

No. 18-

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IN THE  
**Supreme Court of the United States**

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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,  
ET AL.,

*Petitioners,*

v.

JANE O'KEEFFE, ET AL.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the Oregon Fuel Program—which restricts transportation fuel imports based upon a “life-cycle analysis” that regulates the manner in which the fuels are produced and transported in interstate and foreign commerce—is an impermissible extraterritorial regulation that violates the United States Constitution.

2. Whether the Oregon Fuel Program—which is designed to require and has the effect of requiring out-of-state competitors to subsidize in-state producers—violates the Commerce Clause.

## **PARTIES TO THE PROCEEDINGS**

Petitioners, American Fuel & Petrochemical Manufacturers (“AFPM”), American Trucking Associations, Inc. (“ATA”), and Consumer Energy Alliance (“CEA”), were the plaintiffs-appellants below.

Respondents, Jane O’Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, Melinda Eden, Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, and Sue Langston, in their official capacities as officers and employees of the Oregon Department of Environmental Quality, Ellen F. Rosenblum, in her official capacity as Attorney General of the State of Oregon, and Kate Brown, in her official capacity as Governor of the State of Oregon, were the defendants-appellees below.

Respondents, California Air Resources Board, State of Washington, Oregon Environmental Council, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Climate Solutions, were the intervenor-defendants-appellees below.

## **RULE 29.6 STATEMENT**

AFPM is a national trade association. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in AFPM. ATA is a national trade association. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in ATA. CEA is a national trade association of more than 400,000 individual members. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in CEA.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners American Fuel & Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance (collectively, “AFPM”), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The Ninth Circuit’s opinion is reported at 903 F.3d 903 (9th Cir. 2018), and is reproduced at Petition Appendix (“Pet. App.”) 1a–27a. The district court’s opinion is reported at 134 F. Supp. 3d 1270 (D. Or. 2015), and is reproduced at Pet. App. 28a–60a.

### **JURISDICTION**

The Ninth Circuit entered its judgment on September 7, 2018. On November 15, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 7, 2019. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND REGULATORY PROVISIONS**

The Commerce Clause provides that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Relevant

provisions of Oregon’s Clean Fuel Program, Or. Admin. R. 340-253-0000, *et seq.* (2015), are reproduced at Pet. App. 61a-114a.<sup>1</sup>

## INTRODUCTION

The Oregon Clean Fuel Program (the “Fuel Program”) is designed to restructure the market for transportation fuels in Oregon by regulating the manner in which such fuels are extracted, produced and transported in interstate and foreign commerce.

The Fuel Program is modeled on the California Low Carbon Fuel Standard (“LCFS”), which the Ninth Circuit has described as the vehicle through which California “has essentially assumed legal and political responsibility for emissions of carbon resulting from the production and transport, regardless of location, of transportation fuels actually used in California.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1105–06 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014). Like the LCFS, the Fuel Program subsidizes the development of an in-state transportation fuel industry by imposing burdens on competing imported fuels. The Fuel Program applies a “life-cycle” analysis that restricts imports of transportation fuels based on where (and how) they are produced and transported in interstate and foreign commerce.

Petitioners seek review of the Ninth Circuit’s decision rejecting their constitutional challenges to the Fuel Program. Review should be granted because the

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<sup>1</sup> The Petition Appendix contains relevant portions of the January 2015 version of the Oregon Program, which was the version in effect when the Complaint was filed. On December 9, 2015 and November 16, 2018, amended versions of the Program were adopted. Citations herein are, unless otherwise specified, to the January 2015 version.

decision below implicates an established circuit conflict concerning the ability of a state to regulate economic conduct occurring outside of its borders under the United States Constitution and conflicts with this Court's precedents. The decision further implicates a conflict among the circuit courts and with decisions of this Court regarding the standards that apply to assess a state regulation that discriminates against interstate and foreign commerce.

Resolution of these conflicts is critically important because they raise core issues of state sovereignty inherent in the Constitution's structure. That structure guarantees that each of the 50 states remains a co-equal sovereign protected from encroachment by other states seeking to exert control over conduct within the territory of another state. This case presents an ideal vehicle to resolve both of these conflicts. AFPM's challenge to the Fuel Program's "life-cycle" analysis squarely presents the question whether the Constitution protects state sovereignty because the life-cycle analysis is Oregon's means of regulating and controlling conduct occurring outside of its territorial bounds. Further, that life-cycle analysis is the cornerstone of a discriminatory program designed to spark the development of an in-state fuel industry at the expense of out-of-state competitors.

### **STATEMENT OF THE CASE**

Because the Ninth Circuit affirmed the dismissal of AFPM's complaint under Rule 12(b), the "well-pleaded allegations of material fact" are accepted "as true" and construed "in the light most favorable to [AFPM]." Pet. App. 7a.

### A. Regulatory Background

1. The Fuel Program was authorized by Oregon’s legislature and governor and implemented by Oregon’s Department of Environmental Quality (“DEQ”). Pet. App. 123a (Compl. ¶¶ 34–38). It was designed to benefit the local transportation fuel industry at the expense of out-of-state competitors. As explained by the governor, “[i]n 2012, Oregonians sent more than \$6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market.” *Id.* at 134a–135a (quoting Press Release, Or. Governor’s Office, *Governor Kitzhaber Announces New Clean Fuels Initiative* (Feb. 13, 2014)). The governor highlighted that “[t]here are no oil refineries in Oregon, but there are biofuel producers, feedstock growers, a burgeoning electric vehicle industry, and propane, natural gas, and other innovative fuel companies ready to invest in the state.” *Id.* at 135a. Accordingly, the governor sought “to spark this home-grown industry that can capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy.” *Id.*

2. The Fuel Program regulates transportation fuels based on life-cycle “carbon intensity.” Pet. App. 124a–125a. A fuel’s “carbon intensity” is not a measure of the “carbon” in the fuel or “carbon” released during fuel combustion. *Id.* at 125a. Rather, “carbon intensity” is “the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e per MJ).” *Id.* at 124a (quoting Or. Admin. R. 340-253-0040(9)). Thus, “life-cycle” carbon intensity assesses “all stages of fuel production, from feedstock genera-

tion or extraction, production, distribution, and combustion of fuel by the consumer.” *Id.* at 125a (quoting Or. Admin. R. 340-253-0040(37)).

For fuel imports, the life-cycle analysis regulates greenhouse gas (“GHG”) emissions relating to (i) the extraction and production of fuels occurring outside Oregon and (ii) the transport and distribution of fuels in interstate and foreign commerce outside Oregon. Pet. App. 125a. For example, in setting carbon intensities for gasoline and diesel, DEQ considered “[t]he sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources.” *Id.* at 128a. Because Oregon refines no petroleum, these aspects of fuel production all occur outside of Oregon. *Id.* at 131a.

For biofuels, the Fuel Program assigns different carbon intensities to physically identical fuels based, in part, on where and how individual biofuels are produced and brought to the Oregon market. Pet. App. 125a. Because the Fuel Program applies to biofuels produced outside Oregon, it also regulates the production and transport of fuels in other states and countries. *Id.* at 133a (describing burden imposed on Midwest ethanol producers).

The Fuel Program requires fuel providers to reduce the average carbon intensity of the transportation fuels they import or produce in Oregon to meet the annual “clean fuel standard” or to purchase “credits” from competing producers. Pet. App. 129a. The maximum average carbon intensity of transportation fuels is ratcheted down each year through 2025. *Id.* at

128a.<sup>2</sup> The carbon intensity assigned to gasoline and diesel fuels exceeds the annual average carbon intensity fuel standard for 2016 and every year thereafter. *Id.* at 129a. As a result, “importers of gasoline would need to replace existing sources of ethanol with ethanol that has lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements.” *Id.* at 129a; see also *id.* (same for imported diesel fuel). In contrast, in-state producers of ethanol and biodiesel “already meet the proposed average annual carbon intensity,” face “no additional costs” associated with reducing carbon, and instead “generate credits” that can be sold to out-of-state competitors. *Id.* 128a–130a.

3. Oregon officials responsible for the Fuel Program highlighted that it would promote Oregon biofuels production at the expense of existing out-of-state fuel producers. *E.g.*, Pet. App. 133a–138a. The Governor’s Office explained that the Fuel Program would counteract the net outflow of billions of dollars and promote the development of a competing in-state market. *Id.* at 134a–135a. Oregon’s legislators agreed with the governor’s objectives: to “encourag[e] innovating investments,” “reduc[e] [Oregon’s] dependence on petroleum and channe[l] those dollars into Oregon’s economy,” and “help support the growing green energy sector [and] power [Oregon’s] economy.” *Id.* at 136a–

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<sup>2</sup> When the Oregon Program was adopted in 2015, the baseline carbon intensity assigned for gasoline was 89.31 gCO<sub>2</sub>e/MJ, which is a single weighted average of gasoline supplied to Oregon. Pet. App. 129a. Importers of gasoline were required, in 2016, to meet an average carbon intensity cap of 89.08 gCO<sub>2</sub>e/MJ. Likewise, the baseline carbon intensity value for diesel fuel was 87.09 gCO<sub>2</sub>e/MJ. *Id.* At the time of adoption, importers of diesel were required, in 2016, to meet an average carbon intensity of 86.87 gCO<sub>2</sub>e/MJ, which is lower than the carbon intensity for their diesel fuel. *Id.*

137a (quoting Press Release, Or. Sen. Majority Office, *Senate takes historic step advancing Oregon's economy and fuel alternatives* (Feb. 17, 2015)). In turn, DEQ agreed with Oregon's governor and legislators, explaining that the Fuel Program would "result[] in an influx of economic activity, including growth in employment, income and gross state product," and that "[p]ositive economic impacts in Oregon stem from importing less petroleum fuel." *Id.* at 137a (quoting DEQ, *Clean Fuels Program Phase II Rulemaking* at 9 (Jan. 7–8, 2015)). One adviser to DEQ frankly acknowledged that "the whole intent of the [Fuel Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state." *Id.* at 138a.

The Fuel Program has a stated goal of achieving, by 2025, a 10 percent reduction in the annual average carbon intensity for transportation fuels sold in Oregon. Pet. App. 121a–122a. The intended design and effect of the Fuel Program is that importers of gasoline and diesel will generate deficits and therefore will be required to either change the composition of the fuel they import or purchase credits from competitors that produce substitutes for gasoline and diesel fuel. *Id.* at 129a–130a. Oregon's 2018 Forecast confirms that all deficits under the Fuel Program are attributable to "Gasoline blendstock" and "Diesel blendstock," neither of which is produced in Oregon; in contrast, in-state ethanol and biodiesel producers generate credits that can be sold to competitors, thereby providing in-state producers a direct subsidy from their out-of-state competitors. See AFPM Supplemental Authority Under Federal Rule of Appellate Procedure 28(j) at 1–2 (Feb. 27, 2018).

## B. Proceedings Below

1. On March 23, 2015, AFPM, whose members include parties regulated by the Fuel Program, filed suit seeking declaratory and injunctive relief. Pet. App. 116a–121a. AFPM alleged that the Fuel Program regulates activity that occurs wholly outside Oregon—*i.e.*, the extraction, production, and transport of transportation fuels in other states and countries—through application of a “life-cycle” analysis. Pet. App. 138a–139a. By doing so, the Oregon Fuel Program extends Oregon’s regulatory reach beyond its borders in violation of the federal structure of the United States Constitution. *Id.* at 141a–143a. AFPM further alleged that the Fuel Program discriminates against transportation fuels imported into Oregon through the assignment of carbon-intensity scores that favor in-state fuels over imported fuels like gasoline and diesel fuel (which are not produced in Oregon) and Midwest ethanol. Pet. App. 128a–138a.

Respondents and their Intervenors filed Motions to Dismiss the Complaint, which Chief Judge Ann Aiken granted. Pet. App. 29a. The court held that the Fuel Program was not an extraterritorial regulation based on the Ninth Circuit’s prior conclusion that “the analogous LCFS ‘does not control conduct wholly outside the state.’” *Id.* at 48a (quoting *Rocky Mountain*, 730 F.3d at 1103–07). Further, the court concluded that AFPM’s “discrimination claim is largely barred by” the Ninth Circuit’s decision in *Rocky Mountain*, but then addressed “all aspects of [the] discrimination claim.” *Id.* at 37a–38a. The court acknowledged “that Oregon does not produce any petroleum in-state,” *id.* at 41a, and that in assigning carbon intensities to imported fuels, the Fuel Program considered factors such as “location” in assessing “GHG emissions attributable to a default pathway,” *id.* at 42a (quoting *Rocky Mountain*,

730 F.3d at 1089–93). The court dismissed, without substantive discussion, statements by the governor, legislators, and DEQ reflecting that the Fuel Program was intended to benefit local industry at the expense of out-of-state competitors. *Id.* at 43a–45a.

2. A divided panel of the Ninth Circuit affirmed, based largely upon the Ninth Circuit’s ruling in *Rocky Mountain*. With regard to extraterritoriality, the panel rejected AFPM’s allegations “that the [Fuel Program] violates the Commerce Clause and ‘principles of interstate federalism’ by attempting to control ‘commerce occurring wholly outside the boundaries’ of the state.” Pet. App. 20a (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). The panel ruled that “these claims are squarely barred by *Rocky Mountain*” because “[l]ike the LCFS, the Program expressly applies only to fuels sold in, imported to, or exported from Oregon.” *Id.* at 21a.

As to discrimination, the panel again relied upon *Rocky Mountain* to rule that, even though “the Program labels fuels by state of origin,” that “does not render it discriminatory.” Pet. App. 10a.<sup>3</sup> Like the district court, the Ninth Circuit dismissed statements by Oregon’s Governor and legislators, which supported AFPM’s allegation that the “[Fuel Program] was enacted with the intent to ‘foster Oregon biofuels production at the expense of existing out-of-state fuel producers.’” *Id.* at 11a. The panel reasoned that the statements of the Oregon officials “are no more probative of a discriminatory or protectionist purpose than the

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<sup>3</sup> The panel explained that the second phase of the Fuel Program “provides two default ethanol pathways—Midwest and Oregon averages—which assume production using the same inputs but different energy sources.” Pet. App. 5a n.4.

statements by California state officials we found insufficient to establish discriminatory purpose in *Rocky Mountain*.” *Id.* at 12a. Lastly, the panel concluded that there was no discriminatory effect even though in-state producers uniformly benefit from the Fuel Program, and out-of-state petroleum producers will be required to subsidize in-state competitors. *Id.* at 19a–20a.

Judge N.R. Smith dissented. Recognizing that the panel was bound by *Rocky Mountain*, Judge Smith voiced his disagreement with that earlier decision, stating that “the incorporation of location and distance data into the calculation of carbon intensity values is facially discriminatory under the Supreme Court’s Commerce Clause analysis.” Pet. App. 22a n.1 (citing *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 515–16 (9th Cir. 2014) (M. Smith, J., dissenting from denial of rehearing en banc)). Judge Smith further explained the Fuel Program is discriminatory because it is designed so that “*all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits.” *Id.* at 25a (citing *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994)).

## REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit’s decision implicates a conflict concerning the standards for determining whether a State law that restricts imports as a means of controlling conduct in another state is impermissibly extraterritorial within the meaning of the United States Constitution. See *Healy*, 491 U.S. at 335–37 (1989). Oregon’s “life-cycle” analysis restricts the import of transportation fuels into Oregon in an effort to control conduct—the production and transport of fuel in interstate and foreign commerce—occurring outside of Oregon’s territorial boundaries. The decision below

held that the Fuel Program was not extraterritorial because it applied only to fuels “sold in” or “imported to” Oregon. Pet. App. 21a. That ruling conflicts with decisions of the First, Fourth and Seventh Circuits, which have held that an importing state may not make access to its markets contingent on compliance with its preferred way of conducting interstate commerce. See *infra* 12-14. Those conflicting decisions adhere to this Court’s holding that a state “may not attach restrictions to exports or imports in order to control commerce in other states.” *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). Proper resolution of that conflict is critically important to maintaining the Constitution’s structure, which recognizes and protects a union of 50 “coequal sovereigns” that operate as “indestructible States.” *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012); *New York v. United States*, 505 U.S. 144 (1992).

II. Predictably, the Fuel Program’s regulation of conduct occurring outside its borders is designed to discriminate in favor of local interests at the expense of out-of-state competitors. The Ninth Circuit’s approval of that discriminatory scheme warrants further review because it too implicates a conflict among the circuit courts on the standard for assessing whether a statute is facially discriminatory. Further, the majority’s dismissal of allegations concerning the Fuel Program’s discriminatory design and effect violates this Court’s settled precedent. See *W. Lynn Creamery*, 512 U.S. at 194; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271–73 (1984). As explained in Judge Smith’s dissent, under the Fuel Program, (i) “[o]ut-of-state entities bear the full brunt of the law’s burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions,” while (ii) in-

state competitors actually “receive a subsidy from the out-of-state entities in the sale of their valuable credits.” Pet. App. 26a (N.R. Smith, J., dissenting). By doing so, Oregon has sought, in the words of Justice Cardozo, to enhance the competitive position of local industry by “neutraliz[ing] advantages belonging to the place of origin.” *Id.* at 23a (quoting *W. Lynn Creamery*, 512 U.S. at 196 (quoting *Baldwin*, 294 U.S. at 527)). The Fuel Program discriminates in violation of the Commerce Clause.

The petition should be granted.

## **I. THE NINTH CIRCUIT’S RULINGS ON THE EXTRATERRITORIALITY DOCTRINE IMPLICATE A CIRCUIT SPLIT AND CONFLICT WITH DECISIONS OF THIS COURT.**

### **A. The Circuits Are Split As To The Constitutionality Of Extraterritorial State Regulation.**

This Court’s review is needed because the Ninth Circuit’s extraterritoriality ruling conflicts with decisions of the First, Fourth, and Seventh Circuits.

1. In *National Foreign Trade Council v. Natsios*, the First Circuit struck down a law restricting the ability of Massachusetts agencies to purchase goods or services from companies that engaged in business with Burma, in order to pressure the Burmese government regarding “violations of human rights.” 181 F.3d 38, 46-47 (1st Cir. 1999), *aff’d sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). The First Circuit held that the law was unconstitutionally extraterritorial, reasoning that “Massachusetts’s desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma does not permit it to act to regulate activities beyond its borders,” *id.* at 65, by “conditioning state

procurement decisions on conduct that occurs in Burma,” *id.* at 69. The First Circuit also rejected the state’s argument that the law was not extraterritorial because companies could continue to do business in Burma and simply “forgo contracts with Massachusetts” or pay a bidding penalty. *Id.* at 70.

Similarly, the Fourth Circuit recently struck down a Maryland law regulating certain price increases by drug manufacturers and wholesale distributors as unconstitutionally extraterritorial. *Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018).<sup>4</sup> The court ruled that, even if the law were interpreted to “require a nexus to an actual sale in Maryland, it is nonetheless invalid because it still controls the price” of upstream sales of drugs by manufacturers or wholesalers “that occur wholly outside the state.” *Id.* at 671. The fact that the drugs would ultimately be sold in Maryland did not permit the state to “compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland.” *Id.* at 672.

And in *National Solid Wastes Management Association v. Meyer*, the Seventh Circuit struck down a waste regulation as unconstitutionally extraterritorial because it “condition[ed] the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities’ adoption and enforcement of Wisconsin recycling standards.” 63 F.3d 652, 658 (7th Cir. 1995). Rejecting the state’s argument that the extraterritoriality doctrine is

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<sup>4</sup> The Attorney General of Maryland filed a petition for a writ of certiorari from this decision on October 19, 2018. *Frosh v. Ass’n for Accessible Medicines*, No. 18-546 (U.S. filed Oct. 19, 2018). On November 13, 2018, this Court called for a response to the petition, which is due on January 14, 2019.

“limited to th[e] context” of “price affirmation statutes,” the court found the regulation unconstitutional because “[i]t essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce.” *Id.* at 659.

More recently, in *Legato Vapors, LLC v. Cook*, the Seventh Circuit applied the same analysis in striking down an Indiana law as an extraterritorial “direct regulation of out-of-state manufacturing processes and facilities” for “vaping products” sold in Indiana. 847 F.3d 825, 831 (7th Cir. 2017). The Court concluded that the sale of the product in Indiana did not permit Indiana to “dictate[] how out-of-state manufacturers must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers.” *Id.* at 830. The court struck down the Indiana law because its “provisions control conduct ‘beyond the boundaries of the state’ and tell out-of-state companies how to operate their businesses.” *Id.* at 834 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)).

In contrast, the Ninth Circuit adopts a narrow view of extraterritoriality that conflicts with the First, Fourth, and Seventh Circuits. The decision below found that the extraterritoriality “claims are squarely barred by” the Ninth Circuit’s earlier ruling upholding the similar California low carbon fuel standard in *Rocky Mountain*. See Pet. App. 20a. *Rocky Mountain* recognized that “[w]ith the Fuel Standard, California ‘has essentially assumed legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California.” 730 F.3d at 1105–06 (emphasis added). The *Rocky Mountain* Court further recognized that the “lifecycle”

regulation turned on numerous out-of-state “factors,” including “transportation, farming practices, and land use” in other states and countries. *Id.* at 1103.

Nonetheless, the Ninth Circuit in *Rocky Mountain* held that the low carbon fuel standard was not extraterritorial, concluding that California “does not control these factors . . . simply because it factors them into the lifecycle analysis.” *Id.* Stating that the extraterritoriality doctrine is limited to “price-affirmation statutes,” *id.* at 1101, the Ninth Circuit held that “States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants,” *id.* at 1103; see also *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (ruling that extraterritoriality doctrine applies only to price-fixing statutes).

The conflict between the circuits is outcome determinative: The Oregon Fuel Program (and California LCFS) are extraterritorial under the test adopted in *Natsios*, *Frosh*, and *Meyer*, while those cases would be wrongly decided under the standard in *Rocky Mountain*. There, the Ninth Circuit concluded that a state may restrict access to its market “with the goal of influencing the out-of-state choices of market participants,” 730 F.3d at 1103, while the First, Fourth, and Seventh Circuits have all concluded that a state may *not* require a company to “conform to [that state’s] way of doing things” in its nationwide operations “[a]s a price for access to the [state’s] market.” See *Meyer*, 63 F.3d at 658–61. Further, these circuits have rejected the argument—adopted in *Rocky Mountain*—that imposing economic “incentives” or penalties based on out-of-state conduct, rather than an

outright ban, prevents a law from operating extraterritorially. See *Natsios*, 181 F.3d at 70. As the Ninth Circuit’s dissent from denial of rehearing explained, “[b]y penalizing certain out-of-state practices, California’s regulations control out-of-state conduct just as surely as a mandate would, particularly in view of California’s economic clout.” *Rocky Mountain*, 740 F.3d at 518.<sup>5</sup>

Decisions of other circuits, including the Eighth and Tenth Circuits, also show that the lower courts are in need of this Court’s guidance. The Tenth Circuit has remarked that the “extraterritoriality principle may be the least understood of the Court’s three strands of dormant commerce clause jurisprudence,” and that it is unclear—among other things—whether the doctrine is limited to the context of price control or price affirmation statutes, and whether it requires an analysis of discriminatory impact. *Energy & Envtl. Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.) (considering extraterritoriality as an aspect of the Commerce Clause, not as a principle of horizontal structural federalism). And while the Eighth Circuit has considered the doctrine, a majority was unable to come to a conclusion as to its proper scope. See *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (Loken, J.) (concluding that a Minnesota law regulating imported energy was unconstitutionally extraterritorial because it “seek[s] to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside

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<sup>5</sup> See James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357, 1384 (2014) (“By necessity, states only regulate transactions within their borders; the point of the prohibition on extraterritorial regulation is that states cannot leverage in-state regulation to control actions elsewhere.”).

Minnesota. And their practical effect is to control activities taking place *wholly* outside Minnesota”).<sup>6</sup>

This Court should grant the petition to resolve the conflict among the circuits and end the uncertainty as to the scope of the extraterritoriality doctrine.

### **B. The Ninth Circuit’s Ruling Conflicts With Decisions Of This Court.**

In addition, the petition should be granted because the decision below—which applied the earlier Ninth Circuit decision in *Rocky Mountain*—“places the law of this circuit squarely at odds with Supreme Court precedent.” *Rocky Mountain*, 740 F.3d at 513 (M. Smith, J., dissenting from denial of rehearing en banc).<sup>7</sup> Under this Court’s precedent, the Fuel Program violates the Constitutional principle of interstate federalism

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<sup>6</sup> Scholarly commenters have likewise remarked on the “considerable difficulty” and “uncertainty” that federal courts have faced in interpreting the extraterritoriality doctrine. Peter C. Felmlly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467, 491–92 (2003); see Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1884 (1987) (“[W]e do not understand the extraterritoriality principle . . . nearly as well as we should”).

<sup>7</sup> The Court’s denial of certiorari of the interlocutory decision in *Rocky Mountain* does not undermine this Court’s prior precedent or signal approval of *Rocky Mountain*. See *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (“[T]he denial of a writ of certiorari imports no expression of opinion upon the merits of a case, as the bar has been told many times.”); accord Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 5.7 at 335 (10th ed. 2013) (citing cases). Indeed, the California Respondents opposed review in *Rocky Mountain* because, among other reasons, the Ninth Circuit had remanded the case to the district court for “consider[ation of Plaintiffs’] remaining claims.” *Rocky Mountain Farmers Union v. Corey*, No. 13-1148, Brief in Opp. 34 (U.S. May 27, 2014).

because it “impinge[s] on the sovereign interests of [other] States to regulate farming, ethanol production, and other activities within their own borders as they see fit.” *Id.*

Both in the Commerce Clause context and elsewhere, this Court’s cases recognize that the Constitution protects the inherent sovereignty of states by prohibiting one state from exceeding its territorial jurisdiction and seeking to impose its policy preferences on other states. For instance, in *Healy*, the Court held that the Constitution “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)). Under *Healy*, the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Id.* This restriction on state authority reflects “the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.” *Id.* at 335–36 (footnote omitted). Both *Healy* and *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), struck down statutes that prohibited sales of alcohol within a state at higher prices than it was sold out-of-state, holding that the laws “fall[] within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids.” *Id.* at 579. The Court rejected the argument that the laws were not extraterritorial because they regulated only products sold within the state, holding that the “mere fact that the effects of [the] Law are triggered only by sales of liquor within the State . . . does not validate the law

if it regulates the out-of-state transactions of distillers who sell in-state.” *Id.* at 580.

