No. _____

In The Supreme Court of the United States

RICHARD W. COREY, in his official capacity as Executive Officer of the California Air Resources Board, *et al.*,

Cross-Petitioners,

v.

ROCKY MOUNTAIN FARMERS UNION, *et al.*,

Cross-Respondents.

RICHARD W. COREY, in his official capacity as Executive Officer of the California Air Resources Board, *et al.*,

Cross-Petitioners,

v.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B), which authorizes California to prescribe emissions controls with respect to "any fuel" "at any time," bars some or all of petitioners' dormant Commerce Clause challenges to California's Low Carbon Fuel Standard.

2. Whether petitioners' challenges, in No. 13-1149, to the treatment of 2011 California crude oil sales, including the challenge remanded to the district court, are moot, where the challenged regulatory provisions were never actually applied to petitioners or others and have been superseded by substantially different provisions.

LIST OF PARTIES

1. Plaintiffs in the district court, appellees in the court of appeals, petitioners in No. 13-1148, and conditional-cross-respondents: Rocky Mountain Farmers Union; Redwood County Minnesota Corn and Soybean Growers; Penny Newman Grain, Inc.; Rex Nederend; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Growth Energy; and Renewable Fuels Association.

2. Plaintiffs in the district court, appellees in the court of appeals, petitioners in No. 13-1149, and conditional-cross-respondents: American Fuel & Petrochemical Manufacturers Association; American Trucking Associations; and Consumer Energy Alliance.

3. Defendants in the district court, appellants in the court of appeals, and respondents and conditional cross-petitioners in this Court: Richard W. Corey, in his official capacity as Executive Officer of the California Air Resources Board; Mary Nichols, Daniel Sperling, Ken Yeager, Dorene D'Adamo, Barbara Riordan, John R. Balmes, Lydia H. Kennard, Sandra Berg, Ron Roberts, John G. Telles, in their official capacities as members of the California Air Resources Board; Edmund G. Brown, Jr., in his official capacity as Governor of the State of California; and Kamala D. Harris, Attorney General, in her official capacity as Attorney General of the State of California.

LIST OF PARTIES – Continued

4. Intervenor-defendants in the district court, intervenor-appellants in the court of appeals, and respondents and conditional-cross-respondents in this Court: Environmental Defense Fund, Natural Resources Defense Council, Sierra Club and Conservation Law Foundation.

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CONDITIONAL CROSS-PETITION

Richard W. Corey, *et al.*, the governmental respondents in Nos. 13-1148 and 13-1149, respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

The Court should deny both petitions. If, however, the Court were to grant one or both of these petitions, it should also grant this cross-petition to consider the effect of Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B), on the dormant Commerce Clause arguments advanced in those petitions.[1]

If the Court were to grant review of the crude oil discrimination claim in No. 13-1149, respondents request that this Court also expressly grant review to consider whether all challenges to California's treatment of 2011 crude oil sales, including the claim remanded to the district court, are moot.

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[1] The briefs and decisions below, and other cases cited in the argument, generally refer to section numbers from the Clean Air Act rather than the United States Code. To avoid confusion and in light of this Court's Rule 34.5, respondents include some references to the Act's sections along with citations to the Code.

OPINIONS BELOW

The opinion of the court of appeals is reported at 730 F.3d 1070 and reproduced in the appendix to the petition in No. 13-1149 at 1a-74a. The order of the court of appeals denying rehearing en banc is reported at 740 F.3d 507 and reproduced in that appendix at 228a-252a. The three opinions of the district court are reported at 843 F. Supp. 2d 1071, 2011 WL 6936368 and 843 F. Supp. 2d 1042 and reproduced in the same appendix at 75a-134a, 135a-171a, 172a-225a.

JURISDICTION

The court of appeals entered judgment on September 18, 2013 and denied the petitions for rehearing en banc on January 22, 2014. Two petitions for certiorari were filed on March 20, 2014 and docketed that same day as Nos. 13-1148 and 13-1149. This conditional cross-petition is timely pursuant to this Court's Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const., art. I, § 8, cl. 3.

Section 7545(c)(4)(B) of Title 42 of the United States Code (Section 211(c)(4)(B) of the Clean Air Act) provides that:

> Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

This and other relevant provisions of 42 U.S.C. § 7545(c), (o) are reproduced in the appendix to this conditional cross-petition ("Res. App.") at App. 1-4.

The crude oil provisions of California's Low Carbon Fuel Standard can be found in title 17, section 95486(b)(2)(A) of the California Code of Regulations. The superseded crude oil provisions, challenged by petitioners in No. 13-1149, can be found in the appendix to that petition at 285a-290a. The current crude oil provisions can be found in the appendix to the petition in No. 13-1148 at 191a-203a.

