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.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the preemption exemption in Section 211(c)(4)(B) of the Clean Air Act insulates California's Low Carbon Fuel Standard from constitutional challenge.

2. Whether AFPM's challenges to the Low Carbon Fuel Standard's crude-oil provisions are moot.

29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, cross-respondents make the following disclosures:

1. National Petrochemical and Refiners Association (NPRA) is a national trade association of more than 450 companies. In January 2012, NPRA changed its name to American Fuel & Petrochemical Manufacturers Association (AFPM). AFPM's members include virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM.

2. American Trucking Associations, Inc. (ATA) is a District of Columbia non-profit corporation. Neither ATA nor any parent, subsidiary, or affiliate has issued shares or debt securities to the public.

3. Consumer Energy Alliance (CEA) is a nonprofit, nonpartisan organization with more than 230 affiliated organizations and tens of thousands of individual grassroots members that supports the thoughtful utilization of energy resources to help ensure improved domestic and global energy security and stable prices for consumers. CEA has no parent companies, and no publicly held company has a 10% or greater ownership interest in CEA.

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INTRODUCTION

The American Fuel and Petrochemical Manufacturers Association, American Trucking Associations, and Consumer Energy Alliance (collectively, AFPM) submit this opposition to the conditional cross-petition (Cross-Pet.) filed by the governmental respondents (California) in response to AFPM's petition for certiorari, No. 13-1149 (Pet.).

The conditional cross-petition should be denied. In its cross-petition, California argues that (1) Section 211(c)(4)(B) of the Clean Air Act authorizes California to discriminate against and regulate interstate and foreign commerce occurring outside of California, Cross-Pet. 18–23, and (2) AFPM's challenges to the LCFS's crude-oil provisions are moot because California amended the LCFS in November 2012, and because, in 2011, all crude oils received *identical* carbon-intensity values, *id.* at 23–27. Neither argument has merit.

First, Section 211(c)(4)(B) of the Clean Air Act does not insulate the LCFS from constitutional challenge. Section 211(c)(4)(B) does not reflect a "clear and unambiguous" intent to exempt California's fuel controls from Commerce Clause restrictions. Rather, Section 211's text, structure, and history make clear that Section 211(c)(4)(B) is an exemption from the express preemption provision in Section 211(c)(4)(A). Settled precedent from this Court holds that a provision that merely saves state regulations from federal preemption does not authorize Commerce Clause violations. California's argument is particularly extraordinary given its position that Congress granted California, and no other State, authorization to discriminate against interstate and foreign commerce and to regulate extraterritorially. California's authorization argument also fails because the challenged aspects of the LCFS do not constitute a "control or prohibition respecting any fuel" passed "for the purpose of motor vehicle emission control" within the meaning of Section 211(c)(4)(B). Section 211(c)(4)(B) is inapplicable because the LCFS does not regulate any characteristic or component of a fuel or seek to control motor vehicle emissions, but instead regulates the process by which fuels are produced and transported.

Second, AFPM's challenges to the LCFS's crude-oil provisions are not moot. California assigned credits and deficits under the LCFS provisions challenged by AFPM, and those discriminatory assignments have a continuing effect under the LCFS. California never addresses AFPM's showing that the LCFS discriminates by assigning the "identical" baseline average to California TEOR (for which California has calculated a much *higher* individual carbon-intensity value) and Alaskan light crude and imported light crudes (for which California has calculated much *lower* individual carbon-intensity values). California does not make any argument that the effects of this discrimination have been remedied by any regulatory advisory or by the 2012 Amendments to the LCFS. Further, California's 2012 Amendments do not render moot AFPM's separate challenge to the LCFS's discrimination in favor of California TEOR and against "emerging" high-carbon-intensity crude oils. Even if California's advisories and the 2012 Amendments to the LCFS eliminate the challenged distinction prospectively, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012).

STATEMENT OF THE CASE

A. Statutory Background

In arguing that Congress has insulated the LCFS from challenge under the Commerce Clause, California relies exclusively on Section 211(c)(4)(B) of the Clean Air, 42 U.S.C. § 7545(c)(4)(B). California's cross-petition, however, ignores the larger statutory context in which that provision appears. Because that context is necessary to understand Section 211(c)(4)(B)'s function as an exemption from preemption, we briefly set forth here the relevant provisions.

First, Section 211(c)(1) authorizes the Environmental Protection Agency (EPA), after considering specified scientific and economic data and making the required findings, to issue federal regulations governing the composition of fuels used in motor vehicles:

> The Administrator may …, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare ….

Id. § 7545(c)(1).

Once EPA has exercised its authority under subsection (c)(1), either by regulating a component or characteristic of a fuel or by finding that no regulation is necessary, subsection (c)(4)(A) expressly preempts

States from prescribing or enforcing fuel controls that differ from federal controls:

> Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—
>
> > (i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or
> >
> > (ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

Id. § 7545(c)(4)(A).

Subsection (c)(4)(B), upon which California relies, sets forth one of the two exceptions mentioned in subsection (c)(4)(A):

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

Id. § 7545(c)(4)(B).

Although the waiver mentioned in subsection (c)(4)(B) applies to "any State which has adopted standards … for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," *id.* § 7543(b)(1), California was the only State that had adopted such standards by that date, and thus the preemption exemption in Section 211(c)(4)(B) applies only to California, see *Davis* v. *EPA*, 348 F.3d 772, 777 n.1 (9th Cir. 2003) (explaining that § 7545(c)(4)(B) applies only to California); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 527 (2d Cir. 1994) (same).

