No. 13-1308

IN THE

# Supreme Court of the United States

RICHARD W. COREY, in his official capacity as Executive Officer of the California Air Resources Board, *et al.*,
*Cross-Petitioners*,
v.
ROCKY MOUNTAIN FARMERS UNION, *et al.*,
*Cross-Respondents*.

RICHARD W. COREY, in his official capacity as Executive Officer of the California Air Resources Board, *et al.*,
*Cross-Petitioners*,
v.
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
*Cross-Respondents*.

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

## REPLY BRIEF FOR CROSS-PETITIONERS


KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
ROBERT W. BYRNE
Senior Assistant Attorney General
JANILL L. RICHARDS
Deputy Solicitor General
GAVIN G. MCCABE
Supervising Deputy Attorney General

M. ELAINE MECKENSTOCK*
DAVID A. ZONANA
JONATHAN WIENER
Deputy Attorneys General
1515 Clay Street
20th Floor
Oakland, CA 94612-0550
(510) 622-4450
Elaine.Meckenstock@doj.ca.gov

**Counsel of Record*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**STATUTES**

## INTRODUCTION

As demonstrated in the opposition briefs of the government respondents (collectively "ARB") and the intervenor-respondents, all petitions in these cases, including the conditional cross-petition, should be denied. If, however, this Court grants certiorari to consider any of petitioners' claims, it should also consider whether Congress expressly authorized the actions that petitioners depict as encroaching on Congress's Commerce Clause power. Further, if the Court grants certiorari to consider AFPM's challenges to the Low Carbon Fuel Standard's superseded 2011 crude oil provisions, ARB respectfully requests that the Court make clear that it will first consider whether all of those challenges, including those that are pending on remand, are moot.

## ARGUMENT

### I. IF THE COURT GRANTS REVIEW, IT SHOULD CONSIDER CONGRESS'S EXPRESS AUTHORIZATION OF STATE FUEL EMISSIONS REGULATIONS

Petitioners' dormant Commerce Clause challenges fail because the Low Carbon Fuel Standard ("LCFS") applies the same well-established and non-discriminatory scientific methodology to all competing fuels and regulates only the average carbon intensity of fuels used in California. Petitioners' challenges should also fail because, after balancing the interests of the fifty States, the federal government, and the national economy, Congress provided that California "may at any time prescribe and enforce, for the purpose of motor vehicle emissions control, a control or prohibition respecting any fuel or fuel additive." 42 U.S.C. § 7545(c)(4)(B)

("section 211(c)(4)(B)"); *see also* 42 U.S.C. § 7545(c)(1), (c)(4)(A).

1. Disregarding the conditional character of this cross-petition, RMFU and AFPM argue that the nature of Congress's express authorization is a question unworthy of this Court's review. AFPM Opp. 13-14; RMFU Opp. 7-9. However, "[c]ourts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982). Thus, whether the aspects of the LCFS that petitioners challenge are "within the scope of the congressional authorization" in section 211(c)(4)(B) is a question worthy of review, *if* the Court grants review of petitioners' claims. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981).[1]

Contrary to petitioners' arguments, then, neither the presence of a "longstanding line" of Ninth Circuit interpretations of section 211(c)(4)(B) nor the absence of conflicting appellate interpretations would present "obvious" reasons to deny this conditional cross-petition.[2] *See* RMFU Opp. 7; *see also id.* at 8; AFPM Opp. 11, 13. In any event, there is no "longstanding line" of cases concerning the dormant Commerce Clause implications of section 211(c)(4)(B). Indeed, only two district courts have seriously considered this question. In 2001, a district court held that section 211(c)(4)(B) exempted

---

[1] AFPM relies on *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2001) to argue otherwise, AFPM Opp. 14, but that case concerned "a separate legal question not raised in the certiorari briefs" and is therefore inapplicable here.

[2] It is unlikely that a circuit split would arise concerning a provision that concerns only California.

a California fuel regulation from dormant Commerce Clause scrutiny. *Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001). The plaintiffs in that case did not challenge the district court's Commerce Clause conclusion in their appeal, so the Ninth Circuit did not reach the question. *See Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003). Here, the district court held that section 211(c)(4)(B) provides no Commerce Clause exemption. AFPM App. at 175a. The Ninth Circuit panel affirmed with little analysis, determining it was bound by language in an earlier Ninth Circuit decision concerning section 211(c)(4)(B)—a decision that presented no Commerce Clause question. AFPM App. 63a.[3] In sum, no circuit court has actually grappled with the question presented here.[4]

While the absence of substantive analyses by the courts of appeal might ordinarily support the denial of an independent petition for certiorari, that general rule does not apply to this conditional cross-petition or to the question presented here. Because this Court "only engage[s] in [dormant Commerce Clause] review when Congress has not acted or purported to act," *Merrion*, 455 U.S. at 154, the import of Congress's action in section 211(c)(4)(B) should be part of any further review of petitioners' dormant Commerce Clause claims.

