No. 15-35834

IN THE 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

Case No. 3:15-cv-00467-AA
The Honorable Ann Aiken, Chief Judge

BRIEF OF CALIFORNIA AIR RESOURCES BOARD AND STATE OF WASHINGTON, INTERVENORS-DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

**TABLE OF AUTHORITIES
(continued)**

Page

*For the Court's convenience, these bills are provided as Exhibits A and B to Defendants' Request for Judicial Notice.

TABLE OF AUTHORITIES
(continued)

Page

Page

STATEMENT OF ISSUES

1. Whether Oregon's Clean Fuels Program discriminates against out-of-state petroleum fuels in favor of in-state biofuels where Plaintiffs failed to allege that petroleum fuels and biofuels compete in a single market and where in-state biofuels have no competitive advantage over out-of-state biofuels.

2. Whether Oregon's Clean Fuels Program discriminates against out-of-state ethanols in favor of in-state ethanols where the regulation applies the same scientific, peer-reviewed modeling tool to all ethanols; provides competitive advantages to lower-carbon ethanols, regardless of origin; and has assigned its lowest-carbon intensity values to out-of-state ethanols.

3. Whether Oregon's Clean Fuels Program, which sets carbon-intensity standards only for fuels sold for use in Oregon, controls conduct or commerce occurring wholly outside Oregon.

4. Whether an Environmental Protection Agency finding that methane emissions do not contribute to ground-level ozone pollution preempts Oregon's effort to control methane emissions as part of reducing the greenhouse gas emissions that result from the State's use of transportation fuels.

INTRODUCTION

As part of a multi-faceted strategy to address climate-change threats to public health, the environment and the State's economy, Oregon adopted its Clean Fuels Program to reduce the State's contribution to greenhouse gas emissions from transportation fuels. To that end, Oregon's Program establishes annual, average carbon-intensity standards for fuels sold for use in the State—standards that become more stringent over time. These standards account for greenhouse gas emissions from all stages of a fuel's lifecycle, including production, transportation, distribution and consumption.

The Program does not require or prohibit any particular fuels. Rather, fuels with carbon-intensity values above and below the standards can be sold in Oregon, so long as the standards are met on an average basis, across all fuels sold for use in Oregon in a given year.

Plaintiffs are trade associations representing petroleum refining, petrochemical manufacturing, trucking, and other transportation fuel interests. They claim that Oregon's Program discriminates against out-of-state petroleum fuels and ethanols in violation of the dormant Commerce Clause, unconstitutionally regulates extraterritorially, and is preempted by the U.S. Environmental Protection Agency's (EPA's) Reformulated Gasoline Rule. The district court properly dismissed all of these claims.

Plaintiffs' discrimination claims fail because they are not meaningfully distinct from claims this Court resolved against these same Plaintiffs in their challenge to California's Low Carbon Fuel Standard (LCFS), on which Oregon's Program is modeled. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). As is true under California's LCFS, many of the lowest-carbon fuels under Oregon's Program, including many of the lowest-carbon ethanols, originate outside the State. Thus, in-state fuels "have no competitive advantage over out-of-state [fuels]," and Plaintiffs cannot plausibly allege discrimination. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978); *see also Rocky Mountain*, 730 F.3d at 1090, 1092-1093.

As to Plaintiffs' extraterritorial regulation claim, this Court's conclusion, in *Rocky Mountain*, that California's LCFS regulates no wholly out-of-state activity controls, as Plaintiffs concede. Opening Brief of Plaintiffs-Appellants (AOB) at 47. This Court, therefore, has no need to address Plaintiffs' ongoing disagreement with that decision. Moreover, Plaintiffs allege no facts, and advance no legal theories, on which this Court could reach a different conclusion than it did in *Rocky Mountain*—that application of carbon-intensity standards to fuels sold for use in the State is constitutional because it "regulates only the [State's] market." *See Rocky Mountain*, 730 F.3d at 1101.

Plaintiffs' preemption claim also fails. In 1994, EPA found that methane emissions do not contribute to ozone formation. Accordingly, EPA declined to include methane emissions in its regulation of ozone-forming compounds. That is not a finding that no controls on methane emissions are necessary, as would be required to preempt Oregon's Program. Further, since 1994, EPA has taken several actions that underscore that state low carbon fuel standards, such as Oregon's Program, are not preempted.

The district court properly dismissed Plaintiffs' entire complaint, and this Court should affirm that decision.

STATEMENT OF THE CASE

A. Development of Oregon's Clean Fuels Program

In 2007, the Oregon Legislative Assembly recognized that climate change "poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon." Or. Rev. Stat. § 468A.200(3). Specifically, the Assembly found that rising sea levels "threaten[] Oregon's coastal communities," that reduced snowpack and changes in timing of snowpack melt put at risk the State's ability to provide "energy, municipal water, … and irrigation," and that "[g]lobal warming will have detrimental effects on many of Oregon's largest industries." *Id.* § 468A.200(4), (6). Accordingly, the Assembly set greenhouse gas emissions-reductions goals for 2010, 2020 and 2050. *Id.* § 468A.205(1).

In 2009, the Assembly authorized Oregon's Environmental Quality Commission to adopt various rules and standards, including low carbon fuel standards, to reduce greenhouse gas emissions. Or. Rev. Stat. § 468A.270; Defendants-Appellees' and Intervenors-Appellees' Request for Judicial Notice (RJN) Exhs. A, B.[1] The Assembly expressly authorized low carbon fuel standards that would attribute to transportation fuels the greenhouse gas emissions associated with their full lifecycles, "including but not limited to emissions from the production, storage, transportation and combustion of the fuels and from changes in land use associated with the fuels." RJN Exh. A § 6 (House Bill 2186). The Assembly also directed "the commission [to] consider the low carbon fuel standards of other states" before adopting such a standard for Oregon. *Id.* at § 6(2)(c).

[1] Section 6 of House Bill 2186 (2009) expressly authorized low carbon fuel standards but section 8 of the same bill set section 6 to repeal automatically on December 31, 2015. RJN Exh. A. In 2015, Senate Bill 324 repealed section 8 and expressly retained section 6 as law. RJN Exh. B. Because these statutes can be difficult to find in at least some electronic legal research sources, courtesy copies are provided with Defendants' Request for Judicial Notice.

In 2011, through its LCFS, California became the first State to require reductions in carbon intensity of the transportation fuels sold for use in the State. *See* Cal. Code Regs., tit. 17, § 95482 (2010); *see also* RJN Exh. C.[2] The carbon-intensity standards and the carbon-intensity value of any given fuel were based on scientifically determined lifecycle greenhouse gas emissions. *See* Cal. Code Regs., tit. 17, § 95481(a)(11) (2010). In choosing lifecycle emissions as the appropriate measure of a fuel's climate impacts, California's Air Resources Board (ARB) followed well-established science and the actions of other governmental entities, including Congress and EPA. *See* 42 U.S.C. § 7545(o)(1)(H); *see also Rocky Mountain*, 730 F.3d at 1081-1082. Lifecycle emissions are, in fact, the only way to meaningfully compare the greenhouse gas emissions associated with various fuels. RJN Exh. D at 1 ("To completely evaluate the energy and emission effects of these transportation technologies, one must consider emissions and energy use from upstream fuel production processes as well as from vehicle

[2] California's Air Resources Board recently set aside its approval of the original LCFS regulation and adopted a new one that also sets declining annual carbon-intensity standards based on lifecycle emissions. *See* Cal. Code Regs., tit. 17, § 95480 et seq. (2016); *see also POET, LLC v. Cal. Air Resources Board*, 218 Cal. App. 4th 681, 766 (2013) (finding procedural errors with adoption of original LCFS, requiring approval of original LCFS to be set aside, and allowing original LCFS to remain in effect while procedural errors were addressed).

operations."); *see also Rocky Mountain*, 730 F.3d at 1081 ("An accurate comparison is possible only when it is based on the entire lifecycle emissions of each fuel pathway.").[3]

In December of 2012, Oregon's Environmental Quality Commission adopted its Phase 1 reporting-only rules for its low carbon fuel standard, the Oregon Clean Fuels Program. *See* ER 2:46; *see also* Or. Admin. R. 340-253-0000(4) (2013). The Commission adopted its Phase 2 rules in 2015, and they took effect January 1, 2016. Or. Admin R. 340-253-0100(6). The Phase 2 rules include the declining carbon-intensity standards that require reductions in the average carbon intensity of fuels used in Oregon. *Id*.

