ORAL ARGUMENT NOT YET SCHEDULED

No. 15–35834

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,
Plaintiffs-Appellants,

v.

JANE O'KEEFFE, ET AL.,
Defendants-Appellees,

CALIFORNIA AIR RESOURCES BOARD, ET AL.,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon in Case No. 15-cv-00467-AA (Hon. Ann Aiken, Chief Judge)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Roger R. Martella, Jr.
Paul J. Zidlicky
Paul J. Ray
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY 1

ARGUMENT 3

I. The Oregon Program Discriminates Against Interstate Commerce 3

A. The Oregon Program Discriminates Against Out-of-State Gasoline and Diesel Fuel 3

1. Gasoline and Diesel Fuel Compete with Biofuels 4

2. The Oregon Program Discriminates Against Out-of-State Petroleum-Based Fuels 7

3. *Rocky Mountain* Does Not Control This Case 13

B. The Oregon Program Discriminates Against Out-of-State Ethanol 17

II. The Oregon Program Violates the Constitution By Regulating Activity Occurring Outside Oregon 20

III. EPA Has Preempted State Fuel Standards That, Like The Oregon Program, Regulate Methane 25

A. The RFG Rule Preempts The Oregon Program 25

B. The RFG Rule Found That No Regulation Of Methane Is Necessary 26

C. EPA Has Not Reversed The RFG Rule 28

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Page

Cases

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 4, 5, 6, 12

Black Star Farms LLC v. Oliver,
600 F.3d 1225 (9th Cir. 2010) 20

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 23

Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority,
476 U.S. 573 (1986) 22

C & A Carbone, Inc. v. Clarkstown,
511 U.S. 383 (1994) 2, 20, 21, 22

Exxon Corp. v. Governor of Md.,
437 U.S. 117 (1978) 10, 11, 24

Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.,
504 U.S. 353 (1992) 10, 12

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997) 18

Healy v. Beer Inst.,
491 U.S. 324 (1989) 22

Hebbe v. Pliler,
627 F.3d 338 (9th Cir. 2010) 15

Hunt v. Wash. State Apple Advert. Comm'n,
432 U.S. 333 (1977) 8, 9, 11

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 16, 23

New Energy Co. of Ind. v. Limbach,
486 U.S. 269 (1988) 9, 10, 15, 20

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827) 23

Or. Waste Sys. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994)...7, 18, 19

Pharmaceutical Research and Mfrs. of Am. v. Walsh,
538 U.S. 644 (2003)...23, 24

Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.,
768 F.3d 938 (9th Cir. 2014) 3, 14, 15, 17

Rocky Mountain Farmers Union v. Corey,
730 F.3d 1070 (9th Cir. 2013) ....*passim*

Rocky Mountain Farmers Union v. Corey,
740 F.3d 507 (9th Cir. 2014) 19

Rowe v. Educ. Credit Mgmt. Corp.,
559 F.3d 1028 (9th Cir. 2009) 6

Valley Bank of Nev. v. Plus Sys., Inc.,
914 F.2d 1186 (9th Cir. 1990) 16

W. Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994)..3, 7, 8

Watson v. Emp'rs Liab. Assurance Corp.,
348 U.S. 66 (1954)...24

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980)...24

Wyoming v. Oklahoma,
502 U.S. 437 (1992)...17

Statutes and Regulations

42 U.S.C. § 7545 ....25, 27, 29

55 Fed. Reg. 18005 (Apr. 30, 1990) 28

57 Fed. Reg. 47849 (Oct. 20, 1992)...28

59 Fed. Reg. 7716 (Feb. 16, 1994) 25, 26, 27, 28

61 Fed. Reg. 9905 (Mar. 12, 1996)..29

62 Fed. Reg. 10690 (Mar. 10, 1997)..28

74 Fed. Reg. 66496 (Dec. 15, 2009)..29

79 Fed. Reg. 1430 (Jan. 8, 2014) 29

80 Fed. Reg. 56593 (Sept. 18, 2015) 29

OAR § 340-253-400...12

OAR § 340-253-450...12

Other Authorities

DEQ, *Clean Fuels Program Phase II Rulemaking* (Jan. 7-8, 2015),
http://www.oregon.gov/deq/EQC/Documents/2015/0115ItemF
CleanFuels.pdf 6

ICF Int'l, *Task 3—Updated Compliance Scenarios* (Aug. 2014),
http://www.deq.state.or.us/aq/cleanFuel/docs/Compliance
Scenarios_ICF.pdf 5, 7, 17

INTRODUCTION AND SUMMARY

As set forth in Plaintiffs' Complaint, the Oregon Program ("Program") violates federal law in three ways. First, the Program violates the Constitution's guarantee of an open, national market by discriminating in favor of Oregon biofuels producers at the expense of out-of-state gasoline, diesel fuel, and ethanol producers. Second, the Program invades the domain of Oregon's sister states by raising an extraterritorial barrier to imports unless they are produced using methods Oregon prefers. Finally, the Program is expressly preempted by Congress's decision to authorize EPA to set uniform national fuel standards, coupled with EPA's decision under Section 211(c)(4) of the Clean Air Act that regulation of methane emissions is unnecessary. Defendants fail to justify the district court's dismissal of these well-pleaded allegations.