---

[3] *Davis v. EPA*, 348 F.3d 772 (9th Cir. 2003) harmonized two federal statutory provisions as part of a preemption analysis. It did not consider the dormant Commerce Clause. *See* AFPM Opp. 16 n.5.

[4] *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1090 n.1 (2d Cir. 1977) does not purport to interpret section 211(c)(4)(B), let alone determine its relationship to the dormant Commerce Clause. *See* RMFU Opp. 7, 9.

2. AFPM and RMFU also misconstrue the nature of the question presented in the conditional cross-petition. ARB does not argue that section 211(c)(4)(B) grants California "nationwide authority over interstate commerce" or provides California with unfettered authority to "violate the Commerce Clause at will." RMFU Opp. 8, 11; *see also* AFPM Opp. 1, 11. Rather, ARB argues, and the court of appeals correctly held, that the LCFS does not require congressional authorization under any accepted understanding of the dormant Commerce Clause. And, in this conditional cross-petition, ARB asks this Court to consider a narrow issue, namely section 211(c)(4)(B)'s scope and import specifically with respect to petitioners' particular challenges. This challenge-specific inquiry is properly part of the analysis of the scope of congressional authorization. For example, in *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003), the Court held that a federal statute protected certain California milk regulations, but not others, from dormant Commerce Clause scrutiny. *See also Ne. Bancorp., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174-75 (1985) (finding certain state laws exempt from dormant Commerce Clause challenge under Douglas Amendment); *Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 47 (1980) (rejecting exemption under same Douglas Amendment for different state law).

Applying that specific analysis to the challenges here, petitioners' claims that the LCFS will Balkanize fuels markets are plainly barred by Congress's two determinations: 1) that national uniformity is not necessary for fuel regulations unless and until EPA determines otherwise; and 2) that California should be free to establish its own standards, even if EPA makes such a determination. 42 U.S.C. § 7545(c)(4)(A), (B); *see also Prudential*

*Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) ("Congress intended to declare, and in effect declared, that uniformity of regulation [is] not required….").

Congress has also already determined that the benefits of leaving California free to adopt its own innovative fuel regulations outweigh the potential burdens and effects that such regulations might have on interstate commerce. *See* 42 U.S.C. § 7545(c)(1) (recognizing that transportation fuels are "*introduc[ed] into commerce*") (emphasis added); 42 U.S.C. § 7545(c)(4)(B). Congress's determination precludes petitioners' claims (pending on remand) that the LCFS unduly burdens interstate commerce or may alter market-shares in California's fuels market as the State shifts from higher- to lower-carbon fuels. "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce…." *Merrion*, 455 U.S. at 154.

And petitioners' challenges to California's use of well-established science to reduce the greenhouse gas emissions that result from California's own consumption of transportation fuels cannot be reconciled with Congress's intent. In fact, as petitioners acknowledge, Congress intended California to continue leading the Nation in the regulation of air pollutants from the transportation fuels used in motor vehicles. *See* AFPM Opp. 20. In other words, "Congress' purpose was broadly to give support to existing and future [California fuel emissions controls]." *See Prudential Ins.*, 328 U.S. at 429.

3. Petitioners summarily assert that section 211(c)(4)(B) is a "mere savings clause," RMFU Opp. 11 n.3, or a "standard non-preemption clause,"

AFPM Opp. 18, but section 211(c)(4)(B) bears no resemblance to the examples identified by petitioners. In section 211(c)(4)(B), Congress did more than simply "preserve existing state regulations," *Lewis*, 447 U.S. 48-49, or "leave standing whatever valid state laws then existed," *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)). Congress anticipated that California would adopt new, innovative fuel standards in the future and left California free to do so *at any time* and respecting *any fuel or fuel additive* so long as the standard is "for the purpose of motor vehicle emission control." 42 U.S.C. § 7545(c)(4)(B). Congress, thus, "subject[ed] interstate commerce [in fuels] to present and future state prohibitions or regulation." *See United States v. P.U.C. of Cal.*, 345 U.S. 295, 304 (1953) (internal quotation omitted).

