No. 13-1148

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.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

HOWARD R. RUBIN
CHARLES H. KNAUSS
SHANNON S. BROOME
ROBERT T. SMITH
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW
Washington, DC 20007
(202) 625-3500

MICHAEL W. MCCONNELL*
STUART A.C. DRAKE
JOHN C. O'QUINN
STEPHEN S. SCHWARTZ
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com

Counsel for Petitioners

* Counsel of Record

June 9, 2014

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Rocky Mountain Farmers Union; Redwood County Minnesota Corn and Soybeans Growers; Penny Newman Grain, Inc.; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; Rex Nederend; Growth Energy; and the Renewable Fuels Association make the following disclosures:

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

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

3. Penny Newman Grain, Inc. ("Penny Newman") is a leading merchant in the market for grains and feed by-products, headquartered in Fresno, California. Penny Newman has no parent company, and no publicly-held company has a 10% or greater ownership interest in Penny Newman.

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

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

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

7. Rex Nederend is an individual farmer and rancher who owns a dairy near Tipton, California, and ranches near Wasco and Lemoore, California. The disclosures required under Rule 29.6 are inapplicable to Mr. Nederend.

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

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

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INTRODUCTION

The briefs in opposition confirm the need for this Court's timely review. Respondents do not seriously dispute that the LCFS facially rewards and penalizes sales of ethanol based on *where* it is produced. Instead, they double down on the Ninth Circuit's inversion of this Court's facial discrimination doctrine, manipulating it such that the mere existence of (purportedly) worthy and scientific "*reasons*" makes strict scrutiny of those reasons unnecessary.

Nor do Respondents dispute that the LCFS regulates extraterritorial conduct, instead asserting that California may reward and punish out-of-state activities if they are somehow "related" to in-state transactions. But that rationale would be the end of our Constitution's long-standing prohibition on extraterritorial regulation since, as a practical matter, every extraterritorial regulation depends on *some* hook bringing the out-of-state activity within the regulating State's reach.

Respondents, instead, devote most of their energy to propounding reasons to avoid or delay merits review. In truth, the urgent need for this Court's intervention has only increased. Midwest corn ethanol is already being driven from the California market, and CARB predicts its total elimination by 2018. ER11:2728-31. Respondents do not dispute the importance of this matter to the national economy, nor disagree that they intend the LCFS to serve as a model for future regulation by other States. In fact, other States propose to follow California's "lead," and the Ninth Circuit has green-lighted the LCFS's method for other areas of

regulation. The damage this causes to the Union's fabric is confirmed by the amicus brief in support of certiorari signed by *21 States*. And the issues of facial discrimination and extraterritoriality are final and ripe for review.

It is vital for this Court to intervene now, before similar efforts become entrenched both in the Ninth Circuit and throughout the Nation.

REASONS FOR GRANTING THE WRIT

I. THE LCFS IS UNCONSTITUTIONALLY DISCRIMINATORY.

The LCFS facially categorizes ethanol producers by geography, giving in-state corn ethanol production better treatment than identical production processes in the Midwest. That is the essence of facial discrimination. *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). The Ninth Circuit majority refused to find the LCFS facially discriminatory, excusing it instead based on the extraordinary notion that a regulation cannot be facially discriminatory when cloaked in "good and non-discriminatory reason[s.]" App.71a. In so doing, the majority contradicted this Court's precedents requiring it to apply strict scrutiny to CARB's "reasons" for penalizing out-of-state production.

Although Respondents purport to take issue with RFMU's characterization of the majority's reasoning, they actually confirm RMFU's analysis as to everything of substance. Indeed, rather than ground their defense of the LCFS in this Court's precedents, Respondents merely reiterate the Ninth Circuit's view that, because the LCFS's unequal treatment of

ethanol supposedly reflects "real" differences in GHG emissions rather than simple prejudice against Midwest ethanol, *see* Cal.Opp. 7, 19 n.10, 21-22; Interven.Opp. 13-14, 17-18, there is no facial discrimination.

To say that a statute is not facially discriminatory when the "determinant" for differential treatment is ostensibly scientific rather than protectionist, *see* Cal.Opp. 21; Interven.Opp. 14, is indistinguishable from predicating the facial discrimination analysis on a statute's purpose, which this Court has long rejected. *See Oregon Waste*, 511 U.S. at 100; *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). And exempting facial discrimination from strict scrutiny simply because CARB has sometimes rationalized the LCFS in environmental terms (notwithstanding that CARB has *also* justified it as economic protectionism), "puts the cart before the horse," as Judge Murguia noted in dissent. App.76a.