The Ninth Circuit’s ruling also conflicts with *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). The ordinance in *Carbone* required that all waste be processed in a local transfer station before leaving the municipality. The Town of Clarkstown sought to justify its ordinance based upon its extraterritorial effect, that is, as a means “to steer solid waste away from out-of-town disposal sites that [the Town] might deem harmful to the environment.” 511 U.S. at 393. The Court rejected that extraterritorial goal and held instead that “[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other States,” and that the ordinance impermissibly “extend[ed] the town’s police power beyond its jurisdictional bounds.” *Id.*

This Court has applied the same extraterritoriality principle outside the Commerce Clause context, under the Due Process Clause and as an aspect of structural federalism. As *Edgar* explained, “[t]he limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts.” 457 U.S. at 643 (plurality opinion). Whether the State is acting through judicial or regulatory decrees, “[i]n either case, ‘any attempt “directly” to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.’” *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)). For instance, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), ruled that “no single State [can] ... impose its own policy choice on neighboring States,” and that therefore “a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States.” *Id.* at 571–72. And in considering the

jurisdictional reach of state courts, this Court recently held that the Constitution limits “the coercive power of a State” over non-resident litigants as “a consequence of territorial limitations on the power of the respective states.” *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)); *id.* at 1781 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)) (the constitutional principle “of interstate federalism” “may sometimes act to divest the State of its power”).

The extraterritoriality doctrine ultimately is rooted in the Constitution’s structure, which creates a federal union of 50 “coequal sovereigns,” *PPL Mont., LLC*, 565 U.S. at 591, whose spheres of authority are defined by their territorial boundaries. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315–18 (1992) (“The territorial allocation of state authority is a fundamental constitutional principle”); Regan, *supra*, 85 Mich. L. Rev. at 1885 (describing the extraterritoriality doctrine as “one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole”). As this Court has explained, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *New York*, 505 U.S. at 162 (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)).

Just as the Constitution’s structure protects state sovereignty by limiting the power of the federal government, *Printz v. United States*, 521 U.S. 898 (1997),

so too the sovereignty of each State places a reciprocal “limitation on the sovereignty of all of its sister States.” *Woodson*, 444 U.S. at 293; see *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621 (2013) (recognizing the “historic tradition that all the States enjoy equal sovereignty”). Each “state is without power to exercise ‘extra territorial jurisdiction,’ that is, to regulate and control activities wholly beyond its boundaries.” *Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954). That is because the “several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.” *Brown v. Fletcher’s Estate*, 210 U.S. 82, 89 (1908). As a result, “[n]o State can legislate except with reference to its own jurisdiction.” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1882). When states “pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict . . . which renders the exercise of such power incompatible with the rights of other States, and with the constitution of the United States.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827).

The Fuel Program violates the restriction on extra-territorial legislation because, as explained in *Carbone*, a government may not attach “restrictions to exports or imports,” 511 U.S. at 393, to control out-of-state conduct. The Constitution prohibits such an “exten[sion of] the [state’s] police power,” *id.*, over its sister states. *Edgar*, 457 U.S. at 643 (plurality opinion). The Fuel Program’s “lifecycle analysis” of imported fuels is inherently exterritorial because it “depends largely on out-of-state production and land use decisions,” thereby “sweep[ing] beyond the borders” of the regulating state. *Rocky Mountain*, 740 F.3d at 513 (M. Smith, J., dissenting from denial of rehearing en banc). The “carbon intensity” regulated by the lifecycle

analysis “is not an inherent quality of the finished product that is sold in state—two chemically identical gallons of ethanol or gasoline could have drastically different carbon intensities depending on how they were produced and transported across the globe.” Coleman, *supra*, 83 Fordham L. Rev. at 1374.

Specifically, the Fuel Program requires companies to reduce carbon intensity values that are based on out-of-state activities, including “feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer,” Pet. App. 125a (quoting Or. Admin. R. 340-253-0040(37)); *id.* at 128a. By penalizing imported fuels based on how they are produced and transported in other states and countries, the Fuel Program “regulate[s] and control[s] activities wholly beyond its boundaries,” *Watson*, 348 U.S. at 70, thus transgressing the “limitation on [its] sovereignty [put in place by] all of its sister States,” *Woodson*, 444 U.S. at 293. Indeed, “[t]hat forbidden effect is the *aim* of exported state energy regulation”: the Fuel Program “is designed to limit greenhouse gas emissions from production of fuels all over the world.” Coleman, *supra*, 83 Fordham L. Rev. at 1381. As the Ninth Circuit itself recognized, a state that enacts such a regulation is “essentially assum[ing] legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels.” 730 F.3d at 1105–06 (emphasis added).

Because the Ninth’s Circuit’s approval of this “clear attempt to project [one state’s] authority into other states” is “in open defiance of controlling Supreme Court precedent,” the petition for certiorari should be granted. *Rocky Mountain*, 740 F.3d at 519 (M. Smith, J., dissenting from denial of rehearing en banc).

### **C. The Question Presented Is Highly Important.**

The petition also should be granted because the question presented is highly important. It allows the Court to assess whether states may adopt a life-cycle analysis designed to control conduct occurring outside of the regulating state. If the ruling below is left in place, states will be able to leverage access to their markets to regulate a wide range of crucial conduct in other states, impinging upon their sovereign status. The question presented thus has critical nationwide implications.

Already, at least two “states that import energy are now exporting their energy regulations,” and other states are considering following suit. Coleman, *supra*, 83 Fordham L. Rev. at 1357, 1374. These fuel standards create the “daunting prospect of navigating several interlocking, if not entirely contradictory, regulatory regimes,” along with the risk that “[f]ragmentation of the national economy may ensue.” *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J. dissenting from denial of rehearing en banc). Nor is the issue limited to fuel regulations. Under the Ninth Circuit’s ruling, a state “may just as legitimately seek to influence any out-of-state conduct with perceived local effects.” *Id.* “For instance, transport of fruits and vegetables leads to greenhouse gas emissions,” and Oregon or California could therefore use the same rationale to penalize the import of oranges from Florida or peaches from Georgia as more “carbon intensive” than locally-grown fruit, since they must necessarily be transported longer distances. Coleman, *supra*, 83 Fordham L. Rev. at 1392. “[I]f a state could prevent the sale of produce that required significant greenhouse gas emissions to reach its consumers, national food markets would break down.” *Id.*

Through such laws, individual states can “leverage access to [their] markets to regulate every station in the supply chain,” and impose nationwide their “own views of what constitutes virtuous farming practices.” Mot. for Leave to File Bill of Complaint at 6, *Indiana v. Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017). Further, under the Ninth Circuit’s ruling, a state such as California could “require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California.” *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J., dissenting from denial of rehearing en banc). As this Court has held, “one state may not put pressure of that sort upon others to reform.” *Baldwin*, 294 U.S. at 524 (striking down extraterritorial pricing regulation, and noting that “the next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop”); see *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010) (“The consequences of a commercial transaction can be felt anywhere. But that does not permit New York City to forbid New Yorkers to eat in cities in other states that do not ban trans fats from their restaurants.”).

If the Ninth Circuit’s ruling is allowed to stand, then, as *Baldwin* warned, “the door has been opened to rivalries and reprisals” between the states “that were meant to be averted” by the Constitution, 294 U.S. at 522, including the risk of “destructive interstate retaliation” as well as fracturing interstate markets, *Rocky Mountain*, 740 F.3d at 519 (M. Smith, J., dissenting from denial of rehearing en banc). In addition, state sovereignty will suffer as more populous states increasingly exercise their market power to impose their preferred policies on the rest of country. Contrary to the Ninth Circuit’s contention that enforcing the extraterritoriality doctrine would “destroy the

states' ability to experiment with regulation," 730 F.3d at 1105, in fact "[t]he extraterritoriality doctrine protects regional variation." Chad DeVeaux, *One Toke Too Far: the Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. Rev. 953, 978 (2017) (emphasis omitted). It "enables states to 'try novel social and economic experiments' within their own borders, but prohibits them from conscripting the citizens or property of neighboring states as guinea pigs in their experiments." *Id.* at 980; see *Midwest*, 593 F.3d at 667–68 (7th Cir. 2010).

## II. THE NINTH CIRCUIT'S DISCRIMINATION RULING WARRANTS REVIEW.

### A. The Decision Below Conflicts With Decisions Of Other Circuit Courts.

The Ninth Circuit's decision affirming the dismissal of AFPM's discrimination claim also warrants review.

The Ninth Circuit held that the Fuel Program is not facially discriminatory under the Commerce Clause, even though it recognized "that the Program labels fuels by state of origin." Pet. App. 10a. Indeed, the Fuel Program facially assigns less favorable "carbon intensity" scores to "Midwest" corn ethanol than to "Oregon" corn ethanol, *id.* at 133a; *id.* at 140a, even though "ethanol from every source has 'identical physical and chemical properties,'" *Rocky Mountain*, 730 F.3d at 1088. Yet the court below held that the Fuel Program is not facially discriminatory and refused to apply heightened scrutiny because of its prior decision in *Rocky Mountain*. In turn, *Rocky Mountain* concluded that a similar California low carbon fuel standard that expressly established "categories [that are] formed with reference to state boundaries" was not facially discriminatory because

there was a “nondiscriminatory reason for the distinction,” *Rocky Mountain*, 730 F.3d at 1089, 1094; Pet. App. 37a–38a. It held that the Ninth Circuit would “not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason.” *Rocky Mountain*, 730 F.3d at 1107.

This ruling conflicts with decisions from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, which apply strict scrutiny to all “facially discriminatory” state laws, regardless of whether the state provides a “nondiscriminatory reason” for the facial discrimination.<sup>8</sup> In *American Trucking Associations, Inc. v. Whitman*, for example, the Third Circuit rejected the argument that a state

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<sup>8</sup> See *Used Tire Int’l, Inc. v. Diaz-Saldana*, 155 F.3d 1, 3–4 (1st Cir. 1998) (holding that law is facially discriminatory without reference to purported justification and striking it down under strict scrutiny); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. 1995) (same); *Am. Trucking Ass’ns, Inc. v. Whitman*, 437 F.3d 313, 320–21 (3d Cir. 2006) (same); *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785–88 (4th Cir. 1996) (concluding that law “is not facially neutral” from face of the provision and does not withstand strict scrutiny); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 917–18 (5th Cir. 1997) (discrimination on face of provision triggers strict scrutiny); *Piazza’s Seafood World, LLC v. Odom*, 448 F.3d 744, 750–51 & n.12 (5th Cir. 2006) (explaining that under the Foreign Commerce Clause “differential treatment . . . without more, [is] facial discrimination subject to strict scrutiny”); *Waste Mgmt., Inc. of Tenn. v. Metro. Gov’t of Nashville*, 130 F.3d 731, 735–36 (6th Cir. 1997) (differential treatment on face of law triggers strict scrutiny); *Jones v. Gale*, 470 F.3d 1261, 1267–70 (8th Cir. 2006) (finding facial discrimination from face of state law); *Nat’l Solid Wastes Mgmt. Ass’n v. Ala. Dep’t of Env’tl. Mgmt.*, 910 F.2d 713, 720 (11th Cir. 1990) (holding that differential treatment on the face of law is facial discrimination, and that environmental purpose cannot be pursued by origin-based distinctions), *modified on denial of reh’g*, 924 F.2d 1001 (11th Cir. 1991).

law that imposed burdens only on trucks that were traveling interstate was not facially discriminatory because it was intended to reduce “pollution” and “waste disposal costs.” 437 F.3d 313 (3d Cir. 2006). The court held that “the purpose of the law would not be relevant to whether the statute was discriminatory,” and that the regulation’s “explicit distinction and consequent burdening of out-of-state economic interests requires that heightened scrutiny be applied.” *Id.* at 321.

As Judge Murguia explained in her dissent from the decision in *Rocky Mountain*, “[d]etermining whether a regulation facially discriminates against interstate commerce begins and ends with the regulation’s plain language.” 730 F.3d at 1108. This Court should grant the petition to resolve the conflict between the Ninth Circuit and numerous other circuits on this issue.

**B. The Ninth Circuit’s Discrimination Ruling Conflicts With This Court’s Precedent.**

Further, the petition should be granted because the Ninth Circuit’s discrimination ruling squarely conflicts with this Court’s precedents in at least two respects. First, the Ninth Circuit’s refusal to apply strict scrutiny to facially discriminatory provisions conflicts with this Court’s “longstanding dormant Commerce Clause precedent.” *Rocky Mountain*, 740 F.3d at 514 (M. Smith, J., dissenting from denial of rehearing en banc). Second, the Ninth Circuit’s ruling that a provision cannot be discriminatory if it may benefit some out-of-state businesses is directly contrary to several of this Court’s decisions.

1. Under this Court’s precedent, facial discrimination against interstate and foreign commerce must be judged based on the language of the

state law—irrespective of any asserted justification for differing treatment—and facially discriminatory statutes must be subjected to the “strictest scrutiny.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 100–01 (1994). In the decision below, the Ninth Circuit recognized that the Fuel Program “labels fuels by state of origin,” Pet. App. 10a, thereby facially discriminating between “Midwest” and “Oregon” ethanol. Assigning Midwest ethanol a higher carbon intensity score than Oregon ethanol confers a commercial advantage on Oregon ethanol because fuels with lower carbon intensity scores make compliance with the Fuel Program easier and hence are more valuable. *Id.* at 133a. This is discrimination, which “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste*, 511 U.S. at 99.

Nonetheless, the Ninth Circuit held that the Fuel Program was not facially discriminatory, Pet. App. 10a–11a, reaffirming its prior ruling that it will “not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason.” *Rocky Mountain*, 730 F.3d at 1107. But this Court has rejected the argument that a “good and non-discriminatory reason” insulates a law from strict scrutiny, *Rocky Mountain*, 730 F.3d at 1107, holding that “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” *Or. Waste*, 511 U.S. at 100; see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575–76 (1997) (“[i]t is not necessary to look beyond the text . . . to determine that it discriminates against interstate commerce”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988) (“Ohio provision . . . explicitly deprives certain

products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face” is discriminatory). The Ninth Circuit declined to follow these precedents, dismissing them as “archaic formalism.” *Rocky Mountain*, 730 F.3d at 1107.<sup>9</sup>

2. The Ninth Circuit’s ruling that the Fuel Program is not discriminatory in design or effect because it does not burden *every* out-of-state company also conflicts with this Court’s precedents.

As the dissent explained, “the discrimination arises from Oregon’s decision to draw the maximum allowed carbon intensity value in such a manner that *all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits.” Pet. App. 25a (N.R. Smith, J., dissenting). Thus, “[o]ut-of-state entities bear the full brunt of the law’s burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions (and consequently global warming).” *Id.* at 26a. “At the same time,” the dissent explained, “in-state entities not only avoid the burden of the law, they also receive a subsidy from the out-of-state entities in the sale of their valuable credits.” *Id.*; see *id.* at 131a–132a (Oregon explaining that the fuels produced in Oregon “already meet the proposed clean fuel standards” and

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<sup>9</sup> This issue is also currently before this Court in *Tennessee Wine and Spirits Retailers Association v. Blair*, No. 18-96. See Brief of Respondent Tennessee Fine Wines and Spirits, LLC at 21–22, *Tenn. Wine & Spirits Retailers Ass’n v. Blair*, No. 18-96 (U.S. Dec. 13, 2018) (“The court of appeals correctly determined that Tennessee’s durational residency requirements are ‘facially discriminatory.’ . . . Accordingly, under this Court’s Commerce Clause precedents, Tennessee’s discriminatory requirements are subject to ‘a virtually *per se* rule of invalidity.’”) (quoting *Granholm v. Heald*, 544 U.S. 460, 476 (2005)).

can “generate credits and benefit from the sale of those credits”).

The Ninth Circuit majority’s ruling that the Fuel Program is nondiscriminatory directly contradicts this Court’s decisions, including *West Lynn Creamery*, 512 U.S. at 194, and *Bacchus*, 468 U.S. at 273. In *West Lynn Creamery*, the Court found a Massachusetts state law “clearly unconstitutional” because it combined an evenhanded and neutral tax on all milk for consumption with a subsidy to in-state Massachusetts dairy farmers that “entirely (indeed more than) offset” the tax for in-state producers. *West Lynn Creamery* explained that, “when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State’s political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.” 512 U.S. at 200. Similarly, *Bacchus* held that a Hawaii law was unconstitutional because it “had both the purpose and effect of discriminating in favor of local products,” 468 U.S. at 273, “in effect creat[ing] a protective tariff” in which “[g]oods produced out of State were taxed, but those produced in State were subject to no net tax.” *W. Lynn Creamery*, 512 U.S. at 197 (discussing *Bacchus*, 468 U.S. 263).

The Oregon Program similarly operates like a protective tariff by forcing out-of-state fuel producers to subsidize in-state fuel producers, thus “violat[ing] the cardinal principle that a State may not ‘benefit in-state economic interests by burdening out-of-state competitors.’” *Id.* at 199 (quoting *New Energy*, 486 U.S. at 273–74).

The Ninth Circuit held that the fact that some “out-of-state producers are able to—and do—generate

credits and thus share in the Program's benefits" prevents the law from being discriminatory. Pet. App. 19a. However, this Court has rejected that argument, holding that a benefit to some out-of-state producers does not make a law nondiscriminatory; it "merely reduce[s] the scope of the discrimination." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 363 (1992). As the Court explained in *New Energy*, "where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." 486 U.S. at 276 (striking down tax credit as discriminatory despite "the availability of the tax credit to some out-of-state manufacturers"); see *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 349–51 (1977) (holding that a state law was unconstitutionally discriminatory notwithstanding that it benefitted companies in some other states).

By designing the Fuel Program so that all in-state producers benefit and that all burdens fall only on out-of-state competitors, the Fuel Program impermissibly "aspire[s] to reap some of the benefits of tariffs by other means." *W. Lynn Creamery*, 512 U.S. at 193. Because the Ninth Circuit's ruling that the law is nondiscriminatory conflicts with this Court's precedent, the petition should be granted.

### **C. The Issue Is Highly Important.**

Finally, the Court should review the question presented because it is highly important. The Ninth Circuit has refused to apply heightened scrutiny "[i]n the name of combating 'a new type of harm'" from climate change. *Rocky Mountain*, 740 F.3d at 514 (M. Smith, J., dissenting from denial of rehearing en banc), quoting *Rocky Mountain*, 730 F.3d at 1107. But this Court has "often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve

it by ‘the illegitimate means of isolating the State from the national economy.’” *Wyoming v. Oklahoma*, 502 U.S. 437, 456–57 (1992); see *Hunt*, 432 U.S. at 352. The Ninth Circuit’s ruling to the contrary gives States free rein to engage in protectionism so long as they cloak it with purportedly worthy aims, thereby “threaten[ing] to Balkanize our national economy.” *Rocky Mountain*, 740 F.3d at 512 (M. Smith, J., dissenting from denial of rehearing en banc).

Indeed, “protectionism is ubiquitous” in this realm, as even initially “well-intentioned” laws are typically altered during the legislative and regulatory process to address “parochial concerns.” Coleman, *supra*, 83 *Fordham L. Rev.* at 1386. For instance, the governor of Oregon admitted that the Oregon Program is designed “to spark this home-grown [fuel] industry that can capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy.” Pet. App. 135a. Preventing this type of “legislative abuse,” where a state imposes burdens exclusively on out-of-state entities while funneling the rewards to in-state interests, is a crucial purpose of the Commerce Clause. *W. Lynn Creamery*, 512 U.S. at 193; 3 M. Farrand, *Records of the Federal Convention of 1787*, at 478 (1911) (James Madison) (the Commerce Clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves”).

**CONCLUSION**

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

1a

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

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No. 15-35834

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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS;  
AMERICAN TRUCKING ASSOCIATIONS, INC.,  
A TRADE ASSOCIATION; CONSUMER ENERGY  
ALLIANCE, A TRADE ASSOCIATION,

*Plaintiffs-Appellants,*

v.

JANE O'KEEFFE; ED ARMSTRONG; MORGAN RIDER;  
COLLEEN JOHNSON; MELINDA EDEN; DICK PEDERSEN;  
JONI HAMMOND; WENDY WILES; DAVID COLLIER;  
JEFFREY STOCUM; CORY-ANN WIND; LYDIA EMER;  
LEAH FELDON; GREG ALDRICH; AND SUE LANGSTON,  
IN THEIR OFFICIAL CAPACITIES AS OFFICERS AND  
EMPLOYEES OF THE OREGON DEPARTMENT OF  
ENVIRONMENTAL QUALITY; ELLEN F. ROSENBLUM, IN  
HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
STATE OF OREGON; KATE BROWN, IN HER OFFICIAL  
CAPACITY AS GOVERNOR OF THE STATE OF OREGON,

*Defendants-Appellees,*

and

CALIFORNIA AIR RESOURCES BOARD;  
STATE OF WASHINGTON; OREGON ENVIRONMENTAL  
COUNCIL; SIERRA CLUB; NATURAL RESOURCES  
DEFENSE COUNCIL; ENVIRONMENTAL DEFENSE  
FUND; CLIMATE SOLUTIONS,

*Intervenor-Defendants-Appellees.*

Argued and Submitted March 6,  
2018—Portland, Oregon

Filed September 7, 2018

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OPINION

Before: Raymond C. Fisher, N. Randy Smith, and  
Andrew D. Hurwitz, Circuit Judges.

HURWITZ, Circuit Judge

This case requires us to decide whether an Oregon program regulating the production and sale of transportation fuels based on greenhouse gas emissions violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, or is preempted by § 211(c) of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401, 7545. The district court dismissed a complaint challenging the Oregon program. We affirm.

I. Background

A. The Oregon Program

In 2007, the Oregon legislature found that “[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon,” and identified “a need to . . . take necessary action to begin reducing greenhouse gas emissions.” Or. Rev. Stat. § 468A.200(3), (7). The legislature accordingly created the Oregon Clean Fuels Program (the “Oregon program”) and instructed the Oregon Environmental Quality Commission (“OEQC”) to adopt rules to decrease lifecycle greenhouse gas emissions from transportation fuels produced in or imported into Oregon. Or. Rev. Stat. §§ 468A.266–268. Between 2010 and 2015, the OEQC promulgated rules

designed to reduce greenhouse gas emissions from use and production of transportation fuels in Oregon to at least 10% lower than 2010 levels by 2025. *See* Or. Admin. R. 340-253-0000-8100.<sup>1</sup>

Under these rules, a regulated party must keep the average carbon intensity<sup>2</sup> of all transportation fuels used in Oregon below an annual limit. *See id.* 340-253-0100(6), -8010, -8020. The annual carbon intensity limits become more stringent annually through 2025. *See id.*<sup>3</sup>

A fuel with a carbon intensity below the limit generates a credit, and one with a carbon intensity above the limit generates a deficit. *See id.* 340-253-0040(30), (35), -1000(5). Regulated parties must generate carbon intensity “credits” greater than or equal to their “deficits” on an annual basis. Regulated parties can buy or sell credits, store them for future use, or use them to offset immediate deficits. Thus, a “regulated party may demonstrate compliance in each compliance period either by producing or importing fuel that in the aggregate meets the standard or by obtaining sufficient credits to offset the deficits it has incurred

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<sup>1</sup> The regulations were incorporated by reference into American Fuel’s complaint. The parties have also included the regulations in motions for judicial notice, Dkt. 13, 37, 52, which we GRANT.

<sup>2</sup> “Carbon intensity’ or ‘CI’ means the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e/MJ).” Or. Admin. R. 340-253-0040(20).

<sup>3</sup> Regulated fuel importers or producers must (1) register with the Oregon Department of Environmental Quality (“ODEQ”) and (2) report the volumes and carbon intensities of their transportation fuels. Or. Admin. R. 340-253-0100.

for such fuel produced or imported into Oregon.” *Id.* 340-253-0100(6).

The cumulative carbon intensity value attributed to the lifecycle of a particular type of fuel is called a “pathway.” *Id.* 340-253-0040(46) (“Fuel pathway’ means a detailed description of all stages of fuel production and use for any particular transportation fuel, including feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer. The fuel pathway is used to calculate the carbon intensity of each transportation fuel.”); *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1081 (9th Cir. 2013) (noting a similar definition in California’s Low Carbon Fuel Standard (“LCFS”)). The first phase of Oregon rules provided tables with default pathways for various fuels, “including feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer.” Or. Admin. R. 340-253-0040(46), -0400(1). During this phase, regulated parties could either use the default pathways, or seek approval for individualized pathways. *Id.* 340-253-0400(3), -0450.

The second phase of the Oregon rules introduced a scientific modeling tool called OR-GREET, based on “the Greenhouse gases, Regulated Emissions, and Energy in Transportation (GREET) model developed by Argonne National Laboratory” to calculate individualized pathways for nonpetroleum fuels. *Id.* 340-253-0040(67), -0400(1); *see also Rocky Mountain*, 730 F.3d at 1080–84 (describing California LCFS, which also uses GREET modeling tools). The OR-GREET employs a “lifecycle analysis” to determine total carbon intensity, which includes emissions from the production, storage, transportation, and use of the fuels, thus accounting for “all stages of fuel production.” Or.

Admin. R. 340-253-0040(46). The lifecycle analysis allows a state to account for “the climate-change benefits of biofuels such as ethanol, which mostly come before combustion.” *Rocky Mountain*, 730 F.3d at 1081. Lifecycle analysis also allows for an accurate comparison of the carbon effects of fuels produced using different production methods and source materials. *See id.* (“An accurate comparison is possible only when it is based on the entire lifecycle emissions of each fuel pathway.”).

Producers and importers of ethanols and biodiesels can obtain carbon intensity scores in one of three ways. If a fuel has been assigned a carbon intensity score under the California LCFS, a regulated party can have that value adjusted for use in Oregon. Or. Admin. R. 340-253-0400(4)(a). Regulated parties can also use individualized carbon intensity scores calculated using the OR-GREET modeling tool. *Id.* 340-253-0500. If it is not possible to obtain an individualized value, a regulated party may also use a default pathway to report carbon intensity. *See id.* 340-253-0450.<sup>4</sup> “Thus fuel producers can take advantage of default and individualized carbon intensity values, and choose what is most advantageous.” *Rocky Mountain*, 730 F.3d at 1082.