STATEMENT

A. Introduction

California has determined that greenhouse gas emissions are degrading the State's air quality, reducing the quantity and quality of available water, increasing risks to public health, damaging the State's natural environment and causing sea levels to

rise. Cal. Health & Safety Code § 38501. Continuing its long tradition of leadership in the field of air pollution regulation, California has committed to reducing its greenhouse gas emissions to 1990 levels by 2020. *Id.* §§ 38501(c), 38550. As part of those efforts, the California Air Resources Board adopted the Low Carbon Fuel Standard ("LCFS") to reduce greenhouse gas emissions resulting from California's consumption of transportation fuels. ER 9:2197.[2]

Both sets of petitioners challenged the constitutionality of the LCFS in district court, alleging that it was preempted by federal law and that it violated the dormant Commerce Clause. Before discovery had begun, both sets of petitioners filed early motions for summary judgment. Respondents cross-moved. On those cross-motions, the district court resolved some dormant Commerce Clause claims in petitioners' favor, leaving other claims undecided, and certified its judgment under Federal Rule of Civil Procedure 54(b).

The court of appeals reversed in relevant respects, finding no violation of the dormant Commerce Clause as to the claims presented to it. Accordingly, the court of appeals remanded these cases to the district court for further factual development and for resolution of the remaining challenges. On remand, the district court will hear and decide petitioners'

[2] "ER" citations refer to the volume and page number from the court of appeals' excerpts of record.

claims that the LCFS discriminates purposefully and in effect against out-of-state ethanol producers; that the LCFS unduly burdens interstate commerce in both ethanol and crude oil; and that the LCFS is preempted by federal law.

Petitioners in Nos. 13-1148 and 13-1149 seek immediate review of the court of appeals' interlocutory conclusions that the LCFS neither facially discriminates against out-of-state ethanol nor regulates extraterritorially. Petitioners in No. 13-1149 ("AFPM") also seek review of the court of appeals' decision that the LCFS's 2011 crude oil provisions did not discriminate, in design and effect, against out-of-state crude oils.

The court of appeals decided two questions against respondents. Respondents submit this conditional cross-petition because if the cases are to be heard then these issues should also be before the Court, and because a decision in favor of respondents on either question would alter the scope of the remand to the district court under the court of appeals' judgment.

First, while the court of appeals recognized that the LCFS falls within Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B), as a California "control . . . respecting any fuel or fuel additive" adopted "for the purpose of motor vehicle emission control," it held that Section 211(c)(4)(B) did not

preclude petitioners' dormant Commerce Clause claims. Pet. App. 63a.[3] A contrary conclusion from this Court could eliminate those claims, including the ones the court of appeals did not reach, leaving only petitioners' preemption claim to be resolved on any remand.

Second, the court of appeals refused to dismiss as moot any of AFPM's challenges to the LCFS's 2011 crude oil provisions. A contrary decision from this Court would entirely resolve the crude oil discrimination claim presented in No. 13-1149 and eliminate any need for future discovery and adjudication regarding AFPM's claim that the 2011 crude oil provisions unduly burdened interstate commerce while they were technically in effect.

B. Section 211(c)(4)(B) of the Clean Air Act

In the Clean Air Act, Congress established a distinctive structure of shared state and federal authority for the regulation of harmful fuels and fuel additives. Under that structure, the U.S. Environmental Protection Agency ("EPA") has broad authority to "control or prohibit . . . any fuel or fuel additive" if it determines that such a control or prohibition is warranted under the statute. 42 U.S.C. § 7545(c)(1). In the absence of EPA action, States retain their police powers to establish and enforce their own air

[3] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for writ of certiorari in No. 13-1149.

pollution standards regarding fuels. *See id.* §§ 7416, 7545(c)(4)(A). However, if EPA takes action with respect to a particular "characteristic or component of a fuel or fuel additive," States generally may not adopt emissions regulations that conflict with EPA's determination. *Id.* § 7545(c)(4)(A). This is true whether EPA establishes a national emissions standard for the "characteristic or component" or determines that no standard is necessary. *Id.*

EPA action has no effect on California, however. Under an express congressional authorization set out in Section 211(c)(4)(B), California may "control or prohibit[ ] . . . any fuel or fuel additive" "at any time," regardless of any action by EPA, as long as California acts "for the purpose of motor vehicle emission control." *Id.* § 7545(c)(4)(B). This special authority applies to "[a]ny State for which application of section 7543(a) . . . has at any time been waived[,]" *id.*, but California is the only qualifying State. *Davis v. EPA*, 348 F.3d 772, 777 n.1 (9th Cir. 2003) ("As the pioneer in motor vehicle emissions control, California is the only state [recognized in 42 U.S.C. § 7545(c)(4)(B)]."); *see also* 116 Cong. Rec. 42,386 (1970) ("California, however, is free to have any regulation of fuels or additives it finds necessary."). Thus, alone among the States, California has the authority to adopt fuel emissions controls even when EPA has set a different, national standard or has concluded that no standard is necessary. 42 U.S.C. § 7545(c)(4)(B).

This unique authority for California reflects its long tradition of leadership in regulating air pollution

from motor vehicles. To give but a few examples, California led the nation with the installation of the first catalytic converter in 1975; the first limits on lead in gasoline in 1976; low-emission vehicle standards in the 1990s; and clean fuel standards, also in the 1990s, that led to reductions in sulfur dioxide, nitrogen oxides, carbon monoxide and particulate emissions, as well as reductions in the release of reactive organic gases. *See* Doc. 74 at 12-14.[4] In the Clean Air Act, Congress expressly intended that California should continue this tradition of regulatory innovation. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York*, 79 F.3d 1298, 1302 (2d Cir. 1996) (describing history of California-specific provisions in the Clean Air Act); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (same).