B. Regulatory and Procedural Background

1. As explained in AFPM's petition, the LCFS employs a lifecycle analysis that purports to regulate the "carbon intensity" of transportation fuels sold in California and seeks to reduce the maximum average carbon intensity of such fuels by 10 percent by 2020. Pet. 3–5. In doing so, however, the LCFS adopts fundamentally conflicting methods for regulating ethanol and crude oil that in each circumstance benefit California economic interests over out-of-state and foreign competitors. *Id.* at 5–7.

Under the LCFS's lifecycle analysis, carbon intensities for crude oils differ based on the manner in which the crude oils are produced and transported in interstate and foreign commerce. *Id.* at 6. Thus, California has explained that "'carbon intensities for mainstream crude oil production methods range from 4 to more than 20 gCO2e/MJ.'" *Id.* (quoting Pet. App. 306a). Nevertheless, California devised a system that discriminates against out-of-state crude oils in two distinct respects.

First, as explained in AFPM's petition, the LCFS benefits high-carbon-intensity California crude oil (*i.e.*, California TEOR) and burdens low-carbon-intensity crude oils from outside of California (Alaskan crude and imported light crude) by assigning them all the same *average* carbon intensity. *Id.* at 6–7 & n.2. Second, the LCFS also prohibited "emerging" high-carbon-intensity crude oils from outside California from using the "baseline" average, thereby protecting California TEOR from competition by out-of-state high-carbon-intensity crude oils. *Id.* at 6. Throughout this litigation, AFPM has challenged both aspects of the LCFS's discriminatory treatment of crude oils.

In the district court, AFPM showed that the LCFS's treatment of crude oils favors California TEOR (which made up 14.8 percent of the California market) at the expense of Alaskan crude and imported light crude oils (which, together, made up 60.5 percent of the California market). ER11:2699; AFPM's SJ Mem. 11–12, *Rocky Mtn. Farmers Union* v. *Goldstene*, No. 1:09-cv-2234 (E.D. Cal. Filed Nov. 1, 2010) (Doc. 126) (chart explaining benefit to California TEOR and burden on Alaskan and imported light crude oils from being assigned the same baseline average). AFPM further showed that the LCFS discriminated in favor of California TEOR and against "emerging" high-carbon-intensity crude oils from outside California by assigning California the baseline average and requiring "emerging" high-carbon-intensity crude oils to shoulder the full burden of the higher carbon intensity calculated by California. *Id.* at 10–11 (chart explaining benefit to California TEOR and burden on emerging high-carbon-intensity crude oil from Venezuela).

The district court agreed with AFPM that the LCFS's treatment of crude oils is discriminatory in both respects. Pet. App. 137a. It explained that the LCFS assigned California TEOR and Alaskan light crude and imported light crude the same carbon-intensity values even though doing so benefited high-carbon-intensity California TEOR and burdened low-carbon intensity Alaskan and imported crudes. *Id.* at 160a–161a (chart illustrating the impact of the "baseline" average on California TEOR and "existing" imported crude oils). The district court likewise ruled that the LCFS assigned "emerging" high-carbon-intensity crudes from outside of California a higher carbon intensity than California TEOR. *Id.* at 158a–160a (chart illustrating the LCFS's discriminatory treatment of "emerging" high-carbon-intensity crude oils). The district court ruled that both aspects of this discriminatory design were unconstitutional. *Id.* at 162a–165a.

The Ninth Circuit addressed these same claims of discrimination. The Ninth Circuit acknowledged that the district court ruled that the LCFS discriminated in its treatment of crude oils (1) by assigning California TEOR the baseline average while assigning "emerging" high-carbon-intensity crudes their individual carbon intensities, and (2) by assigning California TEOR and Alaskan and foreign crude oils the same baseline average. *Id.* at 47a. Although the Ninth Circuit disagreed with the district court's conclusion that this treatment of crude oils was discriminatory, *id.* at 49a, it rejected California's argument that the amendment of the LCFS's crude-oil provisions in November 2012 rendered AFPM's challenge moot, *id.* at 45a n.12. The Ninth Circuit explained that the original LCFS provisions "applied to crude oil delivered through December 31, 2011," and that "[c]redits awarded based on those values will carry forward to subsequent years and may be used by a regulated party to comply with the Fuel Standard mandates." *Id.* (citing Cal. Code Regs. tit. 17,

§§ 95484(b), (c)(4), 95485(c)). Accordingly, the Ninth Circuit concluded that "[t]he propriety of the scheme under which those credits were distributed remains a live controversy." *Id.*

As noted, AFPM renewed its challenges to the LCFS's treatment of crude oil in its petition to this Court. AFPM showed that the LCFS discriminated in favor of California TEOR by assigning it "the baseline 'average,'" and thereby reducing "its overall carbon intensity for compliance with the LCFS by 10.82 gCO2e/MJ—an amount *greater* than the entire carbon-intensity reduction required by the LCFS when fully implemented in 2020." Pet. 6–7. AFPM further explained that in contrast to the treatment of California TEOR—which is assigned "the default carbon intensity score of 8.07 gCO2e/MJ for its production and transportation, even though California calculated the actual value to be 18.89 gCO2e/MJ"—the requirement that "Alaskan light crude" use the baseline average "*increases* its carbon intensity for production and transportation from 4.36 to 8.07 gCO2e/MJ." *Id.* at 7 n.2.[1] Thus, AFPM explained that the LCFS's

