Nos. 13-1148, 13-1149

IN THE

Supreme Court of the United States

ROCKY MOUNTAIN FARMERS UNION, *et al.*,

Petitioners,

v.

RICHARD W. COREY, *et al.*,

Respondents.

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

Petitioners,

v.

RICHARD W. COREY, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF ENVIRONMENTAL ORGANIZATION RESPONDENTS

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QUESTIONS PRESENTED

California's Air Resources Board adopted the Low Carbon Fuel Standard ("LCFS") to reduce the carbon intensity of transportation fuels sold in California for use in the State and to create incentives to develop lower-carbon fuels. The LCFS employs a lifecycle analysis under which all greenhouse gas emissions from production, transportation, and combustion of each fuel sold in California are tabulated to determine the fuel's carbon intensity. The questions presented are:

1. Whether, as the court of appeals held, the LCFS does not facially discriminate against ethanol produced outside California because the regulatory incentives it establishes as based solely upon lifecycle carbon intensity, not place of origin.

2. Whether, as the court of appeals held, the LCFS does not regulate extraterritorially in violation of the dormant Commerce Clause because, inter alia, it applies only to fuels sold in California, does not control prices or otherwise regulate transactions in other States, and does not require any other jurisdiction to modify its laws.

3. If this Court were to conclude that petitioners' challenge in No. 13-1149 to since-superseded provisions of the 2011 LCFS regulations concerning crude oil is not moot, whether, as the court of appeals held, those 2011 provisions do not discriminate against interstate commerce by design or in effect.

RULE 29.6 STATEMENT

Respondents Conservation Law Foundation; Environmental Defense Fund; Natural Resources Defense Council; and Sierra Club (collectively, Environmental Organization Respondents), all intervenor-defendant-appellants in the court of appeals, are nonprofit environmental organizations. The Environmental Organization Respondents have no corporate parents and no publicly held corporation owns an interest in any of them.

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INTRODUCTION

California's Low Carbon Fuel Standard (LCFS) is a key component of the State's policy response to a serious threat to the health and welfare of Californians. Petitioners' characterizations of the LCFS as merely "symbolic," ineffectual or even counterproductive, are baseless. In fact, the LCFS is expected to be a central contributor toward achieving California's target of reducing the State's greenhouse gas emissions to 1990 levels by 2020 (despite a nearly 50 percent increase in population), and to achieve real, net emissions reductions by encouraging production of low carbon fuels not prevalent when the program went into effect.

Petitioners' portrayals of the LCFS as a ruse to benefit California companies are outright fictional. The LCFS does not assign carbon intensities based on California's "assumptions," but according to the peer-reviewed – and congressionally endorsed – method for measuring the comparative greenhouse gas emissions generated from the use of various transportation fuels. A State that sought to isolate its own ethanol industry from competition would not design a system like the LCFS, that rewards low carbon biofuels wherever they are produced, and that has assigned 39 of the 40 most favorable carbon intensity values (including the top 26) to products manufactured out of State. (Equally spurious are insinuations that California is shunting the costs of the program onto citizens of other States; indeed, petitioners and amici frequently argue, in other fora, that the LCFS will be too expensive for California consumers.).

But the character of the LCFS as serious, well-crafted state policy is not why the court of appeals denied the claims petitioners seek to revive here (or

why this Court's intervention is unwarranted). The panel decision rejected those claims because they are without merit under this Court's controlling dormant Commerce Clause case law. The panel correctly explained that the LCFS is not "facially discriminatory" because lifecycle greenhouse gas emissions, not geographic origin, are the sole determinant of how the LCFS treats ethanols sold in California for use in California. That is true of the ethanol pathways that the LCFS, as initially promulgated, designated with the labels "California," "Midwest" – and "Brazil." The fuels referenced with those shorthand designations were assigned carbon intensity values on exactly the same basis – reflecting actual greenhouse emissions at each lifecycle stage – as all others.

Petitioners' claims of decisional conflict are groundless: In none of the facial discrimination precedents cited by petitioners did a court confront a statute where a neutral factor was the only determinant of a product's treatment, and no court has applied strict scrutiny to a state law that, as this one does, accords dozens of competing products from out-of-state better treatment than the most favored in-state product.

Review is likewise unwarranted of the panel denial of petitioners' claim that the LCFS, by calibrating regulatory treatment to lifecycle emissions, constitutes "extraterritorial regulation" prohibited by the dormant Commerce Clause. The court of appeals carefully examined this Court's precedents applying that doctrine and concluded, correctly, that the LCFS is constitutional in this respect as well. Far from "controlling" wholly out-of-state transactions, the LCFS applies only to fuels sold

in California for use in California and attaches no significance to producers' sales of fuels (including high-carbon ones) to purchasers in other States and nations. Nor does it require or pressure other polities to adopt any laws or standards of any kind. The LCFS alters the incentives of firms (whether in-state or out-of-state) producing fuels used in California, but does not differ in that respect from state regulations universally recognized as constitutional.

What petitioners really fault the Ninth Circuit panel for, and decry as "defiance of settled law," is the panel's adhering to the "handful of decisions" of this Court that *actually establish the dormant Commerce Clause extraterritoriality doctrine*, rather than adopting a "rule," ostensibly derived from emanations of *other* constitutional provisions, which would invalidate nondiscriminatory state laws that influence the incentives of producers who sell in the State's market. See Pet. of Rocky Mountain Farmers Union (RMFU) 15, 29. Petitioners' account of "controlling precedent" has little room for the Court's only dormant Commerce Clause extraterritoriality case in the last quarter-century, *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), which resoundingly rejected an extension along the lines proposed here; indeed, RMFU does not even cite it. And it is doubtful that the out-of-field decisions from which petitioners freely riff actually support their "principle": *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for example, did not hold or suggest that *all* punitive damages awards – which avowedly seek to punish, deter, and alter decisions and production processes that often occur out-of-state – are extraterritorial; consistent with this Court's Commerce Clause cases, it warned against a State's punishing out-of-state

parties for unrelated, wholly out-of-state transactions.

The "rule" petitioners ask the Court to recognize would in fact collide with settled precedent, and have obvious, far-reaching effects on States' police power and – because of the murkiness of the concepts petitioners seek to enshrine – convert the extraterritoriality doctrine from an administrable and narrow rule into "roving" federal judicial oversight. See *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 343 (2007). Unsurprisingly, no court of appeals or state court of last resort has embraced petitioners' sweeping conception of "extraterritoriality."