Respondents misinterpret this Court's references to the "reason" for State statutes in *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994), *see* Interven.Opp. 14, given that this Court has repeatedly held that purpose is irrelevant. And even if there were ambiguity in this Court's precedents (there is not), that merely underscores the need for clear guidance in how to identify facial discrimination.

Caselaw permitting States to exclude harmful pests from out-of-state, *see Oregon-Washington Railroad & Navigation Co.* v. *Washington*, 270 U.S. 87 (1926), is similarly irrelevant. Interven.Opp. 18-19. Unlike pest-infected plants, all ethanol is

identical and produces identical effects when it is used in California.

Nor can Respondents credibly argue that "carbon intensity" is a neutral criterion unrelated to origin. Cal.Opp. 21; Interven.Opp. 13-14, 17. The LCFS ethanol pathways incorporate geographical generalizations about energy efficiency at Midwest ethanol facilities. ER15:3589; ER6:1274; ER4:778, :781. To call that use of geography "nonessential," "benign," or "innocuous" is disingenuous, Interven.Opp. 18, 20, especially given CARB's prediction that the LCFS will totally eliminate Midwest corn ethanol from the California market by 2018, ER11:2728-31. Moreover, CARB does not dispute that the LCFS considers the distance that ethanol travels, and that it penalizes fuels for traveling those distances.

The fact that there are winners and losers under the LCFS inside and outside of California is beside the point. *See C & A Carbone*, 511 U.S. at 391; *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 276-77 (1988). Besides, neither CARB nor the Intervenors disagree with RMFU that in an apples-to-apples comparison of identical corn ethanol producers located in California and the Midwest, the *in-state producer always wins*. *See* App.248a. Instead, Respondents compare apples and oranges, pointing to low-carbon-intensity pathways that have no California equivalents (*e.g.*, individualized pathways specific to particular out-of-state producers, or pathways involving ethanol production feedstocks, such as sugarcane, that are not used to produce ethanol in California). Cal.Opp. 8-9.

Even in Respondents' apples-to-oranges comparison, what Respondents fail to mention is that every single one of the low-carbon-intensity, out-of-state pathways they cite also incorporates a figure for GHGs emitted during shipment to California. That is why CARB geographically classifies the supposedly favored pathways in the first place. Even Brazilian producers, as Respondents admit, bear a transportation penalty for coming to California from abroad, Interven.Opp. 17, which could be avoided if the chain of production were entirely in California.

As for the supposed burdens faced by California ethanol producers, Respondents' protestations cannot be taken seriously. Given CARB's expectation that the LCFS would lead to a boom in California ethanol production and "keep[] more money in the State," ER7:1689, the notion that California producers suffer under the LCFS is an opportunistic litigation position at best. The only specific disadvantage that Respondents point to is the transportation penalty that California facilities face when they import corn from the Midwest. Cal.Opp. 5-6; Interven.Opp. 17. But that only makes the LCFS doubly discriminatory. CARB cannot rescue its discrimination against *shipment of ethanol* by assuring the Court that it also discriminates against *shipment of corn*. Thus, the principle RMFU explained in its Petition is as true as ever: If an ethanol producer were picked up and moved to California, it would automatically receive better treatment. Respondents never show otherwise.

The same considerations also reveal the irrelevance of the alternative pathway application process itself (Method 2). Even when a Midwest corn

ethanol producer — already penalized for producing in the Midwest and shipping to California — can go through the burdensome process of (1) undertaking other ways to lower its carbon intensity score and (2) documenting those changes with scientific proof, *see* LCFS § 95486(e)(1), (3)(A), (f)(1), it is still suffering from discrimination; it has merely compensated for its disadvantage by demonstrating other ways in which it conforms with California's favored policies. Such a producer would *still* be better off if it picked up, moved to California, and started using California-grown corn. Far from proving that the LCFS is nondiscriminatory, the widespread use of Method 2 illustrates the great pressure that the LCFS places on producers if they are to continue competing in California.

II. THE LCFS UNCONSTITUTIONALLY REGULATES OUT-OF-STATE CONDUCT.

On the issue of extraterritoriality, Respondents cannot escape (and never try to take back) CARB's admission that it intended to assume "responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California." ER15:3597 (emphasis added). Respondents also concede that "all ethanols [sic] have identical tailpipe emissions," Interven.Opp. 7, which demonstrates that the only way the LCFS *could* distinguish between "ethanols" is by regulating their production processes, wherever located, *see* ER7:1718 (explaining differentiation of ethanol by location and methods of production). CARB claims that it adopted the LCFS to "reduce the State's contribution to greenhouse gas emissions," Cal.Opp. 1, but the

problem is that — by design — the LCFS is aimed at reducing emissions in *other States*. That ignores the central tenets of this Court's extraterritoriality jurisprudence.