Petitioners' "mere savings clauses" also often speak in negative terms, describing how the federal statute should *not* be interpreted. *See, e.g., Sporhase v. Nebraska*, 458 U.S. 941, 959 (1982) ("nothing in this Act shall be construed as affecting or intended to affect [State laws relating to irrigation water]"). In contrast, section 211(c)(4)(B) speaks affirmatively, describing what California may do ("prescribe and enforce … controls[s] or prohibitions[s]") and in what context California may act ("at any time," "respecting any fuel or fuel additive," and "for the purpose of motor vehicle emission control"). *See also White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 215 (1983) (recognizing city action as "affirmatively sanctioned"); *W. & S. Life Ins.*, 451 U.S. at 653-54 (finding exemption in authorization of "continued regulation … by the several States"). Section 211(c)(4)(B) is not a "mere savings clause,"

and Congress's express action warrants review alongside any review granted of AFPM's or RMFU's petitions.

Further, while petitioners are correct that Congress can (and does) exempt state laws from preemption without creating an exemption from dormant Commerce Clause scrutiny, it does not follow that Congress cannot simultaneously exempt state action from federal preemption and the Commerce Clause. *See* RMFU Opp. 10-12; AFPM Opp. 16-20. In fact, this Court has noted that Congress can, in the same act, "limit congressional preemption under the commerce power, *whether dormant or exercised*." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (emphasis added); *see also Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862 (3d. Cir. 2012). This Court should consider whether Congress has done so here, if it grants further review of petitioners' dormant Commerce Clause claims.

4. Finally, petitioners' arguments that the LCFS is not within the scope of section 211(c)(4)(B) are unmoored from the statutory text. AFPM Opp. 2, 11, 23; RMFU Opp. 13-15. Section 211(c)(4)(B) does not contain the words "characteristic or component" or "fuel specification." Yet petitioners argue that the LCFS cannot fit within section 211(c)(4)(B)'s ambit because carbon intensity is not a "characteristic or component" of fuel and because ARB determined that the LCFS is not a fuel specification under California law. RMFU Opp. 25; *see also* AFPM Opp. 14-15; *see also* ER 10:2358-61 (ARB's fuel specification determination). Notably, every judge to consider this question—first the district court and then a unanimous panel of the court of appeals—disagreed with petitioners. AFPM App. 63a, 67a,

205a. Further, both Congress and petitioners themselves distinguish fuels on the basis of their lifecycle greenhouse gas emissions, indicating that such emissions are a "characteristic" (or other distinguishing feature) of fuels. 42 U.S.C. § 7545(o)(1)(H); ER 2:225, 5:1045, 5:1061.

Petitioners' other attempt to remove the LCFS from section 211(c)(4)(B)'s scope involves the flatly erroneous assertion that the regulation excludes ethanol's tailpipe emissions. *See* RMFU Opp. 4, 15; AFPM Opp. 24 n.10. In fact, ethanol's tailpipe emissions and the carbon dioxide absorbed by growing corn are both included in the lifecycle analysis. ER 4:771-72; *see also* ER 5:1045. They offset each other, and that offset could not occur if one were excluded. Further, the LCFS's lifecycle analysis includes the tailpipe emissions of numerous other fuels, including gasoline, diesel, natural gas, biodiesel, and renewable diesel. Petitioners' suggestion that the LCFS excludes tailpipe emissions is simply false.

The LCFS is "within the scope of the congressional authorization" in section 211(c)(4)(B). *See W. & S. Life Ins.*, 451 U.S. at 652. Should this Court grant review of any of petitioners' dormant Commerce Clause claims, it should also consider the effect of section 211(c)(4)(B) on those claims.

## II. IF THE COURT GRANTS REVIEW OF AFPM'S CHALLENGES TO THE LCFS'S SUPERSEDED CRUDE OIL PROVISIONS, IT SHOULD MAKE CLEAR THAT IT WILL CONSIDER WHETHER THOSE CHALLENGES ARE MOOT

In response to the conditional cross-petition, AFPM now acknowledges that the crude oil provisions it challenges were only in effect during a single year, 2011. AFPM Opp. 9-10. AFPM also

acknowledges that the purportedly discriminatory classification (between "emerging HCICOs" and all other crudes) was never applied, even during 2011. *Id.* at 9-10, 28-29. It is undisputed that all crude oils were assigned *identical* carbon intensity values in 2011. *Id.* AFPM nonetheless contends that its challenges are not moot, but none of AFPM's contentions has merit. If the Court grants AFPM's petition, it should make clear that it will also consider whether all of AFPM's crude oil challenges are moot.