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[1] AFPM's challenges are echoed in the briefs of *amici curiae* supporting review of the Ninth Circuit's judgment. *E.g.*, Br. of *Amicus Curiae* States of Neb. et al. Br. 13–14, Nos. 13-1148, 13-1149 ("the LCFS protects California [TEOR] from competition by out-of-state crude oils that have lower carbon intensities" and "directly harms States like Alaska, which is responsible for more than 16 percent of the crude oil consumed in California"); Br. for the Chamber of Commerce & the American Petroleum Institute Br. 6, Nos. 13-1148, 13-1149 (LCFS's "gerrymander" benefits California TEOR while "disadvantaging several out-of-state crude oils by assigning them higher-than-'actual' carbon intensities"); *id.* at 9–10 (explaining that the LCFS was designed to "*discourag*[*e*] the diversion of high-carbon fuels out of California while protecting the same in-state product from out-of-state competition by assigning it a lower-than-'actual' carbon intensi-

crude-oil provisions discriminate because they "assign the same 'average' carbon intensity to 'existing' crude oils, and as a result 'California TEOR,' which has an exceptionally high carbon-intensity value, 'was treated favorably compared to out-of-state sources.'" *Id.* at 21 (quoting Ninth Circuit's decision).

2. Since AFPM first challenged the LCFS in February 2010, California has issued a series of regulatory advisories addressing the LCFS's discriminatory treatment of "emerging" high-carbon-intensity crude oils, and, in November 2012, amended the LCFS's treatment of crude oils effective January 1, 2013.

In December 2010, after AFPM filed its motion for summary judgment in the district court, California issued the first in a series of advisories purporting to alter California's treatment of imported, "emerging" high-carbon-intensity crude oils. The December 2010 advisory allows regulated parties, for a portion of 2011, to use the baseline average for crude oils that may qualify as "emerging" high-carbon-intensity crude oils, but does not affect the "baseline" average that favors California TEOR at the expense of Alaskan light crude and imported light crudes. SER14:3486; SER14:3488. In July 2011, after AFPM filed its reply papers in support of summary judgment, California issued another regulatory advisory, this time extending through the end of 2011 the treatment of potential "emerging" high-carbon-intensity crude oils set forth in the December 2010 advisory. SER14:3492. The July 2011 advisory did not alter the LCFS's treatment of California TEOR,

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ty and assigning out-of-state sources a higher-than-'actual' value").

Alaskan crude oil, or imported light crude oils. *Id.*[2] In December 2011, just before the district court struck down the LCFS, California issued a third advisory stating that it had proposed amendments to the LCFS's crude-oil provisions and that, through the end of 2012, all crude oils would be assigned the same baseline average regardless of their actual carbon intensity. SER14:3502. None of California's advisories addressed the LCFS's use of the same "baseline" average to benefit California TEOR at the expense of Alaskan crude and imported light crude oils.[3]

On November 26, 2012, California approved amendments to the LCFS's crude-oil provisions, effective January 1, 2013. Cross-Pet. 13. As the Ninth Circuit noted, "[t]he new provisions pursued the same goals with similar logic" as the original LCFS provisions. Pet. App. 20a–21a. Contrary to California's suggestion that the "LCFS now *assigns* all crude oils, including *all* California crude oils, their individual carbon intensity values," Cross-Pet. 24 (first emphasis added; emphasis omitted), the Ninth Circuit explained that, under the 2012 amendments, "all crude oil is assessed the same carbon intensity value, either the average of the California market in the year of

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[2] Two years later, in July 2013, California issued another regulatory advisory altering the treatment of 2011 sales of crude oil. Cross-Pet. App. 9–10. As the Ninth Circuit explained, California, in July 2013, "altered the treatment of 2011 sales of crude oil" by telling regulated parties that retroactive adjustment of credit balances described in earlier advisories "would not be required." Pet. App. 21a.

[3] These advisories expressly state that they can be superseded by new regulatory advisories. SER14:3486 (Regulatory Advisory, Dec. 2010) ("[T]his [Advisory] will remain in effect … unless superseded by a subsequent ARB advisory or notice."); SER14:3491 (Regulatory Advisory, July 2011) (same); SER14:3502 (Regulatory Advisory, Dec. 2011) (same).

sale or the average from 2010, whichever is higher." Pet. App. 21a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. The Ninth Circuit correctly rejected California's argument that Section 211(c)(4)(B) of the Clean Air Act insulates the LCFS from constitutional challenge under the Commerce Clause. That holding, which does not conflict with any decision of this Court or any other circuit, does not warrant further review.

A. Section 211(c)(4)(B) does not reflect any intent, let alone the required clear and unambiguous intent, to exempt California's fuel controls from Commerce Clause restrictions. Rather, as the Ninth Circuit held, and as Section 211's text, structure, and history make clear, Section 211(c)(4)(B) is an exemption from the express preemption provision in Section 211(c)(4)(A). This Court has repeatedly held that a provision that merely saves state regulations from federal preemption is insufficient to authorize Commerce Clause violations. By authorizing California to continue exercising its preexisting regulatory authority over motor vehicle fuel emissions, Congress did not authorize California—and no other State—to discriminate against or to regulate interstate or foreign commerce outside California.

B. Independently, California's authorization argument fails because the challenged aspects of the LCFS do not constitute a "control or prohibition respecting any fuel" passed "for the purpose of motor vehicle emission control" under Section 211(c)(4)(B). As California conceded during the administrative proceedings, the LCFS does not regulate any characteristic or component of a fuel. Rather, it regulates the process by which fuels are produced and transported in interstate and foreign commerce. Because the LCFS regulates commercial activities (*e.g.*, the production and transportation of fuels) that do not affect the fuel's composition or the emissions it produces when combusted in a motor vehicle, and because the LCFS regulates emissions from a wide variety of sources other than motor vehicles, Section 211(c)(4)(B) by its terms does not apply and cannot save the LCFS.

