Nos. 13-1148, 13-1149

In The Supreme Court of the United States

ROCKY MOUNTAIN FARMERS UNION, *et al.*,

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

California's Low Carbon Fuel Standard ("LCFS") is designed to reduce the State's contribution to greenhouse gas emissions and the harms those emissions are causing in California. The LCFS reduces the carbon intensity of transportation fuels consumed in California and creates incentives for fuel producers to develop lower-carbon fuels for the California market. The LCFS determines the carbon intensity of each fuel consumed in California through the use of lifecycle analysis—a well-established methodology that accounts for all greenhouse gas emissions from every stage in the life of the fuel, including production, transportation, and combustion. The court of appeals rejected a subset of petitioners' dormant Commerce Clause challenges to the LCFS, while remanding the remaining claims for further proceedings.

The questions presented are:

1. Whether the AFPM petitioners' challenges to the LCFS's provisions concerning crude oil for calendar year 2011, which have been formally superseded and were never applied, (i) are moot or (ii) lack merit because, as the court of appeals held, they do not discriminate against interstate commerce either by design or in practical effect.

2. Whether the court of appeals properly rejected petitioners' contention that the LCFS discriminates on its face against ethanol produced outside California, where regulatory treatment is based on a fuel's carbon intensity, not its place of origin, and the regulation has repeatedly generated more favorable carbon intensity values for out-of-state ethanols than for competing in-state ethanols.

3. Whether the court of appeals properly rejected petitioners' contention that the LCFS regulates extraterritorially in violation of the dormant Commerce Clause, where the regulation applies only to fuels consumed in California, does not control prices or otherwise regulate transactions in other States, and does not require any other jurisdiction to modify its laws.

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STATEMENT

A. Statutory And Regulatory Background

California has determined that greenhouse gas emissions are degrading the State's natural resources and threatening public health and welfare. Cal. Health & Saf. Code § 38501. Among other effects, climate change is resulting in more frequent, more intense, and longer heat waves, which increase serious health risks for California's citizens.[1] Sea levels along California's coastline have already risen and are expected to rise substantially higher by 2050, creating hazards for critical infrastructure.[2] Climate change is also substantially increasing the frequency of wildfires and severe droughts.[3]

Recognizing these threats and continuing its long tradition of leadership in the field of air pollution regulation, California committed to reducing its own contribution to greenhouse gas emissions to 1990 levels by 2020. Cal. Health & Saf. Code §§ 38501(c), 38550. Because the transportation sector contributes significantly to greenhouse gas emissions, California must address, and is addressing, the major components of transportation emissions, including land-use and transportation planning (Cal. Gov. Code § 65080); the types of vehicles sold in the State (Cal. Code Regs., tit. 13, §

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[1] Our Changing Climate 2012: Vulnerability & Adaptation to the Increasing Risks from Climate Change in California (Summary Report), at 4, *available at* http://www.energy.ca.gov/2012publications/CEC-500-2012-007/CEC-500-2012-007.pdf, last visited May 4, 2014.

[2] *Id.* at 9.

[3] *Id.* at 2, 5.

1961.1); and, through the Low Carbon Fuel Standard ("LCFS"), the fuels used in the State. *See* 9th Cir. Excerpts of Record ("ER") 4:767, 5:930. A crucial part of California's multi-faceted strategy to reduce transportation emissions, the LCFS is expected to reduce greenhouse gas emissions from transportation fuels used in California by 16 million metric tons per year by 2020. ER 9:2197. This will require "fundamental changes" to the array of fuels used in California, including the introduction of new, lower-carbon fuels. ER 6:1234, 6:1359.

Accordingly, the California Air Resources Board ("ARB") designed the LCFS to use "market mechanisms to spur the steady introduction of lower carbon fuels," including new fuels, into California's market. ER 9:2197. These lower-carbon fuels may come from anywhere. At the time of the LCFS rulemaking, new, lower-carbon fuels were known to be under development in at least 19 States. ER 10:2600-06; *see also* ER 5:1013. ARB designed the LCFS "to provide incentives for these emerging technologies and products," regardless of their origin. ER 4:789.

B. How The LCFS Works

The LCFS establishes an annually declining, average greenhouse gas emissions (or "carbon intensity") standard for transportation fuels used in California. *See* RMFU App. 180a-181a.[4] Fuels with carbon intensities higher than the applicable standard generate deficits; fuels with carbon

[4] The petitions and appendices are referred to as "RMFU" and "RMFU App." (No. 13-1148) and "AFPM" and "AFPM App." (No. 13-1149). A PDF of the LCFS, codified at Cal. Code Regs., tit. 17, § 95480 et seq., can be found at http://www.arb.ca.gov/fuels/lcfs/lcfs.htm ("LCFS Regulation").

intensities below the standard generate credits. ER 4:773; RMFU App. 185a (§ 95485(a)(3)). Deficits from higher-carbon fuels, such as gasoline and diesel, must be offset by credits from lower-carbon, alternative fuels, such as ethanol, renewable diesel, electricity, and biodiesel. *See* ER 4:737; RMFU App. 181a. Excess credits may be traded among regulated parties or carried forward into the next year. RMFU App. 185a.

Regulated parties—primarily refiners and blenders who provide finished fuels to California—comply with the LCFS by providing fuels that, on average, meet or surpass the standard, or by offsetting deficits with LCFS credits carried forward from prior years or purchased from other regulated parties. Cal. Code Regs., tit. 17, § 95488(a). Regulated parties determine how best to comply, based on market conditions, including the availability, carbon intensities and prices of fuels and the availability and prices of LCFS credits. *See* ER 4:773.

Because lower-carbon fuels, such as lower-carbon Midwest ethanols, generate LCFS credits that can be used for compliance or sold, these fuels have obtained price premiums in California under the LCFS. ER 2:131-32, 4:738; 9th Cir. Docket ("Doc.") 21-7 at 22-23.

Lifecycle Analysis

The carbon intensity of a given fuel is determined through 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. *See* RMFU App. 177a-78a (§ 95481(a)(16), (38)); ER 9:2198. Lifecycle analysis is the only appropriate

metric for comparing the greenhouse gas emissions that result from the use of different transportation fuels. ER 4:769-772, 5:1131-32, 6:1201-02. To illustrate, the emissions that result from the use of electricity as a fuel cannot be captured by measuring tailpipe emissions. ER 4:769. There are none. But electricity is not an emissions-free fuel. *Id.* The greenhouse gas emissions that result from using electricity as a fuel will vary depending on how the electricity was generated, and those differences are not captured by metrics other than lifecycle analysis. *See id.*; *see also* ER 5:1131-32.

In addition, lifecycle analysis recognizes, as other metrics do not, that biofuel feedstocks (such as corn used to make ethanol) absorb carbon dioxide (a greenhouse gas) during photosynthesis. ER 4:772. Under lifecycle analysis, corn's photosynthesis offsets ethanol's tailpipe emissions, which are significant (similar to those of gasoline). *See* ER 9:2290. This is one reason that proponents of biofuels, including several petitioners here, use lifecycle analysis to promote the environmental benefits of ethanol relative to petroleum-based fuels. ER 2:225, 5:1045; *see also* ER 5:1061 (AFPM commending U.S. EPA for "its scientific approach" using lifecycle analysis for biofuels).

Lifecycle analysis of the greenhouse gas emissions that result from the use of transportation fuels is well-established. Since 1996, scientists at the U.S. Department of Energy's Argonne National Laboratory have been publishing and updating a lifecycle analysis model (called GREET) specifically to calculate these emissions. ER 9:2286; *see also* ER 2:225. Congress has required U.S. EPA to categorize renewable fuels using lifecycle analysis, and U.S. EPA adopted the GREET model to do so. 42 U.S.C. §

7545(o)(1)(B), (D), (E), (H); *see also, e.g.*, 78 Fed. Reg. 14,190, 14,209 (March 5, 2013).

ARB uses GREET in the LCFS, incorporating into the model some data specific to California, including California's pre-existing fuel specifications and electricity mix. ER 9:2287. This modified GREET model (called CA-GREET) was rigorously reviewed during the LCFS rulemaking process, by both expert peer-reviewers and the public. *See, e.g.*, ER 6:1269-1313.

Ethanol And Other Alternative Fuels

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, in Table 6 or 7 of the regulation, a pre-existing carbon intensity value that corresponds to the fuel's lifecycle ("Method 1") or by obtaining a new, individualized value for the fuel ("Method 2"). RMFU App. 187a-88a, 203a-07a; *see also* ER 4:776, 4:780-82. Both methods calculate carbon intensity values using CA-GREET. RMFU App. 190a.

When promulgated, the LCFS included some initial Method 1 values based on average lifecycle emissions of various fuels commonly sold in California. ER 4:774. These initial Method 1 values were provided to ease the LCFS's implementation for known fuels. *E.g.*, ER 6:1382. Producers with lifecycle emissions lower than these average-based values could choose to obtain lower, individualized values through Method 2. *Id.*; *see also* ER 6:1374.