C. The Low Carbon Fuel Standard

As it has done previously with other pollutants, California has determined that greenhouse gas emissions "pose[ ] a serious threat to the economic well-being, public health, natural resources, and the environment of California." Cal. Health & Safety Code § 38501(a). Responding to that threat, California set a greenhouse gas emissions standard for transportation

[4] Citations to "Doc." refer to numbers in the court of appeals' docket. *See also* Key Events in the History of Air Quality in California, available at http://www.arb.ca.gov/html/brochure/history.htm, last visited April 2, 2014.

fuels sold for use in the State. ARB designed that standard – the LCFS – to reduce greenhouse gas emissions from fuels sold in California by 16 million metric tons per year by 2020. ER 9:2197. Those reductions are a crucial part of California's overall efforts to reduce its greenhouse gas emissions to 1990 levels by 2020, particularly because the transportation sector contributes about forty percent of California's greenhouse gas emissions. *See* ER 5:921; 5:930.

The LCFS sets a declining greenhouse gas emissions (or "carbon intensity") standard that transportation fuels sold for use in the State must meet, on an average basis, each year. Cal. Code Regs., tit. 17, § 95482. It uses lifecycle analysis – a scientific method that accounts for emissions from every stage in the "life" of a fuel, including its production, distribution and ultimate use in a vehicle – to measure the carbon intensity of each fuel. *Id.* § 95481(a)(16), (38) (definitions); ER 9:2198.

Greenhouse gas emissions resulting from the use of transportation fuels cannot be measured accurately without lifecycle analysis. *E.g.*, ER 4:769-72. For example, measuring greenhouse gas emissions from the use of electricity as a transportation fuel requires a lifecycle analysis, because driving an electric vehicle produces no emissions but generating the necessary electricity does. ER 4:769 at ¶ 16. In addition, biofuels like ethanol depend on lifecycle analysis to receive "credit" for the absorption of carbon dioxide (a greenhouse gas) during the photosynthesis of their feedstock plants (e.g., corn or sugar cane). ER 4:772

at ¶ 23. Indeed, proponents of biofuels, including petitioners Renewable Fuels Association and Growth Energy (No. 13-1148), use lifecycle analysis to tout the environmental benefits of ethanol relative to petroleum-based fuels. *See*, *e.g.*, ER 2:225. And Congress has mandated the use of lifecycle analysis to compare and categorize fuels under its Renewable Fuel Standard. 42 U.S.C. § 7545(o)(1)(H) (defining "lifecycle greenhouse gas emissions"); *id.* § 7545(o)(1)(B), (D), (E) (categorizing fuels based on lifecycle emissions); *see also* Res. App. 2-4.

Ethanol

Under the LCFS, the carbon intensity value of every alternative (non-petroleum) fuel, including every ethanol, is determined in one of two ways: by identifying an existing value in the regulation's table that corresponds to the fuel's lifecycle ("Method 1") or by obtaining an individualized value for the fuel ("Method 2"). Cal. Code Regs., tit. 17, § 95486(a)(2), (b)(2)(B), (c), (d). The California Air Resources Board ("ARB") designed these two methods to serve the needs of fuel producers and to encourage emissions reductions. ER 6:1374, 6:1382. The initial values in the LCFS's table were based on average lifecycle emissions for fuels commonly sold in California. ER 4:774 at ¶ 35. Those pre-determined values allowed those fuels (and fuels with similar lifecycles) to be sold in the State without the need for individualized calculations, easing the LCFS's implementation for fuel producers. *E.g.*, ER 6:1382. Producers with

lower-than-average lifecycle emissions have the option to obtain more favorable, individualized values, through Method 2, by demonstrating their actual lifecycle emissions. Cal. Code Regs., tit. 17, § 95486(c), (d); *see also* ER 6:1324, 6:1374, 6:1382.

Many producers have, in fact, utilized Method 2 to obtain such individualized values. *See* Doc. 21-7 at 49-83 (LCFS Biofuel Producer Registration as of February 2012); ER 2:165-197 (same as of June 2011). As of April 2014, the lowest (and most favorable) carbon intensity values available to any ethanol correspond to ethanols from the Midwest, Brazil, El Salvador, Trinidad/Tobago, Jamaica, Guatemala, Costa Rica and Indonesia.[5]

Ethanols with carbon intensity values below the carbon intensity standard for the year generate valuable credits when sold in California, while fuels with carbon intensity values higher than the standard generate deficits. Cal. Code Regs., tit. 17, § 95485(a)(3); ER 4:773 at ¶¶ 29-30.

Crude Oil

Because a primary objective of the LCFS is to diversify California's fuels market with new, low-carbon fuels that are not derived from fossil fuels, the

[5] *See* "Summary of all Pathways Table" and "Additional Method 2 Fuel Pathways" at http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm, last visited April 5, 2014. As indicated on the webpage, these values are presently available for use.

LCFS employs lifecycle analysis somewhat differently for crude oils than it does for alternative fuels, like ethanol. *See*, *e.g.*, ER 6:1359 ("Fuels having carbon intensities from 50 to 80 percent less than gasoline are expected to be needed."); *see also* ER 4:789, 6:1233-34.