First, Defendants do not dispute that the Program assigns more favorable carbon intensity values to Oregon biofuels than to petroleum-based fuels—*all* of which are produced outside Oregon—or to chemically-identical Midwest ethanol. Instead, Defendants argue that potential benefits to some out-of-state producers shield the Program's discrimination against *other* out-of-state producers. But controlling precedent holds that benefits shared by in-state and out-of-state producers cannot immunize discriminatory conduct. Defendants also invoke *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), but that

decision does not resolve the issues presented by the Program. *Rocky Mountain* did not involve a regulation that imposes burdens *only* on out-of-state fuels and burdens *no* in-state fuels. Nor did *Rocky Mountain* address the explicit statements by Oregon officials that the Program is designed to promote Oregon's economy at other states' expense.

Second, with regard to extraterritorial regulation, Defendants fail to distinguish *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), which held that import or export restrictions designed to control out-of-state industry's environmental practices would impermissibly "extend [a state's] police power beyond its jurisdictional bounds." *Id.* at 393. The Program does precisely that, erecting an economic barrier to fuel imports unless out-of-state producers use Oregon's preferred production processes. The Program's differential treatment of out-of-state fuels is based on these production processes, not on how the fuels act within Oregon's borders. Defendants again invoke *Rocky Mountain*, but *Rocky Mountain* never considered whether principles of interstate federalism may render unlawful the regulations considered there.

Finally, Oregon Defendants concede EPA has decided regulation of methane is unnecessary; they simply argue the Program is not preempted because it regulates methane for purposes of controlling greenhouse gas emissions whereas EPA declined to regulate methane as part of a fuel standard under Section

211(c)(4) to control ozone. But preemption under Section 211(c)(4) simply asks whether EPA has decided that regulation is unnecessary. EPA has explicitly invoked its preemptive authority under Section 211(c)(4) and has never revisited that determination.

ARGUMENT

I. The Oregon Program Discriminates Against Interstate Commerce.

A. The Oregon Program Discriminates Against Out-of-State Gasoline and Diesel Fuel.

Defendants do not contest the Complaint's allegations that the Program burdens petroleum-based fuels, which are produced *only* out-of-state. *See* Compl. ¶ 63, ER:192. Nor do they dispute that the Program benefits biofuels produced in Oregon. *Id.* ¶¶ 63, 65-68, ER:192-93. Moreover, they cannot explain away the many statements cited in the Complaint by Oregon officials that the Program is designed to "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 [Oregon's] own economy." *Id.* ¶ 76, ER:195; *see also id.* ¶¶ 72-84, ER:194-98. These allegations amply support the conclusion that the Program "benefit[s] in-state economic interests by burdening out-of-state competitors" and thus discriminates under the Commerce Clause. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994); *see also Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014) (all reasonable inferences

must be drawn in non-moving party's favor). Defendants' grab-bag of defenses does not withstand scrutiny.

1. Gasoline and Diesel Fuel Compete with Biofuels.

The Oregon Defendants—the real parties in interest—do not defend the district court's ruling that the Complaint fails to plead gasoline and diesel fuel compete with biofuels. *See* Order at 12-13, ER:14-15. For good reason: The Complaint alleges, and common sense confirms, that producers of petroleum-based fuels and biofuels are "similarly situated for constitutional purposes" because "their products compete against each other in a single" transportation fuels market. *Rocky Mountain*, 730 F.3d at 1088. If the products compete against one another, "it is irrelevant whether they are made from different materials." *Id.* As the Complaint explains, the "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." Compl. ¶ 58, ER:191. Competition exists between two goods when the use of one good may displace the other. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984). Petroleum-based fuels and biofuels compete for a place "in the same gallon of fuel"; "[b]ecause of this close competition," these fuels "should be compared." *Rocky Mountain*, 730 F.3d at 1088; *see also* ICF

Int'l, *Task 3—Updated Compliance Scenarios* 7 (Aug. 2014), ER:133 ("biofuels can be blended into conventional gasoline or diesel").

CARB Intervenors argue that petroleum-based fuels and biofuels do not compete, CARB Br. 25-29, but they do not explain how the Program could reduce the average carbon intensity of fuels used in Oregon if the gasoline or diesel "substitutes" —including ethanol, natural gas, and electricity—to which the Program assigns low carbon intensity scores do not replace gasoline and diesel, to which Oregon has assigned high carbon intensity scores.[1] *See* ADD-53-67. Certainly Oregon's elected officials designed the Program to work this way, and DEQ agreed that it would. *See* Compl. ¶¶ 58, 72-84, ER:191, 194-98.[2] In fact, Oregon officials praised the Program for its ability to substitute Oregon-produced

---

[1] CARB Intervenors claim the Complaint failed to allege biofuels, rather than electricity or natural gas, will replace petroleum-based fuels. CARB Br. 27. But the Complaint quoted DEQ's own analysis that "the existence of … 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*." Compl. ¶ 81 (emphasis added), ER:197; *see also id.* ¶¶ 74-78, ER:195-96 (listing "biofuel producers" and "feedstock growers" among the "homegrown … fuel producers" that would replace "gas and diesel"). In any event, if natural gas and electricity compete with petroleum-based fuels, then biofuels—which the Oregon regulations list alongside natural gas and electricity as "substitutes" for gasoline and diesel—must as well. *See* ADD-53-67.

[2] CARB Intervenors' suggestion that fuels used by different automobile models cannot compete in the same market, *see* CARB Br. 28-29, contradicts governing case law, which asks simply whether one fuel is capable of replacing another, *see Bacchus*, 468 U.S. at 269.

fuels, including biofuels, for out-of-state gasoline and diesel. *Id.* CARB Intervenors' "position that there is no competition is belied by" the Oregon officials' "justification of the [Program] in the first place." *Bacchus*, 468 U.S. at 269. Indeed, the Program's very heart is increasing use of "substitute" fuels in Oregon at the expense of imported petroleum-based fuels. *See, e.g.*, Compl. ¶ 84, ER:198; DEQ, *Clean Fuels Program Phase II Rulemaking* at 4 (Jan. 7-8, 2015), ER:48 (Program's "primary benefit … is the greenhouse gas reductions from switching to lower-carbon fuels").