The descriptions of the initial Method 1 values include regional references—"Midwest," "California," and "Brazilian"—as a kind of shorthand for some, but not all, of the lifecycle factors used to calculate those Method 1 values. For example, "California"

signifies, in part, 6.8 gCO2e/MJ[5] of emissions for the transportation of corn from the Midwest, because California grows almost no corn for ethanol production. ER 4:777. The "Midwest" descriptor, in contrast, signifies only 2.6 gCO2e/MJ for transporting ethanol from the Midwest to California. *Id.* Midwest producers have lower transportation emissions because it is more efficient to transport ethanol than corn over the same distance and using the same method (railcar). ER 4:778; *but see* RMFU at 5 (claiming LCFS "penalizes Midwest ethanol" for transportation).

Neither transportation emissions nor overall carbon intensity is determined by the "length of the distribution chain" between a fuel producer and California. *See* RMFU at 20 (asserting otherwise). As the example above demonstrates, transportation emissions vary based on what is being transported (and how), even when distance is constant. And ethanols carrying the descriptor "Brazilian" have some of the lowest carbon intensity values, although they travel more than 8,000 miles to California. Doc. 66 at 5.

The descriptors "California," "Midwest," and "Brazilian" reflect other average emissions factors in the scientific, peer-reviewed CA-GREET model. *See* ER 4:776. For example, the descriptor "Brazilian" signifies that producing ethanol from sugarcane is very energy-efficient and that most Brazilian ethanol plants produce low-carbon electricity on-site. Doc. 66 at 3-4; ER 9:2258. The "California" descriptor reflects that California's three corn ethanol plants are newer and more efficient, on

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[5] Emissions are measured in grams of carbon-dioxide-equivalent per megajoule of energy (gCO2e/MJ).

average, than the 100-plus plants in the Midwest. ER 4:778.

In sum, the Method 1 descriptions reflect, in shorthand form, *real* differences in certain average lifecycle factors among fuels commonly sold in California when the LCFS was adopted. These factors, like all the lifecycle factors, are objectively determined, and some of them—like transportation emissions, Brazilian efficiencies and Brazilian electricity production—disadvantage California producers.

Moreover, these initial, average-based Method 1 values were never intended to encompass all fuels used in California. One of the key objectives of the LCFS is to change the make-up of California's fuels market. Method 2 exists precisely to establish new carbon intensity values and facilitate that diversification. ER 6:1324, 6:1374, 6:1382.

Method 2 values now dramatically outnumber the initial Method 1 values. Some Method 2 values have already become part of Table 6 through formal amendment of the regulation. *See* Opp. App. 9-11. But Method 2 values may be used as soon as they are certified, which occurs long before Table 6 is formally amended. RMFU App. 210a-11a.

In fact, there are now well over a hundred available values for ethanol. *See* Summary of all Pathways Table.[6] Many ethanol producers have obtained multiple individualized values, because a single facility can produce ethanol using different processes. *Id.*; ER 2:165-97. These facts belie suggestions that Method 2 presents a "heavy

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[6] *Available at* http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm, last visited May 5, 2014.

burden," *see* RMFU at 5 n.1, and that the LCFS "requires producers to use" pre-existing values, AFPM at 4.

A reader of the petitions might infer that there are only six carbon intensity values for ethanol, because petitioners present only selected values from Table 6. *E.g.*, RMFU at 248a; RMFU at 3. There are, in fact, 41 ethanol values in Table 6 alone. Opp. App. 9-11. The lowest of those values correspond to ethanol from Brazil (ETHS001-3, ETHS005-6) and the Midwest (ETHC030, ETHC035)). *See* Opp. App. 9-11; *see also* Opp. App. 6-7 (identifying ETHC030 and ETHC035 as Midwest producer POET's values).

Overall, including values that have been certified but not yet codified into Table 6, there are *forty* ethanol values lower than 77.44—the lowest Method 1 value assigned to a "California" ethanol and the lowest value in RMFU's "Addendum." Summary of all Pathways Table. Only one of these low-carbon ethanols is produced in California:

Pathway ID	**Origin**	**Carbon Intensity**
ETHM002	Guatemala	22.75
ETHM001	Indonesia	29.19
ETHGW013	Kansas	56.56
ETHS002	Brazil	58.40
ETHGW015	Kansas	58.86
ETHGW010	Kansas	59.76
ETHGW012	Kansas	62.06
ETHGW007	Kansas	62.96
ETHS016	Trinidad/Tobago	63.58
ETHS005	Trinidad/Tobago	63.94
ETHS008	El Salvador	64.11
ETHS010	Jamaica	64.26
ETHGW014	Kansas	64.86
ETHGW009	Kansas	65.26
ETHGW004	Kansas	66.16

ETHG005	Kansas	66.31
ETHS003	Brazil	66.40
ETHG006	Kansas	66.67
ETHGW011	Kansas	68.06
ETHGW006	Kansas	68.46
ETHC073	Kansas	68.54
ETHC074	Kansas	68.90
ETHS013	El Salvador	68.96
ETHG007	Kansas	69.61
ETHS021	Costa Rica	69.71
ETHGW008	Kansas	71.26
ETHWB001	California	71.40
ETHS017	Trinidad/Tobago	71.58
ETHGW003	Kansas	71.66
ETHC075	Kansas	71.84
ETHS006	Trinidad/Tobago	71.94
ETHS009	El Salvador	72.11
ETHS011	Jamaica	72.26
ETHC035	Midwest*	73.21
ETHG003	Kansas	73.39
ETHS001	Brazil	73.40
ETHGW005	Kansas	74.46
ETHC030	Midwest*	74.70
ETHG004	Kansas	76.22
ETHC036	Kansas	76.75

As these values attest, a fuel's origin does not determine its carbon intensity.

Crude Oil

As discussed above, a primary objective of the LCFS is to create incentives for the development of new, much lower-carbon *alternatives* to petroleum—the fuels California needs to achieve its long-term emissions reduction objectives. ER 6:1233-34,

* These values were obtained by POET which owns and operates multiple ethanol plants across the Midwest. *See* Opp. App. 6-7; http://poet.com/plants.

6:1359. Thus, the crude oil provisions differ from those concerning alternative fuels like ethanol. ER 4:789. The crude oil provisions are designed to prevent significant *increases*, and not to reward decreases, in the average carbon intensity of petroleum-based fuels. *Id.* This requires that carbon intensity reductions come from innovation in *alternative* fuels. *Id.*

The original 2011 crude oil provisions were designed to distinguish between high-carbon-intensity crude oils new to California's market ("emerging HCICOs") and all other crudes, because the former could cause average carbon intensity to rise dramatically. AFPM App. 285a-290a; ER 6:1234, 4:789. Emerging HCICOs would use their actual, high-carbon intensity values, and all other crudes would use the same baseline average value. As a result of regulatory and other developments, however, no crude oil was ever determined to be an emerging HCICO, and *all* crude oils used in California in 2011 were assigned the same baseline average value. Doc 204; *see also* Conditional Cross-Petition (No. 13-1308) at 13-14.

In 2012, ARB implemented a new method for assigning carbon intensity values to crude oils, superseding the 2011 provisions. Each crude oil is now assigned its individualized value. RMFU App. 191a-193a. ARB then calculates California's average crude carbon intensity for the year. If that average exceeds the 2010 average, all refiners receive an incremental deficit. *Id.* Refiners select crude oils based on individualized values but have an incentive not to exceed the 2010 average. AFPM has not challenged these current provisions, nor does its petition even acknowledge that these amendments occurred.

C. Current Status Of The LCFS Program

The LCFS is working as designed. Fuel producers from more than ten States and at least seven foreign countries have obtained individualized carbon intensity values for their innovative, lower-carbon, alternative fuels. *See* Summary of all Pathways Table; *see also* ER 2:165-97.

California's market is shifting to lower-carbon fuels, including renewable diesel, biodiesel, natural gas, and lower-carbon ethanols. *See* Opp. App. 12-13. Lower-carbon ethanols, mostly from the Midwest, are obtaining price premiums in California's market. ER 2:131-32, 4:738; Doc. 21-7 at 22-23. Midwest ethanol producers predominate at all carbon intensity levels, including those that are increasing their shares of California's ethanol market. Opp. App. 13-14;[7] *see also* RMFU at n.5 (inaccurately asserting reduction in Midwest market share). California imports more than 90% of its ethanol, mostly from the Midwest. *See* Doc. 21-7 at 23.

D. Proceedings Below

Two sets of plaintiffs challenged the LCFS, alleging that it is preempted by the Energy Independence Security Act (42 U.S.C. § 17001, et seq.) and violates the dormant Commerce Clause. Before discovery had begun, both sets of plaintiffs

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[7] Midwest ethanol producers vastly outnumber California producers, and more Midwest facilities are under construction. *See* http://www.ethanolrfa.org/bio-refinery-locations/, http://www.neo.ne.gov/statshtml/122.htm, last visited May 14, 2014.

moved for summary judgment. Defendants and defendant-intervenors cross-moved.

The district court granted summary judgment to plaintiffs on a subset of their claims, concluding that the LCFS facially discriminates against out-of-state ethanols, regulates extraterritorially, and discriminates in design and effect against out-of-state crude oils. AFPM App. 133a, 162a. The district court also concluded that the LCFS is a "control … respecting any fuel or fuel additive" adopted "for the purpose of motor vehicle emission control," under section 211(c)(4)(B) of the Clean Air Act, 42 U.S.C. § 7545(c)(4)(B), and that Section 211(c)(4)(B) did not preclude plaintiffs' Commerce Clause claims. *Id.* at 224a. The district court certified its decisions as final under Federal Rule of Civil Procedure 54(b).