Because of the uniquely harmful environmental effects of petroleum-based fuels, importers of petroleum-based gasoline and diesel—unlike producers and importers of other fuels—are required to use average

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<sup>4</sup> The second phase of rules provides two default ethanol pathways—Midwest and Oregon averages—which assume production using the same inputs but different energy sources. Or. Admin. R. 340-253-8030, tbl. 3. These pathways are used only until an individual pathway is approved. *Id.* 340-253-0400(4)(b), -0450(3).

carbon intensity pathways, based on the average carbon-intensity values of such fuels in Oregon.<sup>5</sup> Or. Admin R. 340-253-0400(3)(a). This requirement was designed to promote the use and development of alternative fuels, because reliance solely on petroleum-based fuels would make targeted emissions reductions unattainable. *See Rocky Mountain*, 730 F.3d at 1085 (“No matter how efficiently crude oil is extracted and refined, it cannot supply [the targeted] level of reduction. To meet California’s ambitious goals, the development and use of alternative fuels must be encouraged.”).

### B. Procedural Background

In March 2015, the American Fuel and Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance (collectively, “American Fuel”) filed this action against officials of the ODEQ and OEQC (the “Oregon defendants”), alleging that the Program violated the Commerce Clause and was preempted by § 211(c) of the CAA.<sup>6</sup> The district

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<sup>5</sup> *See Rocky Mountain*, 730 F.3d at 1084 (“Crude oil presents different climate challenges from ethanol and other biofuels. Corn and sugarcane absorb carbon dioxide as they grow, offsetting emissions released when ethanol is burned. By contrast, the carbon in crude oil makes a one-way trip from the Earth’s crust to the atmosphere. For crude oil and its derivatives, emissions from combustion are largely fixed, but emissions from production vary significantly. As older, easily accessible sources of crude are exhausted, they are replaced by newer sources that require more energy to extract and refine, yielding a higher carbon intensity than conventional crude oil.”).

<sup>6</sup> The plaintiffs are national trade associations. American Fuel’s members include nearly all United States refiners and petrochemical manufacturers, and sell transportation fuels throughout Oregon. A number of American Fuel’s members produce and sell gasoline, diesel, and ethanol used as transportation

court granted motions to intervene by several conservation organizations (the “Conservation Intervenor”),<sup>7</sup> the California Air Resource Board, and the State of Washington (the “State Intervenor”). The Oregon defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), and the State Intervenor moved for judgment on the pleadings under Rule 12(c). The district court granted both motions, finding American Fuel’s claims “largely barred” by this court’s decision in *Rocky Mountain* about a virtually identical California program. The district court also concluded that the Oregon program did not discriminate in purpose or effect against out-of-state ethanol and was not preempted by the CAA.

We review the district court’s judgment de novo, taking well-pleaded allegations of material fact as true and construing the complaint in the light most favorable to American Fuel. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 695 (9th Cir. 1999).

## II. The Commerce Clause

The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. Const. art. I, § 8, cl. 3. Despite its textual focus solely on congressional power, the Clause also “has

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fuels in Oregon, and several import such gasoline, diesel, and ethanol into Oregon. Members of the American Trucking Association purchase transportation fuels in Oregon for use in Oregon. The Consumer Energy Alliance’s members include industrial consumers and producers of gasoline, diesel, and ethanol.

<sup>7</sup> The Conservation Intervenor are the Oregon Environmental Council, the Sierra Club, the Environmental Defense Fund, Climate Solutions, and the Natural Resources Defense Council.

long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). This so-called “dormant” Commerce Clause is “driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” *Dep’t. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)); see also *South Dakota v. Wayfair, Inc.*, — U.S. —, 138 S.Ct. 2080, 2089, 201 L.Ed.2d 403 (2018) (noting that the Commerce Clause was enacted to combat “the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States” (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979))).

But, courts considering dormant Commerce Clause challenges must “respect a cross-purpose as well, for the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.” *Davis*, 553 U.S. at 338, 128 S.Ct. 1801. Thus, we must uphold a nondiscriminatory law against a dormant Commerce Clause challenge “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

In *Rocky Mountain*, we considered a challenge to the California LCFS, on which the district court accurately noted the Oregon program was modeled and to

which it is analogous in all relevant respects. As in the Oregon program, parties regulated under the LCFS generate credits or deficits based on their carbon intensity scores, which are calculated through a GREET modeling tool. *Rocky Mountain*, 730 F.3d at 1080–82. In *Rocky Mountain*, we largely upheld the LCFS against a Commerce Clause challenge, remanding for further proceedings on an issue not addressed by the district court: whether the LCFS discriminated against out-of-state ethanol in purpose or effect. *Id.* at 1078.<sup>8</sup>

We thus begin from the premise established in *Rocky Mountain*: state regulation violates the dormant Commerce Clause if it discriminates against out-of-state economic interests (in either purpose or effect) or if it regulates conduct occurring entirely outside of a state’s borders. *Id.* at 1087, 1101–02. In contrast, we will uphold regulations that accord all fuels “the substantially evenhanded treatment demanded by the Commerce Clause.” *Id.* at 1094 (quoting *Boston Stock*

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<sup>8</sup> On remand, the district court concluded that the Program did not discriminate in purpose or effect against out-of-state petroleum. *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234, 2014 WL 7004725, at \*14–15 (E.D. Cal. Dec. 11, 2014). The court later held that the Program did not purposefully discriminate against out-of-state ethanol, but, because of changes in the manner in which California calculated its carbon intensity scores, twice denied motions to dismiss the claim that the Program had a discriminatory effect on out-of-state ethanol. *Rocky Mountain Farmers Union v. Corey*, 258 F.Supp.3d 1134, 1158, 1163 (E.D. Cal. 2017); Memorandum Decision and Order, *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal. Aug. 3, 2015), ECF No. 343. These subsequent denials are discussed in greater depth in Part II(A)(iii)(a), *infra*. The plaintiffs voluntarily dismissed their remaining claims and filed an appeal, which is pending in this court.

*Exch. v. State Tax Comm'n*, 429 U.S. 318, 332, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977)).

#### A. Discrimination

##### i. Facial Discrimination

American Fuel’s claim that the Program facially discriminates against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels is squarely controlled by *Rocky Mountain*. Like its California counterpart, the Oregon program discriminates against fuels based on lifecycle greenhouse gas emissions, not state of origin. *See Rocky Mountain*, 730 F.3d at 1090.

A state may not discriminate “against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). But, the Oregon program distinguishes among fuels not on the basis of origin, but rather on carbon intensity. Out-of-state fuels are not necessarily disfavored: when the complaint was filed, the Program assigned twelve out-of-state ethanols, including five Midwest ethanols, lower carbon intensities than those assigned to Oregon biofuels.<sup>9</sup> The fact that the Program labels fuels by state of origin does not render it discriminatory, as these labels are not the basis for any differential treatment. *See Rocky Mountain*, 730 F.3d at 1097 (“California’s reasonable decision to use regional categories in its default pathways . . . does not transform its evenhanded treatment of

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<sup>9</sup> More recent carbon intensity scores—including those submitted with American Fuel’s motion for judicial notice—also make plain that out-of-state fuels are not systematically disfavored. *See* Or. Admin. R. 340-253-8030, -8040.

fuels based on their carbon intensities into forbidden discrimination.”).

ii. Discriminatory Purpose

Citing statements by former Oregon Governor John Kitzhaber and various Oregon legislators, American Fuel next alleges that the Oregon program was enacted with the intent to “foster Oregon biofuels production at the expense of existing out-of-state fuel producers.” But, the stated purpose of the Program is simply to “reduce Oregon’s contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon”—in particular, to “reduce the amount of lifecycle greenhouse gas emissions per unit of energy by a minimum of 10 percent below 2010 levels by 2025.” Or. Admin. R. 340-253-0000(1), (2). “We will ‘assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.’” *Rocky Mountain*, 730 F.3d at 1097–98 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)).

The district court did not err in finding that the statements by Oregon public officials cited in American Fuel’s complaint do not demonstrate that the objectives identified by the legislature were not the true goals of the Program. Even construing the allegations in the complaint in the light most favorable to American Fuel, the statements cited, “do not plausibly relate to a discriminatory design and are ‘easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.’” *Id.* at 1100 n.13 (alteration in original) (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7, 101

S.Ct. 715). The statements of the Oregon officials are no more probative of a discriminatory or protectionist purpose than the statements by California state officials we found insufficient to establish discriminatory purpose in *Rocky Mountain. Id.*<sup>10</sup>

None of the statements cited by American Fuel undermines the Oregon program's stated purpose. One of the allegedly discriminatory statements of former Governor Kitzhaber, for example, explicitly attributed the Program's favorable treatment of biofuels to the fact that "natural gas transmissions and generation emit 50 percent less greenhouse gas than burning coal." *See generally Ashcroft v. Iqbal*, 556 U.S. 662,

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<sup>10</sup> Compare Mem. in Supp. of Mot. Summ. J., *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal. Nov. 1, 2010), ECF No. 112 (quoting remarks by California state officials promoting the benefits of the LCFS, including the prospect that the program would "keep more money in the State" and "ensure that a significant portion of the biofuels used in the LCFS are produced in California"), with Compl., *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, No. 3:15-cv-00467-AA (D. Or. March 23, 2015), ECF No. 1 (citing statements by former Governor Kitzhaber that the Oregon program would "provide important economic benefits to Oregon's economy" and "keep capital circulating in our region through local sourcing and supply chains while reducing our dependence on carbon-intensive fuels." (quoting J. Kitzhaber, *10-Year Energy Action Plan* 37 (Dec. 14, 2012))). American Fuel also cites a statement from an advisory committee member that the LCFS "will create net jobs, make net improvements for household income, and be beneficial for Oregon's Gross State Product." *See* Advisory Final Report, Appx. A, Summary of Advisory Committee Input at 142 (2010), <http://library.state.or.us/repository/2011/201102081424462/appendixA.pdf>. These statements merely represent feedback and recommendations from stakeholders consulted during the rule-making process; under the same subheading, another committee member offered the critique that "more can be done to incentivize low carbon fuels within the state." *Id.*

678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))).

Our federal system recognizes “each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting)). This freedom would be meaningless if officials could not promote the economic benefits of these experiments to their states without running afoul of the Commerce Clause. For this reason, regulations “justified by a valid factor unrelated to economic protectionism” are permissible, even if they benefit a state’s economy. *New Energy Co.*, 486 U.S. at 274, 108 S.Ct. 1803.

It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. *Massachusetts v. EPA*, 549 U.S. 497, 522–23, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). “Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state.” *Exxon Mobil Corp. v. U.S. Env’tl. Prot. Agency*, 217 F.3d 1246, 1255 (9th Cir. 2000). The complaint does not allege that the Oregon program was enacted for the purpose of supporting a uniquely local industry. *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (finding a discriminatory purpose behind tax exemptions for two liquors produced in Hawaii because it was “undisputed that the

purpose of the exemption was to aid Hawaiian industry”). The district court therefore correctly rejected the argument that the complaint plausibly alleged that the Program was discriminatory in purpose.

### iii. Discriminatory Effect

A facially neutral statute can violate the Commerce Clause if it effectuates “differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter.” *Or. Waste Sys., Inc.*, 511 U.S. at 99, 114 S.Ct. 1345. But, even assuming that the in-state and out-of-state fuels at issue in this case are similarly situated, American Fuel’s complaint does not state a claim based on discriminatory effects. *See Rocky Mountain*, 730 F.3d at 1089 (“All factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels.”).

#### a. Burdens on Out-of-State Fuels

American Fuel argues that the Program’s assignment of credits and deficits creates an impermissible burden on producers or importers of petroleum and Midwest ethanols, who must purchase credits, and provides an impermissible benefit to Oregon biofuel producers, who can generate and can sell credits. The argument fails. On its face, the Oregon program assigns credits and deficits to fuels evenhandedly based on a “reason, apart from [their] origin”: carbon intensity. *Or. Waste Sys., Inc.*, 511 U.S. at 101 n.5, 114 S.Ct. 1345. The number of credits assigned to fuels does not depend on their state of origin. *See also Rocky Mountain*, 730 F.3d at 1089 (finding no discrimination under the LCFS, which “does not base its treatment on a fuel’s origin but on its carbon intensity”).

And, American Fuel has not plausibly alleged that the application of these neutral criteria has a discriminatory effect. Many out-of-state producers generate credits, and several fare better in this respect than Oregon producers of the same fuels. Indeed, even factoring in transportation emissions does not neatly divide in-state and out-of-state producers, because “[t]ransportation emissions reflect a combination of: (1) distance traveled . . . ; (2) total mass and volume transported; and (3) efficiency of the method of transport.” *Id.* at 1083; *see, e.g.*, State of Or. Dep’t of Env’tl. Quality, Oregon-Approved Carbon Intensity Values for 2016 (2016) (hereinafter “ODEQ 2016 Report”) (assigning lower carbon-intensity scores to renewable diesels and biofuels from Arkansas, Louisiana, Texas, South Korea, China, and Canada than to Oregon biofuels, and lower carbon-intensity scores to numerous out-of-state ethanols than to Oregon-produced ethanols); Or. Admin. R. 340-253-8030, -8040. Given its scoring system, the Program does not require or even incentivize “an out-of-state operator to become a resident in order to compete on equal terms.” *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963).

Under the Oregon program, producers of higher carbon-intensity fuels are disfavored relative to *all* lower carbon-intensity fuels, including those produced outside of Oregon. This is plainly permissible. A state “may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale” within its borders. *Rocky Mountain*, 730 F.3d at 1104; *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (holding that “interstate commerce is not subjected to an impermiss-

ible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another”). The Commerce Clause “protects the interstate market, not particular interstate firms.” *Exxon Corp.*, 437 U.S. at 127, 98 S.Ct. 2207.

American Fuel alleges that “to compete in the Oregon market, producers of high carbon-intensity fuels must change the manner in which they produce and transport fuels to obtain lower carbon-intensity scores to avoid the commercial disadvantage placed on their higher carbon-intensity fuels.” But this allegation merely affirms that the Program targets differences in production methods that affect greenhouse gas emissions “based on the real risks posed by different sources of generation,” something we have squarely held “is not a dormant Commerce Clause violation.” *Rocky Mountain*, 730 F.3d at 1092.

This is because the OR-GREET model considers in its calculation of carbon intensities emissions from the growth of inputs into the production of fuels, such as corn; efficiency of production, including electricity or fuel used for energy; milling processes; conversion of land for production; and transportation of fuels and feedstock into its calculations of carbon intensities [sic]. *See id.* at 1082–83 (upholding use of analogous GREET model in regulation in California). Accordingly, carbon intensity scores for ethanol vary widely under the Oregon program, ranging in January 2016 from 7.49 (Brazilian sugarcane ethanol) to as high as 98.59 (Midwest coal ethanol). *See State of Or. Dep’t of Env’tl. Quality, Oregon-Approved Carbon Intensity Values for 2016* (2016). But, some of the lowest carbon intensity scores are also assigned to Midwest producers. *See id.* at 8–11 (assigning values to Midwest ethanols ETHC036, ETHC056, ETCH073-75 [sic], and

ETHC089-90 lower than the value of Oregon ethanol). “The dormant Commerce Clause does not require [a state] to ignore the real differences in carbon intensity among out-of-state ethanol pathways,” including emissions from transporting fuels and other “important contributors to GHG emissions.” *Rocky Mountain*, 730 F.3d at 1088, 1093.

Nor does the Oregon program eliminate a competitive advantage that producers of higher carbon-intensity fuels have earned. *Cf. Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 351, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (striking down a North Carolina regulation that had “the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system”). A state may favor environmentally friendly production methods over others with more harmful effects. *See Clover Leaf Creamery Co.*, 449 U.S. at 473, 101 S.Ct. 715. And, “[a]ccess to cheap electricity is an advantage, but it was not ‘earned’ . . . simply because ethanol producers built their plants near coal-fired power plants and imposed the hidden costs of GHG emissions on others.” *Rocky Mountain*, 730 F.3d at 1092; *see id.* at 1091–92 (“Drawing electricity from the coal-fired grid might be the easiest and cheapest way to power an ethanol plant. But the dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient.”); *see also Exxon Corp.*, 437 U.S. at 127, 98 S.Ct. 2207 (holding that the Commerce Clause does not protect “the particular structure or methods of operation in a retail market”).

On remand, the *Rocky Mountain* district court held that American Fuel had plausibly alleged a discriminatory effect on out-of-state ethanol in California from the California program. *Rocky Mountain Farmers Union*, 258 F.Supp.3d at 1163; Mem. Decision & Order, *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal. Aug. 3, 2015), ECF No. 343. But, that finding is of no aid to American Fuel here, as it was based on an allegation that California had changed the way it calculated carbon intensity scores so as to “assign artificially lower CI scores to California-produced ethanol while assigning artificially higher CI scores to ethanol produced elsewhere, particularly in the Midwest.” *Rocky Mountain Farmers Union*, 258 F.Supp.3d at 1159. There is no allegation of a similar change here. Nothing in the complaint in this case suggests that Midwest ethanol’s scores are “artificially” high—only that they are higher than the scores of fuels that generate lower greenhouse gas emissions.

#### b. In-State Benefits

American Fuel also alleges that the Program impermissibly benefits in-state entities because Oregon biofuels producers can generate credits. But, any benefits conferred on Oregon biofuels producers arise from the relatively low carbon intensity of their products. The Program assigns lower carbon intensity scores to *all* biofuels (regardless of state of origin) in comparison to other fuels because of their lower greenhouse gas emissions. *See, e.g.*, ODEQ 2016 Report; Or. Admin. R. 340-253-8030, -8040. Such factors “are not discriminatory because they reflect the reality of assessing and attempting to limit GHG emissions.” *Rocky Mountain*, 730 F.3d at 1093.

And, biofuels are not a “uniquely local industry” to Oregon. *Id.* at 1100; *cf. Bacchus*, 468 U.S. at 271, 104 S.Ct. 3049 (finding the effect of a tax exemption “clearly discriminatory, in that it applies only to locally produced beverages”). As the district court explained, some of the fuels “most desirable from a carbon intensity standpoint” are out-of-state biofuels. Judgment, *Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*, No. 3:15-cv-00467-AA (D. Or. March 23, 2015), ECF No. 72. The Program thus does not favor in-state biofuels over similar out-of-state biofuels, which renders this case fully distinguishable from *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994), upon which the dissent relies. In that case, a Massachusetts tax on in-state and out-of-state milk dealers was used to fund a subsidy exclusively for in-state milk producers. *See* 512 U.S. at 190–91, 114 S.Ct. 2205. Under the structure of the Oregon Program, however, out-of-state producers are able to—and do—generate credits and thus share in the Program’s benefits. As the district court noted, the Program “rewards all investment in innovative fuel production, irrespective of where that innovation occurs.” *See* ODEQ 2016 Report. In contrast, the subsidies at issue in *West Lynn Creamery* were distributed explicitly and exclusively to in-state producers based on geography alone. *See* 512 U.S. at 190–91, 196–97, 114 S.Ct. 2205.

Thus, the pleadings do not provide a plausible basis from which to infer that the Program will shift market shares to *in-state biofuel producers*, as opposed to biofuel producers in general. *See Exxon Corp.*, 437 U.S. at 126, 98 S.Ct. 2207 (holding that a law did not discriminate against out-of-state refiners because “in-state independent dealers will have no competitive advantage over out-of-state dealers”); *Black Star*

*Farms LLC v. Oliver*, 600 F.3d 1225, 1231–32 (9th Cir. 2010). The fact that some burdens of Oregon’s program “fall[] on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Exxon Corp.*, 437 U.S. at 126, 98 S.Ct. 2207.<sup>11</sup>

### B. Extraterritorial Effect

The dormant Commerce Clause also prohibits a state from regulating conduct that “takes place wholly outside of the State’s borders.” *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)). American Fuel alleged that the Oregon program violates the Commerce Clause and “principles of interstate federalism” by attempting to control “commerce occurring wholly outside the boundaries” of the state. *Healy*, 491 U.S. at 336, 109 S.Ct. 2491. But, these claims are squarely barred by *Rocky Mountain*. See 730 F.3d at 1101 (“Firms in any location may elect to respond to the incentives provided by the Fuel Standard if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to

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<sup>11</sup> The fact that Oregon does not have a petroleum industry that is burdened under the Program does not support American Fuel’s discrimination claims. We have previously upheld, for example, an Arizona regulation that could shift market share away from large wineries even though the state had only one large winery that would be burdened under the regulation. See *Black Star Farms*, 600 F.3d at 1227–29. The regulations show that the Program “‘regulates evenhandedly’ . . . without regard” to a regulated party’s origin. *Clover Leaf Creamery Co.*, 449 U.S. at 471–72, 101 S.Ct. 715.

California.”). Like the LCFS, the Program expressly applies only to fuels sold in, imported to, or exported from Oregon. Or. Admin. R. 340-253-0100(1).

American Fuel contends that its claim based on principles of interstate federalism raises issues not considered in *Rocky Mountain*. However, as the district court correctly noted, “irrespective of its constitutional basis, any such claim is necessarily contingent upon a finding that the Oregon program regulates and attempts to control conduct that occurs in other states.” See *Rocky Mountain Farmers Union*, 2014 WL 7004725, at \*13–14 (denying leave to amend on remand to add claim alleging that the LCFS was unconstitutional under principles of interstate federalism because claim was based on same premise as an extraterritorial legislation claim). Because the Program does not legislate extraterritorially, American Fuel’s claim fails no matter how its constitutional claim is labelled.

### C. Preemption

Finally, American Fuel alleges that the Oregon program is preempted by § 211 of the CAA. That Act recognizes that “air pollution control at its source is the primary responsibility of States and local governments,” 42 U.S.C. § 7401(a)(3), but preempts state regulation of a fuel or fuel component if the EPA Administrator has declared regulation unnecessary:

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 . . . .

42 U.S.C. § 7545(c)(4)(A).

American Fuel contends that the EPA has found regulation of methane is unnecessary because it excluded methane from the definition of volatile organic compounds under § 211(k) of the CAA in light of its low reactivity. *See* 40 C.F.R. pt. 80 (1994); 42 U.S.C. § 7545(k). The CAA, however, makes plain that the administrator must find that “no control or prohibition . . . under” § 211(c) is necessary in order to effect preemption. The EPA’s decision not to regulate methane under § 211(k) is not a finding that regulating methane’s contributions to greenhouse gas emissions is unnecessary, and thus is not preemptive under § 211(c)(4)(A)(i).

### III. Conclusion

For the reasons above, we AFFIRM the judgment of the district court.

N.R. SMITH, Circuit Judge, dissenting:

I cannot agree to dismiss American Fuel’s claim,<sup>1</sup> alleging that the practical effect of Oregon’s Clean

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<sup>1</sup> I agree with the majority that *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), resolved many of the issues presented in this case. Nonetheless, although bound by our circuit precedent, I continue to believe that the incorporation of location and distance data into the calculation of carbon intensity values is facially discriminatory under the Supreme Court’s Commerce Clause analysis. *See Rocky Mountain Farmers*

Fuels Program (the “Oregon program”) impermissibly favors in-state interests at the expense of out-of-state interests.

I.

Where “a statute discriminates against out-of-state entities . . . in its practical effect, it is unconstitutional unless it ‘serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.’” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)). In *Rocky Mountain*, we followed the Supreme Court’s decision in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). See 730 F.3d at 1098–1100. There the Supreme Court struck down as “clearly unconstitutional” a facially neutral state pricing order that imposed a tax on all milk produced for consumption in Massachusetts while also providing a subsidy “exclusively to Massachusetts dairy farmers” that “entirely (indeed more than) offset” the tax for in-state producers. *W. Lynn Creamery*, 512 U.S. at 194, 114 S.Ct. 2205. By increasing the competitiveness of in-state industry at the expense of out-of-state industry, Massachusetts “neutraliz[ed] advantages belonging to the place of origin.” *Id.* at 196, 114 S.Ct. 2205 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, 55 S.Ct. 497, 79 L.Ed. 1032 (1935)). The Supreme Court explained that

[n]ondiscriminatory measures, like the even-handed tax at issue here, are generally upheld, in

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*Union v. Corey*, 740 F.3d 507, 515–16 (9th Cir. 2014) (M. Smith dissenting from denial of rehearing en banc).

spite of any adverse effects on interstate commerce, in part because the existence of major in-state interests adversely affected is a powerful safeguard against legislative abuse. . . . However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.

*Id.* at 200, 114 S.Ct. 2205 (original alterations and internal quotation marks omitted).

In *Rocky Mountain*, we applied the West Lynn Creamery Rule in evaluating the constitutionality of California's clean fuels program (which the Oregon law models). 730 F.3d at 1098–1100. There we determined that the California law burdened more in-state industry than it benefitted. *See id.* at 1099. Importantly, that conclusion was necessary to our decision that California's law did not violate the principles in *West Lynn Creamery*. *See id.* at 1098–1100.

In its opinion the majority fails to grapple with the Oregon program's *West Lynn Creamery* problem. That decision causes them to err as is shown below.

## II.

Again, to state a plausible claim for discrimination, American Fuel must allege that (A) the Oregon program discriminates against out-of-state interests in its practical effect, and (B) Oregon's legitimate interest in reducing global warming could be addressed by non-discriminatory means.

Further, as an initial matter in evaluating American Fuel's claim, this case is distinguished from *Rocky*

*Mountain* because it comes before us on a motion to dismiss, not summary judgment. The evidentiary record has not been developed in discovery. Thus, we must take all factual allegations and reasonable inferences therefrom in the light most favorable to American Fuel. See *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1142–43 (9th Cir. 2012).

## A.

American Fuel’s pleadings plausibly allege that Oregon’s program discriminates in its practical effect. First, Oregon’s program assigns a carbon intensity<sup>2</sup> to all transportation fuels produced for in-state consumption. The program then sets a maximum carbon intensity value. Fuels with a carbon intensity level above the maximum allowed carbon intensity value generate deficits and fuels with intensity levels below this value generate credits. Oregon also requires producers with deficits to off-set those deficits by purchasing credits from competing fuel producers that have generated credits under the law.