Respondents' proposed rule amounts to this: The sale of a product in California entitles California to regulate "related" transactions outside the State, thus giving California a say in the entire chain of commerce from production to consumption. Cal.Opp. 24-28; Interven.Opp. 25 n.10. That rule indeed emerges from the Ninth Circuit majority's decision. *See* App.59a. But Respondents never mention that this Court has squarely rejected it. "The mere fact that the effects of [a State law] are triggered only by sales of [goods] within the State . . . does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 580 (1986).

The implications of the Ninth Circuit's rule are staggering, and deepen the conflict with courts that have adhered to this Court's precedents. California could effectively penalize the sale of out-of-state produce that is not grown using sustainable farming techniques; restrict the sale of out-of-state goods manufactured using electricity from coal-fired power plants; or, as Judge Smith recognized, "require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California." App.171a.

Respondents attempt to justify the Ninth Circuit's narrowing of the Constitution's extraterritoriality prohibition, but those efforts conflict with this Court's precedents and those of

other circuits in at least three ways. First, Respondents selectively quote *Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989), to avoid acknowledging its binding "practical effect" test, in contradiction of, for example, *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 69 (1st Cir. 1999), and *National Solid Wastes Management Association* v. *Meyer*, 63 F.3d 652, 658 (7th Cir. 1995). *See* Cal.Opp. 23; Interven.Opp. 22. Second, Respondents assert that ethanol producers may simply choose to forego selling their fuel in the California market. Cal.Opp. 24. But this Court has repeatedly rejected this argument. For example, in *Baldwin* — a case CARB never acknowledges — this Court rejected New York's argument that the State's milk law was not extraterritorial because a noncompliant out-of-state producer could "keep his milk or drink it, but sell it [within New York] he may not." 294 U.S. at 521. *Cf. Mutual Pharm. Co., Inc.* v. *Bartlett*, 133 S. Ct. 2466, 2477-78 (2013) (when a State exceeds its regulatory authority, it is not saved by the ability of regulated parties to cease the regulated activity). Third, Respondents contend that the LCFS merely "incentiv[izes]" certain ethanol production methods by placing a premium on preferred techniques. Cal.Opp. 26-27; Interven.Opp. 23. This Court, though, recognizes that a "strong incentive" is indistinguishable from a "penalty." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576, 578-79 (1997).

Casting about for a regulatory hook to justify applying the LCFS to out-of-state production, Respondents suggest that because out-of-state GHG emissions allegedly affect California's climate, the State may seek to control those emissions by

regulating agricultural and industrial processes. Cal.Opp. 1-2. This Court, however, has flatly rejected the contention that States may regulate perceived harmful activity occurring *outside* their boundaries, "*whether or not the commerce has effects within the State*." *Healy*, 491 U.S. at 336 (emphasis added) (citation and internal quotation marks omitted); *Baldwin*, 294 U.S. at 524 ("If farmers or manufacturers in Vermont are [failing to maintain quality dairy farms] the Legislature of Vermont and not that of New York must supply the fitting remedy."); *see also Massachusetts* v. *E.P.A.*, 549 U.S. 497, 519 (2007) ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions[.]"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

Respondents also rely on a series of inapposite cases. There is little doubt that a State can regulate the harmful effects of products produced or consumed *inside* the State, *see Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), or of *in*-state business methods, *see Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), even if regulated parties change their out-of-state conduct to comply. But that is not what the LCFS does: Where Midwest ethanol production is concerned, the LCFS aims to change nothing *except* out-of-state conduct.

Nor can Respondents rely on *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003). Cal.Opp. 28; Interven.Opp. 24-25. Under the statute in *Walsh*, pharmaceutical

manufacturers were required to negotiate a "rebate agreement" with Maine or submit to "prior authorization" before marketing their drugs within the State. 538 U.S. at 658-59. The statute did not in any way penalize pharmaceutical manufacturers for out-of-state business practices. *Id.* at 669. As a result, this Court easily concluded that the statute was a classic regulation of in-state business activity — as distinct from the statute in *Healy*, which the Court cited by way of example. *Id.* Contrary to Respondents' reading, nothing in *Walsh* confines *Healy* to its facts, let alone overrules *sub silentio* two centuries of jurisprudence limiting States to their territories.

