IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 12-15131

ROCKY MOUNTAIN FARMERS UNION; REDWOOD COUNTY MINNESOTA CORN AND SOYBEAN GROWERS; PENNY NEWMAN GRAIN, INC.; REX NEDEREND; FRESNO COUNTY FARM BUREAU; NISEI FARMERS LEAGUE; CALIFORNIA DAIRY CAMPAIGN; GROWTH ENERGY; RENEWABLE FUELS ASSOCIATION; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, FKA National Petrochemical & Refiners Association; AMERICAN TRUCKINGS ASSOCIATIONS; CENTER FOR NORTH AMERICAN ENERGY SECURITY; THE CONSUMER ENERGY ALLIANCE,

Plaintiffs - Appellees,

v.

JAMES N. GOLDSTENE, in his official capacity as Executive Officer of the California Air Resources Board; MARY D. NICHOLS; DANIEL SPERLING; KEN YEAGER; DORENE D'ADAMO; BARBARA RIORDAN; JOHN R. BALMES; LYDIA H. KENNARD; SANDRA BERG; RON ROBERTS; JOHN G. TELLES, in his official capacity as member of the California Air Resources Board; RONALD O. LOVERIDGE, in his official capacity as member of the California Air Resources Board; EDMUND G. BROWN, Jr., in his official capacity as Governor of the State of California; KAMALA D. HARRIS, Attorney General, in her official capacity as Attorney General of the State of California,

Defendants - Appellants,

ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; CONSERVATION LAW FOUNDATION,

Intervenor-Defendants - Appellants.

Continued…

No. 12-15135

ROCKY MOUNTAIN FARMERS UNION; REDWOOD COUNTY MINNESOTA CORN AND SOYBEAN GROWERS; PENNY NEWMAN GRAIN, INC.; REX NEDEREND; FRESNO COUNTY FARM BUREAU; NISEI FARMERS LEAGUE; CALIFORNIA DAIRY CAMPAIGN; GROWTH ENERGY; RENEWABLE FUELS ASSOCIATION; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, FKA National Petrochemical & Refiners Association; AMERICAN TRUCKINGS ASSOCIATIONS; CENTER FOR NORTH AMERICAN ENERGY SECURITY; THE CONSUMER ENERGY ALLIANCE,

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Defendants - Appellants,

ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; CONSERVATION LAW FOUNDATION,

Intervenor-Defendants - Appellants.

BRIEF OF THE STATES OF OREGON, MARYLAND, MASSACHUSETTS, NEW YORK, RHODE ISLAND, VERMONT AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANTS

Appeal from the United States District Court
for the District of Oregon

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BRIEF OF THE STATES OF OREGON, MARYLAND, MASSACHUSETTS, NEW YORK, RHODE ISLAND, VERMONT AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTERESTS OF THE AMICI STATES

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the State of Oregon, joined by the States of Maryland, Massachusetts, New York, Rhode Island, Vermont, and Washington ("Amici States"), submit this brief as amici curiae in support of the appellants, members of the California Air Resources Board ("CARB"), who appeal the district court's rulings that (1) California's low carbon fuel standard ("LCFS") violates the dormant Commerce Clause; and (2) California should be preliminarily enjoined from enforcing the LCFS during the pendency of this litigation. The district court's rulings are of concern to Amici States because low carbon fuel standards such as California's are an important means of reducing greenhouse gas emissions that contribute to climate change. And there is no question that climate change threatens the health, safety and welfare of Amici States' citizens.

In the Pacific Northwest, states are highly dependent on water stored in snowpack to maintain stream flow throughout the summer, and snowpack has already declined substantially throughout the region due to climate change. U.S. ENVTL. PROTECTION AGENCY (EPA), *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases Under*

Section 202(a) of Clean Air Act 150-51 (2009).[1] Rising sea levels will also increase coastal erosion and beach loss in the Northwest. *See id*. at 151. In addition, "the risk of forest fires has risen as the region has experienced higher summer temperatures, earlier spring snowmelt, and increased summer moisture deficits * * *" *Id*. And when air temperature exceeds key thresholds at the end of this century, the Northwest's salmon and other cold-water fish will lose approximately one-third of their current habitat, further threatening their continued existence. *See id*.