As American Fuel alleges, the discrimination arises from Oregon’s decision to draw the maximum allowed carbon intensity value in such a manner that *all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits. As a practical matter, this not only exempts in-state entities from any burden under the law (to remedy deficits by purchasing credits from competitors), but it also affords them an additional subsidy in the form of valuable carbon credits. By contrast, out-of-state regulated

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<sup>2</sup> The Carbon intensity value is based on a formula aimed at assessing the carbon footprint of each fuel from production through its ultimate consumption.

entities, including American Fuel, generate deficits and experience the full impact of the law.<sup>3</sup>

Thus, like the tax and subsidy in *West Lynn Creamery*, Oregon's program discriminates in its practical effect. *See* 512 U.S. at 200, 114 S.Ct. 2205. Out-of-state entities bear the full brunt of the law's burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions (and consequently global warming). At the same time, in-state entities not only avoid the burden of the law, they also receive a subsidy from the out-of-state entities in the sale of their valuable credits. Thus, American Fuel plausibly alleges that the Oregon program discriminates in its practical effect.

#### B.

It is also plausible that there are nondiscriminatory means of advancing Oregon's legitimate interest in combating global warming. *See Rocky Mountain*, 730 F.3d at 1087, 1106 (identifying legitimate state interests in addressing global warming). To state a plausible claim, it is unnecessary to identify every "available nondiscriminatory means" of accomplishing the goal of reducing greenhouse gases. *See id.* at 1087 (quoting *Taylor*, 477 U.S. at 138, 106 S.Ct. 2440). However, it is easy to suggest one plausible example. Oregon could simply adopt a per unit tax on carbon intensity. Such a tax would discourage use of carbon intense fuels without artificially shielding in-state

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<sup>3</sup> As the majority is quick to note, there are some out-of-state entities that also generate credits. But the Commerce Clause problem emphasized in the *West Lynn Creamery* analysis was the uniform absence of an in-state burden—not the presence of a uniform burden on out-of-state interests. *See* 512 U.S. at 200, 114 S.Ct. 2205.

interests from any responsibility for their contributions to greenhouse gas emissions. The availability of nondiscriminatory means of addressing global warming plausibly establishes that the discriminatory effect of Oregon's law violates the Commerce Clause.

III.

There is no doubt American Fuel alleges a plausible claim. Taken together, the discriminatory practical effect of Oregon's program and the availability of nondiscriminatory alternatives plainly state a claim under the Commerce Clause that ought to survive a motion to dismiss.

**APPENDIX B**

UNITED STATES DISTRICT COURT  
D. OREGON

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Case No. 3:15-cv-00467-AA

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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,  
AMERICAN TRUCKING ASSOCIATIONS, INC.,  
A TRADE ASSOCIATION, AND CONSUMER ENERGY  
ALLIANCE, A TRADE ASSOCIATION,

*Plaintiffs,*

v.

JANE O'KEEFFE, ED ARMSTRONG, MORGAN RIDER,  
COLLEEN JOHNSON, AND MELINDA EDEN, IN THEIR  
OFFICIAL CAPACITIES AS MEMBERS OF THE OREGON  
ENVIRONMENTAL QUALITY COMMISSION; DICK  
PEDERSON, JONI HAMMOND, WENDY WILES, DAVID  
COLLIER, JEFFERY STOCUM, CORY-ANN WIND, LYDIA  
EMER, LEAH FELDON, GREG ALDRICH, AND SUE  
LANGSTON, IN THEIR OFFICIAL CAPACITIES AS OFFICERS  
AND EMPLOYEES OF THE OREGON DEPARTMENT OF  
ENVIRONMENTAL QUALITY; ELLEN ROSENBLUM, IN HER  
OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
STATE OF OREGON; AND KATE BROWN, IN HER OFFICIAL  
CAPACITY AS GOVERNOR OF THE STATE OF OREGON,

*Defendants,*

v.

CALIFORNIA AIR RESOURCES BOARD,  
STATE OF WASHINGTON, OREGON ENVIRONMENTAL  
COUNCIL, INC., CLIMATE SOLUTIONS,  
NATURAL RESOURCES DEFENSE COUNCIL,  
ENVIRONMENTAL DEFENSE FUND, AND SIERRA CLUB,

*Defendant-Intervenors.*

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Signed Sept. 23, 2015

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**OPINION AND ORDER**

AIKEN, Chief Judge:

Defendants Jane O’Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, Melinda Eden, Dick Pederson, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory–Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, Sue Langton [sic], Ellen Rosenblum, and Kate Brown move to dismiss plaintiffs American Fuel and Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance’s claims pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6). Defendant-intervenors California Air Resources Board and the State of Washington (collectively “State Intervenors”) separately move to dismiss plaintiffs’ complaint with prejudice. Defendant-intervenors Oregon Environmental Council, Inc., Climate Solutions, Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club (collectively “Conservation Intervenors”) also move for judgment on the pleadings under Fed.R.Civ.P. 12(c).<sup>1</sup> For the reasons set forth below, defendants’ and defendant-intervenors’ motions are granted, and this case is dismissed.

**BACKGROUND**

In 2007, the Oregon legislature found that climate change seriously threatened Oregon’s economy, environment, and public health. Or.Rev.Stat. § 468A.200.

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<sup>1</sup> Defendant-intervenors’ arguments in favor of dismissal are analogous to those asserted by defendants. Except where otherwise indicated, the Court will address defendant-intervenors’ and defendants’ motions together.

These threats included “[r]educed snowpack, changes in the timing of stream flows, extreme or unusual weather events, rising sea levels, increased occurrences of vector-borne diseases and impacts on forest health.” *Id.* Such environmental damage would “have detrimental effects on many of [Oregon’s] largest industries, including agriculture, wine making, tourism, skiing, recreational and commercial fishing, forestry and hydropower generation.” *Id.* The Oregon legislature identified a need to assess and monitor the current level of greenhouse gas emissions (“GHG”) in Oregon, “and to take necessary action to begin reducing greenhouse gas emissions in order to prevent disruption of [Oregon’s] economy and quality, [sic] of life and to meet [Oregon’s] responsibility to reduce the impacts and the pace of global warming.” *Id.*

In 2009, the state resolved to lower GHG emissions from transportation fuels, which, at 30%, account for the largest single market share. Compl. ¶ 30; Or. Admin. R. 340–253–0000(1). Specifically, via House Bill 2186, the Oregon legislature instructed the Oregon Environmental Quality Commission (“EQC”) to adopt rules to decrease lifecycle GHG emissions from transportation fuels, based on their carbon intensities, that are produced in or imported to Oregon by 10% over a 10–year period (“Oregon Program”).<sup>2</sup> Compl. ¶¶ 30–31; Or. Admin. R. 340–253–0000(2)–(3).

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<sup>2</sup> Lifecycle GHG emissions are the “aggregated quantity of [GHG] emissions, including direct emissions and significant indirect emissions, such as significant emissions from changes in land use associated with the fuels; [m]easured over the full fuel lifecycle, including all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer; and [s]tated in terms of mass values for all [GHGs] as adjusted to C02e to account for the

In 2010, the Department of Environmental Quality (“DEQ”) convened an advisory committee to help design a program consistent with House Bill 2186. Compl. ¶¶ 30–31. In January 2011, the DEQ published a final report outlining the advisory committee’s process and recommendations. *Id.* at ¶ 33. In December 2012, the EQC adopted Phase 1 rules for the Oregon Program. *Id.* at ¶ 34. Phase 1 began on January 1, 2013, when the state began requiring regulated parties—i.e. “[a]ll persons that produce in Oregon or import into Oregon any regulated fuel”<sup>3</sup>—to register for the Oregon Program and record/report the volumes and carbon intensities of their transportation fuels. Or. Admin. R. 340–253–0100(1), 340–253–0200, 340–253–0500, 340–253–0600–50.

In January 2015, after the DEQ convened a second advisory committee, the EQC adopted Phase 2 rules. Compl. ¶¶ 35, 37. These rules require regulated parties to meet the annual clean fuel standards. Or. Admin. R. 340–253–0100–250, 340–253–0400, 340–253–8010–20. The carbon intensity of a fuel is based on OR–GREET, a lifecycle emissions model developed by the Argonne National Laboratory and customized for Oregon. Or. Admin. R. 340–253–0040(44). The Oregon Program regulations include lookup tables

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relative global warming potential of each gas.” Or. Admin. R. 340–253–0040(37). “Carbon intensity,” in turn, is “the amount of lifecycle [GHG] emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gC02e per MJ).” Or. Admin. R. 340–253–0040(9).

<sup>3</sup> The Oregon Program contrasts “regulated fuel,” which is essentially any traditional fuel such as gasoline or diesel, with “clean fuel,” which is defined as any “transportation fuel with a carbon intensity value lower than the clean fuel standard for gasoline or diesel fuel and their substitutes.” Or. Admin. R. 340–253–0200.

that list the carbon intensities of a variety of fuels.<sup>4</sup> Or. Admin. R. 340–253–8030–40.

Beginning in 2016,<sup>5</sup> regulated parties will need to hold credits equal to or greater than their deficits, on an annual aggregate basis, to demonstrate their compliance with the Oregon Program. Or. Admin. R. 340–253–8010–20. A clean fuel credit is generated when fuel is produced, imported, dispensed, or used in Oregon and the carbon intensity value is lower than the clean fuel standard for that year. Or. Admin. R. 340–253–1000(5). Conversely, a clean fuel deficit is generated when fuel is produced, imported, dispensed, or used in Oregon and the carbon intensity value exceeds the clean fuel standard for that year. Or. Admin. R. 340–253–1000(6). Credits can be bought and sold, banked for the future, or used by a fuel importer or producer to offset a deficit created by the importation or production of other fuels. Or. Admin. R. 340–253–1050. This structure allows regulated parties flexibility in complying with the Oregon Program, as

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<sup>4</sup> These tables, in part, represent default values that “incorporate . . . average [carbon intensities] for producers within [a] region that use the same mechanical methods and thermal-energy source and produce the same co-product.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1093 (9th Cir.2013), *reh’g denied en banc*, 740 F.3d 507 (9th Cir.), *cert. denied*, — U.S. —, 134 S.Ct. 2875, 189 L.Ed.2d 835 (2014), — U.S. —, 134 S.Ct. 2884, 189 L.Ed.2d 835 (2014). Other rows represent individualized carbon intensity values for particular fuel pathways. *See, e.g.*, Or. Admin. R. 340–253–8030 (Table 3). Regulated parties are instructed to use the carbon intensity value for the fuel that “best matches the description in the fuel pathway” in the lookup tables. Or. Admin. R. 340–253–0400(2).

<sup>5</sup> In March 2015, Governor Brown signed Senate Bill 324, which removed the sunset date for the Oregon Program and allowed DEQ to continue its implementation efforts. Compl. ¶ 38.

no regulated party is required to sell any particular fuel or blend of fuels with a certain carbon intensity or origin.

On March 23, 2015, plaintiffs filed a complaint in this Court alleging that the Oregon Program: (1) discriminates against out-of-state commerce in violation of the Commerce Clause; (2) regulates extraterritorial activity in violation of the Commerce Clause and principles of interstate federalism; (3) is expressly preempted by section 211(c) of the Clean Air Act (“CAA”) and the Environmental Protection Agency’s (“EPA”) [sic] Reformulated Gasoline Rule (“RFGR”); and (4) is conflict preempted by section 211(o) of the CAA, which contains the Renewable Fuel Standard (“RFS”) as amended by the Energy Independence and Security Act (“EISA”).<sup>6</sup> In June 2015, defendants and defendant-intervenors filed the present motions to dismiss.<sup>7</sup>

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<sup>6</sup> The Oregon Program is comparable to California’s Low Carbon Fuel Standard (“LCFS”). *Compare* Cal.Code Regs. tit. 17, §§ 95480–90, *with* Or. Admin. R. 340–253–0000–8080. In fact, it is undisputed that the Oregon Program was modeled after the LCFS and is analogous thereto in all relevant respects. Pls.’ Resp. to Mots. 3–5, 25; *see also* State Intervenors’ Mot. Dismiss 2–4 (detailing the similarities between each program). The LCFS was recently challenged by several farming and fuel associations, including plaintiffs, on many of the same grounds. *See generally Rocky Mountain*, 730 F.3d 1070; *Rocky Mountain Farmers Union v. Goldstene* (“*Rocky Mountain II*”), 2014 WL 7004725 (E.D.Cal. Dec. 11, 2014); *Am. Fuels & Petrochem. Mfrs. Ass’n v. Corey*, 2015 WL 4872639 (E.D.Cal. Aug. 13, 2015).

<sup>7</sup> State Intervenors also request judicial notice of certain documents. State Intervenors’ First Req. Judicial Notice Exs. AG [sic]; State Intervenors’ Second Req. Judicial Notice Exs. H–L. Additionally, defendants attach materials to their opening and reply briefs. Defs.’ Mot. Dismiss Appx.; Defs.’ Reply to Mot. Dismiss Exs. 1–7. Plaintiffs do not object to and, in some instances, rely on these documents. Because they are part of the

## STANDARDS

Where the court lacks subject-matter jurisdiction, the action must be dismissed. Fed.R.Civ.P. 12(b)(1). The party seeking to invoke the subject-matter jurisdiction of the court bears the burden of establishing that such jurisdiction exists. *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.1989). The court may hear evidence regarding subject-matter jurisdiction and resolve factual disputes where necessary: “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the [court] from evaluating for itself the merits of jurisdictional claims.” *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1195 (9th Cir.2008).

Where the plaintiff “fails to state a claim upon which relief can be granted,” the court must dismiss the action. Fed.R.Civ.P. 12(b)(6). To survive a motion to dismiss, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). For the purposes of a Fed.R.Civ.P. 12(b)(6) motion, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir.1983). Bare assertions that amount to nothing more than a “formulaic recitation of the elements” of a claim “are conclusory and not entitled to be assumed true.” *Ashcroft v. Iqbal*,

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public record and/or incorporated by reference into the complaint, the Court considers these materials, to the extent relevant, in evaluating the present motions. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.2003) (citations omitted); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n. 2 (9th Cir.2006) (citations omitted).

556 U.S. 662, 680–81, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Rather, to state a plausible claim for relief, the complaint “must contain sufficient allegations of underlying facts” to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216, *reh’g en banc denied*, 659 F.3d 850 (9th Cir.2011).

Judgment on the pleadings is proper where “the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir.1990); Fed.R.Civ.P. 12(c). “Rule 12(c) is functionally identical to Rule 12(b)(6) and [the] same standard of review applies to motions brought under either rule.” *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n. 4 (9th Cir.2011) (citation and internal quotations omitted).

#### DISCUSSION

The central issue to be decided in this case is whether the Oregon Program violates federal law. Defendants argue that dismissal of plaintiffs’ Commerce Clause claims is required because they are precluded by *Rocky Mountain*, fail at the pleadings level, and/or are not yet ripe. In addition, defendants contend that plaintiffs cannot state an express preemption claim because the EPA did not affirmatively preclude state regulation of methane. Defendants also assert that plaintiffs’ conflict preemption claim fails because prudential standing is lacking and the RFS and EISA are in harmony with the Oregon Program.<sup>8</sup>

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<sup>8</sup> To the extent plaintiffs maintain that their allegations are sufficient or plausible despite the actual text of the relevant stat-

I. *First Claim: Discrimination*

Plaintiffs allege that the Oregon Program discriminates in purpose and effect, as well as facially, “by attempting to regulate and control economic conduct occurring outside the borders of Oregon, including the extraction, production and distribution of transportation fuels.” Compl. ¶¶ 4, 107–19.

The Commerce Clause “has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of State of Or.*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (citation omitted). Known as the “dormant” Commerce Clause, this aspect is not a complete negative, as “the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (citations omitted). Accordingly, a “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.” *Rocky Mountain*, 730 F.3d at 1087 (citation and internal quotations omitted).

“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Davis*, 553 U.S. at 337–38, 128 S.Ct. 1801 (citation and internal quotations omitted). Economic protectionism, or dis-

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utes and regulations, or certain contradictory judicially noticeable facts, their argument is without merit. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir.2000).

crimination, “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345. If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, strict scrutiny applies: the law is unconstitutional unless it “serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.” *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (citation and internal quotations omitted). Absent discrimination, a law will be upheld “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).<sup>9</sup> “The party challenging the statute bears the burden of showing discrimination.” *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir.2010).

The Court notes, at the outset, that plaintiffs’ discrimination claim is largely barred by on-point precedent: the Ninth Circuit held that the LCFS did not facially discriminate against out-of-state ethanol or petroleum, and did not discriminate in purpose or effect against out-of-state petroleum. *Rocky Mountain*, 730 F.3d at 1107. The only issue related to discrimination that falls outside *Rocky Mountain* is whether the Oregon Program discriminates in purpose or effect

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<sup>9</sup> Plaintiffs neither argue nor allege that the Oregon Program fails under the balancing test articulated in *Pike*. See generally Compl.; Pls.’ Resp. to Mots.; see also *Rocky Mountain II*, 2014 WL 7004725 at \*15 n. 16 (plaintiffs “abandon[ed] their *Pike* challenges to both the crude oil and ethanol provisions of the LCFS”). Therefore, the sole issue is whether the Oregon Program is discriminatory.

against out-of-state ethanol. *Rocky Mountain II*, 2014 WL 7004725 at \*14–15 (citations omitted). While plaintiffs concede that Rocky Mountain “controls” certain issues, they nonetheless disagree and categorize its holdings as largely non-binding because it “involved a different state’s officials, a different statute and regulations, a different record, and different statements.” Pls.’ Resp. to Mots. 2, 11, 18–19. Plaintiffs further seek to preserve their arguments for appeal, such that the Court will address all aspects of their discrimination claim.

#### A. *Facial Discrimination*

Plaintiffs assert that the Oregon Program is facially invalid because it discriminates against petroleum—by “assign[ing] petroleum a higher carbon intensity than ethanol and other Oregon biofuels”—and Midwest ethanol—because “[t]he lookup tables consistently give higher scores to ethanol produced in the Midwest than to ethanol produced using the same process in Oregon.” Pls.’ Resp. to Mots. 16–18 (citing Compl. ¶¶ 55–59, 66–80).

Initially, plaintiffs do not meaningfully address how petroleum and ethanol are similarly situated or cite to any well-pleaded factual allegations to that effect. *See generally* Compl.; Pls.’ Resp. to Mots.; *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 298–99, 310, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (when the alleged discrimination involves “entities [that] provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes”); *Rocky Mountain*, 730 F.3d at 1084–94 (analyzing ethanol and petroleum separately because “[c]rude oil presents different climate challenges from ethanol and other biofuels . . . [if a state] is to successfully [counter] a trend towards

increased GHG output and rising world temperatures, it cannot ignore the real factors behind GHG emissions”); State Intervenors’ Reply to Mot. Dismiss 8–9 (“[i]n the transportation fuel context, courts have traditionally considered ethanol to compete with ethanol and petroleum to compete with petroleum”) (collecting cases).<sup>10</sup> Thus, to the extent they phrase it broadly to encompass both fuels, plaintiffs’ claim fails at the pleadings level.

In any event, the fundamental premise of plaintiffs’ claim is that the only fuels benefitting from the Oregon Program originate in Oregon. Plaintiffs therefore ignore significant segments of the market and instead ask this Court to assume that the pertinent comparison consists of Oregon biofuels,<sup>11</sup> on the one hand, and

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<sup>10</sup> Although defendants and State Intervenors raise this issue as a basis for dismissal, plaintiffs respond solely by pointing to, and misquoting, the complaint’s allegations. Pls.’ Resp. to Mots. 17 n. 9 (citing Compl. ¶ 58). This is especially problematic given that compliance with the Oregon Program can be achieved exclusively through the purchase of credits, such that nothing precludes plaintiffs from continuing to produce and import diesel/petroleum in lieu of fuels with lower carbon intensities. *See* Defs.’ Reply to Mot. Dismiss Ex. 2, at 8 (“the low carbon fuel standards would not mandate the use of any specific fuel”); Defs.’ Reply to Mot. Dismiss Ex. 3, at 1 (“[t]o meet the [annual clean fuel] standards, regulated parties would select the strategy that works best for them [which could mean merely] purchasing clean fuel credits from providers of clean fuels”).

<sup>11</sup> Biofuels include ethanol and biodiesel; nevertheless, the Court’s analysis focuses exclusively on ethanol, as plaintiffs fail to allege any facts concerning biodiesel produced either inside or outside of Oregon, beyond observing that Oregon biodiesel “already meet[s] the proposed average annual carbon intensity.” Compl. ¶ 58; *see also* Or. Admin. R. 340–253–8040 (Table 4) (all biodiesels have average carbon intensities below the annual fuel standard).

out-of-state petroleum and Midwest ethanol, on the other. *See, e.g.*, Pls.’ Resp. to Mots. 12. The Ninth Circuit, however, expressly rejected this attempt at “selective comparison, which excludes relevant [competing] fuel pathways” and held that discrimination claims, whether premised on ethanol or petroleum, must be viewed “in context of the full market.” *Rocky Mountain*, 730 F.3d at 1088–90, 1099.

Like the LCFS, the Oregon Program is not facially discriminatory because it distinguishes among fuels based on lifecycle GHG emissions, not origin or destination. In fact, the Oregon Program assigns twelve out-of-state ethanol pathways carbon intensities lower than the value plaintiffs’ allege confers discriminatory benefits. *Id.* at 1089–96; Or. Admin. R. 340–253–8030 (Table 3); *see also* Compl. ¶ 70 (recognizing that an ethanol produced in California obtains the same benefits under the Oregon Program as those produced in Oregon). These twelve lower pathways represent biofuels from outside of Oregon; seven are expressly identified as from California and Brazil, and the remaining five correspond to ethanols from the Midwest. Or. Admin. R. 340–253–8030 (Table 3); *see also Rocky Mountain*, 730 F.3d at 1084, 1090 (“the lowest ethanol carbon intensity values, providing the most beneficial market position, have been for pathways from the Midwest and Brazil”). As such, the Oregon Program does not facially discriminate against out-of-state ethanol.

Assuming that biofuels and petroleum compete in the same market, the fact that the Oregon Program assigns lower carbon-intensity values to in-state and out-of-state biofuels than to petroleum is not indicative of discrimination. Petroleum’s higher carbon intensity values exist for a legitimate, nondiscriminatory reason:

[c]orn and sugarcane absorb carbon dioxide as they grow, offsetting emissions released when ethanol is burned. By contrast, the carbon in crude oil makes a one-way trip from the Earth's crust to the atmosphere. For crude oil and its derivatives, emissions from combustion are largely fixed, but emissions from production vary significantly. As older, easily accessible sources of crude are exhausted, they are replaced by newer sources that require more energy to extract and refine, yielding a higher carbon intensity than conventional crude oil. As extraction becomes more difficult, emissions from crude oil will only increase, but [the state] expects that fuels with carbon intensity values fifty to eighty percent lower than gasoline will be needed to meet its emissions-reduction targets. No matter how efficiently crude oil is extracted and refined, it cannot supply this level of reduction. To meet [the state's] goals, the development and use of alternative fuels must be encouraged.

*Rocky Mountain*, 730 F.3d at 1084–85.

Moreover, it is undisputed that Oregon does not produce any petroleum in-state. Pls.' Resp. to Mots. 17–18 (citing Compl. ¶¶ 57–58); *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125, 98 S.Ct. 2207, 57 L.Ed.2d 91, *reh'g denied*, 439 U.S. 884, 99 S.Ct. 232, 233, 58 L.Ed.2d 200 (1978) (because the state's "entire gasoline supply flows in interstate commerce [as] there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless"); *see also Rocky Mountain*, 730 F.3d at 1089 ("a regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally"). Under *Rocky*

*Mountain and Exxon Corp.*, facial discrimination against out-of-state petroleum would not transpire even if it were ultimately displaced by biofuels in, [sic] the Oregon market because “successfully promot[ing] low-carbon intensity fuels” requires the consideration of “factors [that] bear on the reality of GHG emissions,” including “location, but only to the extent that location affects the actual GHG emissions attributable to a default pathway.” *Rocky Mountain*, 730 F.3d at 1089–93.

Finally, the cases plaintiffs rely on are distinguishable. See Pls.’ Resp. to Mots. 16–17 (citing *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)). Two of these cases focused primarily on non-facial discrimination. See, e.g., *Bacchus*, 468 U.S. at 268–73, 104 S.Ct. 3049 (observing “that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce” but ultimately basing its ruling on the statute’s purpose and effect); *Hunt*, 432 U.S. at 350–52, 97 S.Ct. 2434 (describing the challenged statute’s facial neutrality and instead striking it down due to its discriminatory effect). Regardless, the law invalidated in *Bacchus* limited the state’s liquor excise tax exemption to two products manufactured exclusively in-state. *Bacchus*, 468 U.S. at 265–66, 104 S.Ct. 3049. In contrast, under the Oregon Program, both in-state and out-of-state products can earn, and have earned, lower carbon intensity values, and regulated parties are not required to import or manufacture any specific fuel in order to achieve compliance. See *Rocky Mountain*, 730 F.3d at 1100 (distinguishing *Bacchus* in relation to the plaintiffs’ petroleum-based discriminatory purpose claim).

*Hunt* and *New Energy* are similarly distinct. Plaintiffs cite to these cases for the proposition that an otherwise-unconstitutional statute is not saved because it favors certain out-of-state products in addition to in-state products. Pls.’ Resp. to Mots. 16. Unlike the Oregon Program, the state laws challenged in *Hunt* and *New Energy* were not the most beneficial towards out-of-state products. *Hunt*, 432 U.S. at 350–52, 97 S.Ct. 2434; *New Energy*, 486 U.S. at 271–75, 108 S.Ct. 1803; see also *Rocky Mountain*, 730 F.3d at 1092 (distinguishing *Hunt* in relation to the plaintiffs’ ethanol-based facial discrimination claim). Further, unlike the plaintiffs in *Hunt*, plaintiffs here identify no competitive and economic advantages they earned and that the Oregon Program eliminates. Indeed, on its face, the Oregon Program rewards all investment in innovative fuel production, irrespective of where that innovation occurs. Defendants’ and defendant-intervenors’ motions are granted as to plaintiffs’ facial discrimination claim.

#### B. *Discriminatory Purpose*

Plaintiffs contend that the Oregon Program “was enacted to [favor] Oregon’s ‘home-grown’ biofuels industry against the petroleum and ethanol industries of other states.” Pls.’ Resp. to Mots. 8 (citing Compl. ¶¶ 71–84). Plaintiffs cite to statements made by state lawmakers, as well as DEQ committee members and officials, to support their assertion of discriminatory purpose. *Id.* at 8–11.