The case is manifestly ill-suited to immediate review for reasons apart from the weakness of petitioners' legal claims and the absence of any legitimate decisional conflict. The court of appeals remanded the case for the trial court to consider, in the first instance, claims that the LCFS's ethanol provisions (which are petitioners' primary target) should nevertheless be subject to strict scrutiny because they have a discriminatory purpose or effect, and if they do not, whether they unduly burden commerce under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Not only is the record wholly undeveloped as to the nearly three and a half years of actual experience under the LCFS, but many of petitioners' most strident assertions – including the protectionism charge and claims that Midwest ethanol industry is being destroyed – are directly relevant to claims that are pending on remand and have never been adjudicated. And it would be strange to take up a challenge based on negative implications from Congress's Commerce power, without first

resolving petitioners' still-pending claim, not yet decided even in the trial court, that the LCFS was preempted through an *affirmative* exercise of Congress's Commerce power.

Two additional developments, unmentioned in the petitions, further undermine any case for immediate intervention. First, the 2011 crude oil provisions challenged by petitioner AFPM have been replaced, without ever having been applied to anyone, rendering the fact-bound crude oil claims almost certainly moot and, in any event, of no continuing importance. And in 2013, the LCFS was invalidated on state-law grounds by a California appeals court, triggering a comprehensive de novo public rulemaking process expected to result in a wholesale reissuance of the rule. Among many other changes, Air Resources Board (ARB) staff have proposed a new procedure for assigning carbon intensity values under the LCFS that would not include the "Method 1" approach of the original regulation that is the basis of petitioners' "facial discrimination" complaint.

In sum, petitioners ask this Court to pretermit final judgment and review, on a skeletal and out-of-date record, an interlocutory decision that correctly applied governing doctrine to provisions of a law, some of which have been repealed and the remainder of which, following state-law invalidation, are under an active and comprehensive review by the responsible agency. The petitions should be denied.

STATEMENT

The LCFS. Pursuant to California's Global Warming Solutions Act, ARB promulgated the LCFS, 17 Cal. Code of Regs. §§ 95480, *et seq*., in 2009, with the aim of reducing the carbon intensity of transportation fuels sold in California by 10 percent by 2020.[1] The LCFS requires a gradual reduction in average carbon intensity in order to create incentives to "spur the development and production of low-carbon fuels." App. 14a. To reach the LCFS's targets, "fuels having carbon intensities from 50 to 80 percent less than gasoline are expected to be needed." ER 6:1359.[2]

The LCFS applies to most transportation fuels sold in California for consumption in California, including gasoline, diesel, ethanol, electricity and natural gas. 17 Cal. Code of Regs. § 95480.1(a). (Aviation and ocean vessel fuels are exempted.) The regulations set an increasingly stringent annual

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[1] See also Ninth Circuit Excerpt of Record, vol. 5, pp. 921-22 ("ER 5:921-22") (Executive Order on LCFS). References to "App." are to the appendix to RMFU's petition. American Fuel & Petrochemical Manufacturers' petition is referenced as "AFPM __."

[2] Petitioners and amici assert that the LCFS will end up producing no net environmental benefits (or will even be a net harm) due to fuel shuffling (shifts in sales of high-carbon fuels to markets outside California). *E.g*., RMFU 7-8; Chamber of Commerce Amicus Br. 11-12, 14-15. In fact, ARB concluded that, while some shifts could occur during the early years of implementation, as the average carbon intensity standard becomes more stringent, the LCFS will require the development of much lower-carbon intensity fuels, yielding real and significant net emissions reductions. See ER 4:785; 9:2197; 9:2218-19; 9:2226.

carbon intensity standard that regulated parties – those who sell finished transportation fuels in the State, typically refiners or blenders of gasoline or diesel – must meet. *Id*. §§ 95482(b), 95484(a). A fuel whose carbon intensity is lower than the standard for the year is entitled to a credit, which may be sold to other regulated parties, or carried forward. *Id*. § 95485; ER 4:773. Regulated parties comply by providing a mixture of fuels that, in the aggregate, meets or falls below the target and/or by using accumulated or purchased credits. 17 Cal. Code of Regs. §§ 95484, 95485; ER 4:773-74.

Lifecycle Analysis. The LCFS assigns carbon intensity to each fuel through a lifecycle analysis that quantifies the net total greenhouse gas emissions from the fuel's production, transportation and combustion. 17 Cal. Code of Regs. § 95481(a)(16), (38); ER 4:769-72; ER 9:2198; ER 9:2279; see also App. 16a-18a. Carbon intensity is expressed as grams of carbon dioxide equivalent emissions per megajoule (a unit of energy).

Lifecycle analysis is necessary to reflect the true greenhouse gas consequences of using different fuels. See, *e.g*., 42 U.S.C. § 7545(o)(1)(H) (adopting lifecycle analysis); ER 6:1201-02. For example, cars fueled with electricity produce no tailpipe emissions at all; but the emissions reduction relative to fossil fuels will vary greatly, depending whether electricity was generated from a solar or hydroelectric source or from one burning coal. ER 4:769. As with electricity as a fuel, all ethanols have identical tailpipe emissions, but those produced using coal for heat and electricity contribute more greenhouse gas emissions per gallon than does gasoline, whereas ethanol produced using biomass can result in much lower emissions. See, *e.g*.,

State Opp. App. 9-11. Lifecycle analysis of ethanol likewise includes a credit for the absorption of carbon dioxide from the atmosphere during plant growth. ER 4:772, 9:2288-90.[3] The LCFS assesses the carbon intensity by means of a peer-reviewed adaptation of the "GREET" model developed by Argonne National Laboratories (and used by the U.S. EPA). ER 4:770; see also 42 U.S.C. § 7545(o)(2)(A)(i); App. 17a-18a.