The Northeast will also experience "reduced snowpack in the mountains, earlier breakup of winter ice on lakes and rivers, and earlier spring snowmelt resulting in earlier peak river flows." *Id*. at 142. The densely populated nature of the Northeast's shore lands make them particularly vulnerable to damage, such as loss of coastal structures and residences, wetlands, and beaches, from rising sea levels and stronger and more frequent storm surges and coastal flooding. *See id*. Also alarming is the fact that scientists project that the likelihood of the occurrence of a coastal flood in New York City will increase from a once-in-a-century event (also known as a one-hundred-year flood) to

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[1] *Available at* http://www.epa.gov/climatechange/endangerment/downloads/Endangerment%20TSD.pdf (last visited June 13, 2012).

once every ten to twenty-two years by the end of this century. *Id*. Heat waves, which have a disproportionate impact on children, the elderly, and the economically disadvantaged but which are currently rare in the Northeast, are likely to become more commonplace. *Id*. Climate change will also adversely impact businesses throughout the Northeast. For example, maple sugar businesses are threatened by the fact that "maple-beech-birch forests of the Northeast are projected to shift dramatically northward as temperatures rise." *Id*.

The federal government has been slow to confront climate change. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (ordering a reluctant EPA to determine whether greenhouse gases cause or contribute to climate change). As a result, it has fallen to the states to take the lead. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

California has often taken the lead on climate change, including adopting its LCFS as a strategy to reduce greenhouse gas emissions from transportation fuels sold and distributed within California. California, however, is not alone in

its efforts to reduce greenhouse gas emissions through an LCFS. In 2009, for example, the Oregon Legislature granted authority to the Environmental Quality Commission (EQC) to adopt rules setting an LCFS for gasoline, diesel, and gas/diesel substitutes. House Bill 2186, 2009 Oregon Laws Ch. 754, § 6(2)(a). The Oregon Legislature specifically allowed the EQC to include in the standard the emissions attributable to fuels throughout their lifecycle, "including but not limited to emissions from the production, storage, transportation and combustion of the fuels and from changes in land use associated with the fuels." 2009 Oregon Laws Ch. 754, §6(2)(b)(B). And, on April 17, 2012, Oregon's governor directed the Oregon Department of Environmental Quality to propose a regulation adopting an LCFS by the end of this year.

Likewise, agencies in the State of Washington, in response to legislative and gubernatorial direction, have recently developed an Integrated Climate Change Response Strategy. The governor also directed the Washington Department of Ecology (WDOE) to study and make recommendations regarding the adoption of a low carbon fuel strategy. Executive Order 09-05. WDOE issued its report in February 2011, outlining a variety of strategies involving the use of renewable fuels. *See generally* DEP'T OF ECOLOGY, STATE

OF WASHINGTON, A LOW CARBON FUEL STANDARD IN WASHINGTON: INFORMING THE DECISION (2011).[2]

States on the East Coast—including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont— are examining the use of a clean fuel standard similar to California's LCFS to reduce emissions from the transportation sector.[3] In August 2011, the Northeast States for Coordinated Air Use Management produced a report, *Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region*, as a step in the process of considering and designing an LCFS.[4]

The Amici States thus have a strong interest in the outcome of this case, as well as interest in and knowledge about the subject matter.

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[2] *Available at* http://www.ecy.wa.gov/ climatechange/docs/ fuelstandards _finalreport_02182011.pdf (last visited June 14, 2012).

[3] Memorandum of Understanding on Northeast and Mid-Atlantic Low Carbon Fuel Standard (Dec. 29, 2009), *available at* http://www.nescaum.org/ documents/lcfs-mou-govs-final.pdf/ (last visited June 14, 2012).

[4] *See* http://www.nescaum.org/topics/clean-fuels-standard (last visited June 13, 2012).

SUMMARY OF ARGUMENT

The district court erred when it invalidated the LCFS as a violation of the Dormant Commerce Clause. Contrary to the district court's reasoning, the LCFS is not facially discriminatory because its underlying methodology for calculating lifecycle greenhouse gas emissions looks to location-neutral indicators of emissions, without regard to whether those indicators relate to in-state or out-of-state facts. Although the LCFS regulation uses some regional identifiers, those identifiers are merely shorthand for a more detailed technical analysis that is based on nondiscriminatory factors. The district court's failure to look behind these identifiers improperly elevated the nomenclature used by the LCFS regulation over its underlying substance.