In the end, Respondents cannot reconcile the Ninth Circuit's holding with this Court's extraterritoriality decisions, the decisions of other circuits, or basic norms of federalism. California may believe that it is acting in the Nation's best interests by regulating carbon emissions in its sister States, but under the Constitution, Congress or the legislatures of those States "must supply the fitting remedy" — not the legislature of California. *Baldwin*, 294 U.S. at 524.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR URGENTLY NEEDED REVIEW.

Both CARB and the Intervenors argue at length that RMFU's Petition is not an appropriate vehicle for this Court to address the issues presented. Ultimately, however, their arguments betray how badly Respondents want to avoid review of the LCFS on its merits.

This Court's finality doctrines do not stand in the way of review. Even when lower court proceedings remain, review is appropriate when an issue is "fundamental to the further conduct of the case." *See United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964). RMFU's Petition presents clear-cut issues of law that, if accepted by this Court, are *dispositive* of the case (the district court entered Rule 54(b) final judgments as to each claim, *see* App.146a), and those issues have nationwide impact both economically and jurisprudentially. The remaining issues are independent of facial discrimination and extraterritoriality, and would require time-consuming factual development not yet undertaken.

Respondents do not seriously disagree that under the Ninth Circuit majority's reasoning, every State could isolate itself from the Nation's economy and impose its own policy preferences on other States — if they are big enough, like California, to possess economic leverage. And whatever proceedings might remain in the lower courts, the Ninth Circuit's decision will remain on the books. Only this Court can set aside that dangerous precedent.

This Court's review grows only more urgent. Midwest ethanol producers continue to be driven out of the California market. *See* Pet. 31 n.5. Meanwhile, efforts to adopt LCFS-like regimes outside California have gathered steam again, and are slated to resume in Washington, *see* Washington

Executive Order 14-04 (2014),[1] and in Oregon, *see* Press Release, Oregon Governor's Office, "Governor Kitzhaber announces new clean fuels initiative" (Feb. 13, 2014).[2] Two courts have recently issued decisions about other State statutes seeking to reduce GHG emissions by regulating out-of-state transactions. *See Energy & Env't Legal Inst.* v. *Epel*, ___ F. Supp. 2d ___, 2014 WL 1874977 (D. Colo. May 9, 2014); *North Dakota* v. *Heydinger*, ___ F. Supp. 2d ___, 2014 WL 1612331 (D. Minn. Apr. 18, 2014). And in California, this case is a bellwether for the State's other efforts to leverage its market power into control over out-of-state activity, including regulating the out-of-state treatment of chickens as a condition for selling eggs, *Missouri* v. *Harris*, No. 2:14-cv-341 (E.D. Cal., *filed* Feb. 3, 2014), and regulating the out-of-state treatment of ducks and geese as a condition for selling *foie gras*, *Association des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937 (9th Cir. 2013), *petition for cert. filed*, 2014 WL 1691054 (U.S. Apr. 28, 2014) (No. 13-1313).

As for CARB's pending rulemaking on the LCFS, the revisions would not bear on the legal issues raised in RMFU's Petition at all, much less moot the case.[3] Nothing in the administrative paper CARB

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[1] *Available at* http://www.governor.wa.gov/office/execorders/documents/14-04.pdf.

[2] A*vailable at* http://www.oregon.gov/gov/media_room/Pages/press_releases/press_021314.aspx.

[3] CARB argues only that *AFPM's* petition is moot, which AFPM vigorously disputes.

cites, *see* Cal.Opp. 13-14, 34, promises or even proposes for public comment any change in the LCFS's discriminatory and extraterritorial features that CARB is attempting to defend here. *See* CARB, Low Carbon Fuel Standard Re-Adoption Concept Paper A1-A2 (Mar. 7, 2014).[4] States should not be permitted to evade constitutional review of fundamental features of a regulatory regime by perpetually tinkering with details.

Furthermore, even CARB has predicted in state-court filings that any revisions would not be in final form *until at least the fall of 2015*, and then would be subject to further review by the California Office of Administrative Law. *See* Supp.App.4a. In the meantime, the LCFS remains in effect. As the developing harms faced by Midwest ethanol producers show, not to mention the *amicus* brief in support of certiorari signed by 21 States, this Court's review is needed *now*.

CONCLUSION

The Court should grant RMFU's petition.