Assignment of Carbon Intensity Values. When the LCFS was first implemented, ARB determined the carbon intensities for a variety of fuels expected to be sold in California. The resulting "default" carbon intensity values were placed in the LCFS regulation in Table 6 (for gasoline and gasoline substitutes) and Table 7 (for diesel and diesel substitutes); "Method 1" for determining a fuel's carbon intensity value is to find the corresponding pathway on these "lookup tables." *E.g.*, 17 Cal. Code of Regs. § 95486; ER 5:903-906; App. 18a-19a. The LCFS provides an alternative way, known as "Method 2," by which any fuel producer may obtain individual carbon intensity values based upon its own production process. 17 Cal. Code of Regs. § 95486(c), (d); ER 4:780-82; App. 19a. Method 2 values may be relied upon as soon as they are "certified," and such values eventually become part of Table 6 or 7 in the regulation. *Id.*

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[3] This is why biofuels like ethanol can have carbon intensity values significantly below those of gasoline or diesel, which, when combusted, do not merely return recently absorbed carbon to the atmosphere, but release carbon that has been sequestered for millions of years. See App. 24a (noting that "the carbon in crude oil makes a one-way trip from the Earth's crust to the atmosphere").

ARB has approved more than 140 pathways for ethanol through Method 2, almost all of them for ethanol produced outside California – far exceeding the number of ethanol pathways listed in the initial version of the regulation.[4] The initial range of values under the LCFS for all ethanols was 58.40 to 120.99, with Brazilian sugarcane ethanol at the lowest. ER 5:0903 (Table 6). Now, after development of dozens of additional pathways under Method 2, the range of certified ethanol values includes ones as low as 21.47 (Nicaraguan). See Summary Table, cited in n.4, *supra*. Most ethanol is made from starch (corn or sorghum) or sugar (sugarcane). These feedstocks vary significantly in the amount of greenhouse gases produced as they are grown and converted into ethanol, with sugar-based ethanol having fewer emissions than corn-based ethanol. ER 10:2577. Ethanol-production facilities also have widely varying emissions per unit of ethanol produced. ER 3:376, 381.

Most ethanol sold in California is produced outside the State. The few California corn ethanol plants registered under the LCFS import corn from the Midwest. ER 4:777. Transporting this corn to California generates more emissions than does transporting finished ethanol from the Midwest to California; in other words, Midwest ethanol producers *benefit* relative to California producers from consideration of transportation in the lifecycle analysis. *Id.*

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[4] See Summary of All Pathways Table ("Summary Table"), available at http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm); see also State Opp. App. 9-11 (listing the subset of these certified pathways that have been incorporated into Table 6).

Proceedings Below. In late 2009 and early 2010, petitioners filed lawsuits in federal district court, asserting that the LCFS violates the dormant Commerce Clause and is preempted by federal law concerning renewable fuels. On cross-motions for partial summary judgment filed before discovery, the district court held that the LCFS violated the dormant Commerce Clause in that it (1) impermissibly discriminated on its face against out-of-state ethanols; (2) regulated extraterritorially; and (3) discriminated in purpose and effect (but not on its face) against out-of-state crude oil. App. 83a, 146a. The court did not reach claims that the ethanol provisions were discriminatory in purpose and effect and likewise did not resolve plaintiffs' *Pike* balancing or preemption claims. The court certified its rulings under Fed. R. Civ. P. 54(b) and issued a preliminary injunction. Pet. App. 146a.

After entering a stay allowing the LCFS to remain in effect, the Ninth Circuit reversed, holding that the LCFS did not discriminate in any respect against out-of-state crude oil and did not facially discriminate against out-of-state ethanol or regulate extraterritorially. App. 1a. The court of appeals remanded the case to the district court for consideration of petitioners' remaining dormant Commerce Clause and preemption claims. Dissenting in part, Judge Murguia concluded that the portions of Table 6 that included geographical references established "facial discrimination" and that a "nondiscriminatory" alternative was available – assigning carbon intensity values on an individual basis (without use of the default averages), as under Method 2. App. 77a-78a. The court of appeals denied petitions for rehearing en banc, with seven judges voting to grant rehearing. App. 147a.

Ongoing Administrative Proceedings. In a separate lawsuit brought by a large biofuel company and other plaintiffs, a state appeals court held that ARB had committed procedural violations in approving the LCFS. *POET, LLC v. State Air Resources Bd.*, 217 Cal. App. 4th 1214 (Cal. Ct. App.), *as modified on denial of rehearing*, 218 Cal. App. 4th 681, 160 Cal. Rptr. 3d 69 (2013), review denied (Nov. 20, 2013). The court "direct[ed] the trial court to issue a writ of mandate directing ARB to set aside its approval of the subject LCFS regulations," 160 Cal. Rptr. 3d at 77, but decreed that, given its environmental benefits, the LCFS should remain in place, with the 2013 carbon intensity standards in effect, while ARB remedied the state law violations, *id.* at 127, 131.

Pursuant to that remand, ARB has stated that it will "re-adopt the LCFS regulation" and consider a proposed "suite of amendments to provide a stronger signal for investments in and production of the cleanest fuels, offer additional flexibility, update critical technical information, and provide for improved efficiency and enforcement of the regulation." ARB, Low Carbon Fuel Standard Re-Adoption Concept Paper 1 (March 7, 2014).[5] Among the changes under consideration is restructuring the process for assigning carbon intensities to "replace the existing Methods 1 [and 2] processes." *Id*. at 6.

[5] This publication is available at http://www.arb.ca.gov/fuels/lcfs/lcfs_meetings/030714lcfsconceptpaper.pdf.

REASONS FOR DENYING THE PETITIONS

This case, especially at this time, raises no important question of federal law warranting this Court's review. Despite the rhetorical pitch with which they are delivered, petitioners' contentions that the LCFS's ethanol provisions are facially discriminatory and extraterritorial in operation lack support in this Court's dormant Commerce Clause precedent; their charges that the court of appeals departed from established principles rest on distortions of the lower court's actual reasoning; and the case does not implicate any division of authority in the circuit courts. AFPM's separate challenge to the superseded 2011 crude oil provisions is moot and otherwise wholly unworthy of review. Furthermore, the interlocutory posture of this case – with remanded claims relevant to arguments made in the petitions still unresolved; no evidence having been taken in the trial court concerning the regulations' more than three years of actual operation; and ongoing state agency reconsideration and revisions of the program in response to a state-court remand – militates strongly against certiorari.