Plaintiffs’ claim fails for three reasons. First, plaintiffs ignore the actual stated purpose of the Oregon Program, which is to “reduce Oregon’s contribution to the global levels of [GHG] emissions and the impacts of those emissions in Oregon” by “reduc[ing] the amount of lifecycle [GHG] emissions per unit of energy

by a minimum of 10 percent below 2010 levels over a 10-year period.” Or. Admin. R. 340–253–0000(1)–(3); *see also Rocky Mountain*, 730 F.3d at 1098 (court “will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [it] to conclude that they could not have been a goal of the legislation”) (citation and internal quotations omitted); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966) (“[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes”). Plaintiffs also ignore that the metric by which GHG emissions are measured applies evenhandedly; the dispositive inquiry is a fuel’s carbon intensity, which correlates to the fuel’s contribution to climate change, not its origin. *Rocky Mountain*, 730 F.3d at 1089–90. In other words, the purpose and design of the Oregon Program are nondiscriminatory on their face.

Second, the comments plaintiffs rely on are provided out of context. When read in their entirety, the documents in which these remarks appear reinforce that the purpose of the Oregon Program is to reduce GHG emissions. *Compare* Compl. ¶¶ 71–84 (excerpted comments), *with* Defs.’ Reply to Mot. Dismiss Exs. 1–7 (comments provided in context). In any event, the hope of state officials that, in effectuating the legitimate goal of lowering GHG emissions, the Oregon Program benefits the local economy is insufficient to evince a discriminatory purpose. *See Valley Bank of Nev. v. Plus. Sys., Inc.*, 914 F.2d 1186, 1193–96 (9th Cir.1990) (regulation that “advances . . . legitimate state interests” and “applies evenhandedly certainly passes muster under the commerce clause”; the “predictable concern” from state politicians for their own residents

“does not rebut the evenhandedness of the legislation’s plain language”).

Third, the plaintiffs in *Rocky Mountain* based their discriminatory purpose claim on similar, isolated comments made by California lawmakers. *Rocky Mountain*, 730 F.3d at 1089–1101; *see also* Defs.’ Reply to Mot. Dismiss 11–12 n. 4 (summarizing comparable statements made by California officials highlighting the LCFS’ benefits to in-state industries) (citations omitted). In holding that the LCFS did not have a discriminatory purpose, the Ninth Circuit explicitly acknowledged the “few quotes from an expansive record” cited by plaintiffs but nonetheless held that they “do not plausibly relate to a discriminatory design and are ‘easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.’” *Rocky Mountain*, 730 F.3d at 1100 n. 13 (quoting *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 463 n. 7, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)). As discussed herein, any claim of a protectionist purpose is belied by the fact that the Oregon Program provides advantages, in terms of lower carbon intensity values, to numerous out-of-state fuels. *See, e.g.*, Or. Admin. R. 340–253–8030 (Table 3). Defendants’ and defendant-intervenors’ motions are granted as to plaintiffs’ discriminatory purpose claim.

### C. *Discriminatory Effect*

Plaintiffs allege that the Oregon Program creates a “‘commercial disadvantage’ for petroleum and ethanol from outside Oregon [by] requir[ing] regulated parties to comply with the standard for carbon intensity, and [assigning] lower carbon-intensity values to Oregon ethanol and other biofuels than to petroleum, and lower carbon-intensity values to Oregon ethanol than to identical Midwest ethanol.” Pls.’ Resp. to Mots. 13

(citing Compl. ¶¶ 55–57 and quoting *New Energy*, 486 U.S. at 274, 108 S.Ct. 1803).<sup>12</sup>

As a preliminary matter, plaintiffs’ [sic] base their opposition on the wrong standard. Whether actual evidence of differential treatment amongst in-state and out-of-state interests exists, as opposed to a commercial disadvantage, is the critical question. *See Black Star*, 600 F.3d at 1232 (“[c]ourts examining a ‘practical effect’ challenge must be reluctant to invalidate a state statutory scheme . . . simply because it might turn out down the road to be at odds with our constitutional prohibition against state laws that discriminate against Interstate Commerce [especially] where neither facial economic discrimination nor improper purpose is an issue”); *see also New Energy*, 486 U.S. at 274–76, 108 S.Ct. 1803 (discrimination was “patent” such that an analysis of the statute’s discriminatory effect was not necessary). As a result, to survive a motion to dismiss, a plaintiff must allege more than the existence of a commercial disadvantage, such as facts creating a reasonable inference that the challenged law has differing effects on similarly situated in-state and out-of-state entities.

Plaintiffs have not done so here; their only pleadings pertaining to this subject conclude that the Oregon

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<sup>12</sup> In response to defendants’ ripeness argument, which the Court does not find persuasive given the Oregon Program’s imminent start date and the hardship that would result to the parties from withholding a decision, plaintiffs contend that “the question of the Oregon Program’s effects is already clear”; yet, in other portions of their brief, plaintiffs argue the effects are unknown and that a “motion to dismiss is not an appropriate mechanism to test whether a party will ultimately prove facts underlying its well-pleaded claims.” *Compare* Pls.’ Resp. to Mots. 14, *with id.* at 31, 34.

Program “will have the intended discriminatory effect” due to its discriminator design. Pls.’ Resp. to Mots. 13. Yet the purported discriminatory design that plaintiffs object to generally required regulated parties to reduce the lifecycle GHG emissions of their fuels. See Compl. ¶¶ 55–58 (gasoline and “diesel importers would need to replace existing sources [with fuels that have] lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements”).

Additionally, the essential tenants of plaintiffs’ discriminatory effects claim are undermined by the plain language of the Oregon Program and Ninth Circuit precedent. The definition of a regulated party does not depend on the origin of the fuel. Or. Admin. R. 340–253–0100(1). Likewise, the Oregon Program “does not base its treatment on a fuel’s origin but on its carbon intensity.” *Rocky Mountain*, 730 F.3d at 1089. As addressed in section I(A), the Oregon Program also does not grant preferential treatment to in-state [sic] biofuels over out-of-state petroleum and Midwest ethanol. Whatever effects the Oregon Program may ultimately have on Oregon’s biofuels market, there are no plausible allegations demonstrating that out-of-state producers will be commercially disadvantaged or considerably burdened, as some of their biofuels are the most desirable from a carbon intensity standpoint and the Oregon Program mandates neither the use of any particular fuel nor a specific carbon intensity or origin. Defendants’ and defendant-intervenors’ motions are granted as to plaintiffs’ first claim.

## II. *Second Claim: Extraterritorial Legislation*

Plaintiffs next allege that the Oregon Program “violates the United States Constitution by regulating interstate and foreign commerce that occurs wholly

outside Oregon.” Pls.’ Resp. to Mots. 19 (citing Compl. ¶¶ 121–30).

The constitution, pursuant to either the dormant Commerce Clause or principles of structural federalism embodied therein, proscribes any “statute that directly controls commerce occurring wholly outside the boundaries of a State.” *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The extraterritoriality principle is rarely utilized and has been confined to three circumstances: price control statutes, statutes that link prices paid in-state with those paid out-of-state, and statutes that discriminate against out-of-state commerce. *Rocky Mountain*, 730 F.3d at 1101–03.

Plaintiffs paint their current extraterritorial legislation claim as discrete from the claim that was reviewed and rejected by the Ninth Circuit because it is independently based on principles of interstate federalism. Nevertheless, plaintiffs recognize that, irrespective of its constitutional basis, any such claim is necessarily contingent upon a finding that the “Oregon Program regulates and attempts to control conduct that occurs in other states,” as both “the Commerce Clause [and] principles of structural federalism [exist to] prohibit states from engaging in extraterritorial regulation.” Pls.’ Resp. to Mots. 19–21.

Accordingly, because the Ninth Circuit expressly held that the analogous LCFS “does not control conduct wholly outside the state,” and is not “an impermissible extraterritorial regulation,” plaintiffs’ claim fails as a matter of law. *Rocky Mountain*, 730 F.3d at 1103–07; *see also Rocky Mountain II*, 2014 WL 7004725 at \*13–14 (plaintiffs’ proposed amendment—i.e. to add a

claim alleging that the LCFS was unconstitutional under “principles of interstate federalism”—was barred by the law of the case doctrine because, per plaintiffs [sic] own admission, any such claim was premised on the fact that a state “may not apply its laws to commerce that takes place wholly outside of [its] borders, or seek to control commerce in other States”) (citations and internal quotations and ellipses omitted); *Am. Fuels*, 2015 WL 4872639 at \*9–12 (dismissing, without leave to amend, plaintiffs’ extraterritorial regulation claim based on “principles of interstate federalism”). Defendants’ and defendant-intervenors’ motions are granted as to plaintiffs’ second claim.

### III. *Third Claim: Express Preemption*

Plaintiffs’ [sic] also allege the Oregon Program is expressly preempted by section 211(c)(4)(A)(i) of the CAA and the RFG, which found that “no control or prohibition relating to the GHG methane is necessary for transportation fuels.” Compl. ¶¶ 131–36.

The Supremacy Clause gives Congress the power to preempt state law by, amongst other avenues, “withdraw[ing] specified powers from the States by enacting a statute containing an express preemption provision.” *Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2500–01, 183 L.Ed.2d 351 (2012) (citation omitted). When a federal act contains an express preemption provision, the court’s primary task is to “identify the domain expressly pre-empted by that language.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The court “focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

The CAA authorizes the EPA. [sic] to regulate fuels and their emissions. 42 U.S.C. § 7545. Under Section 211(c)(1), the EPA may regulate a fuel if that fuel or its emission product “causes, or contributes, to air pollution . . . that may reasonably be anticipated to endanger the public health or welfare.” 42 U.S.C. § 7545(c)(1). The CAA also includes an express preemption provision under section 211(c)(4):

no State (or political subdivision thereof) may prescribe or. [sic] 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 [EPA] 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 [sic] finding in the Federal Register, or

(ii) if the [EPA] 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 [EPA].

42 U.S.C. § 7545(c)(4)(A). Thus, subsection (ii), which is not at issue in this case, is preemption by affirmative, positive EPA regulation, whereas subsection (i) is preemption by affirmative, negative EPA regulation. *See* 62 Fed.Reg. 10,690, 10,693 (“[s]ection 211(c)(4) applies only where EPA has affirmatively decided to regulate a particular fuel characteristic or component, or has affirmatively found that no such regulation is necessary”).

Section 211(k) of the CAA, in turn, requires the EPA to control fuel to achieve the “greatest reduction in emissions of ozone forming volatile organic compounds . . . through the reformulation of conventional gasoline.” 42 U.S.C. § 7545(k)(1)(A). In 1994, the EPA issued the RFGR, the purpose of which is “to improve air quality by requiring that gasoline be reformulated to reduce motor vehicle emissions of toxic and tropospheric ozone-forming compounds, as prescribed by section 211(k)(1).” 59 Fed.Reg. 7716. To meet the obligations of section 211(k)(1), the RFGR positively and exclusively regulates ozone-forming volatile organic compounds (“VOC”), such that states are expressly preempted from setting different VOC restrictions. *Id.* at 7722–23, 7809; 42 U.S.C. § 7545(c)(4)(A)(ii). The EPA concluded, in plaintiffs’ own words, that methane was “excluded from regulation under Sections 211(c) and 211(k)” because it did not pose a sufficient threat to the public health or welfare. Pls.’ Resp. to Mots. 23 (citations omitted). Specifically, the EPA found that “methane would be excluded from the definition of VOC on the basis of its low reactivity.” 59 Fed.Reg. at 7722–23.

As such, the plain language of the RFGR did not affirmatively find that no control or prohibition of methane was necessary. Rather, the EPA determined only that methane was not an ozone-forming VOC under section 211(k) and therefore not subject to regulation under section 211(c)(1). In other words, the EPA’s sole finding relating to preemption was under section 211(c)(4)(A)(ii)—i.e. that its standard for ozone-forming VOCs should preempt non-identical state regulation. *See* 59 Fed.Reg. at 7809 (“dissimilar State [VOC] controls [are] preempted”). Because the RFGR’s limited discussion of methane says nothing about the need for an affirmative, negative regulation pursuant

to section 211(c)(4)(A)(i), this fuel component is not covered under the CAA's express preemption provision.

This reading is consistent with the recognition that air pollution prevention is within the states' traditional authority—for which “there is a general presumption against preemption” absent a “clear and manifest” expression of intent by Congress. *Oxygenated Fuels Ass'n, Inc. v. Davis*, 331 F.3d 665, 668–73 (9th Cir.2003) (citations and internal quotations omitted); *see also* 40 C.F.R. § 80.1 (“[n]othing in this part is intended to preempt the ability of State or local governments to control or prohibit any fuel or additive for use in motor vehicles and motor vehicle engines which is not explicitly regulated”); 62 Fed. Reg. at 10,693 (“as a policy matter, EPA's decision to regulate [certain fuel components in reformulated gasoline] areas did not encompass a determination that states should not or need not regulate that characteristic outside of those areas”). The CAA's “sweeping and explicit” savings clause is further textual evidence that where, as here, the EPA has not made an affirmative finding that no control is necessary, the states retain authority to regulate air pollutants. *Exxon Mobil Corp. v. Env'tl. Prot. Agency*, 217 F.3d 1246, 1255 (9th Cir.2000) (citing 42 U.S.C. § 7416).

Moreover, as State Intervenor observe, the EPA has spoken unequivocally when it intends to invoke section 211(c)(4)(A)(i). State Intervenor's Mot. Dismiss 16. For instance, in relation to fuel oxygen content, the EPA “propos[ed] to issue a finding that ‘no control or prohibition [is] necessary’ under section 211(c)(4)(A)(i),” with the “effect [being] to preempt state controls.” 57 Fed.Reg. 47,849, 47,849. In contrast, the RFGR contains no such language concerning methane, or any

other component of fuel, and instead only speaks to VOC controls. 59 Fed.Reg. at 7809.

In sum, plaintiffs erroneously equate the EPA's finding that methane is not affirmatively, positively preempted by the RFGR with an affirmative, negative determination that no control or prohibition of methane is necessary.<sup>13</sup> In so doing, plaintiffs ignore the possibility, embodied in the plain language of the statute, that the EPA may decline to make and publish the finding required by section 211(c)(4)(A)(i), thereby allowing states to regulate that fuel characteristic or component as they choose. Defendants' and defendant-intervenors' motions are granted as to plaintiffs' third claim.

#### *IV. Fourth Claim: Conflict Preemption*

Lastly, plaintiffs allege that the "Oregon Program conflicts with and stands as an obstacle to the purposes and goals of the [EISA, RFS, and] Energy Policy Action of 2005" because it "is designed to close Oregon as a market for certain renewable fuels (in particular,

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<sup>13</sup> The EPA made an Endangerment Finding in 2009 that methane is a GHG which "may reasonably be anticipated to endanger public health or welfare." 74 Fed.Reg. 66,496, 66,497. This is essentially the same standard that triggers the EPA's authority to regulate under section 211(c)(1). 42 U.S.C. § 7545(c)(1). Contrary to plaintiffs' assertion, the fact that the Endangerment Finding "was issued under Section 202 of the CAA, which governs vehicle standards—not Section 211(c), which governs fuel standards," does not render it irrelevant. Pls.' Resp. to Mots. 27 (emphasis removed). The Court nonetheless agrees with plaintiffs that the Endangerment Finding does not amend the RFGR; rather, the Endangerment Finding speaks to the hazards of methane that have been discovered over the past fifteen years such that, even if the EPA had found it unnecessary to control emissions from this component in 1994, it subsequently reversed course in light of newfound scientific evidence. 79 Fed.Reg. 1430, 1455.

certain forms of corn ethanol) produced in existing refineries necessary to meet national renewable fuel standards set by Congress.” Compl. ¶¶ 137–45.

“[S]tate laws are preempted when they conflict with federal law,” including instances “where compliance with both federal and state regulations is a physical impossibility [or] where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona*, 132 S.Ct. at 2501 (citations and internal quotations omitted). “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Id.* (citation and internal quotations omitted).

Section 211(o) of the CAA sets forth the RFS, which was modified in 2007 by the EISA. 42 U.S.C. § 7545(o). The purpose of the RFS is

to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emis-

sions compared to baseline lifecycle greenhouse gas emissions.

42 U.S.C. § 7545(o)(2)(A)(i).<sup>14</sup>

As a threshold matter, plaintiffs’ [sic] lack prudential standing as they do not contend to generate or sell the type of biofuel the Oregon Program allegedly penalizes, or that their interests are closely aligned with those whose rights are at issue. Critically, plaintiffs do not assert that they or any of their members own or sell fuel from exempted biofuel plants; plaintiffs also do not allege any hindrance to the exempted biofuel facilities’ ability to protect their own interests. Pls.’ Resp. to Mots. 35 (citing Compl. ¶¶ 8–10, 17–20); *see also* State Intervenors’ Mot. Dismiss 20 (noting plaintiffs “oppose[d] the very type of mandate [they] claim Congress created and with which [they] allege [the Oregon] Program conflicts,” and that several ethanol “associations are plaintiffs in one of the consolidated *Rocky Mountain* cases”) (citations omitted). Given these pleading deficiencies, in conjunction with plaintiffs’ failure to point to any additional facts that might confer subject-matter jurisdiction, the Court concludes that the fourth claim is premised on the rights of non-partes—namely, those who produce qualifying renewable fuels in facilities constructed pre-December 2007.

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<sup>14</sup> In opposing dismissal, plaintiffs cite to a different provision of the EISA, which does not concern the RFS, as defining the RFS’ purpose. *Compare* Pls.’ Resp. to Mots. 30 (citing EISA § 806, codified at 42 U.S.C. § 17285), *with* Compl. ¶¶ 104–05 (citing EISA § 202, codified at 42 U.S.C. § 7545(o)(2)). Assuming its relevance to the Court’s preemption analysis, that provision espouses many compatible goals, all of which relate to increasing the United States’ reliance on “domestic renewable resources” and “increas[ing] [the] use of renewable energy.” 42 U.S.C. § 17285.

See *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (the court lacks subject-matter jurisdiction, due to prudential limitations, where a plaintiff “rais[es] another person’s legal rights”); see also *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15 n. 7, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (prudential standing limitations exist to ensure “that the most effective advocate of the rights at issue is present to champion them”) (citations and internal quotations omitted).

Irrespective of subject-matter jurisdiction, plaintiffs’ allegations are implausible in four respects. First, plaintiffs maintain “that Section 211(o ) was enacted to ensure a continued market for ethanol from existing ethanol plants.” Pls.’ Resp. to Mots. 30–31. Yet the expressly stated purpose and intended effects of the RFS is to increase the United States’ reliance on renewable fuel sources and reduce GHG emissions. 42 U.S.C. § 7545(o )(2)(A)(i). Because section 211(o )(2)(A)(i) makes no mention of ensuring a market for then-existing facilities, the fact that Congress elected to exempt such facilities from the requirement that certain fuels achieve a 20% reduction in lifecycle GHG emissions does not confer upon them a preferred or dominant status.

Contrary to plaintiffs’ assertion, the volume requirements for renewable fuel set in section 211(o )(2)(B) do not include a minimum amount that must be met with corn ethanol generally, let alone from corn ethanol produced in facilities constructed before December 2007; this statute simply articulates applicable volumes of renewable fuel required for the calendar years of 2006 through 2011. 42 U.S.C. § 7545(o )(2)(B); see also 42 U.S.C. § 7545(o )(1)(B)(i) (“advanced biofuel,” the use of which is encouraged under the RFS, “means

renewable fuel, other than ethanol derived from corn starch”). The Oregon Program is also not an EPA regulation, such that the anti-geographic restriction provision embodied in section 211(o)(2)(A)(iii) is not implicated. *See* 42 U.S.C. § 7545(o)(2)(A)(iii) (speaking only to the EPA’s ability to issue “regulations . . . under clause (i) [that] restrict geographic areas in which renewable fuel may be used”).

Second, both the EISA’s savings clause and legislative history reflect that Congress did not intend to preempt state regulation of transportation fuels. As part of its RFS rule-making, the EPA rejected one commenter’s suggestion that the RFS should “preempt state programs designed to address carbon content and lifecycle analysis of fuels,” including “state low carbon fuel standards,” explaining that “[i]ssues associated with State LCFS programs . . . are not germane to the final RFS program.” State Intervenors’ First Req. Judicial Notice Ex. G, at 6–7<sup>15</sup>; *see also id.* at 4 (“these [RFS] thresholds do not constitute a specific control on [GHGs] for transportation fuels (such as a low carbon fuel standard”). In fact, the EPA saw no conflict between state low carbon fuel standards and the RFS. *See id.* at 7 (“where possible [the EPA has] attempted to structure the RF[S] program so as to be compatible with existing State LC[F]S programs, including coordination on lifecycle modeling”).

The EISA’s savings clause, in turn, specifies that “nothing in the amendments made by this title to section 211(o) of the [CAA] shall be construed as superseding, or limiting, any more environmentally protective requirement under . . . any other provision of State

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<sup>15</sup> Because State Intervenors did not numeralize their exhibits, the Court refers to the page numbers assigned in the docket.

or Federal law or regulation.”<sup>16</sup> EISA § 204(b), Pub.L. No. 110–140. While plaintiffs are correct that a savings clause does not necessarily bar conflict preemption principles, this case presents no actual discord between the EISA, RFS, and Oregon Program. *See Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 854 (9th Cir.2002) (as amended) (where a savings clause exists, state law is preempted only “to the extent that actual conflict persists between state and federal policies”); *see also State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 841 (N.D.2006), *cert. denied*, 549 U.S. 953, 127 S.Ct. 383, 166 L.Ed.2d 270 (2006) (distinguishing *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), and other conflict preemption cases, which involved “inconsistent and conflicting preemption provisions and savings clauses within the federal statutes,” from one in which “an express provision explicitly provid[es] that nothing in the federal statute shall preempt any State law on the precise subject matter involved in the case”) (internal quotations omitted).

Third, as addressed in section I, the Oregon Program neither “penalize[s] ethanol produced in existing [Midwest] ethanol plants” nor renders these plants

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<sup>16</sup> Plaintiffs’ assertion that the Oregon Program is “[not] more environmentally protective” because it “may instead increase GHG emissions (or at the very least hide them)” is both unavailing and insufficient to preclude application of the EISA’s savings clause. Pls.’ Resp. to Mots. 34; *see also Rocky Mountain*, 730 F.3d at 1082 (describing the LCFS as “starting to work as intended,” while noting that “[t]here is growing scientific and public consensus that the climate is warming and that this warming is to some degree caused by anthropogenic GHG emissions”) (citations omitted). This is especially true in light of the fact that they do not make any allegations regarding this issue in the complaint. *See generally* Compl.

“[un]able to export their fuels to Oregon.” Pls.’ Resp. to Mots. 30. Aside from the fact that plaintiffs’ complaint is silent as to the carbon intensities of the ethanols generated from these unspecified, exempted plants, Midwestern producers have obtained some of the most favorable treatment under the Oregon Program.

Fourth, the compliance scenarios cited by plaintiffs in opposing dismissal do not “predic[t] Oregon’s ending its importation of fuels from existing Midwestern ethanol plants.” Pls.’ Resp. to Mots. 30. As a preliminary matter, these scenarios are neither predictions nor do they provide any evidence of future market conditions. *See* State Intervenors’ Second Req. Judicial Notice Ex. I, at 3 (compliance scenarios “should not be confused with IFC market forecasts”). Rather, ongoing market conditions and fuel availability, amongst other factors, will determine how compliance occurs. *See, e.g.*, Def.’s Reply to Mot. Dismiss Ex. 5, at 17. Regardless, the compliance scenarios merely demonstrate that one category of ethanol, labeled “Corn, MW,” may drop off in 2019, after an initial increase in 2017 and 2018. State Intervenors’ Second Req. Judicial Notice Ex. I, at 23. This category of ethanol, however, is defined as corn ethanol from “conventional processes,” such that it possesses a higher average carbon intensity. *Id.* at 13–15. Notably, this is not the only kind of corn ethanol produced by Midwestern plants. Or. Admin. R. 340–253–8030 (Table 3); *Rocky Mountain*, 730 F.3d at 1084; State Intervenors’ Second Req. Judicial Notice Ex. L, at 7, 11. Thus, these scenarios show conventional, higher-carbon corn ethanol from the Midwest being replaced in Oregon’s market by other types of corn ethanol, several of which are also produced in the Midwest, as well as some sugar cane-based fuels from Brazil. Given the actual tone and content of these scenarios, combined with the fact that compliance can

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be achieved exclusively through purchasing credits, plaintiffs' conclusion that the Oregon Program will shutter the state's market to Midwest ethanol is not entitled to the presumption of truthfulness. Defendants' and defendant-intervenors' motions are granted as to plaintiffs' fourth claim.

#### CONCLUSION

State Intervenors' first and second requests for judicial notice (docs. 53, 68) are GRANTED. Defendants' motion to dismiss (doc. 51), State Intervenors' motion to dismiss (doc. 52), and Conservation Intervenors' motion for judgment on the pleadings (doc. 54) are also GRANTED. Accordingly, the parties' requests for oral argument are DENIED as unnecessary. This case is DISMISSED.

IT IS SO ORDERED.

**APPENDIX C**

**OREGON CLEAN FUELS PROGRAM**

340-253-0000

Overview

(1) Context. The Oregon Legislature found that climate change poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon. Section 1, chapter 907, Oregon Laws 2007. The Oregon Clean Fuels Program will reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon in concert with other greenhouse gas reduction policies and actions by local governments, other states and the federal government.

(2) Purpose. The purpose of the Oregon Clean Fuels Program is to reduce the amount of lifecycle greenhouse gas emissions per unit of energy by a minimum of 10 percent below 2010 levels over a 10-year period. This reduction goal applies to the average of all transportation fuels used in Oregon, not to individual fuels. A fuel user does not violate the standard by possessing fuel that has higher carbon content than the clean fuel standard allows.

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340-253-0040

Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If this rule and 340-200-0020 define the same term, the definition in this rule applies to this division.

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(3) “Bio-based” means produced from non-petroleum, biological renewable resources.

(4) “Biodiesel” means a diesel substitute that consists of mono-alkyl esters of long chain fatty acids derived from plant or animal matter that complies with ASTM D6751.

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(9) “Carbon intensity” means the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e per MJ).

\* \* \*

(11) “Clean fuel” means a transportation fuel whose carbon intensity value is lower than the applicable clean fuel standard for gasoline and gasoline substitutes in Table 1 under OAR 340-253-8010 or for diesel and diesel substitutes in Table 2 under OAR 340-253-8020.