CARB Intervenors cite two paragraphs in the Complaint stating that one compliance method is replacing the biofuels presently included in gasoline and diesel with lower-carbon biofuels. CARB Br. 26-27 (citing Compl. ¶¶ 55-56, ER:190-91). But this does not suggest biofuels compete *only* with other biofuels; rather, as Plaintiffs alleged throughout the Complaint, under the Program, biofuels are "substitutes" for and compete with gasoline and diesel. *See, e.g.*, Opening Br. 28-29; Plaintiffs' Request for Judicial Notice Ex. B at 10 (Doc. 13) (Program creates incentives to market "fuels that exceed the minimum 10 percent ethanol or five percent biodiesel blending rates" in Oregon).[3]

---

[3] CARB Intervenors dispute whether the Program will in fact increase use of biofuels, *see* CARB Br. 27-28 & n.7, but that question cannot be resolved on a motion to dismiss, *see, e.g.*, *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029 (9th Cir. 2009), and is irrelevant, because the Commerce Clause forbids discriminatory measures to preserve the market share of local products just as

2. The Oregon Program Discriminates Against Out-of-State Petroleum-Based Fuels.

As Plaintiffs previously showed, the Program discriminates against interstate commerce by benefiting in-state fuels at the expense of out-of-state fuels. *See, e.g.*, *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). The Program assigns both gasoline and diesel—which are produced *only* out-of-state—a carbon intensity value always higher than the annual "clean fuel standard." Compl. ¶¶ 55-56, 60, 63, ER:190-92. The Program thus burdens importers of such fuels by requiring them to alter the mix of fuels they import or acquire "credits" purchased from competing producers of fuels such as biofuels. *Id.* ¶¶ 55-56, ER:190-91. By contrast, the Program assigns carbon intensity values to Oregon biofuels that will remain well below the annual fuel standard as the standard is reduced each year, generating credits for Oregon biofuels producers. *See id.* ¶¶ 58, 60, 68, 70, ER:191-94.

By awarding credits to Oregon biofuels producers but demanding that out-of-state producers of petroleum-based fuels purchase credits, the Program affords "differential treatment [to] in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99. Like the law

---

much as measures to increase local products' market share. *See W. Lynn*, 512 U.S. at 205. In any event, Oregon's own analysts concluded that "biofuel blending will likely be a major form of compliance." ICF Int'l, *Task 3*, *supra* at 4-5, ER:133.

struck down in *West Lynn Creamery*, the Oregon Program "conjoin[s] a" penalty on out-of-state industry with "a subsidy" to in-state producers. 512 U.S. at 199-200. That is quintessential discrimination. *See id.*

Defendants attempt to distinguish the Program from the invalid law in *West Lynn Creamery* by claiming the Program may provide benefits to some out-of-state biofuel producers. *See* Or. Br. 21-22; CARB Br. 32; NGO Br. 7. But this distinction makes no difference. As Plaintiffs explained in their opening brief, the Supreme Court has repeatedly found discrimination where a state law benefited in-state industry at the expense of out-of-state industry, even if the law did not discriminate against *all* out-of-state industry, and even if the law conferred benefits on some out-of-state industry. *See* Opening Br. 31-32.[4]

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Supreme Court held that a North Carolina statute that benefited in-state apple growers at the expense of Washington apple growers was discriminatory, despite the statute's conferral of benefits on competing apple growers in several other states. *Id.* at 349, 351, 353. Defendants seek to distinguish *Hunt* on the grounds that the statute there "'strip[ped] away … competitive and economic advantages'" from Washington apple growers. CARB Br. 35 (quoting *Hunt*, 432

[4] Plaintiffs do not "ignor[e] out-of-state biofuels," CARB Br. 31; rather, any benefits to those fuels are irrelevant to whether the Program discriminates against imported petroleum-based fuels in favor of Oregon biofuels.

U.S. at 351); Or. Br. 32. Here, of course, requiring that producers of petroleum-based fuels purchase credits that subsidize in-state biofuel production strips away the relative "economic advantage" they enjoy with respect to Oregon-based biofuels. Indeed, the "most obvious" form of discrimination in *Hunt* was "raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." 432 U.S. at 351. The Program's discrimination is even more "obvious" because it increases the cost of importing petroleum-based fuels while *subsidizing* the production of competing biofuels in Oregon. Compl. ¶¶ 58-59, ER:191. Under *Hunt*, the possibility that the Program could subsidize biofuel production in other states does not shield the Program from a finding of discrimination.

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988), is likewise on point. There, the Supreme Court expressly rejected the argument that an Ohio statute that provided tax credits to in-state ethanol producers was not discriminatory due to "the availability of the tax credit to some out-of-state manufacturers." *Id.* at 274. Defendants try to distinguish the *New Energy* statute because it provided tax credits "only for out-of-state ethanols from States offering Ohio ethanol similarly favorable treatment," thus "ensur[ing] that Ohio-produced ethanol would always compete on the most favorable terms." CARB Br. 33. But

that is just what the Oregon Program does: It privileges biofuels production in Oregon over out-of-state production of petroleum-based fuels, thus "ensur[ing] that [Oregon]-produced ethanol would always compete" favorably. *Id.*

In *Fort Gratiot*, too, the Supreme Court explained that the fact that a statute does not discriminate against *some* out-of-state industry does not immunize discrimination against other out-of-state industry. *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 363 (1992). CARB Intervenors claim that *Fort Gratiot* is distinguishable because the Oregon Program, unlike the law in *Fort Gratiot*, "bans no fuels at all," CARB Br. 34, but whether a law imposes a ban or a "commercial disadvantage" "makes no difference for purposes of Commerce Clause analysis." *New Energy*, 486 U.S. at 275.