In No. 13-1149, AFPM challenges the crude oil provisions that were technically in effect in 2011, alleging that those provisions discriminated against out-of-state high carbon intensity crude oils ("HCICOs") by distinguishing between "emerging HCICOs" and all other crude oils. Pet. 13-1149 at 6, 21-23. Under those 2011 provisions, emerging HCICOs were to be assigned their individualized, high carbon intensity values, and all other crudes would be assigned a single, lower value – the average carbon intensity from California's 2006 crude oil pool. Pet. App. 285a-290a (2009 LCFS). This distinction was designed to prevent significant increases in the overall, average carbon intensity of California's crude market, a danger presented only by emerging HCICOs. ER 4:788-99, 6:1234.

Under the 2011 provisions, approximately 200 crude oils with origins as diverse as Alaska, Qatar, Brazil, Texas and Norway were determined *not* to be HCICOs and were, accordingly, assigned the 2006 average carbon intensity value. ER 2:124-28, 11:2698-99. Other crude oils, referred to as "potential HCICOs," would have required additional analysis to determine if they were, in fact, emerging HCICOs. *See* ER 2:122.

As a result of subsequent regulatory developments, however, ARB never performed that additional analysis, and no crude oil was determined to be an emerging HCICO. In 2011, before the district court decided the summary judgment motions in this case, ARB initiated a rulemaking to amend the crude oil provisions. Res. App. 5-8. ARB did so to incorporate "lessons learned since [the LCFS's] implementation began," changes in the petroleum market since the original 2009 rulemaking, and a new modeling tool specifically designed to measure greenhouse gas emissions from crude oils. *Id.* at 6-7, 10.

The rulemaking to amend the crude oil provisions was completed in 2012, and the amended provisions formally took effect on January 1, 2013. *Id.* at 9. ARB had already made the amended provisions effective as of January 1, 2012 through a regulatory advisory. *See id.* at 10; *see also* Doc. 64 at 75. Thus, as AFPM and the court of appeals both recognized, the original crude oil provisions were effective only during 2011. Doc. 124 at 82 (AFPM's brief); Pet. App. 44a-45a.

Further, the challenged distinction between emerging HCICOs and all other crude oils was never applied, even in 2011 when it was technically in effect. After considering various ways to deal with the "potential HCICOs" sold in California in 2011, ARB announced, in July 2013, that all crude oils sold in California in 2011 – even those designated potential HCICOs – would use the 2006 average carbon intensity value. Res. App. 10; *see also* Doc. 204. In sum, all

crude oils sold in California in 2011, the only year the original crude oil provisions were in effect, were assigned identical carbon intensity values.

D. Proceedings in the Court of Appeals

The court of appeals held that the LCFS does not facially discriminate against out-of-state ethanol; that the LCFS does not regulate extraterritorially; and that the LCFS's 2011 crude oil provisions were non-discriminatory. Pet. App. 5a, 65a. As noted above, the court of appeals then remanded the case to the district court for adjudication of the remaining dormant Commerce Clause claims and the preemption claim. *Id.* at 65a.

Judge Murguia partially dissented on the ethanol facial discrimination claim, stating that ARB should have used only individualized carbon intensity values as a "nondiscriminatory alternative" to the LCFS's initial values based on average emissions. Pet. App. 70a-71a. Judge Murguia did not reach the extraterritoriality question but concurred that the 2011 crude oil provisions were non-discriminatory. *Id.* at 67a, 68a n.2.

With respect to respondents' arguments that Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B), bars petitioners' dormant Commerce Clause claims, the panel unanimously concluded that the LCFS was "prescribe[d] for the purpose of motor vehicle emission control" and is "a control . . . respecting any fuel or fuel additive" within the meaning of

Section 211(c)(4)(B). Pet. App. 63a, 67a. However, a previous panel of the same court of appeals had stated, in a preemption case, that the "sole purpose" of Section 211(c)(4)(B) was to exempt California fuel regulations from preemption by EPA. *Id.* at 63a (citing *Davis*, 348 F.3d at 786). Relying entirely on that earlier decision, the panel concluded that section 211(c)(4)(B) does not exempt the LCFS from any dormant Commerce Clause scrutiny. *Id*. at 63a. This conditional cross-petition seeks review of that decision, should this Court grant review of either or both petitions.

The court of appeals also concluded that none of AFPM's crude oil claims was moot, reasoning that that ARB might have applied the challenged distinction between emerging HCICOs and all other crudes in a way that could have resulted in lingering harms. Pet. App. 45a n.12. This conditional cross-petition seeks review of that conclusion with respect to all of AFPM's crude oil claims, including the remanded claim, should this Court grant AFPM's petition (No. 13-1149).

ARGUMENT

Both petitions should be denied. As will be discussed in the governmental respondents' brief in opposition, the court of appeals' decision is both interlocutory and entirely consistent with the decisions of this Court and the other courts of appeals.