B. How Oregon's Clean Fuels Program Works

Oregon's Clean Fuels Program is designed to reduce lifecycle greenhouse gas emissions from Oregon's use of transportation fuels to at least 10 percent below 2010 levels. Or. Admin. R. 340-253-0000. To accomplish this, the Program requires regulated parties to meet carbon-

[3] For example, using electricity as a transportation fuel produces no tailpipe emissions, but, depending on how it is accomplished, the generation of electricity can produce significant greenhouse gas emissions. *See* RJN Exhs. D at 30-32; E at 739. Without a lifecycle analysis that captures the production of the fuel, as well as its use in the vehicle and other events in the lifecycle, there would be no way to determine if increased use of a particular fuel, like electricity, actually reduces emissions.

intensity standards that become more stringent each year through 2025. *Id.* at 340-253-0100(6); 340-253-8010; 340-253-8020. Regulated parties are those that either produce transportation fuel in Oregon or import transportation fuel for use in Oregon. *Id.* at 340-253-0100(1). The carbon-intensity standard for a given year "applies to the average of all transportation fuels used in Oregon." *Id.* at 340-253-0000(2). Thus, no particular fuel is mandated by the Program, and no particular fuel is prohibited by the Program, even if it "has a higher carbon content than the clean fuel standard allows." *See id.*

Oregon's Program operates through a system of credits and deficits. Credits are generated "when fuel is produced, imported or dispensed in Oregon, … and the carbon intensity of the fuel … is less than the [applicable] clean fuel standard." Or. Admin. R. 340-253-1000(5)(a). Deficits are generated "when fuel is produced, imported, dispensed or used in Oregon, … and the carbon intensity of the fuel … is more than the [applicable] clean fuel standard." *Id.* at 340-253-1000(5)(b). Regulated parties comply by possessing and retiring credits equal to their deficits. *Id.* at 340-253-1030(1), (2).

Under Oregon's Program, a fuel's "carbon intensity" reflects the fuel's lifecycle greenhouse gas emissions determined using a scientific modeling tool called OR-GREET 2.0 (based on Argonne National Laboratory's "GREET" tool for Greenhouse gases, Regulated Emissions, and Energy in Transportation). Or. Admin R. 340-253-0040(17), (63); 340-253-0400(1). GREET was first developed in 1996—specifically to model lifecycle greenhouse gas emissions associated with transportation fuels—and has been peer reviewed multiple times since. *Rocky Mountain*, 730 F.3d at 1081; *see also* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standards Program, 74 Fed. Reg. 24,904, 25,025 (May 26, 2009) ("GREET … has undergone extensive peer review through multiple updates [and] offers the most comprehensive treatment of [transportation fuel] emissions.").

Oregon's Program is modeled on California's LCFS, and the two regulations share many features, including the use of the GREET scientific modeling tool to determine lifecycle greenhouse gas emissions and the use of declining carbon-intensity standards that must be met on an average, aggregate basis through a system of credits and deficits. *See* Cal. Code Regs., tit. 17, § 95484 (declining standards); *see also Rocky Mountain*, 730 F.3d at 1080-1082 (describing California's LCFS). In fact, to ease compliance burdens for regulated parties and other fuel producers, Oregon's Program allows the use of carbon-intensity values approved under

California's LCFS, with minor adjustments to comport with the specifics of Oregon's Program. Or. Admin. R. 340-253-0400(4)(a).

The similarities in the two programs are unsurprising. When States act as laboratories of regulatory innovation, as this Court recognized California has done and is doing, other States often follow.[4] *See Rocky Mountain*, 730 F.3d at 1087 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)). Further, as noted above, the Oregon Legislative Assembly instructed Oregon's Environmental Quality Commission to review other state low carbon fuel standards when developing one for Oregon. RJN Exh. A at § 6(2)(c).

C. Carbon-Intensity Values Under Oregon's Program

As described above, a fuel's carbon intensity determines whether it generates credits or deficits under Oregon's Program. Petroleum-based gasoline and diesel are required to "use the statewide average carbon intensities" of those two fuels. Or. Admin R. 340-253-0400(3)(a). In other words, every gallon of petroleum-based gasoline is assigned the average carbon-intensity value of petroleum-based gasoline used in Oregon (100.77). *Id.*; *see also id.* at 340-253-8030. And every gallon of petroleum-based

[4] British Columbia has also adopted standards for its transportation fuels in order to reduce average carbon intensity by 10%. RJN Exh. F.

diesel is assigned the average carbon-intensity value of petroleum-based diesel used in Oregon (101.65). *Id.* at 340-253-0400(3)(a); *see also id.* at 340-253-8040. In contrast, alternative fuels, such as ethanols and biodiesels, use carbon-intensity values that are more individualized. *Id.* at 340-253-0400(4), (5); *see also id.* at 340-253-0450. All such carbon-intensity values are calculated using the OR-GREET 2.0 modeling tool. *Id.* at 340-253-0400(1).

As this Court recognized with respect to a similar approach under California's LCFS, using statewide average values for petroleum fuels and individualized values for alternative fuels "promote[s] the development of alternative fuels" instead of "encourag[ing] marginal emissions reductions" from petroleum fuels. *Rocky Mountain*, 730 F.3d at 1085. This is because only alternative fuels can generate credits. Therefore, some significant volume of alternative fuels must be sold in Oregon in order to produce sufficient credits for compliance. And the credits generated by alternative fuels have value and can be sold among regulated parties, enhancing the incentives for the development and use of those fuels. Providing these incentives to alternative fuels, but not to petroleum fuels, reflects Oregon's intention to "transform[] [Oregon's] transportation infrastructure to support a diversity of low carbon fuels." ER 2:43; *see also Rocky Mountain*, 730 F.3d at 1084-1085.

Carbon-intensity values for alternative fuels—such as ethanol—can be obtained in one of three ways under Oregon's Program. If an alternative fuel already has an approved carbon-intensity value under California's LCFS, that value can be used, once adjusted for Oregon's Program. Or. Admin. R. 340-253-0400(4)(a). Fuel producers can also apply for an individualized value under Oregon's Program, if they do not have such a value under California's LCFS. *Id.* at 340-253-0400(5). Or if the fuel corresponds to one of the values identified in Table 3 or 4 of Oregon's regulation, the appropriate value from those tables may be used. *Id.* at 340-253-0400(4)(b). Those Table 3 and 4 values are only to be used when "it is not possible to" use an approved individualized value. *Id.* at 340-253-0450(3).

The range of approved carbon-intensity values for ethanol is large—from a low of 7.49 to a high of 98.59 (as of January 25, 2016). RJN Exh. G at 6-17. The size of this range underscores the importance of using a scientific lifecycle analysis in order to compare the greenhouse gas emissions of different fuels. As this Court recognized in *Rocky Mountain*, ethanol production involves an array of choices which can have implications for carbon-intensity values. *See Rocky Mountain*, 730 F.3d at 1082-1084;

see also RJN Exh. E at 734 (noting large variety in feedstocks and production methods for biofuels and associated wide range in greenhouse gas emissions levels); 74 Fed. Reg. at 25,039 (noting multiple production factors that affect greenhouse gas emission levels of ethanols).

There are two approved carbon-intensity values for ethanol produced in Oregon—the 64.68 "average" value in Table 3 and an individualized value of 54.85. RJN Exh. G at 11 (ETHC088), 19 (ORETHC002); *see also* OAR 340-253-8030 (Table 3). There are nineteen approved carbon-intensity values for out-of-state ethanols that are below the lowest value approved for Oregon ethanol. *See* RJN Exh. G. These include values that correspond to cellulosic ethanol—a long-anticipated, very low-carbon fuel, produced from crop residues and non-crop feedstocks that has recently begun to be produced in commercial quantities. RJN Exh. G at 6 (Pathway codes ETHB001-3); *see also* 74 Fed. Reg. at 25,045 (anticipating very low-carbon cellulosic ethanol). Other very-low-carbon ethanols include several from Midwestern producers using biomethane for some or all of the thermal energy needed to turn corn into ethanol (RJN Exh. G at 10 (ETHC073-75)); another from a Midwestern producer where the thermal energy comes from a combination of natural gas, landfill gas, and biomass (*id.* at 11, ETHC096); and ethanols made from molasses where the plant produces electricity at the same time it produces ethanol (*id.* at 14-15, ETHM001-5). Other Midwestern ethanols have carbon-intensity values below that of Oregon ethanol, including one produced using natural gas for thermal energy while co-generating electricity on site (*id.* at 8, ETHC036); one using landfill gas for 20% of its thermal energy requirements (*id.* at 9, ETHC056); and one using a mixture of biogas and natural gas for thermal energy (*id.* at 11, ETHC089-90); *see also id.* at 8 (ETHC030, ETHC035_1), 11 (ETHC087, ETHC090, ETHC096), 15 (ETHM007, ETHM008).