CARB Intervenors rely upon *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), arguing, mistakenly, that the law in *Exxon* "did not discriminate against out-of-state refiners because 'in-state independent dealers will have no competitive advantage over out-of-state dealers.'" CARB Br. 36. Rather, *Exxon* held that a statute unfavorable to out-of-state refiners was not discriminatory because "there [were] no local producers or refiners" to compete with the out-of-state refiners, and the statute treated in-state and out-of-state independent dealers, who did compete, equally. *Exxon*, 437 U.S. at 125-26. Here, as shown above, the disadvantaged out-of-state gasoline and diesel producers—which are produced

only out-of-state, Compl. ¶ 63—*do* compete with in-state biofuels producers, and the Program "place[s] added costs upon" the out-of-state producers. *Exxon*, 437 U.S. at 126. Indeed, *Exxon* supports a finding of discrimination because the Program, unlike the *Exxon* statute, was designed "to cause local goods to constitute a larger share … of the total sales." *Id.* at 126 n.16.

Defendants suggest the Program does not discriminate because its benefits to in-state biofuels producers may be small, either in absolute terms or by comparison to the benefits to out-of-state biofuels producers. *See, e.g.*, Or. Br. 21-23; CARB Br. 30-31. But the *degree* of discrimination achieved by a state program is immaterial; the question is simply whether the program benefits in-state industry at out-of-state industry's expense. *See supra* at 8-9. The Supreme Court has never asked whether benefits to in-state interests exceed incidental benefits to out-of-state interests. *See, e.g.*, *Hunt*, 432 U.S. at 349-54 (finding law benefiting in-state and out-of-state interests discriminatory without assessing which interests experienced greater benefit). Further, Defendants' evidence that out-of-state benefits predominate is simply a list of fuel pathways approved for use in Oregon, without any indication whether, and how much, fuel has been imported using those pathways. *See* CARB Br. 30-31; Def. RJN Exh. G. Even if the comparative benefit and burden to in-state and out-of-state parties mattered, it would need to be assessed in light of the record evidence, including statements by Oregon officials

that the Program would "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." Compl. ¶ 76, ER:195. Finally, the Oregon Defendants' assertion that most of the ethanol used in Oregon comes from the Midwest, Or. Br. 22, further supports the conclusion that the Program is designed to increase the market share of smaller local industries at the expense of a primary out-of-state competitor. *See Bacchus*, 468 U.S. at 272.

Defendants argue that the lookup tables' pathways, which favor Oregon, are temporary. *See* Or. Br. 9; CARB Br. 43. But regulated parties, credit generators, and brokers may develop "individual pathways," Or. Br. 9, only if "it is not possible to identify an applicable carbon intensity" listed in the lookup tables (or previously approved in California), OAR § 340-253-400(5).[5] In any event, the Program benefits in-state biofuels before "an individual pathway" can be "calculated and approved," Or. Br. 9; even if the lookup tables' pathways were temporary, that fact "merely reduce[s] the scope of the discrimination." *Fort Gratiot*, 504 U.S. at 363. Finally, there is no suggestion that "individual pathways" will eliminate the Program's favoritism toward in-state biofuels by

[5] The lookup tables appear to be "fallback values," CARB Br. 43, only for "[o]ut-of-state producers that are not a regulated party, credit generator or broker" and that wish to "apply to obtain a carbon intensity." OAR § 340-253-450(1), (3).

giving carbon intensity values to Oregon-based fuels equal to petroleum-based fuels.

3. *Rocky Mountain* Does Not Control This Case.

Oregon Defendants claim this Court's decision in *Rocky Mountain* addressing the California low-carbon fuel standard's treatment of in-state and out-of-state ethanol controls whether the Program discriminates against out-of-state gasoline and diesel and in favor of in-state biofuels. *See* Or. Br. 28-29 (citing *Rocky Mountain*, 730 F.3d at 1092-93). That is wrong.

In the first place, unlike California's regulation, the Oregon Program burdens *only* out-of-state fuels; it imposes no burden but *only* a benefit on in-state fuels. *See supra* at 7. *Rocky Mountain* noted that the regulation there imposed both burdens and benefits on in-state petroleum-based fuels. *See* 730 F.3d at 1099-100. The *Rocky Mountain* Court stated that a "burden on 'major in-state interests … is a powerful safeguard against legislative abuse.'" 730 F.3d at 1099.[6] Oregon Defendants are thus incorrect that this case is controlled by *Rocky Mountain*'s conclusion that "a low carbon fuel standard that is based on lifecycle greenhouse gas emissions does not violate the Commerce Clause." Or. Br. 28. *Rocky*

---

[6] Contrary to CARB Intervenors' assertions, CARB Br. 31 n.9, the fact that some out-of-state biofuels may receive more favorable treatment than Oregon biofuels does not safeguard against discriminatory treatment of gasoline and diesel fuel, which Oregon does not produce. Compl. ¶ 58, ER:191.