(12) “Clean fuel standard” means the annual average carbon intensity a regulated party must comply with, as listed in Table 1 under OAR 340-253-8010 for gasoline and gasoline substitutes and in Table 2 under 340-253-8020 for diesel fuel and diesel substitutes.

\* \* \*

(17) “Credit” means a unit of measure that is generated when the carbon intensity value of a fuel that is produced, imported, dispensed or used in Oregon is less than the clean fuel standard. Credits are expressed in units of metric tons of carbon dioxide equivalent and are calculated under Table 2 under OAR 340-253-1020.

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(18) “Credit generator” means any person eligible to generate credits by providing clean fuels for use in Oregon and who voluntarily registers to participate in the clean fuels program, described in OAR 340-253-0100(2), and specified by fuel type in Tables 1-4 under OAR 340-253-0310 through 340-253-0340.

\* \* \*

(20) “Deficit” means a unit of measure that is generated when the carbon intensity value of a fuel that is produced or imported in Oregon exceeds the clean fuel standard. Deficits are expressed in units of metric tons of carbon dioxide equivalent and are calculated under OAR 340-253-1020.

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(28) “Fuel pathway code” means a code that represents a unique fuel type. The fuel pathway code is a field in the CFP Online System used to represent a specific type of fuel that has an assigned carbon intensity value.

(29) “Gasoline” means a spark ignition engine fuel conforming to the specifications defined in ASTM D4814.

(30) “Gasoline substitute” means any fuel, other than gasoline, that may be used in an engine designed for gasoline use.

\* \* \*

(37) “Lifecycle greenhouse gas emissions” are:

(a) The aggregated quantity of greenhouse gas emissions, including direct emissions and significant indirect emissions, such as significant emissions from changes in land use associated with the fuels;

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(b) Measured over the full fuel lifecycle, including all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer; and

(c) Stated in terms of mass values for all greenhouse gases as adjusted to CO<sub>2</sub>e to account for the relative global warming potential of each gas.

\* \* \*

(44) “OR-GREET” means the Greenhouse gases, Regulated Emissions, and Energy in Transportation (GREET) Argonne National Laboratory model that DEQ modifies and maintains for use in Oregon. DEQ will provide copies of OR-GREET upon request.

(45) “Physical transport mode code” means how a fuel physically enters Oregon. Physical transport mode code is a field in the CFP Online System used to represent how a fuel was imported.

(46) “Producer” means:

(a) With respect to any liquid fuel, the person who makes the fuel in Oregon; or

(b) With respect to any biomethane, the person who refines, treats or otherwise processes biogas into biomethane in Oregon.

\* \* \*

(48) “Regulated fuel” means a transportation fuel identified under OAR 340-253-0200(2).

(49) “Regulated party” means a person responsible for compliance with the clean fuel standards identified under OAR 340-253-0310.

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(54) "Transportation fuel" means gasoline, diesel, any other flammable or combustible gas or liquid and electricity that can be used as a fuel for the operation of a motor vehicle. Transportation fuel does not mean unrefined petroleum products.

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340-253-0100

Oregon Clean Fuels Program Applicability and Requirements

(1) Regulated parties. All persons that produce in Oregon or import into Oregon any regulated fuel must comply with the rules in this division. The regulated parties for regulated fuels produced or imported in Oregon are designated under OAR 340-253-0310.

(a) Regulated parties must comply with sections (4) through (8) below; except that:

(b) Small importers are exempt from sections (5) through (8) below.

(2) Credit generators.

(a) The following rules designate persons eligible to generate credits for each fuel type:

(A) OAR 340-253-0320 for compressed natural gas, liquefied natural gas, liquefied compressed natural gas, liquefied petroleum gas and renewable diesel;

(B) OAR 340-253-0330 for electricity; and

(C) OAR 340-253-0340 for hydrogen fuel or a hydrogen blend.

(b) Persons eligible to be credit generators are not required to participate in the program. Persons who choose voluntarily to participate in the program to

generate credits must comply with sections (4), (5), (7) and (8) below.

\* \* \*

(4) Registration.

(a) A regulated party must submit a complete registration application to DEQ under OAR 340-253-0500 for each fuel type on or before the date upon which that party begins producing the fuel in Oregon or importing the fuel into Oregon. The registration application must be submitted using DEQ approved forms.

(b) A credit generator must submit a complete registration to DEQ under OAR 340-253-0500 for each fuel type before it may generate credits for fuel produced, imported, dispensed or used in Oregon. DEQ will not recognize credits allegedly generated by any person that does not have an approved, accurate and current registration.

(c) A broker must submit a complete registration to DEQ under OAR 340-253-0500, or modify its existing registration each time it enters into a new contract with a regulated party or credit generator, before trading credits or facilitating credit generation or trading by a regulated party or credit generator. DEQ will not recognize the transfer of credits by a broker that does not have an approved, accurate and current registration.

(d) When DEQ approves the registration application of a regulated party, credit generator or broker under OAR 340-253-0500, the regulated party, credit generator or broker must establish an account in the CFP Online System and must use the CFP Online System to record and report credit and deficit

generation, credit trading and compliance with the CFP rules in this division.

(5) Records. Beginning on July 1, 2015, regulated parties, credit generators registered under subsection (4)(b) and brokers registered under subsection (4)(c) must develop and retain all records OAR 340-253-0600 requires.

(6) Clean fuel standards. Each regulated party must comply with the following standards for all transportation fuel it produces in Oregon or imports into Oregon in each compliance period. To demonstrate compliance, regulated parties must use the calculation method OAR 340-253-1030 specifies. Regulated parties may demonstrate compliance in each compliance period either by producing or importing fuel that in the aggregate meets the standard or by obtaining sufficient credits to offset deficits for such fuel produced or imported into Oregon.

(a) Table 1 under OAR 340-253-8010 establishes the Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes; and

(b) Table 2 under OAR 340-253-8020 establishes the Oregon Clean Fuel Standard for Diesel and Diesel Substitutes.

(7) Quarterly progress report. Regulated parties, credit generators and brokers must submit quarterly progress reports under OAR 340-253-0630.

(8) Annual compliance report. Regulated parties, credit generators and brokers must submit annual compliance reports under OAR 340-253-0650.

340-253-0200

Regulated and Clean Fuels

(1) Applicability. Producers and importers of transportation fuels listed in this rule, unless exempt under OAR 340-253-0250, are subject to Division 253.

(2) Regulated fuels. Regulated fuels mean the following transportation fuels:

- (a) Gasoline;
- (b) Diesel fuel;
- (c) Denatured fuel ethanol;
- (d) Biodiesel; and
- (e) Any other liquid or non-liquid transportation fuel not listed in section (3) or exempted under OAR 340-253-0250.

(3) Clean fuels. Clean fuels means a transportation fuel with a carbon intensity value lower than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable, for that calendar year, such as:

- (a) Bio-based compressed natural gas;
- (b) Bio-based liquefied compressed natural gas;
- (c) Bio-based liquefied natural gas;
- (d) Electricity;
- (e) Fossil compressed natural gas;
- (f) Fossil liquefied compressed natural gas;
- (g) Fossil liquefied natural gas;
- (h) Hydrogen or a hydrogen blend;

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- (i) liquefied petroleum gas; and
- (j) Renewable diesel.

340-253-0250

Exemptions

(1) Exempt fuels. The following fuels are exempt from the list of regulated fuels under OAR 340-253-0200(2):

(a) Fuels used in small volumes: A transportation fuel supplied for use in Oregon if the producer or importer documents that all providers supply an aggregate volume of less than 360,000 gasoline gallon equivalents or diesel gallon equivalents per year.

(b) Small volume fuel producer: A transportation fuel supplied for use in Oregon if the producer documents that:

(A) The producer has an annual production volume of less than 10,000 gasoline gallon equivalents or diesel gallon equivalents per year; or

(B) The producer has an annual production volume of less than 50,000 gasoline gallon equivalents or diesel gallon equivalents and the fuel producer uses the entire volume in motor vehicles the producer uses directly; or

(C) The producer is a research, development or demonstration facility defined under OAR 330-090-0100.

(c) Fuels that are exported for use outside of Oregon.

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340-253-0330

Credit Generators: Electricity

(1) Applicability. This rule applies to providers of electricity used as a transportation fuel.

\* \* \*

340-253-0400

Fuel Carbon Intensity Values

(1) Statewide carbon intensity values.

(a) Regulated parties, credit generators and brokers must use the statewide average carbon intensity values in Table 3 or 4 under OAR 340-253-8030 or 8040, as applicable, for the following fuels:

- (A) Gasoline;
- (B) Diesel fuel;
- (C) Fossil compressed natural gas;
- (D) Fossil liquefied natural gas;
- (E) Liquefied petroleum gas; and

(F) Electricity, unless an electricity provider meets the conditions under subsection (1)(b) and chooses to obtain a different carbon intensity value.

(b) For electricity, credit generators and brokers may obtain a carbon intensity value different from the statewide average carbon intensity value by following the procedures under section (3), if the electricity provider:

- (A) Is exempt from the definition of public utility under ORS 757.005 (1)(b)(G), and is not regulated by the Oregon Public Utility Commission; or

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(B) Generates lower carbon electricity at the same location as it is dispensed into a vehicle.

(2) Carbon intensity values for established pathways. Except as provided in section (3), regulated parties, credit generators and brokers must use the carbon intensity value for each transportation fuel that best matches the description in the fuel pathway in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, and as approved through the registration process under OAR 340-253-0500.

(3) Individual carbon intensity values.

(a) Directed by DEQ. A regulated party, credit generator or broker must obtain and use an individual carbon intensity value for a fuel if DEQ:

(A) Determines the fuel's carbon intensity is not adequately represented by any of the carbon intensity values for established pathways in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable; and

(B) Directs the regulated party, credit generator or broker to obtain an individual carbon intensity value under OAR 340-253-0450.

(b) Election of the party. A regulated party, credit generator or broker may obtain and use an individual carbon intensity value for a fuel if:

(A) It applies for and obtains DEQ approval under OAR 340-253-0450; and

(B) The fuel's carbon intensity value differs from the carbon intensity value for the most similar fuel pathway in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, by at least 5.0 gCO<sub>2</sub>e per MJ or 10 percent, whichever is less.

(c) New fuel or feedstock. A regulated party, credit generator or broker must obtain approval for an individual carbon intensity value under OAR 340-253-0450 for any fuel not included in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, and for any fuel made from a feedstock not represented in a carbon intensity value in Table 3 or Table 4 under OAR 340-253-8030 or 340-253-8040, as applicable. A regulated party, credit generator or broker must notify DEQ by submitting a modification to the original registration within 30 days of providing a new transportation fuel for use in Oregon.

(d) Process change notification. If a fuel's carbon intensity value changes due to a change in refining process in a way that increases the fuel's carbon intensity value by more than either 5.0 gCO<sub>2</sub>e per MJ or 10 percent, whichever is less, the regulated party, credit generator or broker must notify DEQ and obtain an individual carbon intensity value under OAR 340-253-0450 by submitting a modification to the original registration under OAR 340-253-0500 within 30 days after the refining process changes.

(e) OR-GREET. Regulated parties, credit generators and brokers must calculate all carbon intensity values using the approved version of OR-GREET, or a DEQ-approved comparable model for any fuel that cannot be modeled with OR-GREET. Any variations from the approved version of OR-GREET must be documented as described under OAR 340-253-0450(1) and submitted to DEQ for approval.

(4) DEQ review of carbon intensity values. Every three years, or sooner if DEQ determines that new information becomes available that warrants an earlier review, DEQ will review the carbon intensity

values in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 and:

- (a) Must consider, at a minimum:
  - (A) The sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources;
  - (B) The sources of natural gas and associated factors that affect emissions such as extraction technologies, capture of fugitive emissions and energy sources;
  - (C) The statewide mix of electricity used in Oregon;
  - (D) Individual carbon intensity values that have been approved under OAR 340-253-0450;
  - (E) Changes to OR-GREET;
  - (F) New methods to calculate lifecycle greenhouse gas emissions;
  - (G) Changes in quantifying indirect land use change; and
  - (H) Changes in quantifying indirect effects.

(b) Report to EQC regarding whether statewide average carbon intensity values in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 should be revised. Changes to Table 3 or 4 under OAR 340-253-8030 or 340-253-8040 may only be revised through a rulemaking.

340-253-0450

#### Approval for Individual Carbon Intensity Values

(1) Individual carbon intensity value approval. A regulated party, credit generator or broker may not

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use an individual carbon intensity value without written DEQ approval under this rule. Individual carbon intensity values are not available for the fuels listed under OAR 340-253-0400(1)(a).

(a) OR-GREET modifications. To obtain an individual carbon intensity value, a regulated party, credit generator or broker may propose a modification to inputs into OR-GREET that more accurately reflect the specific characteristics of the fuel or changes to OR-GREET itself that will result in a more accurate calculation of the carbon intensity value for a fuel. The proposal for an individual carbon intensity value must include:

(A) Inputs used to generate the carbon intensity values under OAR 340-253-0400; and

(B) All modified parameters used to generate the new fuel carbon intensity value.

(b) Other modifications. To obtain an individual carbon intensity value, a regulated party, credit generator or broker may propose modifications based on any new information to calculate lifecycle greenhouse gas emissions. The proposal for an individual carbon intensity value must include:

(A) Inputs used to generate the carbon intensity values under OAR 340-253-0400; and

(B) All parameters used to generate the new fuel carbon intensity value.

(2) Reliability. The regulated party, credit generator or broker must supply documentation necessary for DEQ to determine that the method used to calculate the individual carbon intensity value is reliable and comparable to OR-GREET.

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(3) Modification submittal. The regulated party, credit generator or broker must submit proposed modifications under this rule electronically and must include:

(a) Documentation that the proposed pathway has been approved by the California Air Resources Board, if available;

(b) A description of all modifications required by Section (1);

(c) Supporting data and calculations; and

(d) Any other information the party would like to submit or DEQ requests to verify the method for calculating the proposed, individual carbon intensity value.

(4) Review process. Within 15 workdays after receiving any modification proposal submitted under section (3), DEQ will determine whether the proposal is complete.

(a) If DEQ determines the proposal is incomplete, DEQ will notify the regulated party, credit generator or broker and identify the deficiencies. If the party submits supplemental information, DEQ has 15 workdays to determine if the supplemental submittal is complete, or to notify the party and identify the continued deficiencies.

(b) If DEQ determines the proposal is complete, DEQ will:

(A) Publish the application on the Oregon Clean Fuels Program website; and

(B) Approve or deny an individual carbon intensity value.

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(5) DEQ approval. A regulated party, credit generator or broker may use an individual carbon intensity value upon receiving written approval from DEQ. DEQ will propose to incorporate all associated parameters and fuel-related information of a DEQ-approved individual carbon intensity value into Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable, in a future rulemaking.

(6) DEQ denial. If DEQ determines the proposal for an individual carbon intensity value is not adequately documented, DEQ will deny the modification proposal, identify the basis for the denial, and notify the party which carbon intensity value it is authorized to use for the fuel.

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340-253-1000

Credit and Deficit Basics

(1) Carbon intensity values.

(a) Except as provided in subsection (b), when calculating carbon intensity values, regulated parties, credit generators and brokers must:

(A) Use a DEQ carbon intensity value approved under OAR 340-253-0500(4); and

(B) Express the carbon intensity value to the same number of significant figures as shown in Table 3 or 4 under OAR 340-253-8030 or 340-253-8040, as applicable.

(b) If a regulated party, credit generator or broker has submitted a complete registration under OAR 340-253-0500 and DEQ has not approved the proposed carbon intensity value or has not determined that a different carbon intensity value more accurately reflects the fuel type, the regulated party, credit generator or

broker must use the carbon intensity value proposed in its registration.

(2) Fuel quantities. Regulated parties, credit generators and brokers must express fuel quantities to the nearest whole unit applicable for each fuel such as gallons, standard cubic feet, kilowatt-hours or pounds.

(3) Conversion of energy. To convert other energy units to megajoules, the regulated party, credit generator or broker must multiply the unit by the corresponding energy density factor based on the lower heating values of fuels in OR-GREET using BTU to megajoules conversion of 1,055 J per BTU. Table 6 under OAR 340-253-8060 includes energy density conversions for Oregon.

(4) Metric tons of CO<sub>2</sub> equivalent. Regulated parties, credit generators and brokers must express credits and deficits to the nearest whole metric ton of carbon dioxide equivalent.

(5) Credit generation. A clean fuel credit is generated when fuel is produced, imported, dispensed or used in Oregon, as applicable, and the carbon intensity value of the fuel approved under OAR 340-253-0500(4) is less than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable.

(6) Deficit generation. A clean fuel deficit is generated when fuel is produced, imported, dispensed or used in Oregon, as applicable, and the carbon intensity value of the fuel approved under OAR 340-253-0500(4) is more than the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable.

340-253-1010

Fuels to Include in Credit and Deficit Calculation

(1) Fuels included. Regulated parties, credit generators and brokers must calculate credits or deficits for all regulated fuels and clean fuels.

(2) Fuels exempted. Except as provided in section (3), regulated parties, credit generators and brokers may not calculate credits and deficits for fuels:

- (a) Exported outside Oregon; or
- (b) Exempt under OAR 340-253-0250.

(3) Voluntary inclusion. A regulated party, credit generator or broker may choose to include in its credits and deficits calculations fuel that is exempt under OAR 340-253-0250(1) or sold to an exempt user under OAR 340-253-0250(2) provided that all fuel listed on the same delivery invoice is included.

340-253-1020

Calculating Credits and Deficits

Regulated parties, credit generators and brokers must calculate credits or deficits for each fuel included under 340-253-1010 by:

- (1) Using credit and deficit basics as OAR 340-253-1000 specifies;
- (2) Calculating energy in megajoules by multiplying the amount of fuel by the energy density of the fuel in Table 6 under OAR 340-253-8060;
- (3) Calculating the adjusted energy in megajoules by multiplying the energy in megajoules from section (2) by the energy economy ratio of the fuel using Table 7 or 8 under OAR 340-253-8070 or 340-253-8080, as applicable;

(4) Calculating the carbon intensity difference by subtracting the fuel's carbon intensity value as approved under OAR 340-253-0500(4) from the clean fuel standard for gasoline or diesel fuel and their substitutes in Table 1 or 2 under OAR 340-253-8010 or 340-253-8020, as applicable;

(5) Calculating the grams of carbon dioxide equivalent by multiplying the adjusted energy in megajoules in section (3) by the carbon intensity difference in section (4);

(6) Calculating the metric tons of carbon dioxide equivalent by dividing the grams of carbon dioxide equivalent in section (5) by 1,000,000; and

(7) Determining under OAR 340-253-1000(5) and (6) whether credits or deficits are generated.

340-253-1030

#### Net Balance Calculation Deficits

(1) Small deficits. At the end of a compliance period, a regulated party that has a net deficit balance may carry forward a small deficit to the next compliance period without penalty if the regulated party does not have any credits to offset its deficits. A small deficit exists if the amount of credits the regulated party needs to meet the standard is 10 percent or less than the total amount of deficits the regulated party generated for the compliance period.

(2) Large deficits. At the end of a compliance period, a regulated party that has a net deficit balance may not carry forward a large deficit to the next compliance period. A large deficit exists if the amount of credits the regulated party needs to meet the standard is greater than 10 percent of the total amount of deficits the regulated party generated for the compliance

period. A regulated party violates this rule if that party has a large deficit at the end of a compliance period.

(3) Deficit reconciliation. If a regulated party carries a small deficit forward from the previous compliance period, the regulated party must eliminate the small deficit by the end of the current compliance period. This provision does not preclude the regulated party from carrying forward a small deficit in the subsequent compliance period based on the total amount of deficits the regulated party generated in the subsequent compliance period.

340-253-1050

#### Credit Basics

(1) General.

(a) Clean fuel credits are a regulatory instrument and do not constitute personal property, instruments, securities or any other form of property.

(b) Regulated parties, credit generators and brokers may:

(A) Retain clean fuel credits without expiration for use within the CFP, subject to this rule and OAR 340-253-1030; and

(B) Acquire or transfer clean fuel credits from or to other regulated parties, credit generators and brokers that are approved program users under OAR 340-253-0500(4) and have account access to the CFP Online System.

(c) Regulated parties, credit generators and brokers may not:

(A) Use alleged credits that have not been generated in compliance with the rules in this division; or

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(B) Borrow or use anticipated credits from future projected or planned carbon intensity reductions.

(2) Mandatory retirement of credits.

(a) At the end of a compliance period, a regulated party that possesses credits must retire a sufficient number of credits to satisfy the regulated party's compliance obligation for that compliance period. A regulated party may not carry over credits to the next compliance period if the regulated party has any remaining deficits.

(b) At the end of a compliance period, if the total number of credits is less than the total number of deficits, the regulated party is subject to OAR 340-253-1030.

(3) Credit transfers between parties.

(a) "Credit seller," as used in this rule, means a regulated party, credit generator or broker who wishes to sell or transfer credits.

(b) "Credit buyer," as used in this rule, means a regulated party, credit generator or broker who wishes to acquire credits.

(c) A credit seller and a credit buyer may enter into an agreement to transfer credits.

(d) A credit seller may only transfer credits up to the number of total credits in the credit seller's CFP Online System account.

(4) Credit transfer form.

(a) When parties intend to enter in to a credit transfer agreement, the credit seller must use the "Credit Transfer Form" provided in the CFP Online System and must include the following:

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- (A) Date of the proposed credit transfer agreement;
- (B) Name and FEIN of the credit seller and credit buyer;
- (C) Name and contact information of the person who performed the transaction on the credit seller's and credit buyer's behalf;
- (D) The number of credits proposed to be transferred; and
- (E) The price or equivalent value of the consideration (in US dollars) to be paid per metric ton of credit proposed for transfer, excluding any fees.

(b) After receiving the credit transfer form from the credit seller, the credit buyer must confirm the accuracy of the information contained in the credit transfer form using the CFP Online System.

(5) Broker. A credit seller or a credit buyer may elect to use a broker to facilitate the transfer of credits but may only use a broker who complies with this rule. A broker may only facilitate the transfer of credits if that broker:

- (a) Has an approved and active registration under OAR 340-253-0500(4);
  - (b) Has an account on the CFP Online System; and
  - (c) Complies with OAR 340-253-0100(4).
- (6) Illegitimate credits.

(a) A credit generator violates these rules if it submits information into the CFP Online System indicating that one or more credits have been generated when such an assertion is inconsistent with the requirements of OAR 340-253-1000 through 340-253-1020. If DEQ determines that one or more clean fuel

credits a credit generator claims to have generated was not generated in compliance with these rules, then the credit generator:

(A) Must provide an approved clean fuel credit to replace each credit that was not properly generated, if available; and

(B) Is also subject to enforcement for the violation.

(b) A regulated party, credit generator or broker that has acquired one or more illegitimate credits is subject to enforcement unless DEQ determines:

(A) The credits were acquired from a registered regulated party, credit generator or broker with a CFP Online System account; and

(B) The carbon intensity value of the fuel for which the credits were generated matches the carbon intensity value approved by DEQ for that fuel pathway.

(7) Public disclosure.

(a) List of DEQ-approved registered parties. DEQ will maintain a current list of regulated parties, credit generators and brokers that have had their registrations approved by DEQ under OAR 340-253-0500(4) and will make that list available on-line. The list will include, at a minimum, the name of the regulated party, credit generator or broker and whether the regulated party is a large importer, a small importer or a producer.

(b) Clean Fuels Program status report. DEQ will publish a quarterly report that summarizes the aggregate CFP credit and deficit generation for the:

(A) Most recent quarter;

(B) Past quarters of the current compliance period; and

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(C) Past annual compliance periods.

(c) Clean Fuels Program credit report. DEQ will publish a monthly report that summarizes the aggregate CFP credit transfer information for:

(A) Most recent month;

(B) Past months of the current compliance period;  
and

(C) Past annual compliance periods.

(d) DEQ reports will be based on information submitted into the CFP Online System.

(e) DEQ reports will represent information aggregated for all fuel transacted within the state; not by individual parties.