II. AFPM's challenges to the LCFS's crude-oil provisions are not moot.

A. Throughout the litigation, AFPM has challenged the LCFS's crude-oil provisions because they assign the "identical" baseline average to California TEOR (for which California calculated a much *higher* individual carbon-intensity value) and Alaskan light crude and imported light crudes (for which California calculated much *lower* individual carbon-intensity values). As the Ninth Circuit acknowledged, California TEOR is "treated favorably compared to out-of-state sources based on a comparison of a fuel's individual carbon intensity to its assigned carbon intensity." Pet. App. 48a. California assessed credits and deficits under this discriminatory system. Nevertheless, California ignores this aspect of AFPM's discrimination claim even though (1) it affects over 75 percent of the California crude-oil market, and (2) the allocation of credits and deficits under this discriminatory regime has a continuing impact under the LCFS. AFPM's challenge is not moot.

B. Nor do California's 2012 Amendments render moot AFPM's challenge to the LCFS's discrimination in favor of California TEOR and against "emerging" high-carbon-intensity crude oils. Even if the 2012 Amendments did eliminate that category of discrimination, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 132 S. Ct. at 2287. That principle applies with particular force here because, absent reversal by this Court, the Ninth Circuit's approval of the LCFS's discriminatory design gives California free reign to reinstate that prior scheme.

I. CALIFORNIA'S CONGRESSIONAL AUTHORIZATION ARGUMENT DOES NOT WARRANT THIS COURT'S REVIEW.

California's cross-petition first seeks review of the Ninth Circuit's holding that the preemption exemption in Section 211(c)(4)(B) of the Clean Air Act does not authorize California to violate the Commerce Clause. The Ninth Circuit ruled that California's authorization argument was foreclosed by circuit precedent holding that "the sole purpose of Section 211(c)(4)(B) is to waive for California the express preemption provision found in [Section 211(c)(4)(A)]." Pet. App. 63a (internal quotation marks and alteration omitted). That holding is plainly correct and does not warrant this Court's review.

Indeed, California does not even argue that the authorization question satisfies the criteria for certiorari. California does not argue that the decision below conflicts with any decision of this Court or any other circuit. Nor could it—neither this Court nor any other court of appeals has addressed whether Section 211(c)(4)(B) authorizes violations of the Commerce Clause. Instead, California argues that this Court's review of the constitutional questions would "be incomplete without consideration of Section 211(c)(4)(B)." Cross-Pet. 16. But that is no more true here than in any other case in which the respondent seeks to defend the judgment below on alternative grounds. This Court need not consider whether Section 211(c)(4)(B) authorizes California to regulate without regard to the limits imposed by the Commerce Clause to decide the analytically distinct issue of whether the LCFS discriminates against interstate and foreign commerce or regulates commerce outside California. Cf. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (declining to consider a "separate legal question" that was "not a predicate to an intelligent resolution of" the question presented) (internal quotation marks omitted).

A. Section 211(c)(4)(B) Is A Preemption Exemption, Not An Authorization To Violate The Commerce Clause.

California's authorization argument fails, first, because Section 211(c)(4)(B) is an ordinary preemption exemption and not a clear and unmistakable authorization for California to violate the Commerce Clause.

1. In seeking to show that Congress has insulated the LCFS from Commerce Clause scrutiny, California carries a heavy burden. Before reaching the extraordinary conclusion that Congress has authorized a State to discriminate against interstate or foreign commerce, or to regulate commerce beyond its borders,[4] California must show that Congress's intent to

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[4] With respect to extraterritorial regulation, Congress *cannot* authorize otherwise invalid state legislation. As discussed in the petitions and the supporting *amicus* briefs, the constitutional prohibition on extraterritorial state regulation is a fundamental principle of horizontal federalism that arises not only from the Commerce Clause, but from numerous other provisions of the Constitution and its federal structure as a whole. Pet. 26–27 & n.5; RMFU Pet. 23–25, No. 13-1148; Br. of Law Professors 8–14, No. 13-1148; Br. Amicus Curiae of Pacific Legal Foundation 15–17, Nos. 13-1148, 13-1149. Congress's authority to regulate interstate and foreign commerce must be exercised consistent with

remove Commerce Clause restrictions is "unmistakably clear." *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984); *accord Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (an "unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state regulation"). Further, "to authorize a Commerce Clause violation, Congress must do more than simply authorize a State to regulate in an area." Pet. App. 221a. It must "affirmatively contemplate otherwise invalid state legislation," *S.-Cent. Timber*, 467 U.S. at 91–92, and clearly express its intent to "remove federal constitutional constraints," *Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941, 960 (1982).

The requirement that Congress clearly express its intent to remove Commerce Clause restrictions is "mandated by the policies underlying dormant Commerce Clause doctrine." *S.-Cent. Timber*, 467 U.S. at 92. A central concern of this Court's jurisprudence is that "[u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *Id.* By contrast, "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* This Court's rule requiring "a clear expression of approval by Congress ensures that there is, in fact, such a collective decision." *Id.* Conversely, "[a]bsent a 'clear expression of approval by Congress,' any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affect-

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these independent constraints, and if Congress cannot itself violate principles of constitutional federalism, then it cannot authorize a State to do so.

ed by restraints on commerce.'" *Maine*, 477 U.S. at 139 (quoting *S.-Cent. Timber*, 467 U.S. at 92). As attested by the 21 States that have urged the Court to grant the petitions, these concerns are particularly acute in this case. See Br. of *Amicus Curiae* States of Neb. et al. Br. 1–2, Nos. 13-1148, 13-1149.