I. THE COURT OF APPEALS' INTERLOCUTORY DECISION PROPERLY APPLIED THIS COURT'S PRECEDENT TO PETITIONERS' "FACIAL DISCRIMINATION" CLAIMS AND DOES NOT WARRANT FURTHER REVIEW

Petitioners' plea for immediate review of the Ninth Circuit's resolution of their dormant Commerce Clause "facial discrimination" claim should be denied. Petitioners' submissions that the panel strayed from this Court's precedent by deeming a legitimate environmental "purpose" sufficient to excuse facial discrimination (RMFU 16-18; see also AFPM 13, 17)

and disregarded evidence of "obvious" facial discrimination (RMFU 17) are seriously mistaken. Even if had any merit, petitioners' claim of application error below is not the kind of issue that "cries out" (RMFU 21) for this Court's immediate review.

Like others who are unsuccessful in establishing that a state law is facially discriminatory, petitioners may press claims of discriminatory purpose or effect under the Commerce Clause. The centerpiece of petitioners' "facial discrimination" claim here – the geographic references appearing with the (accurate) default values on the LCFS's "lookup tables" – play a nonessential and diminishing role in ARB's regime and no causal role in petitioners' injury. Indeed, a decision ordering assignment of individual carbon intensity values would not benefit producers whose market position under the LCFS reflects the fact that their fuels have high carbon intensities relative to other biofuels.

1. Contrary to petitioners' accusations, the panel below fully recognized that facially discriminatory action is subject to strict scrutiny, see App. 30a-31a, and it relied upon this Court's definition of facial discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." App. 30a (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl Quality*, 511 U.S. 93, 99 (1994)). Nor did the majority suggest, let alone hold, that a facially discriminatory law is not subject to strict scrutiny if "its purpose is environmental rather than economic protectionism," RMFU 14. To the contrary, the panel held that California's law *is not facially discriminatory* – a determination logically prior to the level-of-scrutiny

choice – because the LCFS "does not base its treatment on a fuel's origin but on its carbon intensity." App. 34a-35a. That determination turned, not on the measure's broad "purpose," but on its actual mechanics.

The panel's mention of the "reasons" for differential treatment of fuels, see RMFU 10 (citing App. 71a), refers not to the LCFS's ultimate purpose or rationale, but to the basis or "determinant" of each fuel's treatment, see *Oregon Waste*, 511 U.S. at 99. After stating that "there is a *nondiscriminatory reason* for [a particular ethanol's] higher carbon intensity value" – namely its higher greenhouse gas emissions – the majority clarified that "*[s]tated another way*, … CARB can *base* its regulatory treatment on [higher] emissions." App. 35a (emphasis added). This Court has used the word "reason" the same way: "We have interpreted the Commerce Clause to invalidate local laws that … discriminate against an article of commerce *by reason of* its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (emphasis added).

Petitioners' lackluster effort to demonstrate a conflict of authority consists of string-citations for the principles that facially discriminatory laws are subject to strict scrutiny, and that a valid police power purpose does not save a discriminatory law from such scrutiny. See, *e.g.*, RMFU 20-21 & n.4; AFPM 18 n.4. But the court of appeals did not do anything in tension (let alone conflict) with those principles.

2. A misapplication of a correctly identified principle of law normally does not warrant this Court's attention, but the panel's finding here of no facial discrimination was entirely correct.

Petitioners' assertions that the LCFS is "systematically" discriminatory, RMFU 1, depend on serious misstatements about how the LCFS operates.

The centerpiece of petitioners' assertion that "[a]ll things being equal," "California ethanol *is always treated more favorably* than Midwest ethanol," RMFU 17 (emphasis in original), is their comparison of three pairs of default carbon-intensity values in Table 6, described as showing that ethanols created through "identical production processes," RMFU 5; see also *id.* at 16-19, receive different carbon-intensity values, depending on their origin in the Midwest or California. But, as the court of appeals carefully explained, this "demonstration" is little more than sleight of hand: the California ethanol pathways petitioners highlight use "less thermal energy and electricity in the production process" and less electricity "generated by coal-fired power plants" than do their supposedly "identical" peers. App. 20a-21a. Different values are not assigned "simply because of where production is located" (RMFU 5) at all; rather, the reason for the differences is that the particular Midwest pathways have significantly higher carbon emissions than do the specified California pathways. App. 22a-23a. As the decision recognized (App. 50a), nothing in this Court's Commerce Clause precedent allows petitioners to omit "the factors of lifecycle analysis that do not favor them while keeping those that do" – such as corn's absorption of carbon dioxide as it grows – and then plead "facial discrimination." See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298

(1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities.").[6]

Nor is this the only way in which petitioners' claims depend on omitting or obscuring central aspects of the LCFS, features that appear on "the face" of the law. Petitioners ignore that the same table from which they extract pairings has, from the inception, included (on its face) default values for "Brazilian ethanols" that are significantly *lower* than the California pathways they highlight. And as explained above, the LCFS has, from its inception, contained provisions that entitle a fuel producer, wherever located, to be assigned its own, individualized carbon intensity value when its processes entail lower emissions than the lookup table would otherwise provide. See pp. 8-9, *supra* (describing "Method 2"). The RMFU petitioners relegate this integral and increasingly central feature of the regulatory regime to a single footnote (RMFU 5 n.1), and insinuate that this route is onerous or insignificant window dressing when, in fact, ethanol pathways established in this manner account for most ethanol pathways now in use. The AFPM petitioners never even mention Method 2.

A look at the actual pathways that are currently in use suffices to refute petitioners' picture of a regime "systematically favoring California." RMFU 1. Thirty-nine of the 40 most favorable (lowest) carbon intensity values now available for use are for ethanols

[6] If, as petitioners suggest (RMFU 5), a Midwest producer would receive "better regulatory treatment" were it moved to California, that would only occur if its emissions were lower as a result.

made outside California (the California entry is the 27th most favorable on the list). See State Opp. App. 9-11; Summary Table.

3. Furthermore, while petitioners tell the Court that "[]ARB penalizes Midwest ethanol for the GHG emissions associated with transporting finished fuel to California—an integral aspect of interstate commerce," RMFU 5, the transportation component, as the decision below explains, App. 21a, operates to the *disadvantage* of California-produced fuels, because almost all corn for ethanol processed in California is shipped from the Midwest (and unprocessed corn is more energy-intensive to transport than finished ethanol). (Notably, despite the even greater distances, Brazilian ethanol receives a lower transportation value than does California, reflecting the superior energy efficiency of tanker shipping. See App. 21a-22a.) All the lifecycle factors, whether or not connected to location, "measure[] real differences in the harmful effects of ethanol production." App. 38a.