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[4] *Available at* http://www.arb.ca.gov/fuels/lcfs/lcfs_meetings/030714lcfsconceptpaper.pdf.

Respectfully submitted.

Howard R. Rubin
Charles H. Knauss
Shannon S. Broome
Robert T. Smith
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW
Washington, DC 20007
(202) 625-3500

Timothy Jones
John P. Kinsey
WAGNER JONES HELSLEY PC
265 E. River Park Circle
Suite 310
Fresno, CA 93720
(559) 233-4800

Michael W. McConnell*
Stuart A.C. Drake
John C. O'Quinn
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com

*Counsel of Record

June 9, 2014

APPENDIX

KAMALA D. HARRIS *State of California*
Attorney General *DEPARTMENT OF JUSTICE*

1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 622-2100
Telephone: (510) 622-4451
Facsimile: (510) 622-2270
E-Mail: Mark.Poole@doj.ca.gov

May 14, 2014

The Honorable Jeffrey Y. Hamilton, Jr.
Superior Court of California, County of Fresno
Department 402
1130 "O" Street
Fresno, CA 93724-0002

RE: POET, LLC v. California Air Resources Board
Superior Court of California, County of Fresno, Case No. 09-CECG-04659-JYH

Dear Judge Hamilton:

On behalf of the Air Resources Board, I write to update the Court on the progress made complying with the peremptory writ of mandate issued in this matter. I also write to inform the Court of slight adjustments to the schedule outlined in ARB's initial return to the writ which will delay the schedule for the Alternative Diesel Fuel rule (ADF rule) three

months to allow it to track with the proposed Low Carbon Fuel Standard (LCFS) rulemaking, as well as a one to two month delay in the LCFS rulemaking itself, neither of which will have a significant impact on the overall schedule set forth in the initial return.

Since the filing of the initial return and the Court's amended writ, the Board has completed the following:

- Feb. 13, 2014 — Public workshop held to vet updated proposed ADF regulation concepts.
- March 11, 2014 — Two workshops held, one to discuss general changes contemplated in the proposed LCFS, and a second addressing an update on indirect land use change calculations.
- April 4, 2014 — Two workshops held to present staff's latest thinking on the proposed LCFS, and to solicit public input on fuel pathways and the cost containment provisions.
- April 17, 2013 — Public meeting held to present staff's latest thinking on the ADF provisions, and to solicit stakeholder feedback.
- April 18, 2014 — Two workshops held on the LCFS-related topics of refinery and crude oil provisions and reporting and enforcement provisions.

In the near future, ARB also plans the following:

- May 19, 2014 — An advisory panel will meet to conduct a review of the LCFS

pursuant to Title 17 of the California Code of Regulations, section 95489. This will be followed by a second advisory panel meeting in August 2014.

- May 30, 2014 — A workshop will provide the public with additional updates about planned LCFS provisions, and information about the environmental analysis, economic analysis/fuel availability, and a tentative schedule. Staff will solicit stakeholder feedback during the workshop.
- June 2014 — ARB staff will schedule a webinar to describe new engine test data related to biodiesel NOx emissions.

In its initial return to the writ, ARB voluntarily committed to inform the Court of adjustments to the announced schedule. (ARB's Initial Return, pp. 5:25-6:2). To that end, ARB wishes to inform the Court that on March 14, 2014, ARB announced it was withdrawing the ADF rule (proposed on Oct. 22, 2013) so that staff could give further consideration to public comments received and discuss changes with stakeholders and other members of the public before proposing a revised ADF rule. This has resulted in a slight delay from the schedule set forth in the initial return. Originally, the ADF rule was proposed to be considered in "Summer 2014." (*Id.* at 3:20-21.) ARB now expects to propose both the ADF rule and the amended LCFS rule this fall, which still allows ARB to bring the LCFS to a Board hearing before the end of the year, as initially contemplated. The primary reasons for this change are to allow time for staff to fully develop the re-proposed ADF rule, and, significantly, to allow a

joint CEQA analysis of both rules. In addition to this delay in the ADF rule, ARB anticipates an additional one to two months will be needed by staff to complete work on the new LCFS rule. Under this revised schedule, if ARB adopts the regulations, the final rules would be submitted to the Office of Administrative Law by fall 2015 (compared to summer 2015 in the initial return). (*Id.* at 4:23-28.) ARB remains committed to diligently proceeding in good faith to satisfy the terms of the peremptory writ.

Sincerely,

/s/ Mark. W. Poole

MARK W. POOLE
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Cc: See attached service list

MP:

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