As these examples illustrate, lower-carbon-intensity ethanols are produced in a variety of locations and using a variety of processes. As Plaintiffs themselves allege, Oregon has only one ethanol plant, so the vast majority of lower-carbon ethanols (including all of the lowest-carbon ethanols) are produced outside the State. ER 2:194 at ¶ 70; *see also* RJN Exh. G at 6-17. Indeed, the data obtained under the reporting-only Phase 1 of Oregon's Program revealed that 49 large out-of-state firms account for 99% of the fuel consumed in Oregon. RJN Exh. H at 2.

D. Procedural History and the District Court's Decision

Plaintiffs filed their complaint on March 23, 2015, alleging that Oregon's Program discriminates against out-of-state fuels, regulates extraterritorially in violation of both the dormant Commerce Clause and what Plaintiffs describe as "principles of interstate federalism," and is preempted both by the Energy Independence and Security Act of 2007 (EISA) and by EPA's Reformulated Gasoline Rule. ER 2:202-206.

ARB and the State of Washington moved to intervene, and the district court granted that motion. Dist. Ct. Dkt. Nos. 23, 36. The district court also granted a separate motion to intervene filed by a group of environmental non-profit organizations. Dist. Ct. Dkt. Nos. 25, 50.

The Oregon Defendants and the State Intervenors (ARB and Washington) each moved to dismiss the complaint for failure to state a claim and, as to the preemption claim under EISA, for lack of prudential standing. Dist. Ct. Dkt. Nos. 51, 52. The environmental non-profit organizations moved for judgment on the pleadings, as they had filed an answer to the complaint at the time of their intervention. Dist. Ct. Dkt. No. 54. On September 23, 2015, the district court granted the motions to dismiss and the motion for judgment on the pleadings, dismissing Plaintiffs' complaint with prejudice. ER 1:3-38.

The district court began by noting that Plaintiffs' discrimination claim "is largely barred by on-point precedent," specifically this Court's decision in *Rocky Mountain*. ER 1:13. The district court also held that Plaintiffs had failed to plead facts sufficient to support the necessary, threshold element of their discrimination claim concerning petroleum fuels—namely that petroleum fuels and ethanols are similarly situated such that differential treatment of them could constitute discrimination under the Commerce Clause. *Id.* at 1:14. The court further concluded that all of Plaintiffs' assertions of discrimination failed because they rest on a flawed "fundamental premise … that the only fuels benefitting from the Oregon Program originate in Oregon." *Id.* at 1:15. Plaintiffs' allegations improperly "ignore[d] significant segments of the market," including "out-of-state ethanol[s]" with "carbon intensities lower than the value plaintiffs[] allege confers discriminatory benefits" to Oregon ethanol. *Id.* at 1:15-16; *see also id.* at 1:21-22, 1:24.

The district court recognized that Plaintiffs' extraterritorial regulation claim is also controlled and precluded by this Court's decision in *Rocky Mountain* and, specifically, this Court's determination that California's analogous LCFS controls no conduct occurring wholly outside the State. *Id.* at 1:25. In light of that determination, Plaintiffs' extraterritorial regulation claim failed as a matter of law whether brought under the dormant Commerce Clause or "principles of interstate federalism." *Id.*

Finally, the district court dismissed Plaintiffs' preemption claim, holding that EPA "did not affirmatively find that no control or prohibition of methane was necessary," as required for preemption under Section 211(c)(4)(A)(i) of the Clean Air Act. *Id.* at 28. Rather, EPA "determined only that methane was not an ozone-forming [volatile organic compound]" and therefore declined to include it in its regulation to reduce ground-level ozone formation. *Id.*

Plaintiffs appealed.[5]

STANDARD OF REVIEW

This Court "review[s] de novo the district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). This Court "accept[s] the plaintiffs' allegations as true and construe[s] them in the light most favorable to plaintiffs." *Id.* (internal quotation omitted). "The [C]ourt need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the [C]ourt required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* (internal quotation omitted). "The complaint is properly

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[5] The district court also dismissed Plaintiffs' preemption claim under the Energy Independence Act of 2007 and the Renewable Fuels Standard. *Id.* at 1:32-37. Plaintiffs did not appeal that decision. AOB at 16 n.10.

dismissed if it fails to plead enough facts to state a claim to relief that is plausible on its face." *Id.* (internal quotations omitted).

SUMMARY OF ARGUMENT

The district court correctly dismissed all of Plaintiffs' claims.

Plaintiffs claim that Oregon's Program discriminates against out-of-state fuels because some of those fuels (specifically petroleum fuels and some Midwestern ethanols) have higher carbon-intensity values than biofuels produced in Oregon. This claim fails for several reasons.

First, Plaintiffs' claim that Oregon's Program discriminates against petroleum fuels in favor of biofuels fails because Plaintiffs did not allege facts that could support the necessary, threshold conclusion that petroleum fuels and biofuels are "similarly situated" products. ER 1:14-15. Absent that conclusion, differential treatment of these two types of fuels cannot constitute discrimination under the Commerce Clause. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

Second, all of Plaintiffs' discrimination claims improperly disregard that Oregon applies the same, peer-reviewed modeling tool when calculating carbon-intensity values and that numerous out-of-state biofuels have obtained carbon-intensity values lower than the biofuels produced in Oregon. As the district court correctly noted, Plaintiffs' narrow market view is the same fatal error that infected their discrimination claims against California's LCFS. ER 1:15-16, 18, 19; *see also Rocky Mountain,* 730 F.3d at 1088, 1099. Given that out-of-state biofuels have the most favorable carbon intensities, "in-state [biofuels] will have no competitive advantage over out-of-state [biofuels]," and Oregon's Program is non-discriminatory. *See Exxon Corp.*, 437 U.S. at 126.

Plaintiffs' primary response is to argue that this Court's decision in *Rocky Mountain* is flawed. *See* AOB at 37-39. But *Rocky Mountain* is binding precedent, and this Court's discrimination analysis was correct. This Court concluded that a scientific lifecycle analysis that differentiates fuels by reason of their actual contributions to dangerous greenhouse gas emissions does not "discriminate against an article of commerce *by reason of its origin* or destination out of State." *C&A Carbone, Inc. v. Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994) (emphasis added); *see also Rocky Mountain*, 730 F.3d at 1090. Focusing on the core concerns of the dormant Commerce Clause, this Court also held that the LCFS did not discriminate against out-of-state fuels because it "does not isolate California and protect its producers from competition." *Rocky Mountain*, 730 F.3d at 1090. The district court applied these same, well-established principles to Oregon's Program. The district court's dismissal of Plaintiffs' discrimination claims should be affirmed.

The district court also correctly dismissed Plaintiffs' extraterritorial regulation claim because this Court's decision in *Rocky Mountain* forecloses that claim. ER 1:25. Indeed, Plaintiffs concede that the relevant conclusion in *Rocky Mountain*—that use of lifecycle analysis to calculate carbon intensities does not regulate wholly out-of-state activity—controls. AOB at 47. The district court's judgment can be affirmed on that basis alone.

Plaintiffs' arguments below and here amount to an ongoing disagreement with *Rocky Mountain* that has no merit. Plaintiffs do not dispute the validity of lifecycle analysis or the modeling tool employed by Oregon to carry out that analysis. Rather, they argue, as they did in *Rocky Mountain*, that States may not apply this well-established science or this peer-reviewed tool to fuels sold in their markets because doing so somehow regulates the full lifecycle of the fuel, including events occurring outside the State. This Court concluded, to the contrary, that a State "does not control these factors—directly or in practical effect—simply because it factors them into the lifecycle analysis." *Rocky Mountain*, 730 F.3d at 1103. That conclusion is consistent with case law holding that a State does not regulate extraterritorially when it establishes requirements for products sold and consumed in the State, even when those requirements affect the decisions of out-of-state producers seeking to do business in the State. *E.g.*, *Pharm. Research & Mfrs. of Amer. v. Walsh* (*PhRMA*), 538 U.S. 644, 669 (2003); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001).

Plaintiffs seek to avoid *Rocky Mountain*'s holding by invoking principles of "structural federalism" as an additional basis for their extraterritorial regulation claim (beyond the dormant Commerce Clause). AOB at 46. But, as Plaintiffs' complaint and briefing indicate, their "structural federalism" theory depends entirely on the same argument rejected in *Rocky Mountain*—that application of a scientific lifecycle analysis to fuels sold for use in the State regulates wholly out-of-state activity. *See* ER 2:203-204; AOB 40 (arguing, under "principles of interstate federalism," that State may not "regulate conduct occurring solely in its sister states"). Oregon's Program "regulates only the [Oregon] market," *see Rocky Mountain*, 730 F.3d at 1101, and the district court correctly dismissed Plaintiffs' entire extraterritorial regulation claim. ER 1:25.