Petitioners ignore this compelling evidence of the LCFS's adherence to neutral and scientific principles, and seek instead to divert attention to purely *hypothetical* measures in which a "transportation factor" might be deployed to disadvantage out-of-state competitors. See RMFU at 33 (positing "Buy Local Produce Act" that would "penalize" Florida citrus, based on greenhouse gas emissions associated with transportation to California). But the LCFS assigns *Brazilian* ethanols (and many Midwestern ones, and still others from Jamaica, El Salvador, Trinidad, and Costa Rica) lower values than California ethanols, and can scarcely be described as a "Buy Local Ethanol" program that would trigger strict Commerce

Clause scrutiny. Cf. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (noting courts' ability to unmask protectionism whether "forthright or ingenious" and citing cases); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (affirming that if "a state law purporting to promote environmental purposes [were shown to be] 'simple economic protectionism,'" it would be subject to a "'virtually *per se* rule of invalidity'").

4. Petitioners' position ultimately rests on nothing more than the fact that the words "California" and "Midwest" (and "Brazil," too) appear in Table 6 next to some of the original fuel pathways identified by ARB.

But the accompanying default values, as the panel cogently explained, App. 45a-48a, reflect *real* differences in (average) greenhouse gas emissions resulting from applying a peer-reviewed model to empirical data about energy usage and efficiency in ethanol production, not "assumptions" that "favor[] California entities." RMFU 5. While this approach may produce, as would any use of averages, inaccurate values in individual cases, RMFU 45, those averages do not systematically favor in- or out-of-state producers. See also App. 48a (concluding that the "regional averages for the default pathways show every sign that they were chosen to accurately measure" emissions).

This Court's cases do not support the notion that any statutory reference to geography, no matter how nonessential or benign, triggers a rule of near per se invalidity, even in cases where neither discriminatory intent nor effect has been established. On the contrary, *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U.S. 87 (1926), rejected a

Commerce Clause challenge to a statute that mentioned by name the States where the infested alfalfa had been found, without any suggestion that the law's constitutionality might be more secure had the reference instead been to "any area where [the insect] was known to be found." Cf. *West Lynn Creamery*, 512 U.S. at 201 (refusing "to analyze separately two parts of an integrated regulation," noting that the Court's Commerce Clause precedents "have eschewed formalism"). It is *petitioners* – by insisting that a law nondiscriminatory in purpose *and* effect be subject to strict scrutiny for including these geographic references – who would loose the dormant Commerce Clause from its doctrinal "moorings," App. 168a (Smith, J.).[7]

Thus, this case is nothing like the supposedly "conflicting" decisions petitioners collect in which courts struck down as facially discriminatory laws that explicitly disfavored out-of-state products, services, or customers. The LCFS applies a uniform, scientifically-based metric to all fuels, wherever they originate.

5. Even if there were doubt about the validity of the decision below, few claims are less deserving of the Court's "immediate intervention" (RMFU 1) than petitioners' assertion that the panel majority erred in

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[7] Concepts of discrimination across different parts of the Constitution share some common ground, but a doctrine that invalidates otherwise nondiscriminatory laws for merely mentioning other States (or regions) by name is far removed from a doctrine "driven by concern about 'economic protectionism,'" *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008); cf. *Miller v. Johnson,* 515 U.S. 900, 911-13 (1995) (law that classifies individuals by race may trigger strict Equal Protection scrutiny, whether or not it imposes *tangible* disadvantage).

not finding "facial discrimination." For all their outsized claims of significance, petitioners point to no other case of this Court or any lower court that confronted, let alone invalidated, a law with the sort of innocuous geographical references at issue here. And contrary to petitioners' suggestion (and Judge Smith's dissent below), a determination that a state law is not so plainly discriminatory as to warrant immediate strict scrutiny hardly confers an immunity from dormant Commerce Clause review or a "circumvent[ion] of strict scrutiny." AFPM 10. The lower courts here must still consider discriminatory purpose and effects claims, both of which can trigger strict scrutiny, as well as an unjustifiable-burden claim under *Pike*.

Petitioners' claims of "glaring uncertainty" resulting from leaving the panel's fact-specific decision unreviewed at this time are characteristically overdrawn: the law in the Ninth Circuit, like everywhere else, is that laws that facially discriminate against out-of-state interests are subject to strict scrutiny, as are facially neutral laws that discriminate in purpose or effect. Indeed, far from "crying out for definitive resolution," RMFU 22, the facial discrimination ruling petitioners insist the Court must immediately review lacks practical significance even in this case. As explained above, as a result of the *POET* decision, ARB, which has long explained that the "default pathways" were developed primarily as a convenience to ease implementation of the program, may soon conclude that, after several years' experience under the program, they are no longer necessary.

Indeed, whether or not that comes to pass, it is clear that the geographic designators, despite their

outsized prominence in petitioners' *arguments*, have little, if anything, to do with their *grievances*. On the contrary, a Commerce Clause remedy along the lines suggested in Judge Murguia's dissent – an order requiring ARB to assign carbon intensity values individually, without aid of the default regional designations, see App. 78a – would in all likelihood do nothing to improve the market position of ethanols with high carbon intensity values.

II. AFPM'S CHALLENGE TO THE SUPERSEDED 2011 CRUDE OIL PROVISIONS IS MOOT AND UNWORTHY OF FURTHER REVIEW

As the State respondents explain, AFPM's challenge to provisions of the 2011 crude regulations, AFPM 21-23, is moot because the regulations have been superseded by new provisions petitioners have not challenged, and were never applied. See also Conditional Cross-Petition, No. 13-1308, at 23-27. But the court of appeals' unanimous conclusion that the LCFS's short-lived regulatory provisions concerning "emerging high carbon intensity crude oils" did not violate the dormant Commerce Clause, App. 52a-58a, would not warrant review in any event.