Unlike laws this Court has found to be facially discriminatory, the LCFS does not determine a product's treatment based on its out-of-state origin. *See*, *e.g.*, *Or. Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994). Rather, the LCFS distinguishes fuels based on scientifically calculated greenhouse gas emissions and has produced more favorable carbon intensity values for out-of-state ethanols (from the Midwest and other countries) than for competing, in-state ethanols. *See* Cal. Code Regs., tit. 17, § 94586(b)(1) (Table 6 pathways ETHC030, ETHC035 (Midwest producer POET) and ETHS001-006 (Brazilian ethanol)); ER 2:169, 2:170, 2:192-194. And unlike laws this Court has found to regulate extraterritorially, the LCFS does not control prices in other States' markets. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). In fact, as petitioners themselves acknowledge, the LCFS controls only "the average carbon intensity of transportation fuels used in California." Pet. 13-1149 at 2; *see also* Pet. 13-1148 at 3. The court of appeals' decision creates no conflict in the law and does not warrant this Court's review.

If, however, this Court grants either petition, or both, its review of the dormant Commerce Clause claims would be incomplete without consideration of Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B). The Court should determine whether Congress has authorized California to control greenhouse gas emissions from transportation fuels using a lifecycle analysis, because when Congress has spoken,

"the commerce power of Congress is not dormant." *See Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

In addition, if this Court grants review of AFPM's discrimination challenge to the LCFS's superseded 2011 crude oil provisions, this Court should first consider whether the court of appeals erroneously held that any challenge to those provisions presents a live controversy. Respondents recognize that mootness is jurisdictional and believe that a conditional cross-petition is, therefore, not required to preserve mootness arguments concerning the crude oil discrimination claim presented in No. 13-1149. Nonetheless, respondents conditionally cross-petition on this issue out of an abundance of caution, recognizing that they do seek to "alter the Court of Appeals' judgment" by precluding litigation on remand of AFPM's undue burden claim concerning the 2011 crude oil provisions. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013); *see also Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994). If a mootness ruling of this Court were to limit the scope of any remand, that would arguably "expand the relief [respondents have] been granted" by the court of appeals. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977). For that reason, and given the remarkable absence of any mention of the relevant, superseding amendments in petition No. 13-1149, respondents conditionally cross-petition on this issue to "protect institutional interests in the orderly functioning of the judicial system, by putting opposing

parties and [this Court] on notice of the issues to be litigated." *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 481-82 (1999).

I. If This Court Grants Certiorari Concerning Any Of Petitioners' Dormant Commerce Clause Questions, It Should Also Consider Whether Congress's Express Decision To Authorize California To Regulate Fuel Emissions Bars Some Or All Of Petitioners' Claims

The crux of petitioners' claims is that California may not employ a lifecycle analysis to categorize fuels based on their scientifically-calculated greenhouse gas emissions. As respondents explained briefly above and will explain in more detail in their brief in opposition, neither the LCFS nor its use of lifecycle analysis discriminates against out-of-state fuels or regulates extraterritorially. Petitioners' arguments to the contrary are unsupported by this Court's jurisprudence.

Petitioners' arguments are also barred by Section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B). In that provision, Congress authorized California to continue its tradition of innovation in the regulation of fuel emissions, as California has done with the LCFS. "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Mass.*

Council of Const. Employers, Inc., 460 U.S. 204, 213 (1983).

Both the district court and a unanimous panel of the court of appeals concluded that the LCFS falls within Section 211(c)(4)(B)'s ambit as "a control . . . respecting any fuel or fuel additive" adopted "for the purposes of motor vehicle emission control." *See* 42 U.S.C. § 7545(c)(4)(B); *see also* Pet. App. 62a-63a. However, based entirely on a prior *preemption* decision concerning Section 211(c)(4)(B), the court of appeals held that this section provides the LCFS with no protection from petitioners' dormant Commerce Clause challenges. If this Court grants certiorari to review any of those challenges, it should also grant this conditional cross-petition to consider the effect on those challenges of Congress's express authorization of California-specific fuels regulations. Section 211(c)(4)(B) is, in fact, the "explicit congressional action[ ]" that petitioners assert is missing here, Pet. 13-1148 at 31, and thus is too central to petitioners' claims to be ignored.

1. Congress recognized California's long tradition of leadership in controlling transportation-related air pollution as early as 1965, observing that California "'leads in the establishment of standards for regulation of automotive pollutant emissions.'" *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109 n.26 (quoting S. Rep. No. 192, 89th Cong., 1st Sess. 5 (1965)). In the Clean Air Act, Congress codified this recognition, providing California with special authority to regulate air pollution from vehicles, engines,

and transportation fuels. *See* 42 U.S.C. § 7543(b)(1), (e)(2); *id.* § 7545(c)(4)(B).

Relevant here, Congress left California "free with regard to fuels." *See* 116 Cong. Rec. 42,520 (1970). Specifically, Section 211(c)(4)(B) provides that California "may *at any time* prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting *any* fuel or fuel additive." 42 U.S.C. § 7545(c)(4)(B) (emphasis added). This "unequivocal language" bars petitioners' dormant Commerce Clause claims. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981). Just as Congress's removal of "*any barrier* to the regulation or taxation of [insurance] business by the several States" precludes dormant Commerce Clause challenges to laws within that scope, so, too, Congress's express decision to leave California free to regulate emissions of "any fuel" "at any time" bars petitioners' challenges to California's control of greenhouse gas emissions from transportation fuels. *See id.* (emphasis added).