Mountain made no such sweeping conclusion, but instead considered a program that imposed a burden on a segment of in-state petroleum-based fuel producers. Indeed, *Rocky Mountain* did not address at all whether the California regulation discriminated against petroleum-based fuels in favor of in-state ethanol. *See* 730 F.3d at 1097-101. In addition, *Rocky Mountain* was decided on the record after cross-motions for summary judgment, whereas here Plaintiffs are entitled to "all reasonable inferences" that may be drawn from the Complaint's allegations, which must be taken as true. *Retail Prop. Trust*, 768 F.3d at 945.

Further, *Rocky Mountain* concluded only that the challenged regulation did not *facially* discriminate in favor of California ethanol; it did not decide "whether the ethanol provisions discriminate in purpose or effect." 730 F.3d at 1107. *Rocky Mountain* thus does not resolve Plaintiffs' claims that the Program discriminates in its design and intended effect in favor of Oregon biofuels against competing out-of-state petroleum.

The inference of discriminatory purpose and effect here is compelling. The Complaint identifies an array of statements by Oregon officials that the Program's purpose "was 'to try to spark [a] 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.'" Compl. ¶ 76, ER:195; *see also id.* ¶¶ 72-84, ER:194-98. These statements,

combined with Oregon's own predictions about the Program's effects, *see, e.g.*, *id.* ¶¶ 79-84, ER:196-98, and the absence of any "safeguard against legislative abuse," *Rocky Mountain*, 730 F.3d at 1099, support a claim of discrimination under the Commerce Clause.[7] This is especially so when, as here, all reasonable inferences must be drawn in Plaintiffs' favor. *See Retail Prop. Trust*, 768 F.3d at 945; *Hebbe v. Pliler*, 627 F.3d 338, 340 (9th Cir. 2010).[8]

To be sure, *Rocky Mountain* ruled, based on the record developed for cross-motions for summary judgment, that the California regulations were not enacted for the purpose of discriminating in favor of California petroleum against out-of-state petroleum. *See* 730 F.3d at 1100 & n.13.[9] But, contrary to Oregon Defendants and the district court, Or. Br. 27; Order at 19, ER:21, that conclusion says nothing about whether the Complaint here adequately pleads discrimination based on statements by officials of a different state in the context of a separate

[7] Further, by pleading that the Program places out-of-state petroleum-based fuels at a "commercial disadvantage," *New Energy*, 486 U.S. at 275, the Complaint pleads that the Program achieves a discriminatory effect by its very design. *See infra* at 19-20.

[8] CARB Intervenors argue that Plaintiffs need to "suggest additional facts they might develop" to proceed, CARB Br. 37, but at this stage, Plaintiffs need only plead facts making their claims "plausible," *Retail Prop. Trust*, 768 F.3d at 945. They have more than done so by pointing to the regulations and statements such as those discussed above. *See* Compl. ¶¶ 72-84, ER:194-98.

[9] Plaintiffs respectfully submit that that aspect of *Rocky Mountain* is incorrect.

regulatory program that was adopted under different circumstances than California's.

Nor can the Complaint's allegations be explained away as, "in context, a[n] economic defense of a [regulation] genuinely proposed for environmental reasons." Or. Br. 27; *see also* CARB Br. 37; NGO Br. 8.[10] The Complaint alleges statements by Oregon officials showing the Program was *driven by* the desire to retain some of the "more than $6 billion [sent annually] out of state to import gas and diesel." Compl. ¶ 74, ER:195; *see also, e.g.*, Plaintiffs' Submission of Documents Incorporated by Reference Exhs. A-B. Even if Defendants could eventually present evidence from Oregon officials to put these statements into "context," at this stage Plaintiffs' statements reasonably can be read as they appear: Candid admissions of a discriminatory design that violates the Commerce Clause. In all events, assessing whether those admissions mean what they say in light of other evidence, *see* Order at 18-19, ER:20-21, is not a question for a district court on a motion to dismiss.[11]

---

[10] Oregon Defendants quote *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), in connection with this argument, but the quoted language addressed the Equal Protection Clause's rational basis test, not the Commerce Clause. *Id.* at 463 & n.7.

[11] *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990), on which the district court relied, Order at 19, ER:21, shows that passing statements of legislative "concern for [in-state] residents" may not defeat a summary judgment motion as to discrimination. *Valley Bank*, 914 F.2d at 1196. It does not

B. The Oregon Program Discriminates Against Out-of-State Ethanol.

Defendants do not contest that the Program assigns a more favorable carbon intensity score to ethanol produced in Oregon than it does to ethanol produced in the primary ethanol-producing region in the United States: the Midwest. *See* Compl. ¶¶ 69-70, ER:193-94; ICF Int'l, *Task 3*, *supra* at 4-5, at 10, 20, 26, ER:136, 146, 152; Opening Br. 36. Nor do they dispute—indeed, Oregon Defendants affirm—that "[a]ll ethanol is chemically identical." Or. Br. 30. The *only* difference between ethanol receiving the better score and ethanol receiving the worse score is whether the ethanol was produced in Oregon or the Midwest. "Such a preference for" ethanol "from domestic sources cannot be characterized as anything other than protectionist and discriminatory," because it gives advantage to Oregon ethanol "based solely on its origin." *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

Rocky Mountain ruled that a law explicitly assigning carbon intensity values to ethanol depending on its geographic origin does not discriminate on its face if the law "considers location … only to the extent that location affects the actual GHG emissions attributable to a default pathway." 730 F.3d at 1089.

---

suggest that express representations by high-ranking officials that a regulation is designed to favor in-state industry over competing out-of-state industry does not support a "reasonable inference[]" of discrimination on a motion to dismiss. *Retail Prop. Trust*, 768 F.3d at 945.