Finally, Plaintiffs' claim that EPA preempted Oregon's Program with its 1994 Reformulated Gasoline Rule, designed to reduce ground-level ozone formation, is equally meritless. As the district court correctly held, EPA did not make the finding necessary to Plaintiffs' claim—namely that no control or prohibition of methane emissions from transportation fuels is necessary. Rather, EPA concluded that methane is not an ozone-forming volatile organic compound and, thus, logically chose not to include methane in its Rule targeting ground-level ozone formation. Further, when EPA promulgated its revised Renewable Fuel Standard in 2010, EPA declined an explicit request to preempt state low carbon fuel standards, such as Oregon's Program, noting instead that it designed the federal Renewable Fuel Standard "so as to be compatible with" state low carbon fuel standards. SER 53. Plaintiffs offer no explanation for why EPA would design a 2010 federal regulation to be compatible with state low carbon fuel standards if, as Plaintiffs claim, such standards were preempted by the Reformulated Gasoline Rule issued sixteen years earlier in 1994.

The district court's decision dismissing all of Plaintiffs' claims should be affirmed.

ARGUMENT

I. OREGON'S PROGRAM DOES NOT DISCRIMINATE AGAINST OUT-OF-STATE FUELS

"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." *Kentucky v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation omitted); *see also McBurney v. Young*, 133 S. Ct. 1709, 1719 (2013). Such measures are invalid unless they "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Davis*, 553 U.S. at 338 (internal quotation omitted).

Plaintiffs claim that Oregon's Program discriminates against out-of-state fuels in two ways. First, they claim that the Program discriminates against petroleum fuels (which are produced outside of Oregon) in favor of biofuels (some of which are produced in Oregon) because the Program recognizes that petroleum fuels are higher in carbon intensity than many biofuels. AOB at 22-35. Second, relying on just two of 190 approved carbon-intensity values for ethanols, Plaintiffs claim that Oregon discriminates against Midwestern ethanols by assigning them higher carbon-intensity values than Oregon ethanols. AOB at 35-39. As the district court held, Plaintiffs did not, and cannot, allege facts sufficient to state a plausible claim for relief on either of these discrimination theories.

A. Oregon's Program Does Not Discriminate in Its Treatment of Petroleum Fuels

As Plaintiffs note, discrimination under the dormant Commerce Clause can be found on a law's face, in its purpose, or in its effects. AOB at 21. With respect to petroleum fuels, Plaintiffs concede, as they must, that Oregon's Program does not discriminate on its face. *Id.* at 24.[6] Plaintiffs contend instead that Oregon's Program "reflects a discriminatory design." *Id.* As the district court held, Plaintiffs' claim fails. Plaintiffs' allegations cannot support the threshold element of this discrimination claim—namely, that petroleum fuels and biofuels are "similarly situated" products. Further, any preference in Oregon's Program for low-carbon biofuels over higher-carbon petroleum fuels is non-discriminatory because it is based on harmful greenhouse gas emissions, not on origin, and because the Program reflects no preference for in-state, low-carbon biofuels over out-of-state, low-carbon biofuels. *See Exxon Corp.*, 437 U.S. at 126.

[6] Plaintiffs' assertion that the treatment of petroleum fuels "is tied to the origin of imported gasoline and diesel fuel" is not to the contrary. *See* AOB at 30; *see also* ER 2:191 at ¶ 58. This assertion is entirely inconsistent with their allegation that Oregon's Program "applies the same state-wide carbon intensity to all sources of gasoline or diesel fuel." *See* ER 2:189 at ¶ 51; *see also* Or. Admin. R. 340-253-0400(3)(a)(A), (C).

1. Plaintiffs' Allegations Cannot Support the Requisite Threshold Conclusion that Petroleum Fuels and Biofuels Are "Similarly Situated"

In cases like this one, where Plaintiffs allege discrimination against one product (petroleum fuels) in favor of a different product (biofuels), "there is a threshold question whether the [products] are indeed similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299; *see also Alaska v. Artic Maid*, 366 U.S. 199, 204 (1961). This "similarly situated" inquiry asks whether there is "competition between the supposedly favored and disfavored entities in a single market." *Tracy*, 519 U.S. at 300 (internal quotation omitted). If the products (or firms) do not compete in a single market, differential treatment cannot constitute discrimination. *Id.* at 298 ("[A]ny notion of discrimination assumes a comparison of substantially similar entities."); *see also* AOB at 28 (acknowledging "single market" test).

For example, the Supreme Court held that canned salmon and fresh-frozen salmon were not "similarly situated" products. *Artic Maid*, 366 U.S. at 204. It did not matter, then, that ships catching salmon for the fresh-frozen market were treated differently than ships catching salmon for the canned market. *Id.* That differential treatment was not discrimination because the ships and their products did not compete in a single market. *Id.*; *see also Tracy*, 519 U.S. at 310 (no discrimination in differential treatment of utilities selling natural gas bundled with other services and natural gas marketers selling unbundled natural gas because firms not similarly situated).

To state their petroleum fuels discrimination claim, then, Plaintiffs must allege facts sufficient to support a plausible conclusion that petroleum fuels and biofuels compete in a single market. Plaintiffs' burden to do so is underscored by the fact that courts have treated ethanol as competing with ethanol and petroleum as competing with petroleum. *See New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 276 (1988) (comparing treatment of in-state and out-of-state ethanols); *Exxon Corp.*, 437 U.S. at 126 (comparing treatment of in-state and out-of-state petroleum sellers); *Rocky Mountain*, 730 F.3d at 1088-97 (comparing treatment of ethanols), 1097-1101 (separately comparing treatment of petroleum fuels).

Yet, as the district court correctly held, Plaintiffs did not meet this pleading burden. ER 1:14. In fact, the only plausible inference to be drawn from Plaintiffs' allegations is the opposite—that Plaintiffs' members purchase ethanol and biodiesel in ethanol- and biodiesel-specific markets; blend those biofuels with petroleum fuels; and then sell those blended fuels in separate markets for finished fuels.

For example, noting that gasoline in Oregon is typically comprised of 90% petroleum and 10% ethanol, Plaintiffs allege that, under Oregon's

Program, their members "would need to replace existing sources of ethanol with ethanol that has lower calculated carbon intensities…." ER 2:190 at ¶ 55. Plaintiffs make a virtually identical allegation about diesel and biodiesel. ER 2:190-91 at ¶ 56 ("[D]iesel importers would need to replace existing sources of biodiesel with biodiesel that has lower calculated carbon intensities…."). In other words, Plaintiffs allege that ethanols and biodiesels compete in markets specific to those fuels—markets in which Plaintiffs' members choose which ethanols and which biodiesels, respectively, to buy. These allegations do not support a reasonable inference that petroleum fuels compete in either of those markets.

Plaintiffs' vague allegation that Oregon's Program "is designed to displace imported fuels from petroleum sources" does not suffice to avoid dismissal. *See* AOB at 28 (quoting ER:191 at ¶ 58). Notably, Plaintiffs do not allege that any displacement of petroleum fuels would result from an increased use of biofuels, as opposed to other lower-carbon fuels such as electricity or natural gas.[7] Indeed, Plaintiff AFPM has represented to EPA that ethanol *cannot* displace petroleum fuels because existing vehicles

[7] In fact, scenarios demonstrating feasibility of compliance with Oregon's Program assumed that natural gas could displace some petroleum in the truck and bus sector and that electricity could displace some petroleum among lighter-duty vehicles like passenger cars. ER 2:142.

cannot run on gasoline that contains more than the 10% ethanol already present in Oregon's finished gasoline. SER 54 (describing "blendwall" of maximum 10% ethanol as "a major impediment" to increased use of biofuels). That natural gas, electricity or other lower-carbon fuel might displace some petroleum does not support a claim that petroleum fuels compete with *biofuels* in a single market.[8]

Further, Plaintiffs' assertion, which they make for the first time on appeal, that Oregon's use of the fuel categories "gasoline substitutes" and "diesel substitutes" establishes that these "substitute" fuels compete against petroleum in a single market is without merit. *See* AOB at 29; *see also* Or. Admin. R. 340-253-8030 (Table 3); Or. Admin R. 340-253-8040 (Table 4). This distinction recognizes that the fuels in each of these categories are typically used in similar kinds of vehicles, with the gasoline category fueling mostly cars and light trucks and the diesel category fueling mostly large trucks and other heavy-duty vehicles. RJN Exh. J at V-5. The word "substitutes" here does not have the meaning Plaintiffs wish to ascribe to it

[8] The other allegations Plaintiffs claim support a "similarly situated" finding here simply assert that compliance with Oregon's Program will be more expensive for petroleum fuels than for lower-carbon biofuels. *See* AOB at 28. Those allegations do not establish competition in a single market.

because, in many instances, one would have to substitute *the vehicle* (e.g., replace a gasoline-powered car with an electric-powered one or replace a diesel-powered bus with a natural-gas-powered one) before one could "substitute" fuels. The use of the word "substitutes" in this context does not identify a single market in which these fuels compete.

