential to Balkanize our entire national economy. If California can burden the importation and sale of ethanol and other fuels to "incentivize" non-Californians to adopt what it considers environmentally friendlier practices, then California (or any other state) can burden the importation and sale of any other product as a means of projecting the state's policy objectives into other states. The result, in any case, would be barriers to free trade across the United States, and the decoupling of the Nation's economy into local economic spheres.

IV. Section 211(c)(4)(B) Of The Clean Air Act Does Not Authorize California's Violations Of The Dormant Commerce Clause.

CARB argues, as a fallback position, that even if the LCFS violates the Commerce Clause, Section 211(c)(4)(B) of the Clean Air Act gives it a free pass. CARB Br. 101-09. That argument, which the District Court rejected, fares no better than CARB's defense of the LCFS on the merits. The text of Section 211(c)(4)(B) is utterly silent as to the Commerce Clause, and this Court has *twice* rejected the argument that its effect extends beyond exempting California from the restrictions of Section 211(c)(4)(A). *See Davis v. EPA*, 348 F.3d 772, 786 (9th Cir. 2003); *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 670

(9th Cir. 2003). Thus, applying binding precedent, Section 211(c)(4)(B) cannot excuse CARB's violations of the dormant Commerce Clause. And even if Section 211(c)(4)(B) did, *arguendo*, authorize California to violate the Commerce Clause in any respect, it still cannot be read to authorize the LCFS.

A. Section 211(c)(4)(B) Is A Limited Exception To Statutory Preemption, Not A Waiver Of Commerce Clause Restrictions.

Only Congress can relieve California of the obligation to comply with the restrictions of the Commerce Clause. And it is well established that courts must not interpret federal statutes as authorizing Commerce Clause violations—including discrimination against interstate commerce, extraterritorial regulation, and excessive burdens on interstate commerce in violation of *Pike*—unless Congress has made its intent "unmistakably clear." *Wunnicke*, 467 U.S. at 91. To satisfy that standard, Congress must not only authorize state regulation over a particular subject matter, but "affirmatively contemplate otherwise invalid state legislation[.]" *Id.* In so doing, Congress must also clearly intend "to remove federal *constitutional* constraints." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (emphasis added).

And the burden is even higher where, as here, state legislation has implications for commerce with foreign nations. *Wunnicke*, 467 U.S. at 92 n.7. Section 211(c)(4)(B) does not even come close to meeting this high standard, and CARB, in turn, cannot come close to satisfying its heavy burden of proving it was Congress's "clear and unambiguous intent" to permit California to violate the Commerce Clause. *Wyoming*, 502 U.S. at 458.

For starters, Section 211(c)(4) must be read as a whole. Section 211(c)(4)(B) immediately follows 211(c)(4)(A), which begins: "*Except as otherwise provided in subparagraph (B)* or (C), no State (or political subdivision thereof) 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 motor vehicle engine[.]" Section 211(c)(4)(B) is simply an *exception* to express preemption of state regulation in Section 211(c)(4)(A). Thus, Section 211(c)(4)(B) is a savings clause, not a grant of special legislative power: "A saving clause does not create anything;

it merely preserves from repeal what is already there." *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2009).[31]

And, indeed, this Court has twice held as much. In *Davis v. EPA*, California argued that Section 211(c)(4)(B) not only relieved the state of preemption under Section 211(c)(4)(A), but gave it unfettered authority to regulate fuel regardless of other provisions of the Act. This Court soundly rejected that argument, holding that the "*sole purpose* of [Section 211(c)(4)(B)] is to waive for California the express preemption