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Table 1 – Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes

Oregon Department of Environmental Quality Table 1 – 340-253-8010 Oregon Clean Fuel Standard for Gasoline and Gasoline Substitutes		
Calendar Year	Oregon Clean Fuel Standard (gCO <sub>2</sub> e per MJ)	Percent Reduction
2015	None (Gasoline Baseline is 89.31)	
2016	89.08	0.25 percent
2017	88.86	0.50 percent
2018	88.41	1.00 percent
2019	87.97	1.50 percent
2020	87.08	2.50 percent
2021	86.18	3.50 percent
2022	84.84	5.00 percent
2023	83.50	6.50 percent
2024	82.16	8.00 percent
2025 and beyond	80.36	10.00 percent

Table 2 – Oregon Clean Fuel Standard for Diesel Fuel and Diesel Substitutes

State of Oregon Department of Environmental Quality Table 2 – 340-253-8020 Oregon Clean Fuel Standard for Diesel Fuel and Diesel Substitutes		
Calendar Year	Oregon Clean Fuel Standard (gCO <sub>2</sub> e per MJ)	Percent Reduction
2015	None (Diesel Baseline is 87.09)	
2016	86.87	0.25 percent
2017	86.65	0.50 percent
2018	86.22	1.00 percent
2019	85.78	1.50 percent
2020	84.91	2.50 percent
2021	84.04	3.50 percent
2022	82.73	5.00 percent
2023	81.43	6.50 percent
2024	80.12	8.00 percent
2025 and beyond	78.38	10.00 percent

Table 3 – Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes

Oregon Department of Environmental Quality Table 3 – 340-253-8030 Oregon Carbon Intensity Lookup Table for Gasoline and Gasoline Substitutes					
Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO <sub>2</sub> e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
Gasoline	ORGAS001	Clear gasoline, based on a weighted average of gasoline supplied to Oregon	89.40	-	89.40
	ORGAS002	Blended gasoline, 10% ethanol, based on assuming 90% clear gasoline and 10% GREET default corn ethanol	89.31	-	89.31
Ethanol from Corn	ETHC001	Midwest average; 80% Dry Mill; 20% Wet Mill; Dry DGS; NG	69.40	-	69.40

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	ETHC002	California average; 80% Midwest Average; 20% California; Dry Mill; Wet DGS; NG	65.66	-	65.66
	ETHC003	California; Dry Mill; Wet DGS; NG	50.70	-	50.70
	ETHC004	Midwest; Dry Mill; Dry DGS, NG	68.40	-	68.40
	ETHC005	Midwest; Wet Mill, 60% NG, 40% coal	75.10	-	75.10
	ETHC006	Midwest; Wet Mill, 100% NG	64.52	-	64.52
	ETHC007	Midwest; Wet Mill, 100% coal	90.99	-	90.99
	ETHC008	Midwest; Dry Mill; Wet, DGS; NG	60.10	-	60.10
	ETHC009	California; Dry Mill; Dry DGS, NG	58.90	-	58.90
	ETHC010	Midwest; Dry Mill; Dry DGS; 80% NG;	63.60	-	63.60

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		20% Biomass			
	ETHC011	Midwest; Dry Mill; Wet DGS; 80% NG; 20% Biomass	56.80	-	56.80
	ETHC012	California; Dry Mill; Dry DGS; 80% NG; 20% Biomass	54.20	-	54.20
	ETHC013	California; Dry Mill; Wet DGS; 80% NG; 20% Biomass	47.44	-	47.44
	ETHC014	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	60.99	-	60.99

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	ETHC015	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 5% of the fuel use (by energy); Coal use not to exceed 66% of fuel use (by energy); Coal carbon content not to exceed 48%	59.08	-	59.08
	ETHC016	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must	57.16	-	57.16

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		be at least 10% of the fuel use (by energy); Coal use not to exceed 60% of fuel use (by energy); Coal carbon content not to exceed 48%			
	ETHC017	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 54% of fuel use (by energy); Coal carbon content not to exceed 48%	55.24	-	55.24

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	ETHC018	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Coal use not to exceed 71% of fuel use (by energy); Coal carbon content not to exceed 48%	59.80	-	59.80
	ETHC019	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Bio-mass must be at least 5% of the fuel use (by energy); Coal use not to exceed	57.86	-	57.86

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		65% of fuel use (by energy); Coal carbon content not to exceed 48%			
	ETHC020	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a value the applicant classifies as confidential; No grid electricity use; Bio-mass must be at least 10% of the fuel use (by energy); Coal use not to exceed 59% of fuel use (by energy); Coal carbon content not to exceed 48%.	55.91	-	55.91
	ETHC021	2B Application*: Midwest; Dry Mill; Plant energy use not to exceed a	53.96	-	53.96

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		value the applicant classifies as confidential; No grid electricity use; Biomass must be at least 15% of the fuel use (by energy); Coal use not to exceed 53% of fuel use (by energy); Coal carbon content not to exceed 48%			
	ETHC022	2A Application*: Midwest; Dry Mill; 15% Dry DGS, 85% Partially Dry DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	57.16	-	57.16
	ETHC023	2A Application*: Midwest; Dry Mill; Partially Dry DGS;	54.29	-	54.29

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		NG; Plant energy use not to exceed a value the applicant classifies as confidential			
	ETHC024	2A Application*: Midwest; Dry Mill; 75% Dry DGS, 25% Wet DGS; NG; Plant energy use not to exceed a value the applicant classifies as confidential	61.60	-	61.60
	ETHC025	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	62.44	-	62.44
	ETHC026	2A Application*: Dry Mill; Dry DGS; Raw	58.49	-	58.49

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		starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential			
	ETHC027	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/ biomass & landfill gas fuels; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	58.50	-	58.50
	ETHC028	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/	61.66	-	61.66

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		corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential			
	ETHC029	2A Application*: Dry Mill; Dry DGS Conventional cook/combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential;	60.52	-	60.52
	ETHC030	2A Application*: Dry Mill; Dry DGS; Raw starch hydrolysis/ biogas process fuel; Amount and	44.70	-	44.70

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		type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential			
	ETHC031	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	53.69	-	53.69
	ETHC032	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not	50.01	-	50.01

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		to exceed a value the applicant classifies as confidential			
	ETHC033	2A Application*: Dry Mill; Wet DGS; Raw starch hydrolysis/ corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	50.26	-	50.26
	ETHC034	2A Application*: Dry Mill; Wet DGS; Conventional cook/ combined heat and power; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the	50.47	-	50.47

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		applicant classifies as confidential			
	ETHC035	2A Application*: Dry Mill; Wet DGS; Raw the starch hydrolysis/ corn fractionation; Amount and type of fuel use, and amount of grid electricity use not to exceed a value the applicant classifies as confidential	43.21	-	43.21
Ethanol from Sugar-cane	ETHS001	Brazilian sugarcane using average production processes	27.40	-	27.40
	ETHS002	Brazilian sugarcane with average production process, mechanized harvesting and electricity co-product credit	12.40	-	12.40
	ETHS003	Brazilian sugarcane	20.40	-	20.40

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		with average production process and electricity co-product credit			
	ETHS004	2B Application*: Brazilian sugarcane processed in the CBI with average production process; Thermal process power supplied with NG	32.94	-	32.94
	ETHS005	2B Application*: Brazilian sugarcane processed in the CBI with average production process, mechanized harvesting and electricity co-product credit; Thermal process power supplied with NG	17.94	-	17.94

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	ETHS006	2B Application*: Brazilian sugarcane processed in the CBI with average production process and electricity co-product credit; Thermal process power supplied with NG	25.94	-	25.94
Compressed Natural Gas	CNG002	North American NG delivered via pipeline; compressed in OR	68.00	-	68.00
	CNG003	Landfill gas (biomethane) cleaned up to pipeline quality NG; compressed in OR	11.26	-	11.26
	CNG004	Dairy Digester Biogas to CNG	13.45	-	13.45
	CNG005	Biomethane produced from the high-solids (greater than 15 percent total	-15.29	-	-15.29

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		solids) anaerobic digestion of food and green wastes; compressed in OR			
	CNG006	North American landfill gas to pipeline- quality biomethane; delivered via pipeline; compressed in OR	33.02	-	33.02
Lique- fied Natural Gas	LNG001	North American NG deliv- ered via pipeline; liquefied in OR using liquefaction with 80% efficiency	83.13	-	83.13
	LNG002	North American NG deliv- ered via pipeline; liquefied in OR using liquefaction with 90% efficiency	72.38	-	72.38
	LNG003	Overseas- sourced LNG deliv- ered as LNG	93.37	-	93.37

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		to OR; re-gasified then re-liquefied in OR using liquefaction with 80% efficiency			
	LNG004	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 90% efficiency	82.62	-	82.62
	LNG005	Overseas-sourced LNG delivered as LNG to OR; no re-gasification or re-liquefaction in OR	77.50	-	77.50
	LNG006	Landfill Gas (biomethane) to LNG liquefied in OR using liquefaction with 80% efficiency	26.31	-	26.31
	LNG007	Landfill Gas (biomethane) to LNG liquefied in OR using	15.56	-	15.56

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		liquefaction with 90% efficiency			
	LNG008	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 80% efficiency	28.53	-	28.53
	LNG009	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 90% efficiency	17.78	-	17.78
Liquefied Petroleum Gas	LPG001	Liquefied petroleum gas, crude and natural gas mix	83.05	-	83.05
Electricity	ELC001	Oregon average electricity mix	108.29	-	108.29
Hydrogen	HYGN001	Compressed H2 from central reforming of NG (includes liquefaction and re-gasification steps)	142.20	-	142.20
	HYGN002	Liquid H2 from central	133.00	-	133.00

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		reforming of NG			
	HYGN003	Compressed H2 from central reforming of NG (no liquefaction and re-gasification steps)	98.80	-	98.80
	HYGN004	Compressed H2 from on-site reforming of NG	98.30	-	98.30
	HYGN005	Compressed H2 from on-site reforming with renewable feedstocks	76.10	-	76.10

Table 4 – Oregon Carbon Intensity Lookup Table  
for Diesel and Diesel Substitutes

Oregon Department of Environmental Quality Table 4 – 340-253-8040 Oregon Carbon Intensity Lookup Table for Diesel and Diesel Substitutes					
Fuel	Pathway Identifier	Pathway Description	Carbon Intensity Values (gCO <sub>2</sub> e/MJ)		
			Direct Emissions	Land Use or Other Indirect Effect	Total
Diesel	ORULSD001	Clear diesel, based on a weighted average of diesel fuel supplied to Oregon	89.00	-	89.00
	ORULSD002	Blended diesel, 5% biodiesel, based on assuming 95% clear diesel and 5% GREET default soybean biodiesel	87.09	-	87.09
Bio-diesel	BIOD001	Conversion of Midwest soybeans to biodiesel (fatty acid methyl esters - FAME)	21.25	-	21.25

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	BIOD002	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters-FAME) where “cooking” is required	15.84	-	15.84
	BIOD003	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters-FAME) where “cooking” is not required	11.76	-	11.76
	BIOD004	Conversion of waste oils (Used Cooking Oil) to biodiesel (fatty acid methyl esters-FAME) where “cooking” is required. Fuel produced in the Midwest	18.72	-	18.72
	BIOD005	Conversion of waste oils (Used	13.83	-	13.83

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		Cooking Oil) to biodiesel (fatty acid methyl esters - FAME) where "cooking" is not required. Fuel produced in the Midwest			
	BIOD007	Conversion of corn oil, extracted from distillers grains prior to the drying process, to biodiesel	4.00	-	4.00
Renewable Diesel	RNWD001	Conversion of Midwest soybeans to renewable diesel	20.16	-	20.16
	RNWD002	Conversion of tallow to renewable diesel using higher energy use for rendering	39.33	-	39.33
	RNWD003	Conversion of tallow to renewable diesel using lower energy use for rendering	19.65	-	19.65

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Com-pressed Natural Gas	CNG002	North American NG delivered via pipeline; compressed in OR	68.00	-	68.00
	CNG003	Landfill gas (biomethane) cleaned up to pipeline quality NG; compressed in OR	11.26	-	11.26
	CNG004	Dairy Digester Biogas to CNG	13.45	-	13.45
	CNG005	Biomethane produced from the high- solids (greater than 15 percent total solids) anaerobic digestion of food and green wastes; compressed in OR	-15.29	-	-15.29
	CNG006	North American landfill gas to pipeline-quality biomethane; delivered via pipeline;	33.02	-	33.02

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		compressed in OR			
Liquefied Natural Gas	LNG001	North American NG delivered via pipeline; liquefied in OR using liquefaction with 80% efficiency	83.13	-	83.13
	LNG002	North American NG delivered via pipeline; liquefied in OR using liquefaction with 90% efficiency	72.38	-	72.38
	LNG003	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction with 80% efficiency	93.37	-	93.37
	LNG004	Overseas-sourced LNG delivered as LNG to OR; re-gasified then re-liquefied in OR using liquefaction	82.62	-	82.62

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		with 90% efficiency			
	LNG005	Overseas-sourced LNG delivered as LNG to OR; no re-gasification or re-liquefaction in OR	77.50	-	77.50
	LNG006	Landfill Gas (bio-methane) to LNG liquefied in OR using liquefaction with 80% efficiency	26.31	-	26.31
	LNG007	Landfill Gas (bio-methane) to LNG liquefied in OR using liquefaction with 90% efficiency	15.56	-	15.56
	LNG008	Dairy Digester Biogas to LNG liquefied in OR using liquefaction with 80% efficiency	28.53	-	28.53
	LNG009	Dairy Digester Biogas to LNG liquefied in	17.78	-	17.78

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		OR using liquefaction with 90% efficiency			
Liquefied Petroleum Gas	LPG001	Liquefied petroleum gas, crude and natural gas mix	83.05	-	83.05
Electricity	ELC001	Oregon average electricity mix	108.29	-	108.29
Hydrogen	HYGN001	Compressed H2 from central reforming of NG (includes liquefaction and re-gasification steps)	142.20	-	142.20
	HYGN002	Liquid H2 from central reforming of NG	133.00	-	133.00
	HYGN003	Compressed H2 from central reforming of NG (no liquefaction and re-gasification steps)	98.80	-	98.80
	HYGN004	Compressed H2 from on-site reforming of NG	98.30	-	98.30

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	HYGN005	Compressed H2 from on-site reforming with renewable feedstocks	76.10	-	76.10
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115a

**APPENDIX D**

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

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CV No. 3:15-cv-00467

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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,  
AMERICAN TRUCKING ASSOCIATIONS, INC.,  
A TRADE ASSOCIATION, AND CONSUMER ENERGY  
ALLIANCE, A TRADE ASSOCIATION,

*Plaintiffs,*

v.

JANE O'KEEFFE, ED ARMSTRONG, MORGAN RIDER,  
COLLEEN JOHNSON, AND MELINDA EDEN, IN THEIR  
OFFICIAL CAPACITIES AS MEMBERS OF THE OREGON  
ENVIRONMENTAL QUALITY COMMISSION; DICK  
PEDERSEN, JONI HAMMOND, WENDY WILES, DAVID  
COLLIER, JEFFREY STOCUM, CORY-ANN WIND, LYDIA  
EMER, LEAH FELDON, GREG ALDRICH, AND SUE  
LANGSTON, IN THEIR OFFICIAL CAPACITIES AS OFFICERS  
AND EMPLOYEES OF THE OREGON DEPARTMENT OF  
ENVIRONMENTAL QUALITY, ELLEN F. ROSENBLUM, IN  
HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
STATE OF OREGON; AND KATE BROWN, IN HER OFFICIAL  
CAPACITY AS GOVERNOR OF THE STATE OF OREGON,

*Defendants.*

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COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

42 USC § 1983; 28 USC §§ 2201-02

Plaintiffs American Fuel & Petrochemical Manufacturers (“AFPM”), American Trucking Associations, Inc. (“ATA”), and Consumer Energy Alliance (“CEA”), (collectively referred to as “Plaintiffs”) allege as follows:

#### INTRODUCTION AND SUMMARY

1. This is an action for declaratory, injunctive and other relief brought by Plaintiffs against (i) Jane O’Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, and Melinda Eden in their official capacities as members of the State of Oregon’s Environmental Quality Commission (EQC); (ii) Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, and Sue Langston in their official capacities as officers and employees of the Oregon Department of Environmental Quality (DEQ); (iii) Ellen F. Rosenblum in her official capacity as attorney general of Oregon; and (iv) Kate Brown in her official capacity as governor of Oregon.

2. Plaintiffs seek injunctive and declaratory relief enjoining implementation and enforcement of Oregon’s Clean Fuels Program, OAR §§ 340-253-0000, *et seq.*, (Oregon Program) and declaring that the Oregon Program violates the United States Constitution and is preempted by the federal Clean Air Act and other federal statutes.

3. First, the Oregon Program violates the Commerce Clause of the United States Constitution because it discriminates against transportation fuels imported into Oregon with the intended purpose and effect of promoting the development of in-state fuel production, promoting economic development in Oregon, keeping more money in Oregon over other states, and discouraging the use of fuels from outside of Oregon.

4. Second, the Oregon Program violates both the Commerce Clause and the principles of interstate federalism embodied in the federal structure of the United States Constitution by attempting to regulate and control economic conduct occurring outside the borders of Oregon, including the extraction, production and distribution of transportation fuels outside of Oregon in interstate and foreign commerce.

\* \* \*

## I. THE PARTIES

### A. Plaintiffs

7. Plaintiff AFPM is a national trade association of more than 400 companies. AFPM's members include virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers nationwide with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine, and computers. The regulation of the interstate and international market for transportation fuel is of vital concern to AFPM and its membership.

8. A number of AFPM's members produce and sell gasoline, diesel and ethanol used as transportation fuels in Oregon, and several of AFPM's members import such gasoline, diesel and ethanol themselves into Oregon. According to Oregon's Department of Environmental Quality, the Oregon Program imposes economic and administrative burdens on regulated parties, including importers, that must satisfy the annual carbon intensity standards set forth in the Oregon Program, as well as the Oregon Program's administrative burdens. In addition, other AFPM

members sell gasoline, diesel and ethanol to companies that then import the products into Oregon. The Oregon Program adversely affects these members' sales by increasing the regulatory cost of using these products in Oregon. The Oregon Program thus illegally imposes burdens on AFPM's members importing transportation fuels into Oregon or selling them to Oregon importers subject to the Oregon Program.

9. AFPM's members sell transportation fuels throughout Oregon, including in the area falling under the Portland Division of this Court.

10. AFPM brings this lawsuit on behalf of its members, one or more of which are parties regulated under the Oregon Program and which would possess standing to challenge the Oregon Program on their own behalf.

11. Plaintiff ATA is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry.

12. ATA's direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation.

13. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States.

14. Several of ATA's members buy transportation fuels in Oregon for use in Oregon. The Oregon Program

increases the regulatory costs of importing such fuels, and some of these costs will be passed along to members of ATA who buy these fuels.

15. ATA's members buy transportation fuels throughout Oregon, including in the area falling under the Portland Division of this Court.

16. ATA brings this lawsuit on behalf of its members, one or more of which would possess standing to challenge the Oregon Program on their own behalf.

17. Plaintiff CEA is a national association of more than 400,000 individual members representing every sector of the United States economy. CEA's members include both transportation fuel end-users and producers and sellers of gasoline, diesel and ethanol, both in Oregon and elsewhere in the United States. The regulation of the interstate and international market for transportation fuel is of vital concern to CEA and its membership.

18. A number of CEA's members produce and sell gasoline, diesel and ethanol used as transportation fuels in Oregon, and several of CEA's members import such gasoline, diesel and ethanol themselves into Oregon. According to DEQ, the Oregon Program imposes economic and administrative burdens on regulated parties, including importers, that must satisfy the annual carbon intensity standards set forth in the Oregon Program, as well as filing requirements and other administrative burdens.

19. Further, several of CEA's members buy gasoline- and diesel-based transportation fuels in Oregon for use in Oregon. The Oregon Program increases the regulatory costs of importing such fuels, and some of these costs will be passed along to members of CEA who buy these fuels. CEA's members buy and sell

transportation fuels throughout Oregon, including in the area falling under the Portland Division of this Court.

20. CEA brings this lawsuit on behalf of its members, one or more of which are parties regulated under the Oregon Program and which would possess standing to challenge the Oregon Program on their own behalf.

21. Neither the claims asserted nor the relief sought in the Complaint requires the participation of any individual member of AFPM, ATA, or CEA.

#### B. Defendants

22. Defendants Jane O’Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, and Melinda Eden are members of the State of Oregon’s Environmental Quality Commission, which adopted the Oregon Program. They are being sued in their official capacities.

23. Defendants Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich and Sue Langston are officers or employees of the State of Oregon’s Department of Environmental Quality, which is tasked with implementing the Oregon Program. These defendants are responsible for implementing and facilitating the implementation of the Oregon Program. Each defendant is sued in his or her official capacity.

24. Defendant Ellen F. Rosenblum is the Attorney General of the State of Oregon. Defendant Rosenblum is responsible for the enforcement of the Oregon Program and is being sued in her official capacity.

25. Defendant Kate Brown is the Governor of the State of Oregon. Defendant Brown is responsible for

the enforcement of the Oregon Program and is being sued in her official capacity.

## II. JURISDICTION AND VENUE

26. Subject matter jurisdiction is founded on 28 USC §§ 1331 and 1343 because this case arises under the Constitution and laws of the United States.

27. The Court has authority to enjoin enforcement of the Oregon Program under 42 USC § 1983, and to grant declaratory relief pursuant to 28 USC §§ 2201 and 2202.

28. Venue is proper in this Court under 28 USC § 1391(b). Defendants maintain their offices within this judicial district and events giving rise to the claims herein occurred within this judicial district.

29. AFPM's, ATA's, and CEA's members market imported transportation fuels throughout Oregon (including within this judicial division) and sell transportation fuels to be used throughout Oregon (including within this judicial division), and therefore a substantial portion of the events giving rise to this lawsuit occur in this division.

## III. LEGAL AND FACTUAL BACKGROUND

### A. Development of the Oregon Program

30. In 2009, the Oregon Legislature authorized DEQ to attempt to reduce greenhouse gas (GHG) emissions by 10 percent over a 10-year period. 2009 Or. Laws ch. 754, § 6(2)(b)(A). As part of that effort, the statute provided that DEQ “may adopt” a “schedule to phase in implementation of [low carbon fuel standards] in a manner that reduces the average amount of greenhouse gas emissions per unit of fuel energy of the fuels by 10 percent below 2010 levels by the year 2020.” *Id.* The Legislature defined GHGs as “any gas

that contributes to anthropogenic global warming including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.” *Id.* § 6(1)(a); ORS § 468A.210.

31. The Legislature stated that, if DEQ were to adopt such a program, it must achieve reductions of GHG emissions across all stages of the “lifecycle[]” of the fuel, which includes the “emissions from the production, storage, transportation and combustion of the fuels and from changes in land use associated with the fuels.” 2009 Or. Laws ch. 754, § 6(2)(b)(B).

32. On April 17, 2012, Oregon Governor John A. Kitzhaber directed DEQ to initiate a rulemaking process to implement a low carbon fuel standard in two phases. In Phase 1, “fuel suppliers would begin to track and report the carbon intensity of transportation fuels over a two year period.” *See* J. Kitzhaber, Letter to D. Pedersen, Director, DEQ (Apr. 17, 2012), *available at* <http://www.deq.state.or.us/aq/cleanFuel/docs/LowCarbonStandards041712.pdf>. In Phase 2, “fuel suppliers would be required to meet the standard.” *Id.* The Governor stated that implementation of a clean fuels program was “important” to support the goals of Oregon’s “ten-year energy action plan,” which are to “[1] Reduce our dependence on carbon-intensive fuels and foreign oil; [2] Develop home-grown renewable energy resources; [3] Mitigate greenhouse gas emissions; [4] Improve energy efficiency and create rewarding local jobs; and [5] Boost Oregon’s economy through investment and innovation.” *Id.*

33. DEQ formed advisory committees to assist in designing the Oregon Program. In 2010, DEQ convened an advisory committee that produced a “final report” for the implementation of low carbon fuel standards. DEQ, Final Report, *Oregon Low Carbon*

*Fuel Standards: Advisory Committee Process and Program Design* 122, 123 (Jan. 25, 2011) (“Advisory Final Report”), available at <http://www.deq.state.or.us/aq/committees/docs/lcfs/reportFinal.pdf>.

34. On December 17, 2012, DEQ adopted rules to implement Phase 1 of the Oregon Program that require Oregon fuel importers and producers to “register, keep records, and report to DEQ the volumes and carbon intensities of the transportation fuels they provide in Oregon.” OAR § 340-253-0000(4).

35. DEQ convened another advisory committee in 2014 to advise DEQ regarding implementation of Phase 2 and consideration of its effects on the Oregon economy. On August 15, 2014, DEQ published the proposed Phase 2 of the Oregon Program.

36. AFPM, on behalf of its members, submitted comments on November 20, 2014 in response to DEQ’s proposal and requested that DEQ not proceed with the rulemaking because it “is contrary to governing federal law and raises serious constitutional concerns.”

37. On January 7, 2015, DEQ adopted rules for Phase 2 of the Oregon Program and imposed a mandatory reduction in average carbon intensity on importers and producers of fuels sold in Oregon.

38. As originally enacted, the legislation authorizing development of the Oregon Program included a “sunset provision” providing for automatic repeal of the authorizing legislation on December 31, 2015. 2009 Or. Laws ch. 754, § 8. On March 12, 2015, Governor Brown signed into law SB 324, which removes the December 31, 2015, sunset provision from the legislation. *Oregon Clean Fuels Program*, Oregon DEQ, <http://www.deq.state.or.us/aq/cleanFuel/> (last visited Mar. 16, 2015).

B. The Oregon Program Regulates “Carbon Intensity”

39. The Oregon Program regulates the average “carbon intensity” of transportation fuels sold in Oregon.

40. Carbon intensity means “the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e per MJ).” *Id.* § 340-253-0040(9).

41. Lifecycle GHG emissions are “[s]tated in terms of mass values *for all greenhouse gases* as adjusted to CO<sub>2</sub>e [carbon dioxide equivalent] to account for the relative global warming potential of each gas.” *Id.* § 340-253-0040(37)(c) (emphasis added). Under HB 2186, which authorized the adoption of the Oregon Program, “[g]reenhouse gas” has the “meaning given that term in ORS 468A.210.” 2009 Or. Laws ch. 754, § 6(1)(a). ORS 468A.210, in turn, defines “[g]reenhouse gas” as “any gas that contributes to anthropogenic global warming including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.”

42. The Oregon Program regulates CO<sub>2</sub> emissions and other GHG emissions, including emissions of methane. *See, e.g.*, OAR § 340-253-8030, tbl. 3. DEQ has stated that the term “CO<sub>2</sub> equivalent, or CO<sub>2</sub>E, is a unit of measurement that combines CO<sub>2</sub> and other greenhouse gases like methane . . . into one number.” Advisory Final Report, Appx. J, Credit and Deficit Calculations at 4, , *available at* <http://www.deq.state.or.us/aq/committees/docs/lcfs/appendixJ.pdf>. And DEQ has explained that “carbon intensity values for vehicle CH<sub>4</sub> [methane] and N<sub>2</sub>O emissions were added to the final diesel and gasoline carbon intensities” included in the Program’s lookup table for petroleum. Advisory

Final Report, Appx. B, Lifecycle Analysis at 7, *available at* <http://www.deq.state.or.us/aq/committees/docs/lcfs/appendixB.pdf>.

43. DEQ states that it calculates lifecycle GHG emissions by aggregating the “direct emissions and significant indirect emissions, such as significant emissions from changes in land use associated with the fuels” and measuring “all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of fuel by the consumer.” OAR § 340-253-0040(37). A fuel’s carbon intensity reflects not only the GHG emissions when a fuel is used in a vehicle, but also “all greenhouse gas emissions associated with a fuel’s production [and] distribution.” Advisory Final Report at 40. The Oregon Program thus assigned different carbon intensity values to biofuels that are physically and chemically identical. *See* OAR § 340-253-8030, tbl. 3; *id.* -8040, tbl. 4. While the regulations purport to include emissions from land use changes in the calculation of lifecycle GHG emissions, DEQ has thus far declined to include such emissions from land use change in the lookup tables published with the regulations. *See* OAR § 340-253-8030, tbl. 3; *id.* -8040, tbl. 4.