Respectfully, Plaintiffs submit that that analysis is inconsistent with Supreme Court case law explaining that, "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 n.15 (1997); *see also Or. Waste Sys.*, 511 U.S. at 100 ("the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory"). CARB Intervenors assert that *Rocky Mountain* did not "consider[] the justification for" California's regulations, CARB Br. 39, but that is precisely what the Court did: It held that "the dormant Commerce Clause … does 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, and upheld the regulations on the grounds that they considered location only *because* "location affects … actual GHG emissions," *id.* at 1089.

The *Rocky Mountain* panel expressed concern that "relying on archaic formalism" would "require that reality be ignored in lawmaking." *Id.* at 1107.[12]

---

[12] CARB Intervenors claim *Rocky Mountain* did not describe Supreme Court precedent this way, CARB Br. 40 n.10, but the legal framework on which Plaintiffs "rel[ied]" in *Rocky Mountain* was taken directly from such precedent. *See Rocky Mountain*, 730 F.3d at 1107.

But that is not so. Whether a State can show that a problem can be addressed only through discrimination against interstate and foreign commerce is an issue properly reserved for and assessed under strict scrutiny. *See, e.g.*, *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 516 (9th Cir. 2014) (mem.) (M. Smith, dissenting from denial of rehearing en banc). Supreme Court precedent does not permit circumventing strict scrutiny by labeling a measure expressly favoring in-state interests and disfavoring out-of-state interests non-discriminatory in the first place. *See, e.g.*, *Or. Waste Sys.*, 511 U.S. at 100.

In any event, *Rocky Mountain* declined to decide whether the California regulation's ethanol provisions "discriminate in purpose or effect," 730 F.3d at 1107, so *Rocky Mountain* does not address Plaintiffs' claims that the Oregon Program discriminates in its purpose and effect against Midwest ethanol. Plaintiffs' Complaint more than adequately pleads such discrimination. Plaintiffs allege 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)," Compl. ¶ 69, ER:193; that the "Program is designed to close Oregon as a market for certain renewable fuels (in particular, certain forms of corn ethanol)," *id.* ¶ 139, ER:206; and that the Program is intended to "keep … dollars in Oregon to grow, produce, and deliver fuels that benefit our communities with new good-paying jobs," *id.* ¶ 77, ER:196. Further, by alleging that the Program's assignment

of a higher carbon intensity score to Midwest ethanol than to Oregon ethanol burdens Midwest ethanol and benefits Oregon ethanol, *see id.* ¶¶ 69-70, 109, ER: 193-94, 202, Plaintiffs plead that the Program places Midwest ethanol "at a substantial commercial disadvantage." *New Energy*, 486 U.S. at 275. Because imposing such a "commercial disadvantage" is a prime example of discrimination, *id.*, the Program achieves a discriminatory effect by its very design; contrary to CARB Intervenors' suggestion, CARB Br. 45 n.12, no "speculation" is required.[13]

II. The Oregon Program Violates the Constitution By Regulating Activity Occurring Outside Oregon.

The Oregon Program also violates the Constitution by "extend[ing] Oregon's police power beyond its jurisdictional bounds" by "attach[ing] restrictions to … imports" of fuel from out-of-state production processes it deems "harmful to the environment." *Carbone,* 511 U.S. at 393. Both the Commerce Clause and principles of interstate federalism forbid such extraterritorial regulation.

In *Carbone*, the Supreme Court struck down a law erecting a barrier to exporting waste, despite concern that the waste, if exported, would be processed by

[13] *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010), cited in CARB Br. 45 n.12, concluded that, where the plaintiff's discrimination claim turned on how many in-state and out-of-state businesses were in fact affected, the plaintiff had to submit proof on that question. Nor, as CARB Intervenors argue, CARB Br. 42-45 & n.12, do benefits to some out-of-state ethanol producers nullify its discriminatory effect, for the reasons stated *supra* at 8-9.

"out-of-town disposal sites that" may be "harmful to the environment." *Id.* The Supreme Court held that the defendant town was forbidden to "attach restrictions to exports or imports" to "steer solid waste away from" these sites, because doing so would "control commerce in other States" and thus "extend the town's police power beyond its jurisdictional bounds." *Id.* In this case, the Oregon Program erects an economic barrier to importing fuels out of concern that they may be produced by processes Oregon "deem[s] harmful to the environment." *Id.* Like the law in *Carbone*, the Oregon Program must be struck down because it "attach[es] restrictions to … imports" to prevent out-of-state processes from harming the environment, thus exceeding Oregon's police power. *Id.*

Oregon Defendants and NGO Intervenors do not cite *Carbone*, while CARB Intervenors denigrate *Carbone*'s extraterritoriality holding as "isolated phrases." CARB Br. 55. But *Carbone*'s extraterritoriality holding was necessary for the Supreme Court to reject a proposed "legitimate local interest" advanced to justify the challenged law and is thus holding, not dicta. 511 U.S. at 392-93. *Carbone* establishes that, contrary to Defendants' view, CARB Br. 55, a product's sale from or purchase into a state is insufficient to authorize that state to regulate the product anywhere in the stream of commerce. In *Carbone*, the waste's origin in the regulating town did not confer power to regulate how the waste was processed once it left the town's borders. *See Carbone*, 511 U.S. at 393. Similarly, that

transportation fuels eventually enter the Oregon market provides no basis for Oregon to regulate how those fuels are produced elsewhere. That principle has long been part of the Supreme Court's case law. *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 580 (1986).