2. The LCFS is an action "specifically authorized by Congress." *See White*, 460 U.S. at 213. In fact, the LCFS is precisely the kind of regulation Congress anticipated California would adopt – an innovative, science-based method to reduce harmful emissions that result from California's use of transportation fuels in motor vehicles. Congress itself has recognized, in a different portion of Section 211, that lifecycle analysis is the proper measure of greenhouse gas emissions from motor vehicle fuels. *See* 42 U.S.C.

§ 7545(o)(1)(L) (defining "transportation fuel" as a fuel used in, *inter alia*, motor vehicles and motor vehicle engines); *id.* § 7545(o)(1)(B), (D), (E) (defining categories of transportation fuels based on lifecycle emissions).

Because lifecycle analysis is the only accurate measure of the greenhouse gas emissions that result from the use of transportation fuels, Section 211(c)(4)(B) authorizes California to use lifecycle analysis to control fuels or fuel additives for the purpose of reducing greenhouse gas emissions from fuels. To the extent petitioners' dormant Commerce Clause claims turn on the use of a lifecycle analysis, the LCFS is insulated from those claims by Section 211(c)(4)(B).

3. Just as Section 211(c)(4)(B) should be read to permit California to use a lifecycle analysis to measure a fuel's greenhouse gas emissions, it should also be read as disposing of petitioners' claim that the LCFS will "Balkanize" the national fuel market. *See* Pet. 13-1148 at 32-33; Pet. 13-1149 at 26, 32.

As the court of appeals correctly concluded, petitioners' "Balkanization" claims are meritless, because California's regulation of fuel sold in California creates no "risk of conflict" with other States' regulation of fuels sold in those States. Pet. App. 61a. Notably, EPA has neither established a national standard for greenhouse gas emissions from fuels nor determined that a standard is unwarranted. Thus, under the structure designed by Congress, all fifty

States remain free to set such standards. 42 U.S.C. § 7545(c)(4)(A).

To the extent that this Court decides to review petitioners' speculative and unsupported claims of Balkanization, however, it should also consider whether such claims are foreclosed by Section 211(c)(4)'s distinct structure of shared authority, including its express authorization of California-specific fuel emissions standards. Congress expressly recognized that fuels and fuel additives are sold in interstate commerce. *See* 42 U.S.C. § 7545(c)(1) (authorizing EPA to "control or prohibit the . . . *introduction into commerce* . . . of any fuel or fuel additive") (emphasis added). And Congress authorized EPA to set a national standard, requiring all States, except California, to follow the agency's lead when it determines a national standard is warranted. *Id.* § 7545(c)(4)(A)(ii). Yet, Congress permitted California to set its own standards, even in the face of conflicting national standards – thus necessarily also authorizing any effect on the national market that might result from California adopting a different standard. *Id.* § 7545(c)(4)(B). As petitioners themselves assert, determinations about "[t]he creation and enforcement of nationwide standards [are] the business of Congress." Pet. 13-1148 at 2. Congress has spoken here; its Commerce Clause power is not dormant.

4. In Section 211(c) of the Clean Air Act, 42 U.S.C. § 7545(c), Congress has balanced the interests of the States, the interests of the federal government, and the need for regulatory uniformity. "When

Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). For example, Congress's "compromise" concerning state banking regulation, which balanced the interests of small banks, large banks, and the States, protected authorized regulations from dormant Commerce Clause challenges. *Ne. Bancorp,* 472 U.S. at 170. Similarly, the administrative structure Congress established to monitor tribal authority taxes applicable to nonmembers barred dormant Commerce Clause challenges to taxes adopted pursuant to that structure. *Merrion*, 455 U.S. at 155. Likewise here, there is no need for the courts to step in to protect the national fuels market from the LCFS, because Congress has already considered that market and left California free to adopt "at any time" its own standard "for the purpose of motor vehicle emission control," as it has done here.

II. If This Court Grants Certiorari Concerning AFPM's Crude Oil Discrimination Claim, It Should Also Consider Whether All Challenges To The 2011 Crude Oil Provisions Are Moot

All of AFPM's challenges to the LCFS's superseded 2011 crude oil provisions, including the claim remanded to the district court, are moot. While the issue of mootness can and will be raised in respondents' brief in opposition, respondents also raise it in

this conditional cross-petition, because if certiorari were granted, they would seek to narrow the scope of the remand from the court of appeals, and because this Court has indicated that cross-petitions in such circumstances can provide important notice to the parties and the courts. *See Nw. Airlines, Inc.*, 510 U.S. at 364; *El Paso Natural Gas Co.*, 526 U.S. at 480-82.

As discussed above, the distinction AFPM challenges – between emerging HCICOs and all other crude oils – was eliminated through regulatory amendments in 2012. *See* Pet. 13-1149 at 6. The LCFS now assigns *all* crude oils, including *all* California crude oils, their individual carbon intensity values, as AFPM asserts it should. *See* Cal. Code Regs., tit. 17, § 95486(b)(2)(A); Pet. 13-1149 at 21. The court of appeals acknowledged these amendments but erroneously concluded that the application of the 2011 crude oil provisions might have resulted in lingering harms. Pet. App. 45a n.12. In fact, as described above, the distinction AFPM challenges was never applied.