The court of appeals largely reversed the district court, holding that the LCFS does not facially discriminate against out-of-state ethanol or regulate extraterritorially and that the LCFS's 2011 crude oil provisions were non-discriminatory. AFPM App. 5a, 65a. The court of appeals agreed with the district court concerning the implications of Section 211(c)(4)(B) of the Clean Air Act. *Id.* at 63a; *see also* Conditional Cross-Petition (No. 13-1308). The court of appeals remanded to the district court for adjudication of petitioners' remaining dormant Commerce Clause claims and their preemption claim. *Id.* at 65a.

Judge Murguia partially dissented on ethanol facial discrimination, stating that individualized carbon intensity values would be a "nondiscriminatory alternative" to the LCFS's initial, average-based Method 1 values. *Id.* at 70a-71a. Judge Murguia concurred that the 2011 crude

oil provisions were non-discriminatory, and did not reach the extraterritoriality question. *Id.* at 67a, 68a n.2.

The court of appeals denied petitioners' requests for rehearing en banc on January 22, 2014. AFPM App. 230a. Judge M. Smith dissented, joined in full by five other judges and in part by Judge Murguia.

E. Regulatory Developments Currently Underway

In July 2013, as a result of separate, state-law litigation, a California court ordered ARB to set aside its approval of the LCFS, to conduct a new rulemaking process, and, ultimately, to decide whether to adopt a re-proposed LCFS. *POET, LLC v. ARB*, 218 Cal. App. 4th 681, 766 (2013). Recognizing the LCFS's environmental benefits, however, that court ordered the regulation to remain in effect in the meantime using the 2013 carbon intensity standard. *Id.* at 762-63, 767.

ARB will re-consider the LCFS in 2014 with numerous proposed amendments reflecting knowledge acquired during the first few years of LCFS implementation. Some of the proposed amendments would categorize alternative fuels based on whether they are conventionally produced, first-generation fuels (such as ethanol from sugarcane or corn) or innovative fuels (such as cellulosic ethanol or biomethane).[8] Carbon intensity values would be determined through individualized procedures that would replace Methods 1 and 2, and

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[8] *See* Low Carbon Fuel Standard Re-Adoption Concept Paper ("Concept Paper"), at 5, *available at* http://www.arb.ca.gov/fuels/lcfs/lcfs_meetings/030714lcfsconceptpaper.pdf, last visited May 18, 2014.

those new values would supersede the values in the current Table 6.[9]

ARGUMENT

Petitioners' requests for this Court's review are based on faulty premises. AFPM fails to mention that the crude oil provisions it challenges have been superseded and were never actually applied. In their facial discrimination arguments, both petitioners disregard much of the regulation's plain text and the court of appeals' reasoning. With respect to extraterritoriality, petitioners incorrectly portray the effects of the LCFS and advocate for an unprecedented legal rule. Further, interlocutory review is not warranted here. ARB is actively considering significant changes to the regulation, and the Midwest ethanol industry is thriving with the LCFS in effect. There is no basis for review.

I. AFPM'S CHALLENGES TO THE LCFS'S CRUDE OIL PROVISIONS ARE MOOT, AND THE COURT OF APPEALS' DECISION THAT THESE PROVISIONS DID NOT DISCRIMINATE DOES NOT WARRANT REVIEW

AFPM's challenge to the LCFS's 2011 crude oil provisions is moot. The 2011 provisions have been superseded through formal regulatory amendment. Doc. 187. Further, the aspect of those provisions that AFPM challenges—the distinction between emerging high-carbon-intensity crude oils and all other crude oils—was never applied. Doc. 204 at 4-5. No one was or ever will be injured by that distinction.

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[9] *Id.* at 5-6.

Even if this challenge were not moot, it would not warrant this Court's review. The court of appeals' unanimous rejection of AFPM's challenge to the 2011 crude oil provisions is entirely consistent with precedent. Cases involving laws that intentionally "squelche[d] competition" do not conflict. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 392 (1994); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984). Those laws impermissibly singled out a local firm or industry for the most favorable treatment. *Carbone*, 511 U.S. at 392; *Bacchus*, 468 U.S. at 270; *see also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274-75 (1988) (invalidating law conditioning favorable treatment on reciprocal benefits from other States).

In contrast, under the LCFS, 200 crude oils from around the country and the world received the *identical* regulatory treatment as all California crude oils. ER 2:124-128; 11:2699. AFPM faults the court of appeals for considering this "full market" context, *see* AFPM at 14, but dormant Commerce Clause discrimination analysis necessarily involves a comparison of the full market of competitors. *See Bacchus*, 468 U.S. at 268-69; *see also Gen'l Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination…." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978). Put another way, when, as here, in-state interests have "no competitive advantage," there is no discrimination. *See id*.

AFPM's selective citation to isolated fragments of the LCFS's voluminous rulemaking record does not establish otherwise. *See* AFPM at 8, 22. Under state law, ARB was required to analyze the economic

effects of the LCFS on California. Fragments of that analysis cannot establish any *purpose* to benefit California businesses. *See* ER 9:2222-23, 10:2425-73. ARB recognized that the LCFS and the federal Renewable Fuels Program, combined, would require the development and commercialization of new, low-carbon alternatives to petroleum. ER 10:2397 (describing facilities that "*might* be built in order to meet the demands of RFS2 and the LCFS") (emphasis added). ARB believed that *some* of those new fuels or biorefineries might develop in California "based on an assessment of [the availability] of potential feedstocks." ER 9:2222. Acknowledging that such development, *if* it occurred, could benefit California's economy is not protectionism. ARB designed the LCFS "to reduce California's dependence on petroleum," ER 9:2197, not to protect California crude oil. And ARB itself noted that alternative fuels intended to displace petroleum fuels were developing in locations around the country. ER 10:2600-17.

The LCFS's assignment of identical carbon intensity values to California crude oils and *hundreds* of their out-of-state competitors indicates "no protectionist purpose, no aim to insulate California firms from out-of-state competition." AFPM App. 50a.

II. THE COURT OF APPEALS' CONCLUSION THAT THE LCFS DOES NOT FACIALLY DISCRIMINATE AGAINST OUT-OF-STATE ETHANOLS CREATES NO CONFLICT IN THE LAW AND DOES NOT WARRANT FURTHER REVIEW

The court of appeals concluded, consistent with this Court's precedents, that the LCFS does not facially discriminate against out-of-state ethanols.

Petitioners' claims of conflicting authority are based on an incomplete account of the LCFS and a misreading of the court of appeals' decision.

1. Although they recognize that facial discrimination analysis requires "examin[ing] the face of the challenged law," RMFU at 17, petitioners labor to prevent that examination from occurring. The foundation of petitioners' arguments is their own highly selective table of six carbon intensity values for ethanol. RMFU App. 248a; *see also id.* at 191a; RMFU at 3; AFPM at 5. Based on those six values, petitioners contend that the LCFS consistently "give[s] chemically identical 'Midwest' ethanols higher carbon-intensity scores," AFPM at 16, "systematically favoring California," RMFU at 1. *See also* RMFU at 17-18 ("California ethanol is always treated more favorably than Midwest ethanol."); AFPM at 3, 10.

The premise of petitioners' argument is false. The actual LCFS Table 6 contains *forty-one* values for ethanol. Opp. App. 9-11. The lowest ethanol values in Table 6 are not labeled "California" and do not correspond to California producers. Rather, they correspond to ethanols from the Midwest and Brazil. Opp. App. 11; *see also id.* at 6-7 (subprovision (T)).

Petitioners also dismiss or omit entire provisions of the regulation. For example, AFPM never mentions Method 2—the provisions that allow fuel producers, regardless of their location, to obtain individualized carbon intensity values. RMFU mentions Method 2 only to dismiss it as a "heavy burden." RMFU at 5 n.1. Method 2 is an integral part of the face of the regulation. And, as discussed above, Method 2 has produced numerous highly favorable carbon intensity values for Midwest and foreign ethanols, including *thirty-nine* of the forty

most favorable values available for ethanols. *See, supra,* at 8-9. The LCFS simply does not "consistently advantage[] ethanol produced in California." *See* RMFU at 17.

Petitioners identify no decision of any court finding facial discrimination where, on its face, the challenged law subjected all competing products to the same, peer-reviewed, scientific evaluation. Petitioners also identify no decision finding facial discrimination where the face of the challenged law showed a competitive advantage for some out-of-state products over *all* chemically identical, competing products produced in-state. And petitioners identify no decision finding facial discrimination where, on its face, the challenged law established procedures by which out-of-state competitors could obtain, and have obtained, advantages over their in-state competitors.