The district court likewise erred by finding that the LCFS had an impermissible extraterritorial effect. The court at no point identified any mechanism by which out-of-state fuel producers or other entities would be compelled to change their behavior in response to California's domestic regulation of transportation fuel. Instead, the court's ruling was based on the supposition that out-of-state entities might feel some incentive to conform their business practices based on the LCFS. But the Dormant Commerce Clause does not prohibit such upstream incentives; instead, it bars only extraterritorial *control* of activities beyond a State's jurisdiction. The district court's

expansion of this doctrine improperly hobbles the states' critical efforts to address the devastating impacts of climate change by considering *all* emissions associated with transportation fuels and other substances.

The district court also erred in granting a preliminary injunction based on plaintiffs' claim that the LCFS is preempted by Section 211(o) of the Clean Air Act. The court failed to explain the basis for its conclusion that plaintiffs' preemption claim raised "serious questions"—indeed, the court elsewhere explicitly declined to evaluate the merits of the plaintiffs' claim due to serious questions about the applicable standard of review. As a result, rather than reaching the preemption argument in the current procedural posture, this Court should vacate the preliminary injunction to the extent that it is based on preemption. If the Court does reach the merits of the preemption ruling, however, it should find that the LCFS is not preempted because Congress has made clear that states remain free to regulate air pollution from transportation fuel above and beyond the requirements of the Clean Air Act.

ARGUMENT

A. California's LCFS Does Not Violate the Dormant Commerce Clause.

1. The LCFS is not facially discriminatory.

The district court erred when it determined that California's LCFS violates the Dormant Commerce Clause by facially discriminating between in-state and out-of-state fuel. (C.R. 259, *Order on RMFU Plaintiffs' Summary*

Adjudication Motion; E.R. 0063).[5] The court's analysis misconstrued both the substance and the purpose of the LCFS. Properly construed, the LCFS does not discriminate based on the in-state or out-of-state origins of fuel; instead, it applies a location-neutral methodology to compare the overall level of emissions associated with the production and use of particular fuel types. Accordingly, the LCFS need only satisfy the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and not, as the district court held, the much more stringent standard of strict scrutiny.

At issue in this appeal is the LCFS's assignment of different carbon intensity scores to different types of fuel, based on a lifecycle assessment of each fuel type's greenhouse gas ("GHG") emissions. The calculation of carbon intensity scores "uses the California-modified GREET (CA-GREET) model." 17 Cal. Code of Regulations § 95486(b)(1). That model determines, for each of a long list of fuel types, a score that reflects an aggregate summary of the quantity of GHGs emitted at every stage of that fuel's lifecycle—from the planting and growth of the feedstock that goes into biofuels such as ethanol, to the use of that fuel by California consumers. *See id.* 17 Cal. Code of Regulations § 95481(a)(28).

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[5] All references to the Excerpt of Record are to the excerpt filed by appellants. The Amici States do not submit a separate excerpt.

The components of the carbon intensity scores calculated by the CA-GREET model do not distinguish between in-state and out-of-state fuel producers. For instance, one of the most significant components for biofuels such as ethanol is based on the GHG emissions associated with the planting, growth, and harvesting of the underlying feedstock (*i.e.*, corn) that is later processed into fuel (*i.e.*, ethanol). But the CA-GREET model does not assign different scores based upon *where* the feedstock is grown. Rather, the model relies on location-neutral factors about the agricultural methods applied to produce the feedstock, and each method results in the same carbon intensity score regardless of whether the model is used in California or Nebraska—or, for that matter, Brazil. Likewise, the CA-GREET model includes an assessment of the GHGs emitted when the feedstock is processed into finished fuel. That assessment is based not on whether that processing occurs inside or outside of California, but rather on differences in the power sources and efficiencies of fuel processing plants.

As California has pointed out, the nondiscriminatory nature of CA-GREET's underlying methodology is demonstrated by the fact that the model assigns *better* scores to certain factors that only out-of-state producers can satisfy. (App. Br. 50 – 51). Brazilian sugarcane, for example, has a considerably lower carbon intensity score than any California or Midwest

feedstock, thereby giving Brazilian sugarcane producers an advantage over domestic California producers. (App. Br. 55.) Likewise, under Methods 2A and 2B, the California Air Resources Board has granted the applications of multiple Midwest ethanol producers for custom carbon intensity scores, based on their particular circumstances, that are lower than the default scores assigned to California-produced fuel. (App. Br. 51) These examples of the CA-GREET model's favorable treatment of out-of-state entities are not happenstance, nor are they merely isolated exceptions from an otherwise discriminatory scheme. Rather, these examples demonstrate that CA-GREET's underlying lifecycle methodology relies on nondiscriminatory factors that do not systematically "favor in-state actors over out-of-state actors." *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007).