1. AFPM seeks review of the panel's unanimous ruling that the 2011 crude oil provisions did not discriminate in purpose or effect. Pet. 13-1149 at 6-7, 21-23; Pet. App. 44a-51a. AFPM claims that the 2011 provisions treated one California HCICO more favorably than emerging out-of-state HCICOs, by assigning a lower, historical average carbon intensity value to the former and a higher, individualized carbon intensity value to the latter. Pet. 13-1149 at 6, 21-23

(citing 2011 regulation). The current and operative crude oil provisions no longer involve this distinction. *See* Cal. Code Regs., tit. 17, § 95486(b)(2)(A).

Where a controversy involves a challenge to the validity of a law, it may be rendered moot by a substantial change to the law that leaves "no basis for concluding that the challenged conduct [would be] repeated." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (citing *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 413-14 (1972)); *see also Fusari v. Steinberg*, 419 U.S. 379, 380 (1975).

The timing, purpose and breadth of the amendments to the LCFS's crude oil provisions indicate there is no risk that the conduct AFPM challenges – the distinction between emerging HCICOs and all other crude oils – is continuing or will be repeated. ARB began the rulemaking process to amend these provisions before the district court ruled and did so based on "lessons learned since [the LCFS's] implementation began" and the evolution of the petroleum market since the original 2009 rulemaking. Res. App. 6-7. ARB's later decision not to apply the relevant distinction "was based on consideration of the uncertainties involved in estimating crude oil production and transport CI [carbon intensity] values from potential HCICOs in 2010 and 2011 and the methodology used at that time for estimating CIs from such potential HCICOs." Res. App. 10. ARB has since formally adopted a new methodology and uses that new methodology as part of the amended provisions.

Id. Nothing about these actions suggests any likelihood that ARB might return to the original provisions in the future.

2. While AFPM may well seek to challenge the amended provisions, the crude oil discrimination claim asserted in its present petition to this Court relates to the superseded, never-applied 2011 provisions. That claim is moot, and AFPM's petition for certiorari is not the appropriate place to litigate, for the first time, challenges to the amended provisions now in effect. As in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1335 (2013), "[t]he instant cases provide no occasion to interpret the amended regulation." *See also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Given the present posture of the case, AFPM's challenges to the superseded 2011 classification scheme for crude oil are moot. See *U.S. Dept. of Treasury v. Galioto*, 477 U.S. 556, 559 (1986) (concluding that new congressional enactment which no longer singled out plaintiff mooted certain of his claims).

3. While the court of appeals acknowledged that "the 2011 provisions have been amended," it speculated that "some out of state crudes may have been treated as high carbon intensity crude oils and therefore issued credits or deficits on that basis." Pet. App. 45a n.12. Thus, the court of appeals incorrectly concluded it was not "impossible for a court to grant any effectual relief whatever to the prevailing party." *See id.* However, all 2011 sales of crude oil have been completed, and no crude oil has been or

will be assigned the individualized, high carbon intensity value on which AFPM's crude oil claims rest. Resp. App. 10. Indeed, in 2011 all crude oils received *identical* carbon intensity values, because no crude oils were deemed to be emerging HCICOs. *Id.* Thus, there is no effectual relief to be granted, and AFPM no longer has a stake in the outcome of its challenge to the constitutionality of the 2011 crude oil provisions of the LCFS. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) (plaintiff's stake in the litigation eliminated by amendments to statute).

CONCLUSION

If the Court grants certiorari in either No. 13-1148 or 13-1149, or both, it should grant this conditional cross-petition and consider the effect of Section 211(c)(4)(B) on petitioners' dormant Commerce Clause claims. If the Court grants certiorari to consider the crude oil discrimination challenge in No. 13-1149, it should expressly include in the grant of

review the question whether all challenges to the 2011 crude oil provisions are moot.

Respectfully submitted,

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April 21, 2014

42 U.S.C. § 7545(c)(1)

The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B)[2] if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

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42 U.S.C. § 7545(c)(4)

(A) 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

[2] So in original. Par. (1) does not contain a cl. (A).

respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine –

(i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543(a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

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42 U.S.C. § 7545(o)(1)

* * *

(B) Advanced biofuel

(i) In general

The term "advanced biofuel" means renewable fuel, other than ethanol derived from corn starch, that has

lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

* * *

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term "cellulosic biofuel" means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

* * *

(H) Lifecycle greenhouse gas emissions

The term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions

(including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

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California Environmental Protection Agency
Air Resources Board
Staff Report: Initial Statement of Reasons
for Proposed Rulemaking
Proposed Amendments to the Low
Carbon Fuel Standard
October 2011

* * *

Executive Summary

The California Air Resources Board (ARB or Board) staff is proposing amendments to the Low Carbon Fuel Standard (LCFS) regulation. The primary objectives of the proposed amendments are to clarify, streamline, and enhance certain provisions of the regulation.