2. California cannot meet its heavy burden. Section 211(c)(4)(B) does not reflect any intent, let alone an unmistakably clear intent, to authorize California to violate the Commerce Clause. Rather, as the statute's text, structure, and history make clear, and as the Ninth Circuit correctly held, Section 211(c)(4)(B)'s "sole purpose" is "to waive for California the express preemption provision found in [Section 211(c)(4)(A)]." *Davis*, 348 F.3d at 786.

California criticizes the court of appeals for relying "on a prior *preemption* decision," Cross-Pet. 19,[5] but it nowhere disputes that Section 211(c)(4)(B) is a preemption exemption. Nor could it. When read in context of Section 211(c) as a whole, rather than in artificial isolation, as California reads it, subsection (c)(4)(B) is indisputably an exception to the express preemption provision in subsection (c)(4)(A).

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[5] In fact, the Ninth Circuit's decision in *Davis* was not a "preemption decision." Rather, the court rejected California's argument, similar to the one advanced by California here, that Section 211(c)(4)(B) authorized California to disregard other provisions of the Clean Air Act. *See* 348 F.3d at 786. In rejecting that contention, the Ninth Circuit adopted EPA's argument that "the sole purpose of § 7545(c)(4)(B) is to waive for California the express preemption provision found in § 7545(c)(4)(A)." *Id.*; *see* EPA Br. 68, *Davis* v. *EPA*, No. 01-71356 (9th Cir. Oct. 10, 2002) ("the sole purpose of section 211(c)(4)(B) is to waive for California the express preemption provision found in section 211(c)(4)(A)").

Subsection (c)(1) authorizes EPA to "control or prohibit … any fuel or fuel additive for use in a motor vehicle" upon making certain findings. 42 U.S.C. § 7545(c)(1). Once EPA has exercised its authority under subsection (c)(1), subsection (c)(4)(A) expressly preempts nonidentical state fuel controls, subject to two exceptions: "Except as otherwise provided in subparagraph (B) or (C), no State … may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle." *Id.* § 7475(c)(4)(A). Subsection (c)(4)(B), in turn, sets forth one of the two exceptions mentioned in subsection (c)(4)(A), providing that California "may at any time prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive." *Id.* § 7475(c)(4)(B).

Thus, Section 211(c)'s structure—a grant of authority to EPA to regulate fuels, followed by an express preemption provision prohibiting state fuel regulations, followed by an exception to that prohibition for California—makes clear that subsection (c)(4)(B) is an exemption from preemption. That conclusion is further confirmed by the statute's text, including subsection (c)(4)(A)'s express cross-reference to subsection (c)(4)(B), *id.* § 7475(c)(4)(A) ("Except as otherwise provided in subparagraph (B) …."), and the parallel language of the two provisions, compare *id.* (providing that no State "may prescribe or attempt to enforce" fuel controls), with *id.* § 7475(c)(4)(B) (providing that California "may at any time prescribe and enforce" fuel controls).

Because Section 211(c)(4)(B) is simply an exemption from preemption, California "has not met its burden of demonstrating a clear and unambiguous intent on behalf of Congress" to remove Commerce Clause constraints. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). This Court has repeatedly held that a provision that exempts state regulations from federal preemption does not authorize Commerce Clause violations. See *id.*; *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341–43 (1982); *Sporhase*, 458 U.S. at 959–60; *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 48–49 (1980). Like the provisions in these cases, Section 211(c)(4)(B) is "a standard 'nonpreemption' clause," *New England Power*, 455 U.S. at 343, and there is "nothing in its language or legislative history to support the contention that it also was intended to extend to [California] new powers to regulate [fuels] that [it] would not have possessed absent the federal legislation," *Lewis*, 447 U.S. at 49, or "'to alter the limits of state power otherwise imposed by the Commerce Clause,'" *New England Power*, 455 U.S. at 341. "Rather, Congress' concern was simply 'to define the extent of the federal legislation's preemptive effect on state law.'" *Id.*

3. California's contrary arguments are unavailing. California inexplicably ignores this Court's extensive precedent on preemption exemptions. It cites *no case* in which a preemption exemption was held to remove Commerce Clause constraints. And the cases it does cite only confirm by stark contrast that Section 211(c)(4)(B) contains "no unambiguous statement of any congressional intent whatsoever to alter the limits of state power otherwise imposed by the Commerce Clause." *Maine*, 477 U.S. at 139 (internal quotation marks omitted).

In each of the cases California cites, Congress's intent to exempt state laws from Commerce Clause scrutiny was clearly manifest, whether from the statute's express language[6] or from its structure[7] or history.[8] Nothing comparable is present here. Section 211(c)(4)(B) contains no language that even arguably authorizes California to discriminate against or regulate interstate or foreign commerce or that otherwise affirmatively removes constitutional restrictions. California emphasizes the "at any time" language, Cross-Pet. 20, but that language simply makes clear that the preemption exemption applies to future California fuel controls and not just those that existed when Section 211(c)(4)(B) was enacted. Cf. *New England Power*, 455 U.S. at 341 & n.7 (preemption exemption applied only to existing state laws). That temporal

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[6] *See W. & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 653 (1981) (McCarran-Ferguson Act expressly provided that "'continued regulation and taxation by the several States of the business of insurance is in the public interest,'" and that "'silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States'") (quoting 15 U.S.C. § 1011); *White* v. *Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213 & n.11 (1983) (federal regulations "affirmatively permit[ted] the type of parochial favoritism" challenged in the case).