Instead, the cases petitioners cite as conflicting involve laws that expressly provided their most favorable treatment to one or more in-state interests. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576 (1997) ("singling out camps that serve mostly in-staters for beneficial tax treatment"); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (applying surcharge only to out-of-state waste); *Hughes v. Oklahoma*, 441 U.S. 322, 339 (1979) (export prohibition limited article of commerce to State citizens); *Used Tire Inter., Inc. v. Diaz-Saldana*, 155 F.3d 1, 3 (1st Cir. 1998) (penalty applicable only to imports); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 917 (5th Cir. 1997) (preferential treatment for in-state products and labor). In contrast, the LCFS does not "benefit in-state economic interests by burdening out-of-state

competitors." *See Dept. of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal quotation omitted); *see also* RMFU at 18 (acknowledging definition of discrimination); AFPM at 16 (same). The LCFS applies the same scientific model to all competing ethanols with the result that some out-of-state fuels obtain advantages over *all* their California competitors. There is no conflict here.

In fact, petitioners' selective focus on a tiny fraction of the ethanols competing in California's market conflicts with this Court's approach which considers all competitors in the regulated market.[10] *See Bacchus*, 468 U.S. at 268-69; *Exxon*, 437 U.S. at 126; *c.f., Tracy*, 519 U.S. at 298 (holding that different products *serving different markets* need not be compared). Petitioners' dismissal or omission of Method 2, which appears on the face of the regulation, also conflicts with this Court's refusal "to analyze separately two parts of an integrated regulation." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

2. In seeking to establish a conflict, petitioners misconstrue the court of appeals' decision. Petitioners assert that the court of appeals "refus[ed] to apply 'strict scrutiny' to a facially discriminatory law" and described the application of strict scrutiny to facially discriminatory laws as "archaic

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[10] Petitioners' suggestion that only values with purportedly "identical production processes" should be compared is also factually inaccurate. *See* RMFU at 5; *see also* AFPM at 5. Differences in carbon intensity values reflect real differences in emissions that result from real process differences. *See* ER 5:1055 (petitioner Growth Energy discussing effects of "the production processes used by biorefineries" on "the GHG attributes of corn ethanol").

formalism." AFPM at 12; *see also* AFPM at 13, 15; RMFU at 18.

In fact, the court of appeals explained that strict scrutiny is triggered by a finding that "a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect." AFPM App. 24a. After determining that the LCFS *does not* facially discriminate, the court remanded for consideration of petitioners' discriminatory purpose and effects claims concerning ethanol, expressly directing the district court to apply strict scrutiny if it finds discrimination. AFPM App. 5a. The court of appeals followed this Court's "protocol for dormant Commerce Clause analysis," under which courts first "ask whether a challenged law discriminates against interstate commerce" and then apply strict scrutiny if (and only if) they find discrimination. *Davis*, 553 U.S. at 338-39; *see also* AFPM at 18 n.4 (listing decisions following this protocol).

The court of appeals did not, as petitioners claim, "reject[], as 'archaic formalism,' this Court's decisions holding that a [discriminatory] state law … must be evaluated under strict scrutiny." AFPM at 2; *see also* RMFU at 15, 19; AFPM at 9, 13, 15, 16, 17. Rather, it used that phrase to describe arguments that the court's facial discrimination analysis should ignore much of the regulation's plain text and focus exclusively on a subset of geographic references ("Midwest" and "California," but not "Brazilian") associated with a small subset of available ethanol values. AFPM App. 64a. After considering the full face of the regulation, the court held there was no facial discrimination. Thus, strict scrutiny would apply only if the district court, on remand, found discriminatory purpose or effect.

AFPM App. 232a. There is no conflict in the law or other reason for further review.

3. Petitioners also claim that the court of appeals improperly looked beyond the face of the LCFS and considered the purpose of, or justification for, the LCFS in its facial discrimination analysis. RMFU at 16-18, 20; AFPM at 10, 13, 17-19. Again, petitioners misread the court of appeals' decision.

The court held that the LCFS does not facially discriminate against out-of-state ethanols because it "does not base its treatment on a fuel's origin but on its carbon intensity." AFPM App. 29a; *see also id.* at 43a, 44a. Under facially discriminatory laws, in contrast, the "*determinant* for which [treatment] applies to any particular [product] … is whether or not [it] was generated out-of-state." *Or. Waste*, 511 U.S. at 99 (emphasis added, internal quotation omitted); *see also Nat'l Solid Wastes Mgmt. Ass'n v. Alabama Dept. of Envtl. Mgmt.*, 910 F.2d 713, 721 (11th Cir. 1990); *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994); *Pac. Merch. Shipping Ass'n v. Voss*, 907 P.2d 430, 439 (Cal. 1995); *Perini Corp. v. Comm'r of Rev.*, 647 N.E. 2d 52, 56 (Mass. 1995); RMFU at 20-21; AFPM at 18-19. The "determinant" of a fuel's carbon intensity under the LCFS is a scientific calculation of greenhouse gas emissions, not the fuel's origin.

Petitioners also assert that the court of appeals' mention of the LCFS's "good and nondiscriminatory reasons" for distinguishing fuels constitutes improper consideration of the LCFS's "purpose … or justification." RMFU at 10 n.3; *see also id.* at 17; AFPM at 17-18. But this Court has used the word "reason" exactly as the court of appeals did here—to refer to the basis of regulatory distinctions. After stating that "there is a nondiscriminatory reason"

why some fuels have higher-carbon-intensity values, the court of appeals wrote, "*Stated another way*, if producers of out-of-state ethanol actually cause more GHG emissions…, CARB can *base its regulatory treatment* on these emissions" without facially discriminating. AFPM App. 29a (emphasis added). This formulation is entirely consistent with this Court's invalidation of "local laws that … discriminate against an article of commerce *by reason of* its origin or destination out of State." *Carbone,* 511 U.S. at 390 (emphasis added) (citing two facial discrimination cases). The court of appeals' use of the word "reason" does not create a conflict or warrant immediate review.

4. In dormant Commerce Clause discrimination cases, courts are concerned about States employing the "illegitimate means" of "isolating [themselves] from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); AFPM at 19, RMFU at 21. The "crucial" focus in such cases is the State's attempt to isolate itself "by erecting a barrier against the movement of interstate trade." *Philadelphia*, 437 U.S. at 628. As the court of appeals correctly recognized, and as petitioners cannot credibly dispute, the LCFS does not isolate California. Indeed, the vast majority of lower-carbon ethanols—those with the greatest advantages under the LCFS—originate outside the State.

III. THE COURT OF APPEALS' DETERMINATION THAT THE LCFS DOES NOT REGULATE EXTRATERRITORIALLY CREATES NO CONFLICT IN THE LAW AND DOES NOT WARRANT FURTHER REVIEW

Consistent with the decisions of this Court and other courts, the court of appeals concluded that the LCFS does not regulate extraterritorially.

Petitioners' arguments for review misstate both the LCFS's effects and the law.

1. This Court has defined extraterritorial regulations narrowly—as State laws that *apply to* or "*control[]* commerce occurring *wholly outside* the boundaries of a State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (emphasis added); *see also id.* at 337. This Court has found extraterritorial regulation in very few cases, almost all involving laws that controlled prices in other States' markets. *E.g.*, *id.* at 338 (invalidating Connecticut law that had "the practical effect of controlling Massachusetts prices"); *see also Pharmaceutical Research & Mfrs. of Am. v. Walsh* ("*PhRMA*"), 538 U.S. 644, 669 (2003) (no extraterritoriality where State did not "regulate the price of any out-of-state transaction").

Federal appellate courts have likewise found extraterritoriality rarely, and only when the state law "controll[ed] commerce occurring wholly outside the boundaries of a State." *Healy*, 491 U.S. at 336. These courts have found extraterritorial regulation, as this Court has, when state laws tie together unrelated transactions in different markets. *See Healy*, at 338, 343; *see also Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69-70 (1st Cir. 1999) (invalidating law tying activity in Massachusetts to unrelated transactions in Burma). And the circuit courts have found extraterritorial regulation when a state law otherwise controls unrelated transactions in other jurisdictions. Thus, the Ninth Circuit invalidated a Nevada law that, in practical effect, would have required Nevada's procedural rules to apply to *all* disciplinary proceedings of the National Collegiate Athletic Association, including those proceedings with no Nevada connection. *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993); *see also Am.*

Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) (invalidating Michigan law that attached criminal penalties to sales in other States). The courts have also found extraterritorial regulation where state laws "tell other polities what laws they must enact." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 662 (7th Cir. 1995); *Hardage v. Atkins*, 619 F.2d 871, 873 (10th Cir. 1980). In contrast, courts have consistently rejected extraterritoriality claims where the state law "is 'indifferent' to" sales in other States. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2nd Cir. 2001) (quoting *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995)).

Petitioners claim all of the decisions finding extraterritorial regulation—except the Ninth Circuit's *NCAA v. Miller* (which petitioners omit)—conflict with the decision here. AFPM at 30-32; RMFU at 26. Yet, petitioners point to no wholly out-of-state commerce that is controlled by the LCFS, and, indeed, acknowledge that the LCFS controls only the average carbon intensity of fuels consumed in California. *See* AFPM at 2.

The LCFS does not tie together unrelated transactions in different markets or otherwise control prices, or other terms, of transactions in other States' markets. Indeed, a Midwest ethanol producer can sell its product in Oregon, New York, or anywhere else without considering the LCFS. Nor, contrary to petitioners' assertions, does the LCFS require other jurisdictions to adopt California's regulatory standards. *See, e.g.*, RMFU at 2 (implying LCFS sets "nationwide standards"), 23-24, 28 (claiming LCFS "pressure[s] other States to adopt more congenial laws"); AFPM at 15

(claiming California "impose[s] its regulatory standards" outside the State), 31.[11] Indeed, no one, including the State amici supporting the petitions, has pointed to a single law the LCFS required another jurisdiction to adopt, even though the regulation has been in effect since January 2011.