Finally, even if alternative fuels compete on the margins of the petroleum market now, or might compete in that market in the future (facts Plaintiffs have not alleged), that would be insufficient to support the requisite "similarly situated" conclusion. In *Tracy*, the Court declined to rely on assumptions that local utilities might compete "at the margins" of the unbundled gas market, which was not the utilities' "core market." 519 U.S. at 301, 308. The Court also declined to base its "similarly situated" analysis on speculation about market shifts that might occur in the future. *Id.* at 308-309.

The district court correctly held that Plaintiffs' petroleum fuels discrimination claim fails on the threshold issue of whether those fuels compete in a single market with biofuels.

2. Plaintiffs' Allegations Cannot Support a Plausible Claim That Oregon's Program Discriminates Against Petroleum Fuels in Favor of Oregon-Produced Biofuels

Even if Plaintiffs had pleaded facts sufficient to support a conclusion that petroleum fuels and biofuels are "similarly situated," Plaintiffs' claim would still fail because it is not plausible on its face. Plaintiffs claim that "the Oregon Program functions as a subsidy to in-state ethanol producers (who have credits to sell)" at the expense of "out-of-state refiners of petroleum-based fuels." AOB at 23-24. But contrary to Plaintiffs' premise, the biofuels industry is not "uniquely local" to Oregon, *see id.* at 26, and Oregon biofuel producers are not the only entities "who have credits to sell," *see id*. at 23. Plaintiffs have not alleged, and cannot allege, otherwise.

As discussed above, numerous out-of-state ethanols have highly favorable carbon-intensity values that generate credits, and many such ethanols generate more credits per gallon than any Oregon-produced ethanol. *See, supra*, Stmt. of Case, Sec. C. And the same is true of both biodiesel and renewable diesel. The only approved pathway for biodiesel that is identified as Oregon-produced has a carbon intensity of 18.12. RJN Exh. G at 19 (ORBIOD002). In contrast, there are four renewable diesel pathways from Louisiana with carbon-intensity values between 5.56 and 13.85 (RNWD012-

13, 18-19); two renewable diesel pathways from Singapore with values of 16.21 and 16.58 (RNWD008-9); and multiple biodiesel pathways with carbon-intensity values from 9.65 to 16.86 from places as diverse as Arkansas, Texas, South Korea, China, and Canada (BIOD005_1, BIOD010, 11, 17, 18, 25, 28). Plaintiffs' premise that low-carbon fuels are unique to Oregon and that Oregon biofuel producers are the only (or even primary) credit generators under the Program fails and cannot support a plausible discrimination claim.

Further, Plaintiffs cannot establish discrimination by comparing in-state biofuels with out-of-state petroleum while ignoring out-of-state biofuels. In *Rocky Mountain*, this Court twice held that a discrimination analysis under the dormant Commerce Clause must consider *all* competitors in the relevant market. 730 F.3d at 1088 ("[A]ll sources of ethanol in the California market should be compared."); *id.* at 1108 (rejecting analysis omitting "several significant parts of the [crude oil] market" and requiring assessment "in context of the full market").[9] Plaintiffs do not challenge these holdings.

[9] This is the primary holding from *Rocky Mountain* that the district court properly noted controls here. *See* ER 1:15-16. The aspect of *Rocky Mountain* that Plaintiffs highlight instead—this Court's recognition that some California "interests" might be burdened by the LCFS—does not aid Plaintiffs' cause. *See* AOB at 26. As discussed above, Oregon biofuels are

(continued…)

Nor could they. This Court's full-market analysis is entirely consistent with previous cases comparing the treatment of all competitors and with the underlying principle that the Court's concern should be with the conditions of competition in the State's market. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984); *Exxon Corp.*, 437 U.S. at 125-26. Plaintiffs' artificially narrow comparison is inconsistent with these holdings and cannot support a discrimination claim.

Plaintiffs' attempt to analogize to *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), underscores the point. In that case, as Plaintiffs note, the subsidy went "*only* to in-state milk producers." AOB at 24 (emphasis added); *see also id.* at 35 n.23. In contrast, here, out-of-state fuels have the opportunity to generate the credits Plaintiffs equate to a subsidy, as demonstrated by the numerous out-of-state fuels with low carbon-intensity values. *See, supra,* Stmt. of Case, Sec. C; RJN Exh G.

Plaintiffs attempt to marginalize the favorable carbon-intensity values obtained by out-of-state fuels by arguing that "benefits to industries in other

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(…continued)
"burdened" by the lower carbon-intensity values obtained by out-of-state, competing ethanols. *See, supra,*Stmt. of Case, Sec. C. Thus, here again, Plaintiffs have failed to identify a "uniquely local industry" that benefits from the program they challenge. *See* AOB at 26.

states do not shield a discriminatory state law from the dormant Commerce Clause." AOB at 31. But the basic definition of discrimination under this Clause is "differential treatment of in-state and out-of-state interests that *benefits the former and burdens the latter*." *Or. Waste Sys., Inc. v. Oregon*, 511 U.S. 93, 99 (1994) (emphasis added). Accordingly, the low carbon-intensity values of out-of-state ethanols underscore that Oregon's Program is non-discriminatory because, even if biofuels displace petroleum, the Program "creates no barriers whatsoever" to displacement by *out-of-state* biofuels. *See Exxon Corp.*, 437 U.S. at 126.

Moreover, the cases on which Plaintiffs rely (AOB at 30-32) do not support their view of the law. For example, while the Ohio law invalidated in *New Energy* awarded tax credits to some out-of-state ethanols along with all in-state ethanols, it did so only for out-of-state ethanols from States offering Ohio ethanol similarly favorable treatment. *New Energy*, 486 U.S. at 274. In other words, Ohio's law ensured that Ohio-produced ethanol would always compete on the most favorable terms, both in its market and in others. Oregon's Program, in contrast, applies the same peer-reviewed modeling tool to all ethanols in order to calculate their carbon intensities. And that science-based approach has resulted in out-of-state ethanols having lower (and more favorable) carbon-intensity values than any ethanols produced in Oregon. In other words, unlike the law in *New Energy*, Oregon's Program provides competitive advantages, in the form of low carbon-intensity values, to fuels that qualify for them based on their emissions and regardless of their origins.

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992), similarly provides no support for Plaintiffs' view of the law and is entirely inapplicable here. The Michigan law at issue in that case banned the acceptance of out-of-county solid waste in all counties in the State unless that acceptance was explicitly authorized in the county's approved solid waste management plan. *Id.* at 357. The Court held that a State "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.* at 361. As Plaintiffs note, the fact that some counties might accept out-of-state waste did not render Michigan's law non-discriminatory because the ban would remain in place elsewhere in the State. *Id.* at 363; *see also* AOB at 32. Oregon's Program, in contrast, bans no fuels at all and, in fact, makes numerous, out-of-state lower-carbon fuels highly competitive in Oregon's market. *See* RJN Exh. G. It, thus, bears no resemblance to the origin-specific ban in *Fort Gratiot*. Further, unlike the law in *Fort Gratiot*, Oregon's Program neither isolates

Oregon from the national economy nor authorizes subdivisions of the State to isolate themselves. *See Rocky Mountain*, 730 F.3d at 1091 (under *Fort Gratiot*, State may not "authoriz[e] each county [in the State] to isolate itself from the national economy"); *id.* at 1090 ("The Fuel Standard does not isolate California….").

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), is equally inapposite. The North Carolina law invalidated in that case "strip[ped] away from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system." *Id.* at 351; *see also Rocky Mountain*, 730 F.3d at 1092 (rejecting Plaintiffs' attempted analogy to *Hunt*). In contrast, Oregon's Program does not strip away any hard-earned marketing advantage in which the petroleum industry has heavily invested. Plaintiffs do not claim that it does. *See* AOB at 31.