[7] *See Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154–56 (1982) (concluding that judicial review of tribal taxes under the Commerce Clause "would duplicate the administrative review called for by the congressional scheme," under which tribal taxes required federal approval before taking effect).

[8] *See W. & S. Life Ins.*, 451 U.S. at 653–54 (discussing history showing that the McCarran-Ferguson Act was intended to reinstate case law holding that the Commerce Clause did not "place *any limitation* upon state power over the insurance business") (internal quotation marks and alteration omitted); *Ne. Bancorp, Inc.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 168–72, 174 (1985) (discussing history admitting of "no other conclusion but that Congress contemplated" the challenged regional interstate banking laws).

clarification says nothing about California's authority to violate the Commerce Clause.

Likewise, neither the structure nor history of Section 211(c) reflects an intent to remove Commerce Clause restrictions. Rather, both confirm that Congress was focused exclusively on preemption. The legislative history discussed only preemption; there is nothing to suggest that Congress considered the Commerce Clause.[9] As California recognizes, Congress created a special exemption for California because it was the only State that had previously regulated motor vehicle emissions. See Cross-Pet. 7; 42 U.S.C. § 7543(b)(1). Congress concluded that California should be permitted to "*continue* to be in a position to exercise police power" that it had previously exercised despite the express preemption that would apply to other States. 116 Cong. Rec. 42,520 (1970) (emphasis added). Because California does not contend that its preexisting fuel controls were exempt from Commerce Clause restrictions, Congress cannot be deemed to have removed those restrictions by allowing California to continue regulating as before.

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[9] Congress enacted Section 211(c)(4) in the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 9, 84 Stat. 1676, 1699. The preemption provision originated in the Senate, but the originally proposed language did not include an exception for California. *See* S. 4358, 91st Cong. § 8 (1970). The Senate Report focused entirely on preemption when discussing this provision, explaining that the amendment "would provide, without exception, for Federal preemption over the prohibition or control of the sale and use of [registered] fuels." S. Rep. No. 91-1196, at 32 (1970). The Conference Committee agreed to add an exception for California. *See* 84 Stat. at 1699. The Conference Committee Report likewise focused exclusively on preemption, explaining that "[n]o State may prescribe or enforce controls or prohibitions respecting any fuel or additive," but "[t]hese restrictions will not apply to California." H.R. Rep. 91-1783, at 53 (1970) (Conf. Rep.).

Unable to find any supporting evidence (much less a clear statement) in Section 211(c)'s text, structure, or history, California argues that Congress's incorporation of lifecycle analysis in the renewable fuel program under Section 211(o) shows that "the LCFS is precisely the kind of regulation Congress anticipated California would adopt." Cross-Pet. 20–21 (citing 42 U.S.C. § 7475(o)). But Section 211(o), initially enacted in 2005, was first amended to include lifecycle analysis in 2007, some 37 years after Congress enacted Section 211(c)(4)(B) in 1970. See Pub. L. No. 110-140, sec. 201, § 211(o), 121 Stat. 1492, 1519–21 (2007); Pub. L. No. 109-58, sec. 1501(a), § 211(o), 119 Stat. 594, 1067–74 (2005). Not surprisingly, California cites no evidence that Congress in 1970 ever imagined that California would seek to regulate fuels based on the out-of-state GHG emissions associated with their production and transportation, let alone that Congress authorized California systematically to discriminate against out-of-state fuels in an effort to promote and protect local fuel production.

Moreover, that *Congress* has now regulated fuels based on lifecycle analysis under Section 211(o) says nothing about whether *California* may do so under Section 211(c). "The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 423 (1946). Absent clear congressional authorization, California is bound by the restrictions imposed by the Commerce Clause, regardless of the "accura[cy]" of lifecycle analysis. Cross-Pet. 21. And nothing in the 2005 or 2007 amendments to Section 211(o) expanded California's authority under Section 211(c)(4)(B) to supply the missing authorization. As California itself explained below, the 2005 and 2007 amendments "made no changes to California's authority to regulate fuels," and "[i]n fact, neither Act made reference to California's express authority to regulate emissions, nor did it even appear to come up in Congressional debates over either bill." Cal. Mot. to Dismiss 5, *Rocky Mtn. Farmers Union* v. *Goldstene*, No. 1:09-cv-2234 (E.D. Cal. filed Mar. 31, 2010) (Doc. 23-1).

Finally, there is no merit to California's contention that balkanization claims are foreclosed because, by permitting California to enact fuel controls that differ from EPA's, Congress "necessarily also authoriz[ed] *any effect* on the national market that might result from California adopting a different standard." Cross-Pet. 22 (emphasis added). If that were true, then any time Congress exempted state laws from preemption, thereby permitting States to enact laws that differ from federal law, Congress would be deemed to have eliminated or reduced the level of Commerce Clause scrutiny with respect to the state laws' effects on interstate and foreign commerce. That argument is refuted by this Court's clear statement rule, which holds that when Congress enacts mere exemptions from preemption, it does *not* thereby intend to alter Commerce Clause scrutiny.

In sum, Section 211(c)(4)(B) is a standard preemption exemption that simply preserves California's preexisting authority to regulate fuels. Accordingly, while California's legitimate fuel controls are exempt from federal preemption under Section 211(c), they must still "operat[e] within the boundaries marked by the Commerce Clause." *Lewis*, 447 U.S. at 49.

B. The LCFS Does Not Come Within Section 211(c)(4)(B) Because It Is Not A Fuel Control For The Purpose Of Motor Vehicle Emission Control.