Petitioners assert that the court of appeals "essentially sought to limit the extraterritoriality principle to the facts of a handful of recent Supreme Court and court of appeals cases." RMFU at 29. But the decision here did not "limit" this Court's or other courts' decisions to their "facts": rather, it undertook to discern and apply the *legal principle* established in this Court's decisions and applied by other courts. The court of appeals noted that the LCFS "regulates only the California market," AFPM App. 59a, and "says nothing at all about ethanol produced, sold, and used outside California," *id.* at 62a. *See Healy*, 491 U.S. at 335-36; *see also, e.g., Sorrell*, 272 F.3d at 110.

Petitioners do not credibly claim error in the court of appeals' conclusion that "[t]he LCFS "does not *control* the production or sale of ethanol *wholly outside California*." AFPM App. 65a (emphasis added). In petitioners' sole reference to "wholly" out-of-state activity allegedly controlled by the LCFS, RMFU highlights that lifecycle analysis considers

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[11] Contrary to AFPM's assertion, there is a "material difference" between a regulation that requires *other sovereigns* to adopt specified standards and one that influences the conduct of *private actors* who wish to compete in the regulated market. *See* AFPM at 31. The former implicates fundamental notions of sovereignty. *See Printz v. United States*, 521 U.S. 898, 924 (1997). Absent discrimination, the latter would be analyzed deferentially under the *Pike* test. *See Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 472-73 (1981).

production processes that, for some fuels, occur "wholly outside the State." RMFU at 25. But the LCFS accounts for only those processes that result in fuels actually *used in California*, and the LCFS's average carbon intensity standard does not *control* any production processes.

Regulated parties are free to comply with the LCFS's average-based standard using whatever combination of fuels and LCFS credits they deem best. ER 4:773. And fuel producers across the country and around the world are finding novel and individualized ways of lowering carbon intensities. Summary of all Pathways Table;[12] *see also* ER 2:165-197. None of those innovations, or the level of emissions reductions they achieve, are dictated by the LCFS. In sum, petitioners fail to identify any wholly out-of-state commerce that is controlled by the LCFS.

2. Petitioners also assert, incorrectly, that the LCFS imposes penalties or sanctions on fuel producers who "do not conform to [California's] views on GHG emissions." RMFU at 25; *see also id.* at 22, 23-24, 25; AFPM at 14, 26, 28, 29. Under the LCFS, California's market provides incentives, including price premiums, for fuel producers who develop innovative ways either to lower the carbon intensity of existing fuels or to produce entirely new, low-carbon fuels. ER 2:131-32, 4:738; Doc. 21-7 at 22-23. Some fuel producers may choose to produce higher-carbon fuels and, thus, to forgo these price premiums. Those producers' decisions, however, do not result in "penalties," particularly since no fuel

[12] *Available at* http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm.

producer is constitutionally entitled to price premiums in California.

Nor do these producers' decisions "impose economic sanctions on violators of [California] laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); *see also* RMFU at 22, 25 (omitting phrases "violators of the law" and "tortfeasors" from this quotation). In *BMW*, this Court rejected Alabama's assessment of punitive damages for cars *refinished and sold outside Alabama*. *Id.* at 564, 573. In contrast, the LCFS attaches no consequences to fuel sales in other states. Notably, Alabama's assessment of damages related to sales *in Alabama* was unobjectionable, even though the refinishing occurred out-of-state. *See id.* at 563 n.1, 565. Thus, even if this Due Process Clause case bore on the Commerce Clause claim petitioners have raised and litigated here, it establishes no conflict. That Alabama had no power to punish BMW for conduct unrelated to Alabama simply underscores that States may not control commerce occurring wholly outside their borders.

3. Petitioners also assert that the LCFS is an extraterritorial regulation because, they claim, its purpose is to "force out-of-state fuel producers to change the way they produce and transport fuels." AFPM at 28; *see also id.* at 30; RMFU at 25. This contention misconstrues the purpose of the LCFS and misreads dormant Commerce Clause jurisprudence.

The LCFS is designed to create, in California, "a lasting market for clean transportation technology" using "market mechanisms to spur the steady introduction of lower carbon fuels" to the State. ER 9:2197. It aims to shift California's fuels market

"towards fuels that meet the much lower carbon intensities needed" to achieve California's emissions reductions goals. ER 6:1234. As in cases where courts have rejected extraterritoriality challenges, the LCFS is "indifferent to sales occurring out-of-state." *Cotto Waxo*, 46 F.3d at 794; *see also, e.g., Sorrell*, 272 F.3d at 110.

In fact, this Court has already rejected arguments similar to those petitioners make here. In *PhRMA*, pharmaceutical manufacturers argued that Maine's law would coerce them into agreeing to unfavorable rebate terms. *PhRMA*, 538 U.S. at 654, 656-57, 662. This was not extraterritorial regulation, even though out-of-state manufacturers had to make difficult decisions that might significantly affect their profitability. *Id.* at 669. And this did not "regulat[e] the terms of transactions that occur elsewhere," even though the out-of-state manufacturers sold their drugs primarily to out-of-state wholesalers. *Id.* Put another way, Maine used a "stick" to encourage out-of-state manufacturers to conduct their out-of-state business in a particular way when that business *related to Maine*. In contrast, the LCFS uses "carrots," such as price premiums, to encourage fuel producers, regardless of location, to reduce the carbon intensities of fuels they provide to California or, ideally, to develop and commercialize new, low-carbon fuels for use in California. The issue is not whether a law uses a "carrot" or a "stick," *id.* at 669, but whether it controls commerce occurring wholly outside the State.

Accordingly, this Court has upheld state laws that have imposed *requirements* on producers, including out-of-state producers, with respect to products destined for the State's market. For

example, this Court upheld Minnesota's prohibition against certain plastic milk containers, without any suggestion that the law might be extraterritorial, although some out-of-state producers were required to change their processes to remain in the State's market. *Clover Leaf*, 449 U.S. at 458. And this Court upheld Maryland's requirement that petroleum refiners, all of which were out-of-state, divest themselves of their retail operations in Maryland. *Exxon*, 437 U.S. at 119. Refiners could still sell gasoline in Maryland, just not through their preferred method (company-operated stations). *Id.* at 127. Both of these laws imposed requirements on producers with respect to sales in the regulating State. Neither was an extraterritorial regulation.

Notably, in *Clover Leaf*, this Court recognized that Minnesota's law would shift Minnesota-related commerce from certain packaging manufacturers and raw material producers to others. 449 U.S. at 472-73. These effects, which fell on both in-state and out-of-state businesses, *id.*, are not meaningfully different from the effects petitioners allege here—that California's market will shift from higher-carbon to lower-carbon fuels. That is not extraterritorial regulation.

These cases belie AFPM's use of out-of-context phrases from *Carbone* to argue that the dormant Commerce Clause prohibits States from "attach[ing] restrictions to exports or imports" that affect any out-of-state decision or conduct. *See* AFPM at 14, 26, 28. AFPM's novel rule would essentially prevent States from regulating their own markets, invalidating restrictions on imports like the one upheld in *Clover Leaf*. *Carbone* did not effectuate such a radical change in the law. Nor is *Carbone* properly understood as an extraterritoriality case.

See PhRMA, 538 U.S. at 669. Rather, having found the law in *Carbone* to be discriminatory, this Court rejected the town's view that other jurisdictions' waste-treatment facilities were poorly regulated as a justification for that discrimination. *Carbone*, 511 U.S. at 393. Unlike the law invalidated in *Carbone*, the LCFS does not "bar the import of [a] processing service" or anything else. *Id.* at 392. In fact, the LCFS's express objective is to spur private investment in the development (anywhere) of lower-carbon fuels for California's market.

Petitioners' extraterritoriality argument boils down to the contention that a State may not alter the conditions under which out-of-state firms make decisions concerning products they offer in the regulating State. Courts have consistently rejected this argument, as the cases discussed above illustrate. Indeed, if petitioners were correct, there would be no need for the *Pike* test to analyze incidental burdens on interstate commerce. *Clover Leaf*, 449 U.S. at 471 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). Any such burdens on out-of-state firms would be impermissible "extraterritorial regulation." That is not the law.

4. While RMFU makes no mention of *PhRMA*, this Court's most recent consideration of extraterritoriality under the dormant Commerce Clause, AFPM attempts to distinguish it (and other cases) by arguing that *production* decisions are entitled to special protection under the Commerce Clause. *E.g.*, AFPM at 30. Petitioners identify no support for their fundamental premise—that some decisions, such as those at issue in *PhRMA*, *Exxon*, and *Clover Leaf*, may be affected but other decisions are constitutionally off-limits. No ruling of this Court or any circuit court has suggested such

distinctions. And several courts have at least implicitly rejected the notion that production processes are specially protected. *See Sorrell*, 272 F.3d at 110 (upholding law affecting out-of-state manufacturers' decisions concerning "production and distribution processes"); *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819, 820 (8th Cir. 2001) (upholding law intended to encourage beef producers, including out-of-state producers, to "make better" production decisions).