1. AFPM claims that ARB might "reinstate" the superseded 2011 crude oil provisions, although it identifies nothing that even suggests this possibility. AFPM Opp. 13; *see also id.* at 29-30. AFPM primarily relies on *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2287 (2012), but unlike the respondent in *Knox*, ARB has not engaged in "postcertiorari maneuvers designed to insulate a decision from review." Rather, ARB began the process to amend the 2011 crude oil provisions before the district court had issued its summary judgment rulings. CCP App. 5-8. After implementing the current provisions, ARB did debate several options for the 2011 crude oils not covered by the new provisions. But, contrary to AFPM's suggestion, that debate simply underscores that the 2011 provisions proved difficult or unworkable in practice. *See id.* at 9-10; *see also* AFPM Opp. 29. There is no reason to believe ARB would re-adopt provisions that it has already rejected.

2. AFPM also argues that its crude oil challenges are not moot because its challenges extend beyond emerging HCICOs and include the treatment of "low carbon-intensity Alaskan crude and imported

crudes." AFPM Opp. 26. This argument suffers from several fundamental flaws.

To begin with, this is not the argument AFPM advanced in its petition. AFPM now claims to have asserted this challenge in a footnote in its Statement of the Case. *See* AFPM Opp. 8 (citing petition at 7 n.2). In its argument, however, AFPM asserted that "California TEOR was the *only high carbon intensity crude oil protected*" by the LCFS. AFPM Pet. 21 (internal quotations omitted, emphasis added); *see also id.* at 22 ("[T]he only high-carbon-intensity crude oil to benefit from that design was California TEOR."). On their face, these arguments are claims of discrimination against high-carbon-intensity crude oils (emerging HCICOs), not against low-carbon crude oils such as Alaskan light crude.

Further, even if AFPM had raised this argument in its petition, the argument disregards the very thing the dormant Commerce Clause is intended to protect: competition in the market. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978). California crude oils obtained no competitive advantage by being assigned carbon intensity values identical to hundreds of out-of-state crudes (including Alaskan light crude). Identical treatment is not differential treatment, let alone discrimination.[5]

The notion AFPM advances here—that assigning Alaskan light crude a carbon intensity other than its "actual" lifecycle emissions is discriminatory—is striking. With respect to ethanol, AFPM argues that ARB's recognition of actual lifecycle emissions

[5] As the court of appeals correctly noted, under AFPM's unusual measure of "discrimination," the maximum "discrimination" fell on *California* crude oil, not out-of-state crude oil. AFPM App. 48a-49a.

differences between fuels is either discriminatory or extraterritorial or both. *See* AFPM Pet. 15-20, 26-33. With respect to crude oils, though, AFPM argues that ARB was *constitutionally obligated* to recognize those differences, remarkably presuming the legitimacy of the very lifecycle analysis it challenges in the other portions of its petition. This is a far more "glaring inconsistency," *see* RMFU Opp. 16 n.4, than the LCFS's different provisions for alternative fuels and petroleum-based fuels. As discussed in respondents' opposition, the LCFS requires reductions in carbon intensity from alternative fuels and prevents significant increases in carbon intensity from petroleum-based fuels in order to advance California's twin objectives of diversifying fuels and reducing emissions. *See* ARB Opp. 9-10.

3. Finally, AFPM attempts to avoid the conclusion that its crude oil challenges are moot by implying that the amended provisions are similar to the superseded provisions. AFPM Opp. 27-28. But AFPM's argument is premised on its erroneous conflation of the treatment of crude oil producers with the treatment of refiners (who buy and process crude oils). Under the amended LCFS provisions, California refiners are, as AFPM asserts, assessed debits based on the average carbon intensity for California's crude mix in a given year. AFPM Opp. 28. But this treatment of *refiners* does not mean, as AFPM suggests, that the LCFS assigns average carbon intensity values to *crude oils*. *See id.* In fact, crude oils are assigned their individual carbon intensity values. RMFU App. 191a-193a. Refiners then determine which crudes to buy, and at what volumes, taking those individualized values and other market conditions into account. *See id.* The current provisions are, thus, significantly different from the superseded ones. AFPM's petition for

certiorari "provides no occasion to interpret the amended regulation," including the current crude oil provisions which have never been considered by a lower court. *See Decker v. Nw. Envt'l Defense Center*, 133 S. Ct. 1326, 1335 (2013).

All of AFPM's crude-oil-related claims—both those presented in the petition and those pending on remand—are moot.

## CONCLUSION

If the Court grants review of any question in this case, the conditional cross-petition should also be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
ROBERT W. BYRNE
Senior Assistant Attorney General
JANILL L. RICHARDS
Deputy Solicitor General
GAVIN G. MCCABE
Supervising Deputy Attorney General

M. ELAINE MECKENSTOCK*
DAVID A. ZONANA
JONATHAN WIENER
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 622-4450
Elaine.Meckenstock@doj.ca.gov

**Counsel of Record*

June 10, 2014