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[31] If there were any doubt that Section 211(c)(4)(B) was intended only as an exception to Section 211(c)(4)(A) preemption, the legislative history of the Clean Air Act resolves it. During the debates on the Clean Air Act, Senator Baker observed that absent any effect on emissions, "[t]he composition of fuels [is] the business of fuel manufacturers and those who buy their products." ER15:3760 (116 Cong. Rec. 32,921). The final Act thus included, in what is now Section 211(c)(2), a strict prohibition on federal regulation of fuels or additives unless the EPA followed specific procedures and addressed specific technical issues. Section 211(c)(4) emerged from the need to ensure that states would not enact a patchwork of regulation themselves. But although most states had not begun to regulate fuel composition at the time the Clean Air Act provisions at issue here were enacted, California had, and Section 211(c)(4)(B) was added to accommodate it. Section 211(c)(4)(B), in other words, was added to the Act as a savings clause to preserve what California had *already* done and ensure its right to continue doing so notwithstanding express statutory preemption. CARB presents no argument that California's pre-Clean Air Act fuel regulations did not have to comply with the Commerce Clause, and so Section 211(c)(4)(B) does not evince any congressional intent to expand California's legislative authority past ordinary constitutional limits.

provision found in [Section 211(c)(4)(A)]." 348 F.3d at 786 (emphasis added). CARB's permission to regulate under Section 211(c)(4)(B), in other words, does not extend beyond the subject matter of Section 211. *Id*. In reaching that conclusion, this Court built on its holding in *Oxygenated Fuels Association Inc. v. Davis*, where the Court explained that Sections 211(c)(4)(B) and 211(c)(4)(A) are "*precisely coextensive*." 331 F.3d at 670 (emphasis added).[32]

Those decisions by this Court, too, are dispositive on the statutory interpretation issues here. If, as this Court has held, Congress's "*sole*" purpose with Section 211(c)(4)(B) was to relieve California of a single statutory preemption provision, Congress could not have had any *additional* purpose to waive normal application of the Commerce Clause. *Davis*, 348 F.3d at 786. Similarly, if Sections 211(c)(4)(B) and 211(c)(4)(A) have "*precisely*" the same scope, then Section 211(c)(4)(B) cannot extend *beyond* Section 211(c)(4)(A) to authorize Commerce Clause violations. *Oxygenated Fuels*, 331 F.3d at 670. Given that

[32] For the same reasons, should the Court reach CARB's statutory defenses to preemption, the Court should find that Section 211(c)(4)(B) does not exempt CARB's regulation from preemption arising from conflicts with Section 211(o).

Section 211(c)(4)(B) does not even exempt California regulation from preemption under the rest of the Clean Air Act, it makes no sense to extend its effect to other laws, least of all the Commerce Clause. At a minimum, *Davis* and *Oxygenated Fuels* cannot be squared with CARB's burden to show "unambiguous" congressional intent.

Moreover, because Section 211(c)(4)(B) simply "defines the extent of the federal legislation's pre-emptive effect on state law," it does not constitute "persuasive evidence" that Congress has consented to let California violate the Commerce Clause at will. *Sporhase*, 458 U.S. at 959-60. Savings clauses are not sufficient to authorize violations of the Commerce Clause. *See Wyoming*, 502 U.S. at 458 (holding that a provision that "simply saves" a state law "from preemption" does not satisfy "[the] burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce"); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (similar); *Lewis*, 447 U.S. at 48-49 (holding that a provision reserving "to the States a general power to enact regulations applicable to bank holding companies" did not create "a new state power to discriminate between foreign and local bank holding companies" but instead applied "only to state legislation that operates within the boundaries marked by the Commerce Clause").[33]

In any event, at most, the text of Section 211(c)(4)(B) would permit California "at any time [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. §7575(c)(4)(B). Neither Section 211(c)(4)(B) nor Section 211, more broadly, contains any reference to the Commerce Clause, or to an affirmative expansion of California's legislative power. Nor does either make any reference at all to "otherwise invalid state legislation," *Wunnicke*, 467 U.S. at 91, and certainly not to lifting "federal constitutional constraints" on the state, *Sporhase*, 458 U.S. at 960.