The district court's conclusion that the LCFS facially discriminates rested on two crucial misunderstandings of the underlying CA-GREET model. First, the court misinterpreted certain regional identifiers in the LCFS regulations as dispositive proof of facial discrimination, when in fact those identifiers are merely shorthand for an underlying substantive analysis based on nondiscriminatory factors. Second, the district court incorrectly found that the CA-GREET model's weighting of transportation emissions discriminated against out-of-state fuel producers, when in fact that component of the carbon

intensity score *favors* Midwest producers over California producers—precisely because it is based on nondiscriminatory factors, rather than state of origin.

Table 6 of LCFS, 17 Cal. Code of Regulations § 95486 assigns lower carbon intensity scores to certain "California" ethanol fuel pathways than it does to analogous "Midwest" pathways. The district court found that this disparity "discriminates on the basis of origin." (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0059). But in fact the disparity is attributable not to state of origin, but rather to significant differences in the efficiency of the power plants used by California and Midwest ethanol producers and the fuel sources of the power plants supplying electricity to those producers. Because California ethanol production plants tend to be newer and thus more efficient than Midwest plants, and because a higher proportion of power plants providing power to California ethanol producers use natural gas rather than coal (C.R. 151, *Declaration of Michael Scheible*, ¶ 47 n.20, E.R. 0778), the CA-GREET model assigns a lower GHG emissions score to that part of the lifecycle of California ethanol. (C.R. 151, *Scheible Dec.*, ¶ 43 tbl 1, E.R. 0777). But that disparity results from substantive differences in how ethanol plants in California and the Midwest are operated, "not from the location of their activities." *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury*, 490 U.S. 66, 78 (1989). Moreover, those scores are based on

the average California and Midwest ethanol producers, and a Midwest plant that is more efficient or uses a different power source than the average plant may apply for an individualized score—as many Midwest producers have. (C.R. 151, *Scheible Dec*. ¶¶ 50, 58, E.R. 0779, 0780 – 0781).

Similarly, the district court found facial discrimination because the CA-GREET model considers the distance that fuel is transported in calculating the carbon intensity score. (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0060). Transportation constitutes only a fraction (less than ten percent) of each fuel type's overall score. (C.R. 151, *Scheible Dec.*, p 14, table 1 and ¶ 45, E.R. 0777 – 0778.) But even as to that small fraction, CA-GREET's assessment of GHG emissions from fuel transportation does not discriminate against out-of-state interests. As relevant here, the CA-GREET model considers two transportation-related components. One component—the GHG emissions from transporting corn to the fuel processing plant—*favors* Midwest ethanol producers by assigning a higher score to California producers, reflecting the fact that corn is primarily grown in the Midwest and must travel further before it can be processed by California plants (C.R. 151, *Scheible Dec.*, ¶ 45, E.R. 0777 – 0778). The advantage that Midwest producers have on this factor—a 4.6 gCO2e/MJ differential over California producers—significantly exceeds the mild benefit that California producers get

from the second transportation-related component—1.3 gCO2e/MJ to reflect the emissions from transporting the finished fuel to California consumers. Thus, contrary to the district court's conclusion, CA-GREET's assessment of GHG emissions on fuel transportation does not in the aggregate provide "differential treatment of in-state and out-of-state economic interests that *benefits* the former and *burdens* the latter." *Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) (emphasis added).

At base, the district court's holding that the LCFS violates the Dormant Commerce Clause rested on the incorrect assumption that an otherwise location-neutral fact (*e.g.*, the relative efficiency of power plants) *becomes* discriminatory simply because it correlates with a particular geographic region. But the Commerce Clause does not forbid evenhanded laws that happen to affect out-of-state interests unequally—so long as those laws are based on factors other than the in-state or out-of-state character of the interests being regulated. Properly understood, the CA-GREET model underlying California's LCFS regulation satisfies this standard.

2. The LCFS does not regulate extraterritorially.

The district court also erred when it concluded that the CA-GREET model's consideration of certain out-of-state facts constituted extraterritorial

regulation. The Dormant "Commerce Clause prohibits state legislation regulating commerce that takes place wholly outside of the state's borders." *Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011). But a state law regulates extraterritorially only "when it *necessarily* requires out-of-state commerce to be conducted according to in-state terms." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (emphasis added). Thus, a state law may not expressly require that out-of-state prices conform to in-state prices. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 520 (1935). Nor may a state law have the "practical effect" of controlling out-of-state prices by interacting with neighboring states' laws in a manner that induces regulatory "gridlock" throughout the region. *Healy v. Beer Inst.*, 491 U.S. 324, 340, 342 (1989).