Petitioners also argue that the Commerce Clause confines state regulatory power to harms that manifest themselves in physical products. AFPM at 14, 29; RMFU at 4. Thus, according to petitioners, California may not regulate the carbon intensity of the fuels consumed in the State because carbon intensity is not a "physical property" of fuel. Again, petitioners identify no support for this proposition or its underlying premise—that extraterritoriality turns on whether the basis of the State's regulatory distinction is physical in nature, rather than on whether wholly out-of-state commerce is controlled.

In fact, States regularly regulate attributes of products that are not physically manifested. *See, e.g.*, *PhRMA*, 538 U.S. at 669 (regulating based on agreement to provide rebates); *Am. Exp. Travel Related Serv., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 373-74 (3rd Cir. 2012) (regulating travelers check terms); *Freedom Holdings*, *Inc. v. Spitzer*, 357 F.3d 205, 211-12, 220-21 (2nd Cir. 2004) (regulating based on escrow fund participation). Indeed, States' authority over their electricity markets includes "administration of integrated resource planning" and "authority over utility generation and resource portfolios." *New York v. F.E.R.C.*, 535 U.S. 1, 24 (2002) (quoting FERC Order 888 at 31,782 n. 544).

Integrated resource planning involves "evaluating and *diversifying* … electricity supply options" based, in part, on methods of production. *See, e.g.*, Del. Code Ann. tit. 26, § 1002 (emphasis added); *see also* 16 U.S.C. § 2602(19). Petitioners' "physical properties" rule would raise questions about such laws and leave courts to distinguish somehow between permissible and impermissible non-physical distinctions.

This Court has long recognized that States may serve as regulatory laboratories. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This established aspect of our federalist structure would be significantly diminished if, as petitioners contend, States could not respond to any risk they cannot physically identify in a product. *See Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 636-37, 647-48 (6th Cir. 2010) (discussing distinctions in milk for which "scientists have been unable to perfect a *test* to detect"). The dormant Commerce Clause, and particularly the narrow extraterritoriality doctrine, does not so limit States' abilities to protect their citizens.

5. RMFU ultimately resorts to general assertions about federalism, relying on fragments from "multiple constitutional contexts," including the Due Process, Full Faith and Credit, and Privileges and Immunities Clauses. RMFU at 23-25. In the end, though, RMFU simply asserts that "[b]reaches of State territorial limitations raise grave concerns," that nationwide regulatory schemes are "entrusted to Congress," and that the Constitution "prevent[s] States from regulating elsewhere." *Id.* at 23, 24. As discussed above, the LCFS does not establish a nationwide regulatory scheme or regulate wholly out-of-state commerce. Thus, even if a petition to

this Court were the appropriate forum in which to advance legal theories under constitutional provisions never raised in its complaint nor litigated below, RMFU's highly general assertions under these penumbral emanations are unavailing.

In sum, the LCFS does not control commerce occurring wholly in other States and is, in fact, indifferent to fuel sales in other States. The effects petitioners allege here resemble the effects of numerous permissible state laws and, further, are the types of effects the district court has been instructed to analyze, on remand, under the *Pike* test. Review is not warranted.

IV. THERE IS NO NEED FOR INTERLOCUTORY REVIEW

As discussed above, there is no final judgment here. Petitioners moved for summary judgment before discovery began, and the district court resolved only some of their claims. The court of appeals remanded to the district court for factual development and consideration of petitioners' claims of discriminatory design and effects as to ethanol, undue burdens against interstate commerce, and federal preemption. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). No "special circumstances" warrant immediate, interlocutory review here. *See Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007). On the contrary, there is no circuit conflict for this Court to resolve, the agency is revisiting and reconsidering the regulation at issue, and petitioners' claims of immediate harm from the LCFS are unfounded.

1. As part of the administrative re-proposal of the LCFS, required by a California court of appeal decision, the agency is considering numerous possible substantive amendments to the regulation. These amendments are broad in scope and include significant changes to the face of Table 6, as well as the process by which carbon intensity values would be assigned to alternative fuels like ethanol.[13] Petitioners' facial discrimination claim is already predicated on only six out of more than a hundred available carbon intensity values for ethanol. These amendments, which would eliminate those six values, would further reduce the significance of petitioners' claim. This Court should decline to review an interlocutory decision concerning a small portion of a regulation that may be rendered largely obsolete by the increasing number of individualized values and may be superseded shortly through regulatory amendments.

The agency will consider re-adopting the LCFS this year. Assuming ARB does re-adopt the LCFS, the new regulation will almost certainly be substantially different than the one considered by the courts below. Review should be denied to allow the administrative proceedings to reach a final result and to allow the lower courts to consider petitioners' remaining claims (and any claims related to the amended regulation).

2. The LCFS is not producing "immediate and substantial harm" to the ethanol industry. *See* RMFU at 30; *see also* RMFU at 1, 6-7. RMFU's claims that Midwestern imports have drastically declined (and that ARB "predicted" such a decline) are based on an artificially narrow view of

[13] Concept Paper, Appendix A.

California's market. *See* RMFU at 31 n.5; AFPM at 5; RMFU at 7 (incorrectly asserting ARB predicted the elimination of *all* Midwest ethanol); *see also* ER 11:2726-32 (illustrative examples of *potential* compliance scenarios showing "average" Midwest ethanol (carbon intensity of 99.4) declining).

In fact, Midwest ethanols predominate in every carbon intensity range used today in California, including those ranges that are gaining market share. *See* Opp. App. 13-14. California still produces very little ethanol and continues to import more than ninety percent of its ethanol, mostly from the Midwest. Doc. 38-9, at ¶ 22-31. And the lower-carbon ethanols imported from the Midwest are obtaining price premiums in California. ER 2:131-32, 4:738; Doc. 21-7 at 22-23.

Further, with the LCFS in effect, Midwest ethanol producers saw "a substantial improvement in industry profitability" in 2013, including increased demand.[14] Recent public comments from Midwestern State officials confirm that the ethanol industry is experiencing "explosive growth" and looking forward to an "even brighter" future.[15] This Court's immediate review is not needed to prevent

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[14] *Contribution of the Ethanol Industry to the Economy of the United States (Feb. 2014),* http://ethanolrfa.org/page/-/rfa-association-site/studies/ABF_Ethanol_Economic_Impact_US_2013.pdf?nocdn=1

[15] Comments on U.S. EPA's "2014 Standards for the Renewable Fuel Standard (RFS) Program," submitted January 30, 2014 by Greg Ibach (Nebraska Dept. of Agriculture) and Terry Brandstad (Governor of Iowa), respectively. *Available at* www.regulations.gov (docket EPA-HQ-OAR-2013-0479, submissions OAR-2013-0479-3944, OAR-2013-0479-5292).

an "imminent, ongoing threat to the ethanol industry." *See* RMFU at 31.

In any event, if the LCFS is drastically reducing out-of-state ethanols' share of California's market, petitioners can demonstrate that to the district court as part of their discriminatory effects claim. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232-35 (9th Cir. 2010).

3. Review is also not needed to prevent States from "withdraw[ing] from the national market." *See* RMFU at 33-34. California has done no such thing here. And the LCFS's use of an established, peer-reviewed, scientific model for the precise application (transportation fuels) for which that model was designed does not implicate petitioners' parade of horribles. *See also* AFPM at 15, 32. Should petitioners' hypothetical laws ever be adopted, those laws would be reviewed for preemption and under established dormant Commerce Clause tests, including the doctrine's core prohibition against protectionism (whether overt or veiled) and, for non-discriminatory measures, its balancing of burdens and benefits.

4. Finally, petitioners' claims that the LCFS will "Balkanize" the national fuels market are unsupported. *See* RMFU at 1; AFPM at 14. The LCFS has been in effect since January 1, 2011, but there is no evidence that the LCFS has "impede[d] the flow of interstate goods" or that "national uniformity" is required in the field of fuels regulation. *See Exxon*, 437 U.S. at 128. In fact, as discussed in respondents' conditional cross-petition, Congress has expressly permitted all 50 states to adopt different fuels regulations, unless and until EPA intervenes, and has authorized California to maintain its own standards even in the face of a

conflict with EPA's approach. 42 U.S.C. § 7545(c)(4)(A), (B); *see also* No. 13-1308 at 18-23.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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Cal. Code Regs., tit. 17, § 95486

Barclays Official California Code of Regulations
Currentness
Title 17. Public Health
Division 3. Air Resources
Chapter 1. Air Resources Board
Subchapter 10. Climate Change
Article 4. Regulations to Achieve Greenhouse Gas Emission Reductions
Subarticle 7. Low Carbon Fuel Standard

§ 95486. Determination of Carbon Intensity Values

* * *

(b) *Method 1 – ARB Lookup Table.*

(1) To generate carbon intensity values, the Executive Officer uses the California-modified GREET (CA-GREET) model version 1.8b (February 2009, updated December 2009), which is incorporated herein by reference, and a land-use change (LUC) modifier (when applicable). The CA-GREET model is available for downloading on ARB's website at http://www.arb.ca.gov/fuels/lcfs/lcfs.htm. CA-GREET, or other model determined by the Executive Officer to be at least equivalent to the CA-GREET, version 1.8b., shall be used by the Executive Officer to generate carbon intensity values.