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[33] The exceptions to statutory preemption in the United States Code are virtually innumerable. As indicated by the Supreme Court's decisions in cases such as *Sporhase*, *Lewis, New England Power,* and *Wyoming*, Congress has relied for decades (if not more) on the assumption that it may fine-tune the limits of federal preemption without inadvertently authorizing state commerce regulation—let alone discrimination against out-of-state parties or extraterritorial regulation—at the same stroke. To cast that assumption into doubt by suggesting that simple preemption carve-outs like Section 211(c)(4)(B) *do* waive the Commerce Clause would eviscerate critical constitutional protections while sowing pandemonium in federal law.

CARB searches in vain for any indication in the text that Congress's intent to waive the Commerce Clause is "clear and unambiguous." *Wyoming*, 502 U.S. at 458. CARB's sole textual argument, which relies on the phrase "at any time," does not bear serious consideration. CARB Br. 103. An authorization to take action at the *time* of CARB's choosing—included to make clear that it was not just preexisting state regulations that were exempted from preemption—hardly means that CARB can do so in violation of other provisions of federal law, let alone the Constitution. Section 211(c)(4)(B)'s language is thus insufficient as a matter of law to lift Commerce Clause restrictions.

CARB's authorities to the contrary, which CARB claims show that other provisions resembling Section 211(c)(4)(B) have been held to waive the Commerce Clause, are inapposite. The federal statute in *Hillside Dairy Inc. v. Lyons* exempted state legislation from preemption "under this Act *or any other provision of law*," 539 U.S. 59, 65 (2003) (emphasis added), a broad phrase which has no counterpart in Section 211(c)(4)(B). Similarly, in *Mabey Bridge & Shore, Inc. v. Schoch*, the statute at issue contemplated that states would impose limitations on commerce, as it provided that the Secretary of Transportation "shall not impose *any limitation or condition* that restricts any State from imposing more stringent requirements than this section *on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries*." 666 F.3d 862, 869 (3d Cir. 2012) (emphasis modified); *see also Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 744 (9th Cir. 2001) (addressing McCarran-Ferguson Act providing that "*silence* on the part of the Congress shall not be construed to impose *any barrier* to the regulation or taxation of such business by the several States") (emphasis added).[34]

[34] In *Silver v. Woolf*, a thirty year-old Second Circuit decision, the statute in question was a savings clause that specifically preserved state consumer protections "greater than the protection provided by this subchapter." 694 F.2d 8, 13 (2d Cir. 1982). The Court in *Silver* was applying *Pike* balancing to a facially nondiscriminatory statute, not a regime like the LCFS. *Silver* also preceded the Supreme Court's decision in cases such as *Wyoming*, which foreclosed once and for all the argument that savings clauses are enough to waive Commerce Clause protections, 502 U.S. at 458. And *Silver* has been subsequently rejected in light of intervening Supreme Court precedent. *See National Revenue Corp. v. Violet*, 807 F.2d 285, 289 (1st Cir. 1986) (rejecting *Silver* as contrary to subsequent Supreme Court caselaw). Regardless, *Silver* specifically distinguished the Supreme Court's decision in *Lewis* on the basis that the federal statute in *Lewis* "preserved only the existing state power in the particular area." 694 F.2d at 13. *Davis* and *Oxygenated*

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Likewise, the legislative history of the statute in *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System* included explicit recognition that it would "permit *out-of-State* holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*." 472 U.S. 159, 171 (1985) (emphasis added). CARB has pointed to no such recognition in the history of Section 211 that outright discrimination against interstate commerce would be permitted.[35]

Fuels make clear that Section 211(c)(4)(B) also only preserved existing power.