III. PETITIONERS' CLAIMS THAT THE LCFS REGULATES EXTRATERRITORIALLY ARE UNSUPPORTED BY PRECEDENT AND UNWORTHY OF FURTHER REVIEW

The Ninth Circuit's ruling that the LCFS does not constitute "extraterritorial regulation" also does not warrant this Court's urgent review. Far from posing a "frontal assault" on precedent (RMFU 30), the panel's decision represents an unexceptionable application of this Court's governing case law, one

that does not conflict with any other appellate decision. The LCFS applies only to fuels sold in California for use in California; and it does not fix prices for producers' out-of-state transactions or otherwise regulate them; it does not control conduct beyond California's borders, nor ask that other States change their laws.

Petitioners' contrary claims, stripped of their unsubstantiated (and erroneous) empirical assertions and overheated rhetoric, *e.g.*, RMFU 23 ("irreparable harm to the Union"), amount to little more than an extended demonstration that a heavily fictionalized version of the LCFS offends against an ill-conceived sweepingly broad "legal rule" that this Court's precedents do not support.

1. This Court, as the decision below recognized, has held that the dormant Commerce Clause, in addition to its core prohibition against protectionist and discriminatory state laws, also forbids state regulation that "directly controls commerce occurring wholly outside [the State]." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). See also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion) (Illinois takeover statute violated the dormant Commerce Clause because it would apply to transactions that "would not affect a single Illinois shareholder"); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidating New York statute establishing minimum price for out-of-state producers' milk).[8]

[8] Petitioners also rely on a passage in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), a discrimination

Petitioners do not seriously argue that the decision below conflicts with any one of *these* decisions or with any court of appeals decision applying the Commerce Clause. Nor could they: as the court of appeals explained, "[f]irms in any location may elect to respond to the incentives provided by the [LCFS] if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California." App. 59a. Compare *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999) (*Meyer II*) (striking down Wisconsin law barring imports of solid waste from jurisdictions that lacked a recycling program meeting Wisconsin's specifications). The LCFS "regulates only the California market," App. 59a, and does not attach any significance to the carbon intensity (or any other characteristic) of fuels that participants or would-be entrants in California's market produce for sale elsewhere. See *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (extraterritoriality prohibition not implicated when challenged law is "indifferent to sales occurring out-of-state").

Rather, the basis for petitioners' "frontal assault" charge (RMFU 30) is the court of appeals' focus on the "handful" of "recent" decisions (RMFU 29) – *i.e.*, the "handful" *that actually announce and apply the*

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case in which the Court cited *Baldwin* in rejecting the town's claimed interest in protecting another jurisdiction's environment as justification for a rule commanding that all commerce go to a single local business, *id.* at 393. This passage provides no support for petitioners' position here: California is even-handedly regulating only in-state transactions, and doing so in the interest of protecting its own environment.

Commerce Clause, rather the "variety of cases" petitioners invoke interpreting the Privileges and Immunities Clause, the First Amendment, the Full Faith and Credit Clause, and the Due Process Clause (both substantive and procedural). See RMFU 22-25.

RMFU proffers a capacious definition of "controlling precedent" – one that includes an amicus brief and an ostensibly helpful First Circuit decision see RMFU 26-27 (citing *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999), aff'd on other grounds *sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000)). But RMFU fails to mention this Court's *only decision on the dormant Commerce Clause extraterritoriality doctrine in the last quarter century*, *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) (*PhRMA*). The Court there resoundingly rejected, *id.* at 668-69, an expanded extraterritoriality doctrine very similar to the one petitioners accuse the panel of defying: petitioner in that case insisted that the Commerce Clause denied Maine any basis for reaching activities of out-of-state *manufacturers* of drugs sold in-state, on the theory that the "'practical effect'" of Maine's law was "to regulate transactions – sales to wholesalers – "occurring 'wholly outside of the state's borders.'" Brief of Petitioner, No. 01-188, p. 30 (quoting *Healy*, 491 U.S. at 336).[9] And the two members of the Court who did not join the Court's opinion in *PhRMA* rejected the extraterritoriality claim based on more

[9] The Court in *PhRMA* was unmoved by "parade of horribles" arguments similar to those of petitioners here. See Brief of Petitioner, No. 01-188 at 30-31 (arguing that rejecting extraterritoriality argument would allow Maine to regulate Texas refineries and California semiconductor manufacturers).

categorical grounds. See 538 U.S. at 674-75 (Scalia, J., concurring in the judgment) ("having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, [the dormant Commerce Clause doctrine] should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated"); *id.* at 683 (Thomas, J., concurring in the judgment) (arguing that doctrine has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application").[10]

The panel decision did not, as petitioners imply, treat the Court's precedents as limited to their *facts*, but rather sought to identify from the language and reasoning of "prior cases involving extraterritoriality … th[e] specific concerns that have shaped this inquiry." *Healy*, 491 U.S. at 337 n.14. (Notably, *Healy*'s "restatement" and "distillation" of "cases involving extraterritoriality," *id.*, was, like the Ninth Circuit's, confined to Commerce Clause precedents.) Nor was there anything remotely improper about the panel's noting that "general expressions" in those

[10] The First Circuit's decision in *National Foreign Trade Council v. Natsios*, unlike the other supposedly "neglected" decisions, at least did involve the Commerce power, albeit the foreign Commerce Clause and combined with the President's powers under Article II. But it does not conflict with the decision below: the Massachusetts statute invalidated there disadvantaged parties that did business with Burma's government, transactions unrelated to their Massachusetts dealings. See 181 F.3d at 45. The LCFS, in contrast, does not attach any significance to fuels a producer sells outside California; producers can compete in the California market on equal terms, even if their out-of-state fuels have high carbon intensity values or do not "conform to [California's] views" of climate policy, RMFU 25.

opinions, *Cohens v. Virginia*, 19 U.S. 264, 399 (1821), all arose in cases invalidating statutes addressing out-of-state price setting. See *PhRMA*, 538 U.S. at 669 ("[U]nlike price control or price affirmation statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices. The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.") (citation and internal quotation marks omitted).

Petitioners' zeal to articulate a rule they can accuse the Ninth Circuit of violating leads them to ignore cautionary language in the opinions they do cite: *Healy* condemned "legislation that has the practical effect *of establishing a scale of prices for use in other states*," and rejected laws "*directly* control[ling] commerce occurring *wholly* outside [the State]." 491 U.S. at 336 (emphasis added; citation and internal quotation marks omitted).