The CA-GREET model imposes no such extraterritorial effects. Instead, the LCFS uses the CA-GREET model solely to regulate California entities' domestic fuel use. And the model considers out-of-state factors only to determine a portion of each fuel type's overall carbon intensity score. Contrary to the district court's reasoning, CA-GREET's mere *consideration* of out-of-state facts does not dictate out-of-state prices or other behavior. In contrast to *Healy*, the district court identified no mechanism—whether through regulatory gridlock or otherwise—by which use of the CA-GREET model would

necessarily cause corresponding changes in farming practices, fuel storage, power plant efficiency or fuel source, or any of the other inputs that the model uses to calculate the overall carbon intensity score for a given fuel. To the contrary, because the LCFS only tracks the *average* carbon intensity of the fuel used by regulated entities in California across an entire calendar year, no out-of-state fuel producer—whatever the carbon intensity score of its product—is categorically required to do anything to maintain its access to the California markets.

At most, the CA-GREET model's weighing of certain facts *may* incentivize certain out-of-state fuel producers to reduce their overall GHG emissions, through whatever methods they see fit. But such incentives would be present even under the alternative regulations of ethanol that the district court acknowledged—and plaintiffs conceded—would not offend the Dormant Commerce Clause. (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0068). And it is well-established that such upstream, out-of-state effects of domestic regulation are insufficient to invalidate a state law—even with respect to prices, *see Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220-21 (2d Cir. 2004), let alone the vaguer and less restrictive incentives purportedly created by CA-GREET's methodology. *See Healy*, 491 U.S. at 345 (Scalia, J., concurring in part and concurring in the judgment)

(warning that "Commerce Clause jurisprudence" should not "degenerate into disputes over degrees of economic effect").

The district court's extraterritoriality ruling unjustifiably impedes the states' ability to address the serious consequences of GHG emissions on the public health, safety, and the environment within their borders. Each State "retains broad regulatory authority to protect the health and safety of its citizens," *Maine v. Taylor*, 477 U.S. 131, 151 (1986), even if its regulations have some "incidental burdens on interstate commerce," *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *see also Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) ("there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it"). And "[t]he protection of our environment has repeatedly been recognized" as a crucial component of the states' undisputed interest in protecting its own citizens. *Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1181 (9th Cir. 2011).

The Supreme Court recognized in *Massachusetts v. EPA* that the dangers of climate change due to GHG emissions are both "widely shared" and specifically felt—in rising sea levels, irreversible changes in natural ecosystems, more intense and damaging storms, and the wider and faster spread

of diseases. 549 U.S. 497, 522 (2007). This Court has also acknowledged the "ample evidence that there is a causal connection between man-made greenhouse gas emissions and global warming." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011). And the Governor of California has expressly recognized that "greenhouse gas emissions pose a serious threat to the health of California's citizens and the quality of the environment." California Executive Order S-01-07 (Jan. 18, 2007).

In enacting and implementing the LCFS, California has made the policy determination that effectively addressing the harmful consequences of GHG emissions from the use of transportation fuels in California must take into account *all* components of a fuel's lifecycle. Even the district court acknowledged that the CA-GREET model's "lifecycle analysis is a widely-accepted approach nationally and internationally to reduce GHG emissions." (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0068). But the district court nonetheless held that neither California, nor by implication any other State, could use this widely respected scientific method to address GHG emissions. Indeed, the district court's ruling on extraterritoriality requires the states to *ignore* any facts regarding the out-of-state history of fuel used within their borders—even if those facts are indisputably tied to greater GHG emissions. The Dormant Commerce Clause's prohibition against

extraterritorial pricing regulations promotes market competition in favor of lower prices by permitting out-of-state businesses to use their competitive advantages to attract in-state consumers. *See Baldwin*, 294 U.S. at 522. But a rule requiring the states to entirely ignore nondiscriminatory factors associated with out-of-state GHG emissions would promote only less efficient energy use, higher levels of emissions, and the swifter approach of the "harms associated with climate change"—harms that are "serious and well recognized" as costly and deadly. *Massachusetts*, 549 U.S. at 521. The Dormant Commerce Clause does not require such a result.

B. The District Court Improperly Based Its Preliminary Injunction in Part on "Serious Questions" about Plaintiffs' Preemption Claim.