[35] CARB relies, lastly, on two district court cases—*Oxygenated Fuels Ass'n Inc. v. Davis*, 163 F. Supp. 2d 1182 (E.D. Cal. 2001), and *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006). The conclusion of the district court in *Oxygenated Fuels*, that Section 211(c)(4)(B) provides California with "unrestricted" authority, 163 F. Supp. 2d at 1186, precedes this Court's *Davis* decision by two years, and does not survive it. In *Witherspoon*, all parties agreed that Section 209(b) of the Clean Air Act—*not* Section 211(c)(4)(B)—allows regulations that might "burden" interstate commerce. Regardless of whether *Witherspoon* was correct to treat Section 209(b) as congressional authorization to "substantially burden interstate commerce," 456 F. Supp. 2d at 1185, the "sole purpose" of §211(c)(4)(B) is "to waive for California the express preemption provision found in §[211](c)(4)(A)." *Davis*, 348 F.3d at 786. The plaintiffs in *Witherspoon*, moreover, did not "allege that California's regulations discriminate against out-of-state interests or directly regulate interstate commerce." 456 F. Supp. 2d at 1183. Nothing in *Witherspoon* supports CARB's position that Section 211(c)(4)(B) permits it not only to burden

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To say that such provisions are "similar in breadth" to Section 211(c)(4)(B), CARB Br. 105, is to distort the statutory texts and histories beyond all recognition. Not *one* of these cases stands for the proposition that an ordinary savings clause such as Section 211(c)(4)(B) is enough to exempt CARB from the dormant Commerce Clause. On the contrary, each underlines how far removed Section 211(c)(4)(B) is from the clear, unambiguous statement that courts require. CARB has failed to bear its burden of showing that Congress unambiguously intended Section 211(c)(4)(B) to except the LCFS from Commerce Clause scrutiny, and so its statutory defense must fail.

B. Section 211(c)(4)(B) Does Not Apply Because The LCFS Is Not A "Control Or Prohibition Respecting Any Characteristic Or Component Of A Fuel Or Fuel Additive."

Even if Section 211(c)(4)(B) were an authorization for California to violate the Commerce Clause in any way, it still would not authorize the LCFS. Section 211(c)(4)(B) applies only to "a control or prohibition respecting any fuel or fuel additive," passed "for the purpose of motor vehicle emission control." CARB argues, on appeal, that the LCFS

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interstate commerce, but to discriminate against Midwest ethanol producers and regulate their activities.

satisfies Section 211(c)(4)(B) because "its very purpose is to reduce GHG emissions from California's use of transportation fuel in motor vehicles." CARB Br. 104. That is evasive at best and ignores CARB's admissions during the rulemaking process. The purpose of the LCFS is not to reduce GHG emissions "from California's *use* of transportation fuel"; it is to reduce GHG emissions from the production and transportation of ethanol that occur in other states.

Even if CARB did enact the LCFS with the purpose of "reduc[ing] GHG emissions from California's use of transportation fuel," CARB Br. 104, that is not the relevant standard. Section 211(c)(4)(B) exempts only "control[s] or prohibition[s] respecting any fuel or fuel additive," and that bear on "*motor vehicle emission control*." As Senator Baker put it, Section 211(c) addresses the problem of "what comes out of the tailpipe." ER15:3760 (116 Cong. Rec. 32,921). In *Oxygenated Fuels*, this Court explained that regulations aimed at environmental concerns other than the emissions from a motor vehicle do not fit within the Section 211(c)(4)(B) exemption. *Oxygenated Fuels*, 331 F.3d at 670. But the LCFS has *nothing* to do with what comes out of California motor vehicles.

CARB's own admissions prove the point. CARB was able to avoid conducting additional environmental review of the LCFS only by determining that "the LCFS regulation, unlike other existing California regulations, *does not establish prescriptive fuel specifications*." ER10:2361 (ISOR) (emphasis added). And CARB's original position, not the purely strategic argument it presents on appeal, is the correct one. The LCFS does not control the composition of *any* fuel, much less ethanol; nor could it, as ethanol is physically and chemically identical no matter where or how it is produced. ER10:2360 (ISOR), *see also* ER10:2422 (ISOR). The LCFS does not prohibit use of ethanol; in fact, it "contains no requirements that dictate the exact composition of compliant transportation fuels," and it does not "require a gasoline ingredient to be added or removed[.]" ER10:2422 (ISOR); *see also* LCFS §95480.1(e) (providing that "[n]othing in [the LCFS] may be construed to amend, repeal, modify, or change in any way the California reformulated gasoline regulations [or] the California diesel fuel regulations"). Nor does the LCFS control the emissions of vehicles using ethanol, for all ethanol burns identically. ER9:2161 (FSOR); ER15:3588 (CARB's Resp. to RMFU Stmt. of Material Facts);

ER10:2360 (ISOR); *see Rocky Mountain Farmers Union*, 719 F. Supp. 2d at 1191 (citing FSOR (ER9:2161)). Thus, the LCFS is clearly not a "control or prohibition respecting a fuel or fuel additive."