Their zeal also leads petitioners to make assertions of "functional" equivalence that go far beyond what precedent supports or allows. Despite championing the virtues of federalism, petitioners startlingly insist that the LCFS is constitutionally indistinguishable from a measure that "tells other polities what laws they must enact," AFPM 30. They assert that "there is no material difference between conditioning favorable treatment on another State's adoption of certain standards and conditioning favorable treatment on commercial actors' conformance of their out-of-state conduct to those standards," AFPM 31-32 (alleging conflict with *Meyer*

II). But see *Printz v. United States*, 521 U.S. 898, 924 (1997) (emphasizing distinction between direct regulation of commerce and regulation of state institutions and officials). Furthermore, petitioners convert *Healy*'s admonition to consider "practical effects" into a rule that there is no difference between an "incentive" and a "total prohibition," or between a law that rewards certain activity and one that "forces" or "mandates" conduct or imposes a "penalty" on conduct that is not so rewarded. See RMFU 11, 25-26. Cf. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (highlighting "basic difference" between a "penalty" and "state encouragement of an alternative activity consonant with legislative policy") (citation and internal quotation marks omitted).

2. The end result of petitioners' loose analogies and penumbral reasoning is a proposed "rule" that any state law, including one in pursuit of legitimate state purposes, is impermissibly "extraterritorial" under the Commerce Clause, and therefore invalid *per se*, if it has either the "express intention or practical effect [of] chang[ing] conduct" beyond state borders, AFPM 32.

Any such "rule" would be incompatible with settled law. In *Clover Leaf Creamery*, 449 U.S. at 471-73, for example, the Court upheld a law (like the LCFS) regulating transactions in the State's own market, even though out-of-state firms would have to "conform to different packaging requirements in Minnesota." And in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978), the requirement that refiners divest themselves of in-state retail operations was upheld, although all affected refiners were out-of-state businesses, *id.* at 121. See Jack L. Goldsmith & Alan O. Sykes, The Internet and the

Dormant Commerce Clause, 110 Yale L.J. 785, 803 (2001) ("state regulations are routinely upheld despite what is obviously a significant impact on outside actors"); *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 377-81 (6th Cir. 2013) (Sutton, J., concurring) (citing cases). Indeed, petitioners' rule conflicts with the *Pike* test that already governs nondiscriminatory state laws that nonetheless burden interstate commerce; that test reviews such claims deferentially. See generally *Davis*, 553 U.S. at 338-39 (noting that such laws are reviewed under *Pike* – and "frequently survive" such review).

In fact, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), a Due Process Clause case that figures prominently in petitioners' parade of "controlling" out-of-field precedent, see RMFU 22-25, 29, contradicts their overstatement of the extraterritoriality principle. *BMW* involved a state court jury's *punitive* damages award (a quite different sort of "economic sanction[]" from the market incentives and disincentives LCFS establishes, but see RMFU 25), and explained that punitive damages imposed based on the number of sales of cars outside Alabama (and lawful in most of those jurisdictions) would be invalid. *Id.* at 572-73. But the Court did not question Alabama's authority to impose punitive damages based on cars sold in Alabama, *i.e.*, measures designed to alter conduct – automobile production – occurring entirely outside the State. See *id.* Thus, the line drawn in *BMW* resembles the one applied in *Healy* and *PhRMA* – and honored in the panel decision here. States may, consistently with the Commerce Clause, regulate goods sold in-state in ways that *affect* out-of-state behavior, but not control out-of-state sellers' unrelated transactions with third parties. That the "production processes" for some

fuels sold in California – like those in *BMW* and *Clover Leaf* and the manufacturer-to-wholesaler transactions in *PhRMA* – take place out-of-state does not place them beyond California's concern.

3. Petitioners propose various qualifications on their novel and otherwise all-encompassing constitutional "rule." But those limitations – like the "principle" petitioners accuse the decision of "assaulting" – have no support in precedent. As noted, there is no rule that a State may not take account of "production processes" (AFPM 30) of products sold in its market; indeed, *Baldwin* itself acknowledged New York's power to require a certification from farmers in a milk-producing State that milk was produced in a hygienic manner. See 294 U.S. at 524. A wide variety of other well-established, nondiscriminatory, non-protectionist state laws – from public utility commissions' traditional jurisdiction over electric utilities' generation and resource portfolios; to product specifications such as recycled content requirements; to States' common law of defamation; to myriad kinds of labeling laws – necessarily take account of production processes regardless of where the production occurs. Petitioners' equally ad hoc claim that the LCFS is extraterritorial because it is not based on "the characteristics of in-state products," RMFU 30; AFPM 29, fares no better. Their bald assertion that carbon intensity is not a "characteristic" of fuels ignores the views of both scientists and Congress, that fuels' lifecycle emissions are important and measurable and have real consequences for the regulating jurisdiction. A "rule" that the basis for regulation must be physically manifest in a product would annul hundreds of state laws and common law principles.

Even if petitioners do not really mean to invalidate every state law that alters incentives for out-of-state actors, their approach at a minimum combines the worst of the subjectivity and uncertainty of the *Pike* test with the exceptional, state sovereignty-diminishing wallop of a rule of automatic invalidity. See *American Beverage Ass'n*, 735 F.3d at 377-81 (Sutton, J., concurring). But the dormant Commerce Clause doctrine is not a "roving license" for federal supervision of state and local governmental action, *United Haulers,* 550 U.S. at 343, and petitioners' new supercharged extraterritoriality rule has little to recommend it – perhaps explaining why neither this Court, nor any federal court of appeals or state high court, has adopted it.

4. There are myriad reasons why petitioners' extraterritoriality claim does not warrant further review at this time, not least among them the Court's general reluctance to review cases in an interlocutory posture and the fact that the panel decision was correct. Petitioners' various doomsday predictions, *e.g.*, that the LCFS threatens to "balkanize the national economy" (RMFU 1), do not alter that conclusion. Possible, yet-unenacted state programs can be judged on their own merits, should they actually be adopted. Cf. RMFU 19 (branding it "speculative" whether other States will adopt their own fuel carbon programs). Moreover, this claim lacks evidentiary support in nearly three and a half years of actual experience under the regulation. Indeed, both the scientific character of the lifecycle methodology and the efforts at interstate cooperation highlighted in *petitioners*' submissions, see RMFU 32, strongly suggest that interstate nonuniformity will be *less* likely and severe in this setting than in other important sectors of the economy, where State-by-

State variation is the norm. Cf. App. 250a n.6 (en banc dissent's suggestion that the *coordination* of LCFS policies among multiple States would constitute balkanization).