To generate carbon intensity values for crude oil production and transport to California refineries, the Executive Officer uses the Oil Production Greenhouse Gas Emissions Estimator (OPGEE) model version 1.0

(September 2012), which is incorporated herein by reference. The OPGEE model is available for downloading on ARB's website at http://www.arb.ca.gov/fuels/lcfs/lcfs.htm. OPGEE, or other model determined by the Executive Officer to be at least equivalent to the OPGEE, version 1.0., shall be used by the Executive Officer to generate carbon intensity values for crude oil production and transport to California refineries.

The Carbon-Intensity Lookup Tables, shown below, specify the carbon intensity values for the enumerated fuel pathways that are described in the following supporting documents, all of which are incorporated herein by reference:

(A) Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California-Modified GREET Pathway for California Reformulated Gasoline Blendstock for Oxygenate Blending (CARBOB) from Average Crude Refined in California," Pathway CBOB001;

(A.1) Supplement Version 2.0 (September 12, 2012) to Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed CaliforniaModified GREET Pathway for California Reformulated Gasoline Blendstock for Oxygenate Blending (CARBOB) from Average Crude Refined in California;"

(B) Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California-Modified GREET Pathway for California Reformulated Gasoline (CaRFG)";

(B.1) Supplement Version 2.0 (September 12, 2012) to Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California Modified GREET Pathway for California Reformulated Gasoline (CaRFG);"

(C) Stationary Source Division, Air Resources Board (February 28, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Ultra Low Sulfur Diesel (ULSD) from Average Crude Refined in California," Pathway ULSD001;

(C.1) Supplement Version 2.0 (September 12, 2012) to Stationary Source Division, Air Resources Board (February 28, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Ultra Low Sulfur Diesel (ULSD) from Average Crude Refined in California;"

(D) Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Corn Ethanol," Pathways ETHC001, ETHC002, ETHC003, ETHC004, ETHC005, ETHC006, ETHC007, ETHC008, ETHC009, ETHC0010, ETHC0011, ETHC0012, ETHC013;

(E) [reserved for future use];

(F) Stationary Source Division, Air Resources Board (February 28, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Compressed Natural Gas (CNG) from North American Natural Gas," Pathways CNG001, CNG002;

(G) Stationary Source Division, Air Resources Board (February 28, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Compressed Natural Gas (CNG) from Landfill Gas," Pathway CNG003;

(H) Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California-Modified GREET Pathway for California Average and Marginal Electricity," Pathways ELC001, ELC002;

(I) Stationary Source Division, Air Resources Board (February 27, 2009, v.2.1), "Detailed California-Modified GREET Pathway for Compressed Gaseous Hydrogen from North American Natural Gas," Pathways HYG001, HYG002, HYG003, HYG004, HYG005;

(J) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.0), "Detailed California-Modified GREET Pathways for Liquefied Natural Gas (LNG) from North American and Remote Natural Gas Sources," Pathways

LNG001, LNG002, LNG003, LNG 004, LNG005;

(K) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.0), "Detailed California-Modified GREET Pathway for Liquefied Natural Gas (LNG) from Landfill Gas (LFG)," Pathways LNG006, LNG007;

(L) Stationary Source Division, Air Resources Board (July 20, 2009, v.1.0), "Detailed California-Modified GREET Pathway for Compressed Natural Gas (CNG) from Dairy Digester Biogas," Pathway CNG004;

(M) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.0), "Detailed California-Modified GREET Pathway for Liquefied Natural Gas (LNG) from Dairy Digester Biogas," Pathways LNG008, LNG009;

(N) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.0), "Detailed California-Modified GREET Pathway for Biodiesel from Used Cooking Oil," Pathways BIOD002, BIOD003;

(O) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.0), "Detailed California-Modified GREET Pathway for CoProcessed Renewable Diesel from Tallow (U.S. Sourced)," Pathways RNWD002, RNWD003;

(P) Stationary Source Division, Air Resources Board (September 23, 2009, v.2.3), "Detailed California-Modified GREET Pathways for Brazilian Sugarcane Ethanol: Average Brazilian Ethanol, With Mechanized Harvesting and Electricity Co-product Credit, With Electricity Co-product Credit," Pathways ETHS001, ETHS002, ETHS003;

(Q) Stationary Source Division, Air Resources Board (December 14, 2009, v.3.0), "Detailed California-Modified GREET Pathway for Biodiesel from Midwest Soybeans," Pathway BIOD001;

(R) Stationary Source Division, Air Resources Board (December 14, 2009, v.3.0), "Detailed California-Modified GREET Pathway for Renewable Diesel from Midwest Soybeans," Pathway RNWD001;

(S) Archer Daniels Midland Company Method B Application Package (May 18, 2011), http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/adm-15day-070811.pdf, Pathways ETHC014, ETHC015, ETHC016, ETHC017, ETHC018, ETHC019, ETHC020, ETHC021;

(T) POET Method 2A Application Package (February 20, 2011) http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/poet-15day-070811.pdf, Pathways ETCH025, ETCH026, ETCH027, ETCH028, ETCH029,

ETCH030, ETCH031, ETCH032, ETCH033, ETCH034, ETCH035;

(U) Trinidad Bulk Traders LTD Method 2B Application Package (November 23, 2010), http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/tbtl-rpt-ncbi-121410.pdf, Pathways ETHS004, ETHS005, ETHS006;

(V) Green Plains Holdings II LLC – Lakota Plant Division Method 2A Application Package, (November 3, 2010), http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/gp-lak-sum-ncbi-121410.pdf, Pathway ETHC024;

(W) Green Plains Central City LLC, Method 2A Application Package (October 20, 2010), http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/gp-cct-rpt-ncbi-121410.pdf, Pathway ETHC023;

(X) Louis Dreyfus Commodities, Elkhorn Valley Ethanol LLC Method 2A Application Package (December 1, 2010), http://www.arb.ca.gov/fuels/lcfs/2a2b/apps/ld-nor-rpt-ncbi-121410.pdf, Pathway ETHC022;

(Y) Stationary Source Division, Air Resources Board (June 30, 2011, v. 2.0), http://www.arb.ca.gov/fuels/lcfs/2a2b/internal/mw-uco-bd-070811.pdf, "Detailed California-Modified GREET Pathway for Biodiesel Produced in the Midwest from Used Cooking Oil and Used in California," Pathways BIOD004, BIOD005; and

(Z) Stationary Source Division, Air Resources Board (November 3, 2011, Version 2.0) "California-Modified GREET Pathway for the Production of Biodiesel from Corn Oil at Dry Mill Ethanol Plants," Pathway BIOD007;

Table 6. Carbon Intensity Lookup Table for Gasoline and Fuels that Substitute for Gasoline

Fuel	*Pathway Identifier*	*Pathway Description*	*Carbon Intensity Values (gCO2e/MJ)*		
			Direct Emissions	*Land Use or Other Indirect Effect*	*Total*
		* * *			
Ethanol from Corn	ETHC001	Midwest average; 80% Dry Mill; 20% Wet Mill; Dry DGS; NG	69.40	30	99.40
	ETHC002	California average; 80% Midwest Average; 20% California; Dry Mill; Wet DGS; NG	65.66	30	95.66
	ETHC003	California; Dry Mill; Wet DGS; NG	50.70	30	80.70
	ETHC004	Midwest; Dry Mill; Dry DGS, NG	68.40	30	98.40
	ETHC005	Midwest; Wet Mill, 60% NG, 40% coal	75.10	30	105.10
	ETHC006	Midwest; Wet Mill, 100% NG	64.52	30	94.52
	ETHC007	Midwest; Wet Mill, 100% coal	90.99	30	120.99
	ETHC008	Midwest; Dry Mill; Wet, DGS; NG	60.10	30	90.10
	ETHC009	California; Dry Mill; Dry DGS, NG	58.90	30	88.90
	ETHC0010	Midwest; Dry Mill; Dry DGS; 80% NG; 20% Biomass	63.60	30	93.60
	ETHC0011	Midwest; Dry Mill; Wet DGS; 80% NG; 20% Biomass	56.80	30	86.80
	ETHC0012	California; Dry Mill; Dry DGS; 80% NG; 20% Biomass	54.20	30	84.20
	ETHC0013	California; Dry Mill; Wet DGS; 80% NG; 20% Biomass	47.44	30	77.44
	ETHC0014	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	60.99	30	90.00
	ETHC0015	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 5% of the fuel use (by energy); Coal use not to exceed 66% of fuel use (by energy); Coal carbon content not to exceed 48%	59.08	30	89.08
	ETHC0016	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 10% of the fuel use (by energy); Coal use not to exceed 60% of fuel use (by energy); Coal carbon content not to exceed 48%	57.16	30	87.16
	ETHC0017	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 54% of fuel use (by energy); Coal carbon content not to exceed 48%	55.24	30	85.24
	ETHC0018	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	59.80	30	89.80