What the LCFS *does* control is how ethanol is produced and delivered to the California market. But the regulated emissions relate to facility energy use and efficiency, drying of distillers grains, corn cultivation, and ethanol shipment—in short, agricultural, industrial, and transportation activities, almost all of which take place out-of-state or in other countries. *Cf. Clean Air Markets v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003) (holding that Section 116 of the Clean Air Act does not authorize states to "control emissions in another State"). These are not "motor vehicle emissions" within the meaning of Section 211(c)(4)(B)—whether from the tailpipe or any other part of the car—by any stretch of the imagination. CARB concedes that the LCFS regulates not motor vehicle emissions, but what it vaguely describes as "GHG emissions *associated with the full lifecycle of fuels consumed in California*." CARB Br. 1 (emphasis added). But Section 211(c)(4)(B) addresses "motor vehicle emission control," not refinery emission control, nor farming emission control. CARB's pre-litigation concessions acknowledge that the LCFS pushes emissions regulation far beyond any authorization Section 211(c)(4)(B) might provide. Thus, Section 211(c)(4)(B) is no answer to the constitutional infirmity of the LCFS.

V. In The Alternative, This Court Should Remand For *Pike* Balancing.

As explained above, RMFU is entitled to affirmance on the basis that the LCFS constitutes impermissible extraterritorial regulation, as well as facial, purposeful discrimination against interstate commerce. The District Court granted judgment on those bases, and did not reach RMFU's alternative argument that the burdens of the LCFS outweigh its benefits under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). But if this Court determines that the LCFS is not facially or purposefully discriminatory and is not an extraterritorial regulation, it should remand for the District Court to perform the *Pike* balancing test. *Lenscrafters*, 567 F.3d at 528 (reversing judgment invalidating California statutes as discriminatory and remanding for consideration of *Pike* balancing).[36]

[36] Other circuits follow the same practice. *E.g.*, *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007); *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 252 (3d Cir. 2008).

On appeal, CARB contends for the first time that it is entitled to judgment on *Pike* balancing. This Court should decline to hear CARB's argument: CARB did not cross-move for summary judgment on *Pike* balancing below, so it has forfeited the argument that it is entitled to judgment on the issue now. *Kassbaum*, 236 F.3d at 495. Since CARB has not preserved the issue, and since the District Court did not reach it, the *most* this Court should do is remand for CARB to present its argument in the proper forum.

In any event, even if the LCFS survives both *per se* invalidation and strict scrutiny, RMFU will ultimately be entitled to judgment on remand because the LCFS unduly burdens interstate commerce under the *Pike* test. As noted above, CARB has admitted that the local benefit of its regulation is negligible because the effect of the LCFS in reducing GHG emissions is itself negligible, even undetectable. *See* ER7:1552 (FSOR); ER15:3755-56 (Sierra Research Report). In fact, there is evidence in CARB's administrative record that the LCFS will not even reduce GHG emissions overall, but only shift the Midwest's ethanol commerce from California to other locations. ER7:1451, :1687 (FSOR). The "widely shared" benefits CARB alludes to in its brief, CARB Br. 96, are purely imaginary. Forcibly redirecting ethanol into new markets while causing "little or no net change in fuel carbon content on a global scale," ER8:1925 (FSOR), creates no benefit for California at all.