If problems arise that prove to be as dire as petitioners forecast, recourse would be available *from Congress* in the form of legislation mandating interstate uniformity. Contrary to petitioners' argument, nothing about the decision here, declining to impose uniformity pursuant to negative implication from the Commerce Clause, "subvert[s]" (RMFU 24) Congress's ability to exercise its textually-conferred affirmative power to regulate interstate commerce.[11] To date, federal law reflects the opposite conclusion: Congress has expressly allowed States to adopt their own fuel regulations, unless and until EPA sets a standard or determines that such regulation is not "necessary"– and even in those cases, Congress has explicitly authorized California to enforce its own fuel regulations. See 42 U.S.C. § 7545(c)(4)(A), (B); see also Conditional Cross-Petition in No. 13-1308 at 6-8.

[11] And Congress is free to preempt state legislation with interstate effects irrespective of whether it would offend the "dormant" Commerce Clause. In fact, petitioners claim that Congress has already done so, a preemption claim that has yet to be decided in this case. See p. 33, *infra*; cf. Protect Interstate Commerce Act, H.R. 2642, 113th Cong. § 11312 (as passed by House, July 11, 2013) (proposed legislation that would preempt state laws affecting "the production or manufacture of any agricultural product sold or offered for sale in interstate commerce" and prohibit standards "in addition to" those of the State of production or the federal government).

IV. THE MULTIPLE UNRESOLVED ISSUES TO BE ADDRESSED ON REMAND, THE INCOMPLETE AND STALE FACTUAL RECORD, AND THE ONGOING AIR RESOURCES BOARD PROCEEDINGS MAKE THIS CASE ESPECIALLY UNSUITED FOR IMMEDIATE REVIEW

Even apart from the absence of precedential support for petitioners' claims, the petitions are exceptionally poor candidates for certiorari.

The Court has repeatedly emphasized that certiorari should normally await a final judgment in the lower courts. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, 280-81 (9th ed. 2007) (citing cases); see also *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., statement respecting denial of certiorari) (observing that denial of review of nonfinal decision "does not, of course, preclude [petitioning party] from raising the same issues in a later petition, after final judgment has been rendered"). The reasons for adhering to that practice are especially compelling in this case.

The district court, for example, never ruled upon, and the Ninth Circuit accordingly never reached, petitioners' related arguments that the LCFS's ethanol provisions discriminate in purpose or effect or that the regulation's burdens on interstate commerce are impermissible under *Pike*. Yet many of the contentions that petitioners and amici advance – that the LCFS was *designed* to protect California businesses (*e.g.*, RMFU 1), will drive or already has driven out-of-state ethanol providers from the market (RMFU 30-31 n.5), and will produce no emissions reductions for California (RMFU 8) – relate directly

to those unresolved claims. Petitioner will have an opportunity to make such arguments, and to support them with actual evidence, in the district court on remand.

Petitioners' preemption claims based upon federal renewable fuels legislation also remain unresolved in the district court. See App. 86a, 121a-23a. It would be incongruous for the Court to take up "dormant" Commerce Clause issues without first deciding whether and to what extent Congress, as petitioners claim, has *affirmatively* acted under the Clause and precluded California from adopting the LCFS. See *Crosby*, 530 U.S. at 374 n.8 ("declin[ing]" to reach dormant Commerce Clause claims in light of decision on preemption grounds, citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). And although petitioners claim that their extraterritoriality rule is a "pure [question] of law," RMFU 35, their most vociferous claims of urgency depend on empirical assertions that, at the very least, are utterly unsupported by evidence. They falsely claim (contrary to representations in other fora) that the ethanol industry is being devastated, RMFU 30-31 & n.5; but see State Opp. App. at 13, 14, and, in a remarkable feat of argumentative gymnastics, having derided as "too speculative" California's expectation that other States would follow suit, see RMFU 19, they assert that intervention is needed because similar, but potentially conflicting, laws from other States are imminent, RMFU 32-33.

Equally important, the factual record at this stage of the case is stale and incomplete. There was no merits discovery below, and the principal evidentiary submissions in the case occurred in 2010 and early

2011, before or immediately after the LCFS had gone into effect and long before the regulations' actual impacts had been assessed. More than three years of experience under the program have now accumulated, and many of the disputed issues concerning the effect of the regulation are now amenable to empirical testing.[12] Important amendments to the program have also occurred since then, and others are under active consideration. It would make scant sense to review a major state program, and to decide important constitutional issues, when highly relevant evidence is readily available, but has not been presented to or evaluated by any court.

Indeed, review of the LCFS at this juncture would be particularly inappropriate because ARB, responding to the state appellate court ruling, has undertaken a comprehensive administrative process that will result in a wholesale reissuance of the regulation. As explained above, ARB will look at a variety of potential changes based upon experience gained through years of LCFS administration, and may well (if, after public comment, the Board itself agrees with a staff proposal) adopt a new structure for assigning carbon intensities to particular fuels that does not include the "Method 1" procedure that petitioners attack as facially discriminatory. The LCFS that emerges from this public process will likely differ from the regulations that were before the lower courts, requiring this Court, if it granted review, to

[12] Amicus Chamber of Commerce submits (Br. 17-18) that the Court should short-circuit the evidentiary process and grant review now based upon an extra-record industry-backed studies predicting that LCFS might not work as intended *during the period 2016-2020*.

perform a de novo analysis of a state administrative regulation. This pending state administrative process (which could also potentially moot certain claims entirely) is all the more reason to allow the proceedings ongoing in the lower courts to run their course.

In short, petitioners ask this Court to "nip this so-called 'experiment' in the bud," as petitioners put it, RMFU 1, despite the absence of any real decisional conflict; the interlocutory nature of the decision below; the lack of any consideration by the lower courts of closely related legal claims awaiting remand; the absence of evidence relating to the entire life of the program's operation; and the impending comprehensive new rulemaking, which is likely to result in material changes to the regulations. Even if there were any merit to petitioners' unfounded aspersions against California's serious effort to address a serious problem, and their mischaracterizations of the LCFS and the Ninth Circuit's decision, there would be no basis for departure from usual certiorari criteria.

CONCLUSION

The petitions should be denied.

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