1. The district court failed to explain how plaintiffs' preemption claim supported the preliminary injunction.

The district court declined to rule for either side on the merits of plaintiffs' preemption claim because it found that the parties had not properly discussed the standard of review that the court should apply to that claim. (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0080). The court nonetheless based its preliminary injunction in part on its unexplained, one-line assertion that "the Rocky Mountain Plaintiffs' preemption claim raises 'serious questions' as to whether the LCFS conflicts with Section 211(o) of the Clean Air Act." (C.R. 259, *Order on RMFU*

Plaintiffs' Summary Adjudication Motion; E.R. 0081). The court's conclusory and internally inconsistent analysis is inadequate to justify the "extraordinary and drastic remedy" of a preliminary injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

A district court may grant a preliminary injunction only upon "a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To ensure that this stringent standard is met, Rule 52(a)(2) of the Federal Rules of Civil Procedure requires a district court to state the conclusions supporting a decision to grant preliminary relief. This Court has made it clear that this requirement is essential to "help the parties understand the reasons for the decision and to facilitate meaningful appellate review." *Diouf v. Mukasey*, 542 F.3d 1222, 1235 n.7 (9th Cir. 2008); *see also Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943).

The district court's decision to impose a preliminary injunction based on plaintiffs' preemption claim fell far short of Rule 52(a)(2)'s mandate. Again, the court stated only that plaintiffs had raised "'serious questions'" about preemption, (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0081), but did not explain what those "serious questions" were. Instead, the court declined to reach the merits of the preemption claim because

"no party ha[d] addressed the appropriate standard of review for this preemption challenge." (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0080; *see also* E.R. at 0078, explaining that the court had to determine whether the LCFS is "a single, unseverable provision" before considering plaintiffs' preemption challenge, and that the parties had not addressed that question).

In the absence of an explanation for the district court's statement that plaintiffs' preemption claim raises "serious questions," and given the court's express refusal to consider the merits of that claim, there was no basis for the drastic remedy of a preliminary injunction on the basis of preemption. As a result, if this Court vacates the district's court's ruling on the Dormant Commerce Clause, it should vacate the preliminary injunction. *See Gordon v. Holder*, 632 F.3d 722, 725-26 (D.C. Cir. 2011).

2. California's LCFS Is Not Preempted by Section 211(o).

If the Court reaches the issue of preemption claim, the Court should determine that Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), does not preempt the LCFS. Preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d at 665 (9th Cir. 2003). (quoting *Rice v. Santa Fe*

Elevator Corp., 331 U.S. 218, 230 (1947)); *see also Wyeth v. Levine*, 555 U.S. 555, 565, n. 3 (2009). Because there is no question that the regulation of air pollution is within California's police powers, *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000); *Oxygenated Fuels*, 331 F.3d at 673, the LCFS can be preempted by Section 211(o) only if there was clear and manifest congressional intent to preempt. There was not.

The relevant language of both the Clean Air Act and the Energy Independence and Security Act ("EISA"), which added Section 211(o) to the Clean Air Act, demonstrates that Congress intended to preserve, not preempt, the states' traditional authority to regulate air pollution. Even in the absence of that clear evidence of Congress's intent, the LCFS would not be preempted because it is consistent with the purposes of Section 211(o).

a. Both the Clean Air Act and the EISA preserve the authority of states to establish air pollution controls.

The best evidence of "the clear and manifest intent of Congress" to preempt is the language of the relevant federal statute. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002). The Clean Air Act recognizes the preeminent role that the states play in environmental protection and regulation of air quality. In particular, the general savings clause in Section 116 of the Act, 42 U.S.C. § 7416, provides that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce

(1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." This Court has recognized the "sweeping" nature of this preservation of state authority. *Exxon Mobil Corp v. U.S. E.P.A.*, 217 F.3d 1246, 1255 (9th Cir 2000).

Notwithstanding the explicit preservation of state authority in Section 116, plaintiffs argue that California's LCFS is preempted because it "stands as an obstacle to the accomplishment of the full purposes and objectives" of Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o). (C.R. 259, *Order on RMFU Plaintiffs' Summary Adjudication Motion*; E.R. 0069, setting out plaintiffs' position). But Section 211(o)—which was added to the Clean Air Act in 2007 by the EISA and directs EPA, among other things, to promulgate regulations requiring new renewable fuel facilities to reduce lifecycle GHG emissions—is itself subject to a specific savings clause. Section 204(b) of the EISA provides:

> Except as provided in section 211(o)(12) of the Clean Air Act, nothing in the amendments made by this title to section 211(o) of the Clean Air Act shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation.[6]

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[6] Section 211(o)(12) provides that Section 211 shall not be construed to "expand or limit regulatory authority regarding carbon dioxide or other greenhouse gases." 42 U.S.C. § 7545(o)(12). By its terms, that provision

Footnote continued…

Pub.L. No. 110-140, §204(b), 121 Stat. 1492, 1529, § 204(b) (codified at 42 U.S.C. § 7545 note). Thus, contrary to plaintiffs' argument, Section 211(o) preserves rather than preempts the traditional authority of states to regulate renewable fuels.

b. California's LCFS does not conflict with the purposes of Section 211(o).