* * *

After the Board approved the LCFS for adoption on April 23, 2009, the regulation entered into full effect on April 15, 2010. Implementation of the CI-reduction requirements and compliance schedules began on January 1, 2011. Since the regulation went into effect, regulated parties have operated under the LCFS program with no significant compliance issues.

In short, the LCFS is working as designed and intended. Regulated parties are using the LCFS Reporting Tool (LRT) to submit electronically their quarterly progress and annual compliance reports with no known significant problems. Further, fuel producers are innovating and achieving material reductions in their fuel pathways' carbon intensities,

an effect the LCFS regulation is expressly designed to encourage, which is reflected in the large number of applications submitted under the "Method 2A/2B" process. Indeed, 26 submittals for Method 2A/2B applications, representing over 100 individual new or modified fuel pathways with substantially lower carbon intensities have been posted to date by staff on the LCFS portal.

* * *

With that said, most complex regulations like the LCFS can generally benefit from further refinements. Based on feedback from regulated parties as well as other stakeholders, and by reviewing lessons learned since implementation began, staff identified specific areas of the regulation for clarification and other improvements. These proposed improvements are expected to better ensure the successful implementation of the LCFS program.

* * *

The current regulation contains a provision requiring regulated parties of petroleum-based fuels to account for their use of high carbon-intensity crude oil (HCICO) in their crude slates. The existing regulation employs a simple "bright line" approach to assigning carbon intensities to petroleum transportation fuels in California (i.e., a crude is determine [sic] to either be a HCICO or a non-HCICO). Although the current approach has the benefit of being relatively simple, it has been suggested that, to reflect current market realities, a better approach be developed to

account for a continuum of crude oil carbon intensities.

Accordingly, staff is proposing a new accounting approach that would require such regulated parties to account for: (1) the difference in carbon intensity between the LCFS compliance schedules and a specified baseline (i.e., the "baseline deficit"), and (2) the incremental difference in carbon intensity between the specified baseline and the actual carbon intensity of petroleum fuels used in California within a specified timeframe (i.e., the "incremental deficit"). In essence, this approach would require the California petroleum-refining sector to not only account for the carbon-intensity reduction that the compliance schedules would otherwise require relative to a specified baseline, but it would also require this sector to account for changes in the actual carbon intensity of petroleum fuels due to the use of HCICO feedstocks.

The proposal described above calls for the new approach to go into effect on January 1, 2013.

* * *

Analysis of Alternatives

Staff evaluated several alternatives to the proposed amendments.

* * *

For petroleum regulated parties, the no-action alternative would mean that those entities would need to continue to meet the existing requirements for high

intensity crude oil (HCICO). Because the HCICO provisions are tied to a 2006 crude slate or "basket," the no-action alternative would preclude adjustments to the HCICO provisions that would better reflect the petroleum market that has evolved since the original 2009 rulemaking. Just as important, the no action alternative would preclude the more accurate accounting of carbon intensities for petroleum crude that would occur under the staff's proposal versus the "bright line" HCICO approach in the current regulation that is based on the grandfathered 2006 crude basket approach.

* * *

Low Carbon Fuel Standard (LCFS) Regulatory Advisory 13-01 July 2013

* * *

The LCFS regulation was amended on November 26, 2012, with the amendments being filed with the Secretary of State on the same day ("amendments"). As specified in Regulatory Advisory 10-04B, it was and remains ARB's intent for the amendments to be applicable and enforceable beginning January 1, 2013, notwithstanding the amendments' filing date. Accordingly, the ARB began implementing the amendments on January 1, 2013, except as otherwise noted herein, and will continue to implement them.

* * *

ACTIONS TAKEN UNDER THIS ADVISORY

* * *

Supplemental Guidance to Advisory 10-04B on Adjustment of 2011 Net Credits Derived from Potential HCICOs

Advisories 10-04A and 10-04B provided guidance applicable to the treatment of credits/deficits that were generated for a fuel pool in calendar year 2011 that is comprised in some part of fuel/blendstock derived from potential high carbonintensity crude oil ("potential HCICO"). In Advisory 10-04B, we provided three options and stated that the process for adjusting 2011 net credits will be more fully specified in a subsequent advisory.

We have reconsidered those options and determined that the best course of action is to not require any adjustments to the 2011 net credits. This determination was based on consideration of the uncertainties involved in estimating crude oil production and transport CI values from potential HCICOs in 2010 and 2011 and the methodology used at that time for estimating CIs from such potential HCICOs. Since then, we have developed and used the Oil Production Greenhouse Gas Emission Estimator (OPGEE) model, version 1.0, which the ARB formally adopted in November 2012 (see section 95486(b)(1) of the regulation). Because of this, we have determined that it would be appropriate not to require adjustments of the 2011 net credits. Regulated parties who used crude oil supplied to California refineries in 2011 will not be required to adjust their 2011 net credit balances in the LCFS Reporting Tool, even if the crude oil was derived at least in part from potential HCICOs.

Please note that the above determination applies only to 2011 volumes of crude oil. Now that the LCFS regulation calculates crude oil CI values using OPGEE, which underwent the public rulemaking process required by State law, regulated parties will be required to report the volumes, names, etc. for crude oils supplied to California refineries in calendar year 2012 and subsequent years, as provided in the regulation.

* * *