In fact, the closest analogy to Plaintiffs' discrimination claim concerning petroleum fuels is *Exxon Corporation*. There, as here, the State was concerned that the practices of petroleum refiners (who happened to be out of state) were harming the citizens of the State. *Exxon Corp.*, 437 U.S. at 121. There, the State enacted a law that required those out-of-state refiners to change some of their business practices with respect to fuel sold in the State. *Id.* at 120. Here, Plaintiffs allege Oregon's Program will require their members to change which biofuels they blend into fuels they sell in Oregon. ER 2:190 at ¶¶ 55, 56. There, as here, the law allowed other, non-refinery businesses, whether in-state or out-of-state, to compete in the State's market. *See Exxon Corp.*, 437 U.S. at 126. There, the law did not discriminate against out-of-state refiners because "in-state independent dealers will have no competitive advantage over out-of-state dealers." *Id*. Oregon's Program similarly does not discriminate because in-state biofuels have no competitive advantage over out-of-state biofuels. *See* RJN Exh. G. Contrary to Plaintiffs' theory, the fact that some burdens of Oregon's program "fall[] on some interstate companies," namely petroleum-fuel producers, "does not, by itself, establish a claim of discrimination against interstate commerce." *See Exxon Corp.*, 437 U.S. at 126. The district court should be affirmed.

3. The District Court Properly Dismissed Plaintiffs' Claim of Discriminatory Purpose

Finally, the district court also correctly dismissed Plaintiffs' claim of discriminatory purpose. As demonstrated above, Oregon's Program distinguishes between fuels based on their contributions to the greenhouse gas emissions which are threatening Oregon's economy, public health, and environment and has assigned its most favorable carbon-intensity values to out-of-state fuels. It is hard to imagine why Oregon would have created such a program if the State's objective were to benefit its local biofuels industry. The Program's stated purpose—to "reduce Oregon's contribution" to greenhouse gas emissions—is its true purpose and is not a pretext for economic protectionism.

In analyzing Plaintiffs' purpose claim, the district court did accept, as true, Plaintiffs' allegations concerning statements by various state officials, contrary to Plaintiffs' assertions here. *See* AOB at 33-34. The district court simply concluded that those allegations were insufficient to support a reasonable or even plausible inference of a discriminatory purpose because, when viewed in context, the statements "reinforce[d] that the purpose of the Oregon Program is to reduce GHG emissions." ER 1:20-21. The "predictable concern" some Oregon officials showed for Oregon's economy did not establish protectionism. *See* ER 1:21; *see also Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1196 (9th Cir. 1990).

Plaintiffs argue that their discriminatory purpose claim could not be resolved at the motion to dismiss stage. AOB at 34 n.21. But they nowhere suggest additional facts they might develop that could support a plausible claim of a discriminatory purpose here.

The district court's dismissal of Plaintiffs' discrimination claims concerning petroleum fuels should be affirmed.

B. Oregon's Program Does Not Discriminate Against Out-of-State Ethanol

Plaintiffs also failed to state a claim that Oregon's Program discriminates against out-of-state ethanol, in favor of in-state ethanol, in any way (on its face, in its purpose, or in its effects).

1. Plaintiffs' Claim of Facial Discrimination Against Midwestern Ethanols Is Foreclosed by *Rocky Mountain*

Plaintiffs concede that *Rocky Mountain* forecloses their claim that Oregon's Program facially discriminates against out-of-state ethanol. AOB at 39 n.25. Like California's LCFS, Oregon's Program "does not base its treatment on a fuel's origin but on its carbon intensity." *See Rocky Mountain*, 730 F.3d at 1089. Also like California's LCFS, Oregon's Program "does not isolate [Oregon] and protect its producers from competition." *See id.* at 1090. "To date, the lowest ethanol carbon intensity values, providing the most beneficial market position, have been for [out-of-state ethanols]." *See id.*; *see also* RJN Exh. G at 6-17. Plaintiffs' concession disposes of their facial discrimination claim concerning ethanol.

Plaintiffs nevertheless mount a meritless attack on this Court's analysis in *Rocky Mountain*. AOB at 37-39. Plaintiffs misread *Rocky Mountain* and claim, incorrectly, that this Court improperly considered the justification for the law when it concluded that California's LCFS distinguished fuels based on their greenhouse gas emissions and not on their origins. *See id.* at 38. This Court applied the established discrimination standard, asking whether the LCFS "discriminate[d] against an article of commerce by reason of its origin or destination out of State." *See Carbone*, 511 U.S. at 390; *see also Rocky Mountain*, 730 F.3d at 1090 ("greater GHG emissions [are] non-discriminatory reason for [fuel's] higher carbon intensity value"). In other words, the LCFS "did not discriminate against interstate commerce as such," but simply reduced traffic in harmful, high-carbon fuels, "whatever their origin." *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 347 (1992) (internal quotation omitted); *see also Or. Waste*, 511 U.S. at 99 (noting that, under facially discriminatory laws, the "determinant for which [treatment] applies to any particular [product] … is whether or not [it] was generated out-of-state") (internal quotation omitted).

This Court did not hold, as Plaintiffs claim, that "unfavorable treatment" based on origin "is not discriminatory." *See* AOB at 39.[10] Rather, the Court concluded that the LCFS's carbon-intensity values reflected "rigorous" analysis of the greenhouse gas consequences of diverse fuels (accomplished by application of the same modeling tool to all fuels) and that California can treat fuels differently based on those impacts without facially discriminating. *Rocky Mountain*, 730 F.3d at 1090. This conclusion—that a State may constitutionally differentiate products sold in its market "based on a realistic assessment of [their relative] threats" to its land and citizens, *id.* at 1096—is consistent with the Supreme Court's guidance that a State may even "exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people," *Chem. Waste*, 504 U.S. at 347 (internal quotation omitted).

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[10] *Rocky Mountain* also did not characterize Supreme Court precedent as "archaic formalism," as Plaintiffs claim. *See* AOB at 39. Rather, that phrase described *Plaintiffs'* arguments that this Court should ignore much of the regulation's plain text and focus exclusively on some geographic references ("Midwest" and "California," but not "Brazilian") associated with a small subset of available ethanol values. *Rocky Mountain*, 730 F.3d at 1107.

Noting that the lowest carbon-intensity values corresponded to out-of-state ethanols, this Court also held that the LCFS "does not isolate California and protect its producers from competition," as discriminatory laws do. *Rocky Mountain*, 730 F.3d at 1090; *see also, e.g.*, *Davis*, 553 U.S. at 338 (noting driving "concerns about economic protectionism" and "economic isolation"); *West Lynn Creamery*, 512 U.S. at 202 (describing prevention of "economic isolation" as "ultimate").

There is no reason to reach a different conclusion about Oregon's Program than this Court reached about California's LCFS. Oregon is not "erecting a barrier against the movement of interstate trade" or "isolating [itself] from the national economy." *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 627, 628 (1978).

2. Plaintiffs' Claim of Discrimination Against Out-of-State Ethanol Also Fails Because It Requires this Court to Disregard the Carbon-Intensity Values Actually in Use

Although conceding that their facial discrimination claim concerning ethanol is foreclosed by *Rocky Mountain*, Plaintiffs nevertheless assert that Oregon's Program "discriminates against out-of-state ethanol by assigning a higher carbon intensity value to Midwest ethanol than to ethanol produced in Oregon." AOB at 35.

As an initial matter, Plaintiffs' arguments incorrectly disregard most of the out-of-state ethanols with approved carbon-intensity values under Oregon's Program. Indeed, Plaintiffs omit sugarcane ethanol, sorghum ethanol, and molasses ethanol from the table they replicate in their brief. *Compare* AOB at 36 (omitting those values from Table 3) *with* OAR 340-253-8030 (Table 3).[11] And, as noted above, Plaintiffs entirely ignore the numerous individualized carbon-intensity values for ethanol that are approved and in use under Oregon's Program. *See* RJN Exh. G at 6-17. Plaintiffs' approach is wrong because, as explained above, dormant Commerce Clause discrimination analyses consider the full market of competitors, *see Bacchus*, 468 U.S. at 268-69; *Exxon Corp.*, 437 U.S. at 125-26, as this Court recognized when it expressly rejected a similarly narrow view of California's ethanol market, *Rocky Mountain*, 730 F.3d at 1088.

[11] The sorghum and molasses pathways in Table 3 do not contain geographic identifiers, but Plaintiffs do not allege that Oregon produces ethanol from either of these feedstocks. *See* ER 2:194 (alleging Oregon has just one corn ethanol plant). Further, the individualized values for sorghum and molasses ethanol indicate that these fuels are produced outside of Oregon. *See* RJN Exh. G, ETHG001-ETHG016 (sorghum); ETHM001-ETHM010 (molasses).