The district court ruled that it could consider plaintiffs' preemption claim—notwithstanding the savings clauses in Section 116 of the Clean Air Act and Section 204(b) of the EISA—based on *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000). (C.R. 258, *Order on Defendants' Summary Judgment Motion*, E.R. 0105). In *Geier*, the Supreme Court determined that a savings clause preserving state tort claims "does *not* bar the ordinary working of conflict pre-emption principles" in light of an express preemption provision that mandated "a single, uniform set of federal safety standards" for motor vehicles. 529 U.S. at 869, 871. Here, by contrast, the EISA does not include a similar provision mandating a uniform federal rule for regulating lifecycle GHG emissions—to the contrary, section 204(b) of the

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(…continued)
does not limit the authority of States to control the greenhouse-gas emissions of transportation fuel.

EISA expressly recognizes the states' ability to enact even "more environmentally protective" measures.

As *Geier* explained, the National Traffic and Motor Vehicle Safety Act *expressly* preempted states from establishing any motor vehicle safety standards that differed from federal standards. *Id*. at 867. But the Act also included a savings clause indicating that compliance with a federal standard would not exempt anyone from liability under common law. *Id*. at 866, 867-68. The Court found that "[t]he two provisions, read together," supported "the application of ordinary conflict pre-emption principles" to determine whether the federal Act preempted a lawsuit against an automobile manufacturer for failing to install an airbag that the federal agency had deliberately not required. *Id*. at 870-71. The Court concluded that the lawsuit was preempted because it "actually conflict[ed]" with the federal agency's deliberate decision to impose more flexible federal airbag requirements, which were intended to "bring about a mix of different devices introduced gradually over time." *Id*. at 874, 875. Thus, the state common law action was preempted in *Geier* because the federal Act's text reflected Congress's clear intent to maintain uniform federal safety standards, and the state tort action "stood as an 'obstacle' to the accomplishment of [that] significant regulatory objective." *Williamson v. Mazda Motor of America*, 131 S. Ct. 1131, 1136 (2011).

In contrast to the National Traffic and Motor Vehicle Safety Act, the Clean Air Act does not reflect a similar congressional intent demanding the maintenance of an exclusive federal rule governing air pollution from transportation fuel. Indeed, the Clean Air Act does not include an express preemption provision that "reflects [Congress's] desire to subject the industry" to uniform federal standards. *Geier*, 529 U.S. at 871. Moreover, unlike in *Geier*, where the savings clause preserved only common law liability, both Section 116 of the Clean Air Act and Section 204(b) of the EISA broadly preserve the pre-existing authority of states to regulate. Thus, contrary to the district court's reasoning, *Geier* does not support the application of conflict preemption principles to California's LCFS regulation.

Even if conflict preemption analysis were appropriate, there would be no preemption here. Plaintiffs claim that the LCFS conflicts with the purposes of Section 211(o) because the LCFS considers the lifecycle GHG emissions of corn ethanol that is produced at existing corn ethanol facilities, while Section 211(o)(2)(A)(i) exempts those facilities from lifecycle GHG requirements. But existing facilities are not entirely exempt from Section 211(o)(2)(A)(i), because EPA has interpreted that provision to exempt only the "baseline volume" of existing facilities as it existed when the EISA was enacted in 2007. 75 Fed. Reg. 14,670, 14,690 (Mar. 26, 2010). If an existing facility subsequently

expands its capacity, its additional capacity is subject to Section 211(o)'s lifecyle GHG reduction requirements. *Id.* Thus, Section 211(o) regulates new facilities and *some* existing facilities, while California's LCFS applies to all corn ethanol sold in California regardless of whether it was manufactured at a new or existing facility. And, as the Supreme Court has made clear, courts must not "seek[] out conflicts between state and federal regulation where none clearly exists." *English v. General Electric Co.*, 496 U.S. 72, 90 (1990) (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)).