Carbone also disposes of the argument that the Program does not regulate extraterritorially because it merely "regulate[s] sales in [Oregon's] own market[]." CARB Br. 51. The law in *Carbone* banned sending waste from the town to disposal sites, *see Carbone*, 511 U.S. at 387; that the law interdicted transactions in the town's own market did not prevent its effect on out-of-town facilities from constituting extraterritorial regulation, *id.* at 393. So, too, here: While the Program directly regulates transactions in the Oregon market, "the practical effect of the regulation is to control" wholly out-of-state fuel production processes. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

As the Complaint explains, the Program assigns a carbon intensity score to an imported fuel based on the fuel's production and transportation outside Oregon. *See* Compl. ¶¶ 43, 88, ER:187, 198. This is especially clear for ethanol. Because "[a]ll ethanol is chemically identical," Or. Br. 30, the differences in carbon intensity scores for out-of-state ethanol cannot be due to differences in how the ethanol acts within Oregon's borders; the differences are due *entirely* to how the ethanol is manufactured outside Oregon, and manufacturers can achieve lower

carbon intensity scores—avoiding penalties or gaining profits—only by changing those out-of-state processes. The Program thus "impose[s] economic sanctions … with the intent of changing the [regulated parties'] conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).[14]

Defendants argue that, under Plaintiffs' view, states will be foreclosed from protecting the environment, Or. Br. 34, or from "imposing standards or restrictions on products sold for use in the State," CARB Br. 55; *see also* NGO Br. 8-9. That is mistaken. A state's traditional exercise of its police powers does not raise extraterritoriality concerns; states would remain free to restrict the type or quality of products sold within the state or regulate how those products perform once inside the state. States would merely be forbidden to "act upon the rights of citizens of other States" by imposing penalties on goods based solely on how those goods were produced outside the state's borders. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827).[15]

---

[14] CARB Intervenors claim regulated parties may have discretion in complying with the Program's carbon intensity standard. CARB Br. 54. But the Program's defect is that it regulates out-of-state processes in setting Oregon's carbon intensity standard, *see supra* at 22, not that the Program gives too few options to comply with the standard.

[15] CARB Intervenors incorrectly claim support from three Supreme Court cases. CARB Br. 51-52. *Clover Leaf Creamery*, 449 U.S. 456, did not involve an extraterritoriality challenge. In *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), the Supreme Court concluded the challenged statute did not affect "the price of any out-of-state transaction, either by

Because the Oregon Program regulates conduct occurring wholly out-of-state, it violates both the Commerce Clause *and* principles of interstate federalism. Defendants do not dispute that, under our federal system, each state's sovereignty limits "the sovereignty of all of its sister States," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980), leaving each state "without power … to regulate and control activities wholly beyond its boundaries," *Watson v. Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954); *see* Or. Br. 33-36; CARB Br. 46-50; NGO Br. 8-9. Nor do Defendants argue that *Rocky Mountain* addressed whether the California regulations violate the principles of interstate federalism Plaintiffs now invoke. Or. Br. 33-36; CARB Br. 47-50; NGO Br. 8-9. Although *Rocky Mountain* binds this Court with regard to Plaintiffs' extraterritoriality claim under the Commerce Clause, *see* Opening Br. 47, that is not so with regard to the interstate federalism claim. Plaintiffs respectfully submit that the Program violates the structural principles underlying the federal system under the United States Constitution.

---

its express terms or by its inevitable effect," *id.* at 669; here, the Program is designed to affect out-of-state production processes, *see supra* at 20. And in *Exxon*, on the only extraterritorial claim presented, the Court held the alleged extraterritorial effect was permissible because it was a consequence of a federal statute rather than the challenged state statute. 437 U.S. at 133 n.28.

III. EPA Has Preempted State Fuel Standards That, Like The Oregon Program, Regulate Methane.

A. The RFG Rule Preempts The Oregon Program.

Oregon Defendants concede that "EPA has decided that regulation of methane is unnecessary." Or. Br. 37. They do not contest that EPA published that finding in the Federal Register. EPA, *Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 Fed. Reg. 7716, 7722-23 (Feb. 16, 1994) (the "RFG Rule"). Nor do they disagree that the RFG Rule, which EPA adopted under Section 211(c)(4) of the Clean Air Act, is still effective or that the Program regulates methane for purposes of vehicle emission control. These facts warrant preemption under Clean Air Act Section 211(c)(4)(A)(i).

Instead, Oregon Defendants argue the Program is not preempted because EPA "has made no finding that regulation of methane emissions is not necessary *to combat climate change*," Or. Br. 37 (emphasis added)—that is, because EPA did not decline to regulate methane *for the same purpose* for which Oregon now wishes to regulate it. *See also* CARB Br. 61-62; NGO Br. 9. But preemption under Section 211(c)(4)(A)(i) turns on *whether* EPA has found regulation of a fuel characteristic or component unnecessary, not *why* it has done so. *See* 42 U.S.C. § 7545(c)(4)(A)(i). The only "purpose" requirement in Section 211(c)(4)(A) is a requirement that the preempted state law be for the "purpose[] of motor vehicle emission control." *Id.* § 7545(c)(4)(A). This Court already has concluded that the

California LCFS, upon which the Oregon Program was modeled, is "a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control." *Rocky Mountain*, 730 F.3d at 1106.