In light of the administrative record and undisputed facts, the burdens of the LCFS are therefore greater than the benefits almost by definition. And those burdens, which include serious disincentives to inter- and intra-state transportation, are heavy indeed. In fact, in the absence of any effect on global warming, virtually the *only* effect of the LCFS would be to advantage California industry at the expense of the Midwest and to impose significant costs on Midwest ethanol producers forced to "shuffle" fuel to other markets. ER7:1689 (FSOR); ER14:3522 (David Rebuttal Decl.). CARB predicts, in fact, that the LCFS will burden interstate commerce so severely that ethanol commerce from the Midwest to California will end entirely—the greatest burden possible. ER10:2728-31 (ISOR). Try as it might, CARB cannot ask this Court to ignore CARB's own predictions. CARB Br. 94-95. Nonetheless, because the District Court did not reach the *Pike* question, this Court need not address it in the first instance, but should remand if it determines that *Pike* balancing is required. *Lenscrafters*, 567 F.3d at 528.

VI. The Court Need Not Review The Preliminary Injunction.

This Court may properly resolve this appeal by addressing only the final judgment certified under Rule 54(b) on the plaintiffs' Commerce Clause claims. As CARB concedes, "[i]f the Court affirms the judgments on dormant Commerce Clause grounds, there will be no need to address the preliminary injunction appeal." CARB Br. 110. In such circumstances, RMFU would be entitled to *final* injunctive relief, and there would be no need to consider the grant of the preliminary injunction.

If, on the other hand, the Court reverses as to the Commerce Clause, we concede that this Court should simply vacate the preliminary injunction and remand. Although the District Court noted that RMFU presented "serious questions" concerning preemption, and although this Court has jurisdiction over the preliminary injunction appeal independent of the Rule 54(b) judgment, the District Court's decision granting a preliminary injunction was—by its own terms—largely driven by its conclusion of success on the merits of the Commerce Clause claims. ER1:81-83 (Dist. Ct. Op.). Because entry of a preliminary injunction is quintessentially a discretionary decision, *California Prolife Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999), if the Court reverses a critical part of the analysis, that alone should warrant a re-weighing of the remaining factors by the District Court. Here, the District Court did not determine the likelihood of success on the merits based on preemption or whether the preemption claim alone warranted entry of a preliminary injunction when balanced against the remaining factors. When this Court finds that a district court granted preliminary injunctive relief in error but alternative grounds for relief remain undecided, this Court's usual course is to vacate the preliminary injunction and remand for resolution of the remaining issues. *See, e.g.*, *Sylvester v. United States Army Corps of Eng'rs*, 884 F.2d 394, 401 (9th Cir. 1989) (vacating preliminary injunction and remanding for the district court to "rule on the propriety of issuing a preliminary injunction on [plaintiff's] other claims"). That is what this Court should do if it reverses as to the Commerce Clause claims here.

Sound prudential reasons support that result. The District Court only assessed whether the preemption claim presented serious questions—and thus this Court lacks the record to review RMFU's likelihood of success on the preemption claim, much less the merits. Indeed, CARB spends a scant four pages of its 122-page opening brief even addressing whether there is a conflict between the LCFS and federal law. Thus, although RMFU maintains that it would ultimately be entitled to relief on the basis of preemption, the District Court should be given the opportunity in the first instance to reweigh the factors relevant to a preliminary injunction analysis in light of a decision on the Commerce Clause issues or to potentially resolve the preemption issue on the merits. *See Sylvester*, 884 F.2d at 401.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order invalidating the LCFS as violating the Commerce Clause of the U.S. Constitution.

STATEMENT OF RELATED CASES

Pursuant to this Court's Rule 28-2.6, Plaintiffs-Appellees hereby state that no related cases are pending in this Court.

August 6, 2012 Respectfully submitted,

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ATTESTATION UNDER CIRCUIT RULE 25-5(e)

I attest that all parties on whose behalf this filing is submitted concur in the filing's content.

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Certificate of Compliance Pursuant to 9th Circuit Rule 32-2
for Case Numbers 12-15131/12-15135

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Dated: August 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 August 6, 2012. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, I have mailed a true and correct copy by First-Class U.S. Mail to the following participants [See Attached Mailing List] who are not registered for electronic service by CM/ECF.

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