The LCFS's imposition of lifecycle GHG requirements on all corn ethanol is wholly consistent with the purposes of Section 211(o). Congress clearly believed that reducing lifecycle GHG emissions advanced the purposes of the EISA because it required those reductions for any additional capacity over a facility's baseline volume, and there is no reason why the incentive provided by the LCFS to reduce lifecycle emissions from the existing capacity of facilities would not serve the same purposes. While Congress chose to impose less burdensome requirements on existing facilities, as it does elsewhere in the Clean Air Act, *see, e.g.*, 42 U.S.C. §§ 7475(a), 7479(2)(C) (applying "prevention of significant deterioration" requirements only to new "major" stationary sources and modifications to major stationary sources.), that choice certainly cannot be said to be "a *significant objective* of the" EISA.

Williamson, 131 S. Ct. at 1136. Accordingly, the stature of that subsidiary choice should not be elevated into a statutory purpose that prevents states from imposing requirements that affect those facilities.

CONCLUSION

This court should reverse the judgments of the district court in favor of plaintiffs, vacate the preliminary injunction, and remand this matter to the district court for further proceedings consistent with that disposition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 5,698 words.

DATED: June 15, 2012

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN FARMERS UNION; REDWOOD COUNTY MINNESOTA CORN AND SOYBEAN GROWERS; PENNY NEWMAN GRAIN, INC.; REX NEDEREND; FRESNO COUNTY FARM BUREAU; NISEI FARMERS LEAGUE; CALIFORNIA DAIRY CAMPAIGN; GROWTH ENERGY; RENEWABLE FUELS ASSOCIATION; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, FKA National Petrochemical & Refiners Association; AMERICAN TRUCKINGS ASSOCIATIONS; CENTER FOR NORTH AMERICAN ENERGY SECURITY; THE CONSUMER ENERGY ALLIANCE,

Plaintiffs - Appellees,

v.

Continued…

U.S.C.A. No. 12-15135

JAMES N. GOLDSTENE, in his official capacity as Executive Officer of the California Air Resources Board; MARY D. NICHOLS; DANIEL SPERLING; KEN YEAGER; DORENE D'ADAMO; BARBARA RIORDAN; JOHN R. BALMES; LYDIA H. KENNARD; SANDRA BERG; RON ROBERTS; JOHN G. TELLES, in his official capacity as member of the California Air Resources Board; RONALD O. LOVERIDGE, in his official capacity as member of the California Air Resources Board; EDMUND G. BROWN, Jr., in his official capacity as Governor of the State of California; KAMALA D. HARRIS, Attorney General, in her official capacity as Attorney General of the State of California,

Defendants - Appellants,

ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; CONSERVATION LAW FOUNDATION,

Intervenor-Defendants – Appellants.

ROCKY MOUNTAIN FARMERS UNION; REDWOOD COUNTY MINNESOTA CORN AND SOYBEAN GROWERS; PENNY NEWMAN GRAIN, INC.; REX NEDEREND; FRESNO COUNTY FARM BUREAU; NISEI FARMERS LEAGUE; CALIFORNIA DAIRY CAMPAIGN; GROWTH ENERGY; RENEWABLE FUELS ASSOCIATION;

Continued…

U.S.C.A. No. 12-15131

STATEMENT OF RELATED CASES

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, FKA National Petrochemical & Refiners Association; AMERICAN TRUCKINGS ASSOCIATIONS; CENTER FOR NORTH AMERICAN ENERGY SECURITY; THE CONSUMER ENERGY ALLIANCE,

Plaintiffs – Appellees

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JAMES N. GOLDSTENE, in his official capacity as Executive Officer of the California Air Resources Board; MARY D. NICHOLS; DANIEL SPERLING; KEN YEAGER; DORENE D'ADAMO; BARBARA RIORDAN; JOHN R. BALMES; LYDIA H. KENNARD; SANDRA BERG; RON ROBERTS; JOHN G. TELLES, in his official capacity as member of the California Air Resources Board; RONALD O. LOVERIDGE, in his official capacity as member of the California Air Resources Board; EDMUND G. BROWN, Jr., in his official capacity as Governor of the State of California; KAMALA D. HARRIS, Attorney General, in her official capacity as Attorney General of the State of California,

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ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; CONSERVATION LAW FOUNDATION,

Intervenor-Defendants – Appellants.

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for amicus party State of Oregon, certifies that she has no knowledge of any related cases pending in this court.

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, I directed the Amicus Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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