Further, the carbon-intensity values in Table 3—the only values Plaintiffs acknowledge—are not actually the primary values used under Oregon's Program. Table 3 provides a set of "default carbon intensity values that … can be used temporarily until an actual calculation can be completed." RJN Exh. I. As the plain text of the regulation indicates, those Table 3 values are to be used only "[i]f it is not possible to identify an applicable carbon intensity" value already approved under California's LCFS or under Oregon's process for obtaining an individualized value. OAR § 340-253-0450(3). This small set of fallback values cannot support a discrimination claim of any sort. *Cf. West Lynn Creamery, Inc.*, 512 U.S. at 201 (dormant Commerce Clause analysis looks to "integrated regulation" as a whole). And when the full range of values is considered, the absence of any discrimination against out-of-state ethanols is clear.

There are two approved carbon-intensity values for Oregon-produced ethanol—the 64.68 default value in Table 3 and an individualized value of 54.85 (ETHC088). There are nineteen approved carbon-intensity values for out-of-state ethanols that are below the lowest value approved for Oregon ethanol, including many from the Midwest and several from other countries. *See, supra*, Stmt. of Case, Sec C; *see also* RJN Exh. G at 6-17. And there are many more approved values for out-of-state ethanols that are below the

64.68 “average” value for Oregon ethanol that is the focus of Plaintiffs’ attack. *See* AOB at 36; RJN Exh. G. at 6-17. Contrary to Plaintiffs’ claims, Oregon’s Program does not “confer[] beneficial treatment on an in-state product at the expense of out-of-state products.” AOB at 37. Rather, like California’s LCFS, Oregon’s Program is non-discriminatory because it “does not isolate [Oregon] and protect its producers from competition.” *See Rocky Mountain*, 730 F.3d at 1090.

3. Plaintiffs Identify No Discrimination Claim That Should Have Survived a Motion to Dismiss

Finally, Plaintiffs argue that the district court should not have dismissed “the totality of th[eir] discrimination claim” concerning Midwest ethanol. AOB at 39. But Plaintiffs do not identify any specific claim that was improperly dismissed. And as the district court correctly noted, Plaintiffs’ “only pleadings pertaining” to non-facial discrimination against out-of-state ethanols were conclusory and merely asserted that Oregon’s Program “‘will have the intended discriminatory effect.’” ER 1:23. Thus, the district court concluded, Plaintiffs offered “no plausible allegations demonstrating” any form of discrimination, including in purpose or in effect.

ER 1:24.[12] Plaintiffs' two sentences of argument here offer no reason for this Court to reach a different conclusion. *See* AOB at 39.

Indeed, as discussed above, no claim for discrimination can be stated where the State distinguishes products based on their harmful impacts and is not isolating itself from interstate trade (as is evident from the favorable carbon-intensity values obtained by many out-of-state fuels). The district court correctly dismissed all of Plaintiffs' discrimination claims.

II. OREGON'S PROGRAM DOES NOT REGULATE EXTRATERRITORIALLY

The district court also correctly dismissed Plaintiffs' claim that Oregon's Program regulates extraterritorially in violation of either the dormant Commerce Clause or what Plaintiffs call "principles of interstate federalism." *See* AOB at 40.

[12] A claim of discriminatory purpose with respect to ethanol would fail for the same reasons that claim fails with respect to petroleum. *See, supra,* Sec. I.A.3. Any speculation that Oregon's Program will discriminate, in effect, in favor of in-state ethanol is implausible in light of the carbon-intensity values of out-of-state ethanols. Such speculation cannot, in any event, support a discriminatory effects claims. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010).

A. Plaintiffs Cannot State an Extraterritorial Regulation Claim, of Any Kind, under *Rocky Mountain*

Plaintiffs claim here, as they did in *Rocky Mountain*, that the use of lifecycle analysis to determine a fuel's contribution to greenhouse gas emissions somehow controls all aspects of the fuel's lifecycle, including any lifecycle events occurring outside the State. *See* AOB at 40. Rejecting this exact argument, this Court held that application of scientific, lifecycle-emissions modeling to the fuels sold in a State's market permissibly regulates only that market and does not control any commerce occurring wholly outside the State. *Rocky Mountain*, 730 F.3d at 1101.[13] And in an *en banc* decision, this Court affirmed that conclusion, confirming that California's LCFS "regulated *in-state conduct*," namely "fuels consumed *in California*." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015), *cert denied*, 136 S. Ct. 795 (2016) (emphasis in original, internal quotation omitted). Plaintiffs concede that *Rocky Mountain*'s holding is equally applicable to Oregon's Program. AOB at 47. That is

[13] EPA reached the same conclusion with regard to its application of lifecycle analysis to renewable fuels, including fuels produced in other countries. 75 Fed. Reg. 14766 (March 26, 2010) ("EPA's lifecycle analysis does not exercise regulatory authority over activities that occur solely outside the U.S., nor does it raise questions of extra-territorial jurisdiction.").

sufficient to affirm the district court's dismissal of Plaintiffs' extraterritorial regulation claim.

Plaintiffs attempt to avoid this result by asserting that "this Court never addressed issues of structural federalism." AOB at 46.[14] But Plaintiffs offer no basis upon which to distinguish their extraterritoriality claim under "principles of interstate federalism," AOB at 40, or the "federal structure of the Constitution," *id.* at 43, from the dormant Commerce Clause claim this Court rejected in *Rocky Mountain*.

As Plaintiffs themselves articulate it, their extraterritorial regulation claim turns on the same question, under both the dormant Commerce Clause and their structural federalism theory. Plaintiffs assert that "principles of interstate federalism … forbid a state to regulate conduct occurring solely in its sister states." AOB at 40 (internal quotation omitted). Plaintiffs similarly assert that "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Id.* at 42. In other words, regardless of how it is styled, Plaintiffs' extraterritorial regulation claim boils down to the same assertion—that state carbon-

[14] The *Rocky Mountain* Court did consider at least one of Plaintiffs' non-Commerce-Clause cases. *Rocky Mountain*, 730 F.3d at 1103 (citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)).

intensity standards, applicable only to fuels sold for use in the State, somehow impermissibly control conduct occurring wholly outside the State. This Court's conclusion to the contrary in *Rocky Mountain*, 730 F.3d at 1102-1103, and its *en banc* affirmation of that conclusion in *Sam Francis Foundation*, 784 F.3d at 1324, foreclose all of Plaintiffs' extraterritorial regulation theories.

The cases to which Plaintiffs refer for their structural federalism theory do not suggest otherwise. *See* AOB at 40-42. In fact, many of those cases do not involve determinations of extraterritoriality. Those that do involve attempts by a State to assert jurisdiction over conduct with no nexus to the State. For example, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court rejected the assertion of state-court jurisdiction where there were "no contacts, ties, or relations with the State" and contrasted that with circumstances that would render jurisdiction constitutional, such as when "a corporation … delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 298-99; *see also BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 564, 573 (1996) (rejecting punitive damages for actions wholly outside the State); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (holding Florida court had no jurisdiction over Delaware trust company with no Florida contacts);

N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (holding Missouri law could not invalidate loan agreement entered into legally in New York between citizens of New Mexico and New York "simply because it modified a contract originally made in Missouri"). None of these cases bear any resemblance to this one; indeed, none of these cases involve States setting standards for products sold for use within their borders.[15] And none of these cases support the extraterritoriality theory Plaintiffs attempt to advance here or provide any reason to reconsider this Court's conclusion in *Rocky Mountain*.

The allegations in Plaintiffs' complaint confirm that there is no difference between the extraterritorial regulation claim they bring here and the one resolved in *Rocky Mountain*. Plaintiffs' extraterritoriality allegations in the operative complaint here are virtually identical to those in their complaint in the *Rocky Mountain* case at the time of this Court's decision. And all of these allegations involve conclusory assertions that the use of lifecycle analysis to calculate carbon-intensity values controls all events in

[15] *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), decided after Plaintiffs' brief was filed here, similarly bears no resemblance to this case. That case involved the discriminatory treatment of a public agency and a conflicts of law issue under the Full Faith and Credit Clause, *id.* at 1281, not the application of a state standard to all products sold for use in the State.

the lifecycle. *Compare* ER 2:203-204 at ¶ 122, 124 *with* SER 42-43 at ¶ 87, 89.

Plaintiffs have had several opportunities, in the district courts in Oregon and in California,[16] to differentiate their "structural federalism" claim from the dormant Commerce Clause claim resolved against them in *Rocky Mountain*. They have failed to do so. *Rocky Mountain* forecloses their claim here. The district court's dismissal of Plaintiffs' extraterritorial regulation claim, in its entirety, should be affirmed.