Even if Section 211(c)(4)(B) could be construed to lift Commerce Clause restrictions, it still would not save the LCFS because the LCFS does not fall within Section 211(c)(4)(B)'s terms. To come within that provision, a regulation must be "a control or prohibition respecting any fuel or fuel additive," and it must be "for the purpose of motor vehicle emission control." 42 U.S.C. § 7545(c)(4)(B). The challenged portions of the LCFS, which regulate out-of-state commercial activities that have no effect on the fuel's composition or the emissions it generates when combusted in a motor vehicle in California, meet neither condition. Because Section 211(c)(4)(B) by its terms does not apply to the LCFS, California's authorization argument fails. See *Hillside Dairy Inc.* v. *Lyons*, 539 U.S. 59, 66 (2003) (rejecting authorization argument because the challenged laws did not fall within the scope of congressional authorization).

As California has acknowledged, the LCFS does not regulate "any characteristic or component of a fuel or fuel additive." 42 U.S.C. § 7545(c)(4)(A). According to California, the LCFS regulates a fuel's "carbon intensity," which "is not an inherent chemical property of a fuel, but rather it is reflective of the process in making, distributing, and using that fuel." SER15:3700. For example, biofuels with "identical physical and chemical properties" are assigned different carbon-intensity scores reflecting California's evaluation of the different ways in which they are produced and transported to California. See ER10:2360 ("the relevant inquiry with carbon intensity is not so much what is contained in a fuel, but how was that fuel made, distributed and used").[10]

For these very reasons, California maintained in the administrative proceedings that the LCFS is not a motor-vehicle specification, a term used in California law to refer to the "ingredients that comprise a fuel (i.e., the fuel's 'composition')." ER10:2358. California concluded that the requirements for enacting new motor-vehicle specifications did "not apply to the LCFS regulation because the LCFS is not setting a fuel standard." SER15:3640. As California explained, the LCFS "does not establish any motor-vehicle fuel specifications because the LCFS contains no requirements that dictate the exact composition of compliant transportation fuels." SER15:3643. Fuel specifications "share a common characteristic": they are "quantifiable and measurable chemical or physical properties that are intrinsic to the final fuel itself." ER10:2360. By contrast, the LCFS regulates "the process for producing and distributing the product," not "the fuel's actual constituents." *Id.* As a result, California concluded that "fuels that comply with the LCFS will be essentially indistinguishable from comparable fuels that comply with other State and federal regulations," and that the LCFS "does not amend, repeal, modify, or change in any way the ex-

[10] The carbon-intensity score California assigns to ethanol does not reflect the tailpipe emissions from the ethanol's combustion because they are offset by the carbon dioxide that was absorbed by the feedstock crops. ER4:772. Thus, for ethanol, the LCFS regulates *only* the activities associated with the ethanol's production and transportation. The carbon-intensity score for the petroleum portion of gasoline and diesel includes tailpipe emissions, but as California explained below, the LCFS "goes further than the simple regulation of combustion emissions." Cal. SJ Mem. 16, *Rocky Mtn. Farmers Union* v. *Goldstene*, No. 1:09-cv-2234 (E.D. Cal. filed Dec. 17, 2010) (Doc. 138-1).

isting State specifications or other State or federal requirements on motor vehicle fuels." ER10:2361; SER15:3699.

Ignoring its concessions, California now attempts to obscure the issue by asserting that the LCFS regulates "emissions from transportation fuels." Cross-Pet. 20; see also *id.* at 18 (characterizing the LCFS as a "regulation of fuel emissions"). But this linguistic sleight of hand cannot change the reality: The LCFS regulates, among other things, emissions from the generation of electricity used to power Midwest ethanol refineries, emissions from the machinery used to extract crude oil in Canada, and emissions from the clearing of land to plant corn in Nebraska. None of these are "emissions from transportation fuels," *id.* at 20, and they certainly are not "motor vehicle emission[s]" within Section 211(c)(4)(B). While these emissions may be related to the production of fuel ultimately sold in California, "[t]he mere fact that [the LCFS] relate[s] to the sale of [fuel in California] is by no means sufficient to bring [it] within the scope" of Section 211(c)(4)(B). *Hillside Dairy*, 539 U.S. at 66.

Because the LCFS does not control "any characteristic or component" of the fuel itself, 42 U.S.C. § 7545(c)(4)(A), but rather the activities associated with the fuel's production and transportation, and because the LCFS's express purpose is to control emissions from sources other than motor vehicles, Cal. Code Regs. tit. 17, § 95480, the LCFS does not fall within the scope of California's authority to "prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel," 42 U.S.C. § 7545(c)(4)(B). For this independent reason, California's authorization argument is meritless, and its cross-petition should be denied.

II. AFPM'S CHALLENGES TO THE LCFS'S CRUDE-OIL PROVISIONS ARE NOT MOOT.

As California notes, the issue of "mootness is jurisdictional" and therefore "a conditional cross-petition is … not required to preserve mootness arguments concerning the crude oil discrimination claim." Cross-Pet. 17. Accordingly, AFPM's response focuses on the merits of California's mootness argument. As this Court has explained, "'[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013). Under that standard, AFPM's challenges to the LCFS's crude-oil provisions plainly are not moot.

1. AFPM's claim is not moot first and foremost because California assigned credits and deficits under a system that discriminates in favor of high-carbon-intensity California TEOR at the expense of low-carbon-intensity Alaskan crude and imported crudes. It did so by assessing them all an "identical" carbon-intensity score. As the Ninth Circuit acknowledged, "California TEOR was treated favorably compared to out-of-state sources based on a comparison of the fuel's individual carbon intensity." Pet. App. 48a (chart showing that use of single "baseline" average benefits California TEOR while burdening "Alaska light" and "Imported Light"). California's cross-petition confirms this discriminatory treatment by acknowledging that "in 2011 all crude oils received identical carbon intensity values." Cross-Pet. 27 (emphasis omitted).