#### C. The Oregon Program Imposes Burdens on Regulated Parties

44. The Oregon Program defines both “regulated fuels” and “clean fuels.” OAR § 340-253-0200. “Regulated fuels” include gasoline, diesel fuel, denatured fuel ethanol and biodiesel. *Id.* § 340-253-0200(2). “Clean fuels” means “a transportation fuel with a carbon intensity value lower than the clean fuel standard. . . .” *Id.* § 340-253-0200(3). The “clean fuel standard” refers to the annual average carbon intensity standard set forth

in Table 1 and Table 2 of OAR § 340-253-8010 and -8020. *Id.* § 340-253-0100(6)(a), (b).

45. The Oregon Program distinguishes between “regulated parties” and “credit generators.” The Oregon Program defines “regulated party” as “[a]ll persons that produce in Oregon or import into Oregon any regulated fuel.” OAR § 340-253-0100(1). An importer is the party that has “ownership title to the transportation fuel from locations outside of Oregon at the time it is brought into the State of Oregon by any means of transport other than in the fuel tank of a motor vehicle for the purpose of propelling the motor vehicle.” *Id.* at § 340-253-0040(32), (33).<sup>1</sup> The producer is the “person who makes the fuel in Oregon.” *Id.* at § 340-253-0040(46). The Oregon Program defines “credit generators” as “providers of compressed natural gas, liquefied natural gas, liquefied compressed natural gas, liquefied petroleum gas and renewable diesel for use as a transportation fuel in Oregon,” “providers of electricity used as a transportation fuel,” and “providers of hydrogen fuel and a hydrogen blend for use as a transportation fuel in Oregon.” *Id.* §§ 340-253-0320, 340-253-0330, 340-253-0340.

46. Under the Oregon Program, regulated parties must comply with specific administrative requirements as well as substantive requirements relating

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<sup>1</sup> Importers that import into Oregon more than 250,000 gallons of transportation fuel in a given calendar year must comply with all of the requirements of the Oregon Program, whereas importers that import into Oregon 250,000 gallons or less of transportation fuel in a given calendar year are exempt from certain requirements. *Id.* §§ 340-253-0100(1)(b), 340-253-0040(35), (51). As used herein, the terms “importer” and “regulated party” are used only in reference to those parties that must comply with all of the requirements of the Oregon Program.

to the average carbon intensity of regulated fuels imported into Oregon.

47. First, as to administrative requirements, regulated parties must register with DEQ “for each fuel type on or before the date upon which the party begins producing the fuel in Oregon or importing the fuel into Oregon.” OAR § 340-253-0100(4). Regulated parties also must develop and retain records as required by OAR § 340-253-0600. *Id.* § 340-253-0100(5). Further, regulated parties must complete quarterly progress reports and annual compliance reports. *Id.* § 340-253-0100(7), (8).

48. Second, as to substantive requirements, each regulated party must “demonstrate compliance in each compliance period by producing or importing fuel that in the aggregate meets the standard or by obtaining sufficient credits to offset deficits for such fuel produced or imported into Oregon.” *Id.* § 340-253-0100(6). The “standard” refers to the annual average carbon intensity standard set forth in Table 1 and Table 2 of OAR § 340-253-8010 and -8020. *Id.* § 340-253-0100(6)(a), (b).

49. The Oregon Program exempts certain fuels and fuel uses that otherwise would be subject to the Oregon Program’s administrative and substantive requirements. OAR § 340-253-0250(1), (2). For example, the Oregon Program exempts “fuels that are exported for use outside of Oregon,” and transportation fuels used in motor trucks “if used primarily to transport logs.” *Id.* § 340-253-0250(2)(a)(I).

D. The Oregon Program Burdens Importers and Out-of-State Refiners of Gasoline and Diesel

50. The Oregon Program has a stated goal of achieving, by 2025, a 10 percent reduction in the annual average carbon intensity for transportation fuels sold in Oregon. Reductions in average carbon intensity are mandated to begin in 2016, and the required reductions increase each year through 2025. OAR §§ 340-253-0100(6), 340-253-8010, tbl. 1, and -8020, tbl. 2.

51. Although the Oregon Program distinguishes between the carbon intensities of different biofuels, it applies the same average state-wide carbon intensity to all sources of gasoline or diesel fuel. Specifically, the Oregon Program calculates a carbon intensity for each source of gasoline and diesel fuel and then adopts a weighted state-wide average that each importer of transportation fuels must use in calculating its annual average carbon intensity. As a result, importers of gasoline or diesel must use the assigned state-wide average even if the carbon intensity for their gasoline or diesel would be lower than the average state-wide carbon intensity for gasoline or diesel. *See* OAR § 340-253-0400(1).

52. In setting state-wide averages for gasoline and diesel, DEQ considered “[t]he sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources.” OAR § 340-253-0400(4)(a)(A).

53. Regulated fuels provided to Oregon that are below the annual average carbon intensity requirement will generate credits. OAR § 340-253-1000(5). And fuels that are above the annual average carbon

intensity requirement will generate deficits. *Id.* § 340-253-1000(6).

54. DEQ requires regulated parties that accumulate deficits to purchase credits from other parties or generate credits through the use of lower-carbon-intensity fuels during the compliance period. *Id.* §§ 340-253-1050, 340-253-0100(6).

55. Under the Oregon Program, the baseline carbon intensity for gasoline is 89.31 gCO<sub>2</sub>e/MJ. That baseline carbon intensity value comprises 10% ethanol Oregon GREET default ethanol and 90% clear gasoline, which is based on a weighted average of gasoline supplied to Oregon. For 2016, importers of gasoline must meet an average carbon intensity target of 89.08 gCO<sub>2</sub>e/MJ, which is lower than the carbon intensity for their gasoline. As a result, importers of gasoline would need to replace existing sources of ethanol with ethanol that has lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements.

56. Likewise, the baseline carbon intensity value for diesel fuel is 87.09 gCO<sub>2</sub>e/MJ. That baseline carbon intensity value comprises 5% biodiesel and 95% clear diesel, which is again based on a weighted average of diesel fuel supplied to Oregon. For 2016, importers of diesel must meet an average carbon intensity of 86.87 gCO<sub>2</sub>e/MJ, which is lower than the carbon intensity for their diesel fuel. As a result, diesel importers would need to replace existing sources of biodiesel with biodiesel that has lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements.

57. The practical effect of the Oregon Program is that importers of gasoline and diesel cannot generate

credits but instead must either change the composition of the fuel they import or purchase credits. As explained by DEQ, revenue from the sale of credits is a benefit to a provider of a fuel that generates credits. Thus, “the regulated party would incur the costs of purchasing credits to comply and providers of clean fuel would benefit from the sale of credits.” DEQ, *Clean Fuels Program Phase II Rulemaking* (DEQ recommendations to EQC) at 12 (Jan. 7-8, 2015), available at <http://www.deq.state.or.us/aq/cleanFuel/docs/CFPPH2staffReport.pdf>.

58. The Oregon Program requires importers and out-of-state refiners of gasoline and diesel fuel to subsidize the development of a transportation fuel industry in Oregon and is designed to displace imported fuels produced from petroleum sources. *See id.* at 4 (“Increased use of clean fuels will displace fuels produced from petroleum sources”). That burden is imposed exclusively on imported fuels because, as DEQ has explained, “there are no producers of gasoline or diesel in Oregon.” *See id.* at 10. In-state producers of ethanol and biodiesel face no such burden because the biofuels produced in Oregon already meet the proposed average annual carbon intensity. *Id.*

59. The Oregon Program will burden out-of-state refiners of gasoline and diesel fuels. It will require importers of petroleum-based fuels either to change the composition of the fuel they import or to purchase credits from other parties. The Oregon Program will incentivize importers not to import fuels from out-of-state refiners and impose additional costs on out-of-state refiners.

60. In 2015, the baseline carbon intensity of gasoline or gasoline substitutes is 89.31 gCO<sub>2</sub>e/MJ. OAR § 340-253-8010, tbl. 1. In 2016, importers of gasoline

or gasoline substitutes must reduce the carbon intensity of their fuels from an average of 89.31 gCO<sub>2</sub>e/MJ to 89.08 gCO<sub>2</sub>e/MJ (a 0.25 percent reduction). *Id.* In 2020, importers of gasoline or gasoline substitutes must reduce the carbon intensity of their fuels to 87.08 gCO<sub>2</sub>e/MJ (a 2.5 percent reduction from baseline). And, by 2025 and beyond, importers of gasoline or gasoline substitutes must reduce the carbon intensity of their fuels to 80.36 gCO<sub>2</sub>e/MJ (a 10 percent reduction from baseline). *Id.*

#### E. The Oregon Program Burdens Out-of-State Competitors

61. The Oregon Program is tailored to benefit fuel producers within Oregon at the expense of fuel importers and refiners that produce fuels in other states and countries.

62. The burdens associated with the Oregon Program fall almost entirely on importers of transportation fuel. According to DEQ, “[b]usinesses that import gasoline, ethanol, diesel fuel, bio-diesel and biomass-based diesel for use as a transportation fuel in Oregon are the largest group of regulated parties.” DEQ, *Clean Fuels Program Phase II Rulemaking* at 10.

63. In contrast, according to DEQ, “there are no producers of gasoline or diesel fuel located in Oregon.” *Id.* at 10. The Governor’s Office likewise has stated that “[t]here are no oil refineries in Oregon, but there are biofuel producers[ and] feedstock growers.” See Press Release, Governor’s Office, *Governor Kitzhaber Announces New Clean Fuels Initiative* (Feb. 13, 2014).

64. DEQ has explained that, apart from administrative reporting requirements, the Oregon Program would impose no additional costs on in-state producers of ethanol or biodiesel because “the biofuels produced

already meet the proposed clean fuel standards” and that these in-state “businesses could also generate credits and benefit from the sale of those credits.” DEQ, *Clean Fuels Program Phase II Rulemaking* at 10. DEQ further explained that “revenue from the sale of credits is a benefit to a provider of clean fuel.” *Id.*

65. Further, DEQ identifies a “variety of businesses types” within Oregon that will benefit from the Oregon Program and “could become credit generators” including: “[1] Businesses, local governments, school districts and transit agencies that own alternative fuel fleets and dispensing infrastructure; [2] Auto manufacturers that own electric charging stations; [3] Businesses that provide chargers for their employees to charge their electric vehicles during work hours; and [4] Utilities that help businesses provide fuel and infrastructure.” *Id.* at 10-11.

66. The Oregon Program benefits in-state producers of transportation fuels, including biofuels (and the feedstock growers who supply the in-state biofuels producers) at the expense of petroleum refiners because it assigns gasoline and diesel fuel higher state-wide carbon intensity values than in-state transportation fuels. *See* OAR § 340-253-8030, tbl. 3; *id.* -8040, tbl. 4.

67. The Oregon Program burdens regulated parties that import petroleum-based gasoline and diesel by requiring them to offset deficits by, for example, buying credits from credit generators in Oregon.

68. The Oregon Program benefits Oregon’s producers of transportation fuels because these producers may sell credits they generate from the fuels produced in Oregon. The Program thus discriminates against out-of-state petroleum fuels in favor of in-state fuels.

69. Similarly, the Program is designed to benefit Oregon ethanol producers at the expense of ethanol producers in other parts of the country (and in particular in the Midwest). The Oregon Program's lookup table assigns different carbon intensity scores based on where the ethanol is produced, either in "California" or in the "Midwest," OAR § 340-253-8030, tbl. 3, and requires providers to use the carbon intensity value in the lookup table "that best matches" the fuel's production method, OAR § 340-253-0400(2).

70. The carbon intensity values for ethanol produced in the Midwest are consistently higher than for ethanol produced in California. For instance, ethanol produced in "California" from corn using "Dry Mill; Wet [Distillers Grain with Solubles ("DGS")]; [Natural Gas ("NG")]" would have a carbon intensity value of 50.70 gCO<sub>2e</sub>/MJ. OAR § 340-253-8030, tbl. 3. This is the process used in the only ethanol plant operating in Oregon on the date of this complaint, to Plaintiffs' knowledge. *See Our Company*, Pacific Ethanol, <http://www.pacificethanol.net/our-company> (last visited Mar. 16, 2015). But corn ethanol produced in the "Midwest" using the same procedure would have a carbon intensity value that is nearly 10 points—or 20%—higher, at 60.10 gCO<sub>2e</sub>/MJ. *See* OAR § 340-253-8030, tbl. 3. The same disparity between "California" and "Midwest" producers would be true for other forms of ethanol. *See id.*

71. The Oregon Program discriminates in favor of Oregon industry at the expense of out-of-state industry by design.

72. A centerpiece of former Governor Kitzhaber's environmental policy was a "ten-year energy action plan" designed in part to "[d]evelop home-grown renewable energy resources," "[i]mprove energy efficiency and create rewarding local jobs," and "[b]oost Oregon's

economy through investment and innovation.” J. Kitzhaber, Letter to D. Pedersen, Director, DEQ (Apr. 17, 2012), *available at* <http://www.deq.state.or.us/aq/cleanFuel/docs/LowCarbonStandards041712.pdf>. Governor Kitzhaber explained, when directing DEQ to issue regulations implementing the Oregon Program, that the Oregon Program “supports these goals and [is] important to the success of this plan.” *Id.*

73. The ten-year plan itself (which Governor Kitzhaber hailed as an “economic action plan” designed to “keep capital circulating in our region through local sourcing and supply chains while reducing our dependence on carbon-intensive fuels,” J. Kitzhaber, Letter to Oregon (Dec. 14, 2012)) stated that the Oregon Program would “provide important economic benefits to Oregon’s economy,” J. Kitzhaber, 10-Year Energy Action Plan 37 (Dec. 14, 2012), *available at* [http://www.oregon.gov/energy/Ten\\_Year/Ten\\_Year\\_Energy\\_Action\\_Plan\\_Final.pdf](http://www.oregon.gov/energy/Ten_Year/Ten_Year_Energy_Action_Plan_Final.pdf).

74. Consistent with the view of the Oregon Program as a means of improving Oregon’s economy by creating new green jobs that “keep capital circulating in [the] region through local sourcing,” Oregon’s lawmakers have highlighted the Oregon Program’s intended effect of discriminating against out-of-state industry in favor of “home-grown . . . resources” and industry. For example, in a 2014 press release announcing his instruction to DEQ to move forward with the Oregon Program, the Governor’s Office set forth the problem the Program is designed to solve: “In 2012, Oregonians sent more than \$6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market.” Press Release, Or. Governor’s Office, *Governor Kitzhaber Announces New Clean Fuels Initiative* (Feb. 13, 2014),

available at <http://us2.campaign-archive1.com/?u=41b11f32beefba0380ee8ecb5&id=a4eced804d>.

75. The Governor's Office explained that the Program's purpose was to shift revenue away from out-of-state refineries to Oregon's own fuel producers: "There are no oil refineries in Oregon, but there are biofuel producers, feedstock growers, a burgeoning electric vehicle industry, and propane, natural gas, and other innovative fuel companies ready to invest in the state if they have regulatory certainty." *Id.*

76. The Governor explained that he was "committed to using every tool at [his] disposal to support 21st century industries and innovation, and to attract investment and new jobs to our state," and that Oregon had "the opportunity to spark a homegrown clean fuels industry right here." Associated Press, *Kitzhaber: Low-carbon Fuel Mandate Will Go Forward*, (Feb. 13, 2014) (quoting Gov. John Kitzhaber), available at <http://newsok.com/kitzhaber-low-carbon-fuel-mandate-will-go-forward/article/feed/651053>. The Governor's objective was "to try to spark this home-grown industry that can capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy." [sic] *Id.*

77. According to Governor Kitzhaber, "We've only scratched the surface of the potential for alternative fuels to create a homegrown industry to tap into the billions we spend on gasoline every year. . . . We should keep more of those dollars in Oregon to grow, produce, and deliver fuels that benefit our communities with new good-paying jobs." See Ian K. Kullgren, *Clean-fuel controversy: Oregon Democrats push bill; GOP tries to hit brakes*, *The Oregonian/OregonLive* (Feb. 2, 2015),

available at [http://www.oregonlive.com/politics/index.ssf/2015/02/oregon\\_democrats\\_push\\_low-carb.html](http://www.oregonlive.com/politics/index.ssf/2015/02/oregon_democrats_push_low-carb.html).

78. Governor Kitzhaber stated that Oregon was faced with the choice “to invest in clean fuels here at home or continue to export fuel dollars out of state, out of the country and out of Oregon,” Yuxing Zheng, *Oregon Clean Fuels: Gov. John Kitzhaber Takes Action After Legislation Stalls*, *The Oregonian*, Feb. 13, 2014 (quoting Gov. John Kitzhaber), and explained that the Oregon Program would “keep more of those dollars here—in Oregon.” Gov. John Kitzhaber, Op-Ed., *Clean Fuels Program Will Help Oregon’s Economy*, *Environment*, *The Oregonian*, Feb. 18, 2014.

79. Likewise, Oregon’s legislators have confirmed that the Oregon Program is designed to create green jobs in Oregon at the expense of other states’ economies. According to State Senator Chris Edwards, the chief sponsor of the recent bill that repealed the sunset provision and thus paved the way for the latest regulation in the Program, *see supra* at ¶ 39, the Program is designed to “reduce carbon pollution, increase consumer choice, and create jobs right here at home.” Press Release, Or. Sen. Majority Office, *Senate takes historic step advancing Oregon’s economy and fuel alternatives* (Feb. 17, 2015), available at [https://www.oregonlegislature.gov/edwardsc/Documents/Press%20Release\\_Caucus\\_CleanFuels\\_2-17-15.pdf](https://www.oregonlegislature.gov/edwardsc/Documents/Press%20Release_Caucus_CleanFuels_2-17-15.pdf). State Senator Lee Beyer similarly explained that the “Clean Fuels Program is a smart, pragmatic approach to protecting our environment and encouraging innovating investments,” and that the Program will “reduc[e] [Oregon’s] dependence on petroleum and channe[l] those dollars into Oregon’s economy.” *Id.* And State Senate Majority Leader Diane Rosenbaum noted that the Program “will help support the growing green energy sector [and]

power [Oregon's] economy," as well as "help address the imminent threats . . . from global warming." *Id.*

80. Consistent with the statements of the Governor and legislators, DEQ acknowledges that the Oregon Program will promote Oregon jobs at the expense of jobs elsewhere.

81. DEQ explained in a 2011 analysis that "the existence of an [sic] Oregon's low carbon fuel standards would be a significant incentive to increase the production capacity of Oregon's existing Biofuels facilities and attract new biofuels production." Advisory Final Report at 121.

82. In the analysis accompanying the draft rule that DEQ submitted for approval to Oregon's Environmental Quality Council, the agency explained the regulation's economic impacts: (1) "To achieve compliance, significant investment in infrastructure and fuel production and capacity results in an influx of economic activity, including growth in employment, income and gross state product," (2) "Positive economic impacts in Oregon stem from importing less petroleum fuel," and (3) "Many of the lower carbon fuels that replace gasoline and diesel cost less and would result in lower costs at the pump for fuel users." DEQ, *Clean Fuels Program Phase II Rulemaking* at 9.

83. During the rulemaking process, one advisory committee member explained:

The state currently exports over \$5 billion every year for transportation fuels. While the [Oregon Program] is a performance-based standard, it provides a market incentive for locally produced fuels (while also allowing for low-carbon fuels to continue to flow in from other locations), which will create net [sic] jobs, make net improvements for household

income, and be beneficial for Oregon's Gross State Product. This is a clear win for Oregon . . . . [T]he [Oregon Program] establishes a strong incentive policy for investment and new business in Oregon.

Advisory Final Report, Appx. A, Summary of Advisory Committee Input at 142, *available at* <http://www.deq.state.or.us/aq/committees/docs/lcfs/appendixA.pdf>.

84. DEQ was aware that new jobs created in Oregon would come at the expense of other states' economies. One advisory committee member commented to DEQ that "the whole intent of the [Oregon Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state." *Id.* at 119.

#### F. The Oregon Program Regulates Interstate and Foreign Commerce

85. The requirements of the Oregon Program constitute extraterritorial regulation of commerce in other states and foreign countries.

86. Through the use of a lifecycle analysis, the Oregon Program determines a fuel's carbon intensity by commercial activities that occur outside of Oregon, including "feedstock generation or extraction, production, [and] distribution." OAR § 340-253-0040(37); *see also* Advisory Final Report at 122, 123 (regulation of activities associated with "extracting or growing the feedstock, refining, storage, [or] transportation" of the fuel or feedstock).

87. The Oregon Program assigns carbon intensity values based on out-of-state activities and requires a reduction in the carbon intensity of the fuels. It requires reductions in carbon intensity to begin in 2016 through 2025 and beyond. OAR §§ 340-253-

0100(6), 340-253-8010, tbl. 1. Over this ten-year period, the Program seeks to alter the practices that produce the GHG emissions in order to reduce the carbon intensities of fuels sold in Oregon.

88. The Oregon Program classifies fuels based on their raw materials, geographic origin, manufacturing process, and the power source used to refine them. OAR § 340-253-8030, tbl. 3; *id.* -8040, tbl. 4. The Oregon Program refers to each class of such fuel as a “fuel pathway.” *See, e.g., id.* -0400(3)(b)(B).

89. Thus, to compete in the Oregon market, producers of higher carbon-intensity fuels must change the manner in which they produce and transport fuels to obtain lower carbon-intensity scores to avoid the commercial disadvantage placed on their higher carbon-intensity fuels. Indeed, the petroleum used in Oregon all comes from out-of-state producers and refineries. *See* DEQ, *Clean Fuels Program Phase II Rulemaking* at 10; Advisory Final Report at 41.

90. By regulating the “fuel pathway,” the Oregon Program directly and unconstitutionally regulates interstate commerce and conduct occurring entirely outside of Oregon and imposes environmental standards on interstate and foreign commerce by erecting a barrier to imports produced and transported in a manner Oregon disfavors.

\* \* \*

#### IV. STATEMENT OF CLAIMS

##### FIRST CLAIM FOR RELIEF

(Discrimination in Violation of the Commerce Clause)

107. The prior paragraphs of the Complaint are incorporated by reference.

108. The Oregon Program violates the Commerce Clause of the United States Constitution by discriminating against transportation fuels produced in other States and other countries.

109. The Oregon Program confers an advantage on fuels produced in Oregon at the expense of fuels produced outside of Oregon. By assigning lower carbon intensities to ethanol and other fuels produced within Oregon and higher carbon intensities to petroleum-based fuels (which are produced in other states and countries but are not produced in Oregon), the Oregon Program discourages the use of fuels produced outside of Oregon and encourages the production of transportation fuels in Oregon.

110. The discrimination inherent in the Oregon Program is designed to provide a competitive advantage to local economic interests and to promote the production and use of Oregon fuels in Oregon, thus keeping more money paid by Oregonians for fuel within the State.

111. The Oregon Program discriminates against imported petroleum-based fuels by requiring importers of those fuels to use a mandatory state-wide carbon intensity average even if the fuels that they import into Oregon have individual carbon intensity values that are lower than the assigned state-wide average. This discrimination against petroleum-based fuels is directed entirely at exports from other states and countries.

112. Further, the Oregon Program treats chemically identical ethanol differently based on where it is produced. By assigning higher carbon intensities to Midwest ethanol, the Oregon Program discourages the use of ethanol produced in the Midwest.

113. The discrimination inherent in the Program is designed to provide an unfair competitive advantage to local economic interests and to promote the use of Oregon ethanol in Oregon.

114. By expressly conditioning favorable or unfavorable regulatory treatment on the ethanol's point of origin, the Oregon Program discriminates against interstate commerce on its face.

115. The Oregon Program imposes significant burdens on Plaintiffs' members in connection with their conduct of interstate commerce.

116. The Program is not justified by any valid public welfare, consumer protection, or pro-competitive purpose unrelated to economic protectionism.

117. Defendants are purporting to act within the scope of their authority under State law in enforcing and implementing the Oregon Program.

118. Defendants are liable to Plaintiffs for proper redress under 42 USC § 1983 because the Program deprives Plaintiffs' members of the rights, privileges, and immunities secured by the Commerce Clause of the United States Constitution.

119. Plaintiffs have no adequate remedy at law.

**SECOND CLAIM FOR RELIEF**  
(Impermissible Extraterritorial Regulation)

120. The prior paragraphs of the Complaint are incorporated by reference.

121. The Oregon Program violates the United States Constitution by directly regulating interstate and foreign commerce and purporting to regulate conduct that occurs in other States and countries.

122. By regulating the “fuel pathway” of transportation fuels – *i.e.*, the manner in which transportation fuels are produced and ultimately reach the Oregon market – the Oregon Program impermissibly penalizes producers and importers based upon the manner in which their transportation fuels are produced in other States and countries and the manner in which they move in interstate and foreign commerce.

123. The express purpose and practical effect of the Oregon Program is to control commerce conducted in other States and countries by attaching restrictions to imported transportation fuels that are produced and transported in a manner that Oregon disfavors.

124. By design and in practical effect, the Oregon Program impermissibly regulates conduct occurring wholly outside of Oregon by making it more difficult to market and sell transportation fuels based upon where the fuels are produced, the manner in which they are produced, and the manner in which they reach the Oregon market.

125. The Oregon Program improperly extends Oregon’s police power beyond its jurisdictional bounds by regulating conduct that lies within the regulatory jurisdiction of other States and countries.

126. The Oregon Program regulates, on its face and in its practical effect, the channels of interstate and foreign commerce and the use of these channels of interstate and foreign commerce.

127. By regulating interstate and foreign commerce that occurs wholly outside of Oregon, the Program violates the Commerce Clause of the United States Constitution and the principles of interstate federalism embodied in the federal structure of the United States Constitution.

128. Defendants are purporting to act within the scope of their authority under State law in enforcing and implementing the Oregon Program.

129. Defendants are liable to Plaintiffs for proper redress under 42 USC § 1983 because the Oregon Program deprives Plaintiffs' members of the rights, privileges, and immunities secured by the Commerce Clause of the United States Constitution and principles of interstate federalism embodied in the federal structure of the United States Constitution.

130. Plaintiffs have no adequate remedy at law.

\* \* \*

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A declaratory judgment, pursuant to 28 USC § 2201, that the Oregon Program violates the United States Constitution and is unenforceable;

B. A preliminary and permanent injunction enjoining the Defendants from implementing or enforcing the Oregon Program;

C. An order awarding Plaintiffs their costs and attorneys' fees pursuant to 42 USC § 1988; and

D. Such other and further relief as the Court deems just and proper.

DATED this 23<sup>rd</sup> day of March, 2015.

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