Section 211(c)(4)(A) requires nothing more. On Defendants' view, states could set fuel standards different from EPA's as long as the their fuel standards aimed at different goals than the EPA standard. But where EPA has set a federal fuel standard, the "national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations." 59 Fed. Reg. at 7809. EPA's uniform fuel standard is undermined by a "patchwork" of state fuel standards regardless whether the same concerns motivate the state standards and EPA's own standard.[16]

B. The RFG Rule Found That No Regulation Of Methane Is Necessary.

CARB Intervenors make a different argument, contending the RFG Rule made no finding whatsoever that regulation of methane was unnecessary. CARB Br. 57-61; *see id.* at 58 (RFG Rule "did not speak to the need to regulate methane emissions in *any future fuel regulation*" (emphasis added)). According to CARB Intervenors, EPA's RFG Rule did not prevent any State from regulating methane

---

[16] Oregon Defendants assert that "the fuel characteristic that the … Program regulates" is "methane's contribution to climate change as a greenhouse gas," Or. Br. 38, *see also* CARB Br. 61, but that simply repackages their claim that Section 211(c)(4)(A)(i) includes a "purpose" element.

for any purpose, *even for ozone control*, which they argue was a principal aim of the RFG Rule. 59 Fed. Reg. at 7716.

Under Section 211(c)(4)(A), however, preemption is triggered when EPA finds "that no control or prohibition … is necessary" under Section 211(c) and publishes that finding in the Federal Register. 42 U.S.C. § 7545(c)(4)(A)(i). EPA made and published such a finding under Section 211(c) and expressly invoked Section 211(c)(4)'s preemption provisions. *See* 59 Fed. Reg. at 7722-23, 7809. CARB Intervenors argue that this finding should be disregarded because EPA concluded under Section 211(k) "that methane emissions did not contribute significantly to ozone formation." CARB Br. 58. But, as noted, EPA determined that regulation of methane was unnecessary not only under Section 211(k), but also under Section 211(c), and Section 211(c)(4)(A)(i) asks only *whether* EPA has decided that regulation is unnecessary.[17]

CARB Intervenors argue the RFG Rule's preemption finding applies only to fuel components the Rule regulates, not to those, like methane, that it decides not to regulate. CARB Br. 59. But rather than citing Section 211(c)(4)(A)(ii), EPA cited Section 211(c)(4) in its entirety, explaining that "Congress provided in the

---

[17] CARB Intervenors point to Plaintiffs' assertion that carbon intensity is not a "physical attribute of fuel," CARB Br. 62, but the fuel component EPA found unnecessary to regulate and the Program regulates is methane emissions. *Compare* 59 Fed. Reg. at 7722-23 *with* Compl. ¶¶ 93-94, ER:199-200.

1977 Amendments to the Clean Air Act that federal fuels regulations preempt non-identical State controls except under certain specified circumstances." 59 Fed. Reg. at 7809. The RFG Rule's preemption of "dissimilar State controls," *id.*, applies to state controls that differ from EPA's own—regardless whether they differ by imposing a divergent standard on a component EPA has regulated *or* by regulating a component EPA has decided does not warrant regulation. Either scenario leads to state fuel standards different from EPA's uniform national fuel standard, thus creating the "patchwork of potentially conflicting regulations" EPA sought to avoid. *Id.*[18]

C. EPA Has Not Reversed The RFG Rule.

CARB Intervenors—but not Oregon Defendants—argue that, if the RFG Rule preempted state methane controls, subsequent EPA actions "reversed" that preemption. CARB Br. 64. But none of the regulations CARB Intervenors cite was issued under Section 211, purports to revise the RFG Rule, or condones a state departing from the national fuel standard to regulate methane emissions. *See*

[18] None of the federal regulations CARB Intervenors cite, CARB Br. 61-62, supports their position. In two regulations, EPA had regulated the fuel component at issue; the question of Section 211(c)(4)(A)(i)'s applicability was thus not presented. *See* 62 Fed. Reg. 10690, 10693 (1997); 55 Fed. Reg. 18005, 18005-06 (1990). And EPA's recitation of Section 211(c)(4)(A)(i)'s "no control or prohibition" language in one proposal two decades ago does not commit EPA to the same formula in every subsequent rulemaking and appears never to have been finalized. *See* 57 Fed. Reg. 47849, 47850 (1992).

CARB Br. 64; 80 Fed. Reg. 56593 (2015) (proposed performance standards under 42 U.S.C. § 7411); 79 Fed. Reg. 1430 (2014) (proposed performance standards under 42 U.S.C. § 7411); 74 Fed. Reg. 66496 (2009) (vehicle standards under 42 U.S.C. § 7521); 61 Fed. Reg. 9905 (1996) (performance standards and guidelines under 42 U.S.C. § 7411).[19] CARB Intervenors do not contest Plaintiffs' showing that, by directing EPA to consider regulating emissions under a vehicle standard before regulating them under a fuel standard, 42 U.S.C. § 7545(c)(2)(A), Congress recognized that not all emissions that are eligible for regulation under any program are necessarily suitable for regulation under a fuel standard. Opening Br. 56. Oregon remains free to petition EPA to modify the RFG Rule to eliminate the Rule's preemptive effect, but until EPA chooses to do so, Oregon may not second-guess EPA's preemption of state fuel controls of methane even if EPA regulates methane emissions in different ways under other programs.

[19] CARB Intervenors cite a three-sentence response by EPA to commenters, *see* CARB Br. 63, but the response discussed neither the RFG Rule nor methane and cannot be read to reverse EPA's preemption of state law under the RFG Rule. SER 53.

CONCLUSION

For these reasons, this Court should reverse the district court's decision dismissing Plaintiffs' claims against the Oregon Clean Fuel Program.

Dated: June 13, 2016

Respectfully submitted,

/s/ Paul J. Zidlicky

Roger R. Martella, Jr.
Paul J. Zidlicky
Paul J. Ray
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Paul J. Zidlicky
Paul J. Zidlicky

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 13, 2016.

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

/s/ Paul J. Zidlicky
Paul J. Zidlicky