That discriminatory design has a continuing impact on AFPM's members. As the Ninth Circuit recognized, under the LCFS, "[c]redits awarded" (and deficits incurred) in a given year "carry forward to subsequent years and may be used by a regulated party to comply with the Fuel Standard mandates." Pet. App. 45a n.12 (citing Cal. Code Regs. tit. 17 §§ 95484(b), 95485(c)). Here, "credits" and "deficits" were calculated by California throughout 2011 based on a discriminatory system that benefits California TEOR at the expense of Alaskan light crude and imported light crudes. That discrimination affects more than 75 percent of the California crude-oil market. Apart from conceding that this occurred, Cross-Pet. 13–14, 27, California nowhere addresses this discrimination in arguing that AFPM's claims are moot.

Further, California makes no persuasive argument that the LCFS's 2012 Amendments have any bearing on the LCFS's discrimination in favor of California TEOR at the expense of Alaskan crude and imported light crudes. As explained by the Ninth Circuit, in the 2012 Amendments, California "pursued the same goals with similar logic" so that "[u]nder the new system, all crude oil is assessed the same carbon intensity value, either the average of the California market in the year of sale or the average from 2012, whichever is higher." Pet. App. 21a. As California acknowledged, "[u]nder the proposed approach, increases in [carbon intensity] would be determined and mitigated in the aggregate." SER14:3448 ("Proposed Amendments to the [LCFS], Initial Statement of Reasons"). Under the 2012 Amendments, as before, California TEOR benefits from the application of an industry-wide average that, in turn, continues to burden imported crude oils for which California has calculated lower carbon-intensity values.

California asserts that "[t]he LCFS now assigns *all* crude oils, including *all* California crude oils, their individual carbon intensity values." Cross-Pet. 24. California's argument is highly misleading. Under the 2012 Amendments, California "assigns" individual carbon intensities to all crude oils to allow California to determine a single California industry average. Thereafter, regulated parties are "assessed" a single *average* carbon intensity for all of the crude oils they sold in California, whether or not they used high-carbon-intensity California TEOR or low-carbon-intensity Alaskan crude or imported light crudes. Pet. App. 21a; see SER14:3442–44 (LCSF Amendments, Initial Statement of Reasons, at 34–36) (describing operation of LCFS Amendments).[11]

2. AFPM's challenge to the LCFS's discrimination between California TEOR and "emerging" high-carbon-intensity crudes likewise is not moot. As set forth in AFPM's petition, the LCFS discriminated against "emerging" high-carbon-intensity crudes by excluding them from the "baseline" average assigned to California TEOR. Pet. 6. By design, California TEOR was the only high-carbon-intensity crude oil that received this beneficial treatment. Pet. App. 302a, 304a.

California argues that this claim of discrimination is moot in light of its regulatory advisories and the 2012 Amendments because "[t]he current and opera-

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[11] *Accord* Cal. Opening Br. 84–85, *Rocky Mtn. Farmers Union* v. *Goldstene*, Nos. 12-15131, 12-15135 (9th Cir. filed Jun. 8, 2012) ("Using actual carbon intensities and actual volumes, *ARB will then calculate the aggregate carbon intensity of California's 2012 crude mix*. All refiners will be assigned an incremental deficit if the average carbon intensity for 2012 was higher than that of 2010.") (internal citations omitted; emphasis added); Air Res. Bd., Cal. EPA, *Final Statement of Reasons: Amendments to the Low Carbon Fuel Standard Regulation* 41 (Oct. 2012) (explaining that the 2012 Amendments are "designed to maintain the status quo and limit the potential for shuffling of crude in order to avoid deficits associated with purchasing individual crudes").

tive crude oil provisions no longer involve this distinction" between California TEOR and "emerging out-of-state HCICOs." Cross-Pet. 24–25. That argument does not withstand scrutiny. As this Court has explained, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 132 S. Ct. at 2287; see also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189–90 (2000); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); cf. *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1050 n.6 (9th Cir. 2007) ("We cannot conclude, on the basis of this Advisory Notice alone, that Appellants' case is moot").

California's actions do not render moot AFPM's challenge to the LCFS's discrimination in favor of California TEOR and against "emerging" high-carbon-intensity crudes. As the cross-petition makes clear, since this litigation began, California has modified the LCFS's treatment of crude oils, on repeated occasions, through a series of regulatory advisories issued *after* AFPM challenged the crude-oil provisions in 2010. Cross-Pet. 13–14. Moreover, those advisories are subject to modification by subsequent advisories. Indeed, California's modification of the LCFS's treatment of crude oil sold in California in 2011 has continued into 2013, well *after* the primary conduct had already been completed. *Id.* (describing impact of July 2013 advisory on crude oil sold in California in 2011).

Since that most-recent advisory, the Ninth Circuit has ruled that the LCFS's treatment of California TEOR and "emerging" high-carbon-intensity crude oils from outside California is constitutional. Pet.

App. 50a. Given these events, a ruling that AFPM's challenge is moot would allow California simply to revert to its prior regulatory regime, either through further amendment of the LCFS or through yet another regulatory advisory that modifies the obligations of regulated parties under the LCFS. See *Knox*, 132 S. Ct. at 2287.

CONCLUSION

For these reasons, California's cross-petition should be denied.

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