	ETHC0019	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 5% of the fuel use (by energy); Coal use not to exceed 65% of fuel use (by energy); Coal carbon content not to exceed 48%	57.86	30	87.86
	ETHC0020	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 10% of the fuel use (by energy); Coal use not to exceed 59% of fuel use (by energy); Coal carbon content not to exceed 48%.	55.91	30	85.91
	ETHC0021	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 53% of fuel use (by energy); Coal carbon content not to exceed 48%	53.96	30	83.96
	ETHC0022	2A Application*: Midwest; Dry Mill; 15% Dry DGS, 85% Partially Dry DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	57.16	30	87.16
	ETHC0023	2A Application*: Midwest; Dry Mill; Partially Dry DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	54.29	30	84.29
	ETHC0024	2A Application*: Midwest; Dry Mill; 75% Dry DGS, 25% Wet DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	61.60	30	91.60
	ETHC0025	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	62.44	30	92.44
	ETHC0026	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	58.49	30	88.49
	ETHC0027	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/biomass & landfill gas fuels; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	58.50	30	88.50
	ETHC0028	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	61.66	30	91.66
	ETHC0029	2A Application*: Dry Mill; Dry DGS; Conventional cook/combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	60.52	30	90.52

	ETHC0030	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/biogas process fuel; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	44.70	30	74.70
	ETHC0031	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	53.69	30	83.69
	ETHC0032	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.01	30	80.01
	ETHC0033	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.26	30	80.26
	ETHC0034	2A Application*: Dry Mill; Wet DGS; Conventional cook/combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.47	30	80.47
	ETHC0035	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/biogas process fuel; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	43.21	30	73.21
Ethanol from Sugarcane	ETHS001	Brazilian sugarcane using average production processes	27.40	46	73.40
	ETHS002	Brazilian sugarcane with average production process, mechanized harvesting and electricity co-product credit	12.40	46	58.40
	ETHS003	Brazilian sugarcane with average production process and electricity co-product credit	20.40	46	66.40
	ETHS004	2B Application*: Brazilian sugarcane processed in the CBI with average production process; Thermal process power supplied with NG	32.94	46	78.94
	ETHS005	2B Application*: Brazilian sugarcane processed in the CBI with average production process, mechanized harvesting and electricity co-product credit; Thermal process power supplied with NG	17.94	46	63.94
	ETHS006	2B Application*: Brazilian sugarcane processed in the CBI with average production process and electricity co-product credit; Thermal process power supplied with NG	25.94	46	71.94

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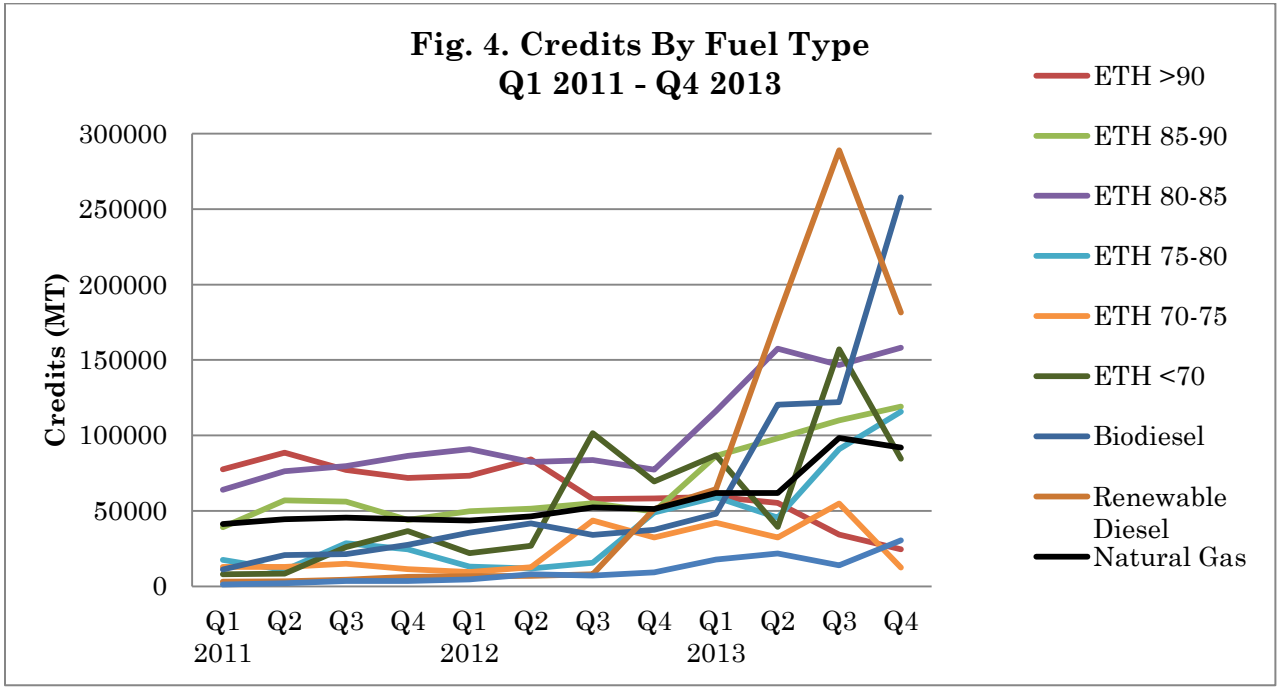
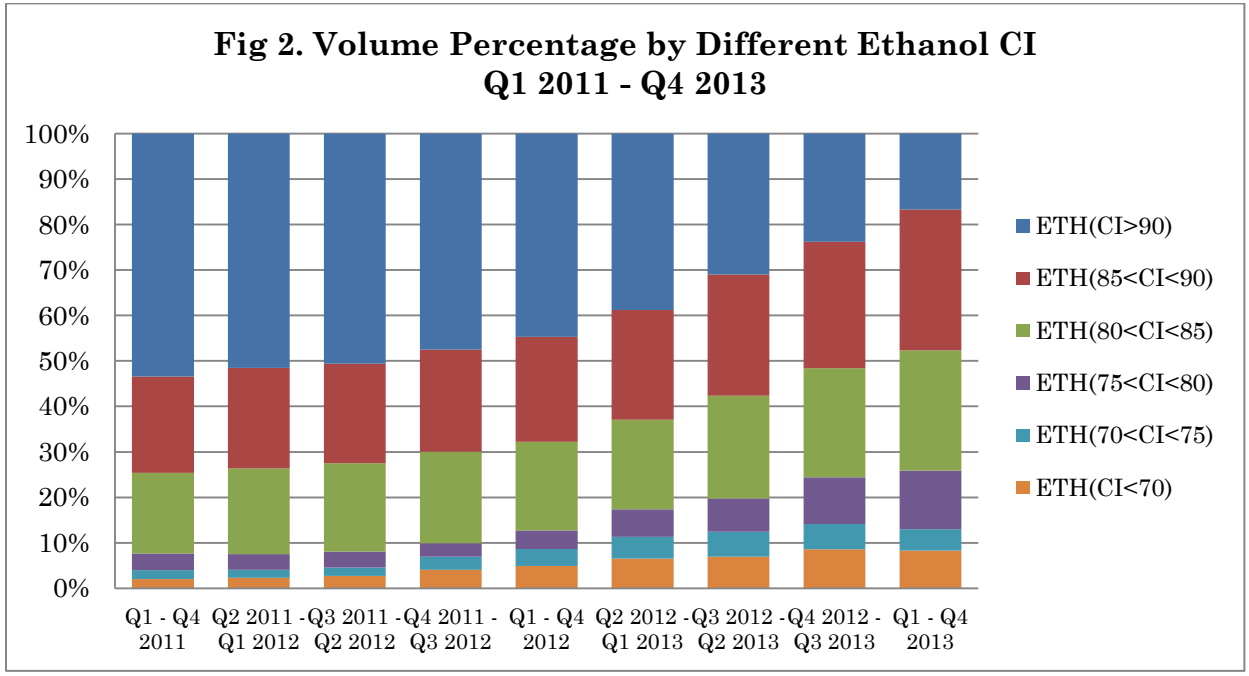


Excerpt from "Q4 2013" report, *available at* http://www.arb.ca.gov/fuels/lcfs/lrtqsummaries.htm, last visited May 23, 2014.



Excerpt from "Q4 2013" report, *available at* http://www.arb.ca.gov/fuels/lcfs/lrtqsummaries.htm, last visited May 23, 2014.

Carbon Intensity Range	Number of Available Ethanol Values by Origin		
	Calif.	Midwest*	Foreign
Greater than 90	0	31	0
Between 85 and 90	1	39	0
Between 80 and 85	2	24	2
Between 75 and 80	1	17	6
Between 70 and 75	1	9	5
Below 70	0	18	12

This table shows the number of carbon intensity values, by carbon intensity range, contained in Table 6 (Opp. App. 9-11) and "Summary of all Pathways Table" (as of April 14, 2014), *available at* http://www.arb.ca.gov/fuels/lcfs/2a2b/2a-2b-apps.htm. The two "average" values (ETHC001, ETHC002) were omitted, because they are rarely, if ever, used. ER 4:775-76; *see also* Cal. Code Regs., tit. 17, § 95486(a)(4), (5).

*For simplicity, values from Idaho (ETHC087), Oregon (ETHC088), and Texas (ETHGC001-24, ETHC078-79, ETHG008-9) are included under "Midwest."