B. Plaintiffs' Attacks on this Court's Decision in *Rocky Mountain* Are Without Merit, and Oregon's Program Does Not Regulate Extraterritorially

In light of Plaintiffs' concession that *Rocky Mountain* controls (AOB at 47), there is no need for the Court to address Plaintiffs' ongoing disagreement with *Rocky Mountain*. In any event, Plaintiffs' attack on that decision is without merit. This Court's decision in *Rocky Mountain* fit squarely within a robust line of extraterritorial regulation cases, including those from the Supreme Court, this Court, and the other Courts of Appeals.

[16] Plaintiffs sought leave to amend their complaint in the *Rocky Mountain* litigation to add their "structural federalism" claim. Plaintiffs conceded that "the elements of [their] federalism claim would be similar to those underlying the claim of extraterritoriality under the Commerce Clause." SER 2. The district court twice held that *Rocky Mountain* forecloses any such claim, "regardless of the basis." SER 22-23; 126.

And cases decided since *Rocky Mountain* have only confirmed that States may constitutionally regulate sales in their own markets, even if that regulation affects the business decisions of out-of-state firms.

Notably, the Supreme Court has found extraterritorial regulation in very few cases, almost all involving laws that controlled prices or other terms of sales in other States' markets. *E.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 338 (1989); *see also PhRMA*, 538 U.S. at 669. Federal appellate courts have likewise found extraterritoriality rarely, and only when the state law "controll[ed] commerce occurring wholly outside the boundaries of a State." *Healy*, 491 U.S. at 336; *see also, e.g.*, *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993).[17]

Consistent with these principles, courts have routinely upheld state laws that set standards for products sold or consumed in the State. For example, the Supreme Court upheld Minnesota's prohibition against the sale of certain plastic milk containers in Minnesota, without any suggestion that

[17] Plaintiffs' cases are entirely consistent. *See* AOB at 49. In *Brown-Forman*, the Court was concerned about one State regulating prices in another State's market. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579-80 (1986). Similarly, in *Sam Francis*, this Court was concerned about the obligation to pay a royalty with respect to sales occurring entirely outside the State and distinguished that requirement from California's LCFS which, like Oregon's Program, applies only to fuels sold for use in the State. 784 F.3d at 1323, 1324.

the law might regulate extraterritorially, although some out-of-state producers were required to change their out-of-state production lines to remain in the State's market. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981). And, in *PhRMA*, the Supreme Court held that attaching requirements to in-state pharmaceutical sales did not regulate extraterritorially, even if there might be effects on out-of-state, wholesale transactions occurring in the same chain of commerce. 538 U.S. at 669; *see also Exxon Corp.*, 437 U.S. at 127 (affirming Maryland law restricting method by which out-of-state refiners could sell gasoline in the State)*; Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013) (rejecting extraterritoriality challenge to California's prohibition against "sales within California of products produced by force feeding birds regardless of where the force feeding occurred"); *Sorrell*, 272 F.3d at 110 (upholding labeling requirements affecting out-of-state manufacturers' decisions concerning "production and distribution processes").

Since *Rocky Mountain* was decided, moreover, this Court confirmed in an *en banc* decision that laws like California's LCFS do not "regulat[e] wholly out-of-state conduct." *Sam Francis Found.*, 784 F.3d at 1324. Likewise in *Chinatown Neighborhood Association v. Harris*, 794 F.3d 1136

(9th Cir. 2015), this Court rejected a claim that California's prohibition on the in-state sale or possession of detached shark fins impermissibly regulated outside the State's borders. *Id.* at 1145-1146. This Court also upheld an Alameda County ordinance imposing collection and disposal obligations on pharmaceutical manufacturers selling their products in the county, although most of the manufacturers were located outside the county. *Pharm. Research & Mfrs. of Amer. v. County of Alameda*, 768 F.3d 1037, 1043-44 (9th Cir. 2014). And the Tenth Circuit rejected a challenge, virtually identical to Plaintiffs' challenge here, alleging that Colorado's requirements to increase the amount of renewable (non-greenhouse-gas-emitting) sources of electricity impermissibly regulated production outside the State. *Energy & Envtl. Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015), *cert denied* 136 S.Ct. 595 (2015). The Tenth Circuit explained that States may set "standards for products sold in-state" and that the Supreme Court "has never suggested" that such standards are extraterritorial regulations. *Id.* at 1173.

All of these authorities confirm that Oregon's Program is not an extraterritorial regulation and that Plaintiffs' view of extraterritoriality principles is wrong. Under Oregon's Program, a Midwest ethanol producer or other out-of-state fuel producer can sell its product in Washington, New York, China, or anywhere else without concern for Oregon law. In other words, Oregon's Program "is 'indifferent' to" fuel sales in other States and is not an extraterritorial regulation. *See Sorrell*, 272 F.3d at 110 (quoting *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995)). Plaintiffs' contentions to the contrary are unavailing.

First, contrary to Plaintiffs' assertions, Oregon's Program does not set standards for production or otherwise regulate the "chain of interstate or foreign commerce" connected to fuels sold for use in the State. *See* AOB at 49. Regulated parties are free to comply with Oregon's carbon-intensity standards using any array of fuels (or fuels and credits) that, in the aggregate and on average, meets the applicable standard. *See, supra,* Stmt. of Case, Sec. B. Plaintiffs do not identify how these regulations "direct the manner in which products are manufactured and transported wholly outside of Oregon." *See* AOB at 45. Indeed, the diverse production methods associated with the broad range of carbon-intensity values approved under the Program underscore that it does not "direct" production processes. *See, supra,* Stmt. of Case, Sec. C; *see also* RJN Exh. G. In any event, as explained above, States may constitutionally set standards for products sold for use within their borders, even if those standards affect the business decisions of firms, including out-of-state firms, doing business in the State.

Second, the body of extraterritoriality cases belies Plaintiffs' view that the dormant Commerce Clause prohibits a State from imposing standards or restrictions on products sold for use in the State, when those standards or restrictions affect out-of-state decisions or conduct. *See* AOB at 47. Plaintiffs' novel legal rule would essentially prevent States from regulating their own markets, invalidating laws like the ones upheld in *Clover Leaf*, *PhRMA*, *Association des Eleveurs*, and *Sorrell*. Plaintiffs' argument relies on isolated phrases from *Carbone*—a case in which the Court struck down a town ordinance, as discriminatory, because, in requiring all solid waste to be processed at a specified facility, it "depriv[ed] competitors, including out-of-state firms, of access to a local market." 511 U.S. at 386. Isolated phrases from that case, which did not involve a claim of extraterritorial regulation, cannot carry the weight Plaintiffs ascribe to them. Indeed, if Plaintiffs were correct that a State may not set standards for products sold in its borders whenever those standards might affect business decisions of out-of-state firms, there would be no need for the *Pike* test to analyze incidental burdens on interstate commerce. *See Clover Leaf*, 449 U.S. at 471 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). Any such burdens on out-of-state firms would be categorically impermissible “extraterritorial regulation,” according to Plaintiffs. That is not the law.[18]

Third, there is also no support in the case law for Plaintiffs’ attempt to limit state authority to “how a product operates in a state,” whatever Plaintiffs mean by this undefined phrase. *See* AOB at 44. In extraterritoriality cases, courts have focused on how the challenged law operates as to wholly out-of-state activity—often, but not always, sales in other States’ markets. *See PhRMA*, 538 U.S. at 669 (comparing law invalidated in *Healy* for regulating sales “in neighboring States” with law upheld in *PhRMA* that regulated no out-of-state sales); *Sam Francis Foundation*, 784 F.3d at 1323 (invalidating application of state law to wholly out-of-state sales); *NCAA*, 10 F.3d at 639 (invalidating Nevada law because it would force NCAA “to conduct its enforcement proceedings,” including those wholly outside Nevada, “according to Nevada law”).

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[18] The existence of the *Pike* test and anti-protectionism principles protect against Plaintiffs’ claims that Oregon’s Program “opens the door to unprecedented state regulation of extraterritorial activity.” *See* AOB at 45. Courts are well-suited to recognize protectionism in the guise of environmental regulation, should a State attempt to use lifecycle analysis to protect local industries. In addition, California has had lifecycle-based carbon-intensity standards in place for transportation fuels since 2011, and Plaintiffs’ parade of horribles has not even arguably materialized.

This Court's decision in *Rocky Mountain* is entirely consistent with all of these cases and forecloses Plaintiffs' extraterritorial challenge to Oregon's Program. The district court's dismissal of that claim should be affirmed.

III. OREGON'S PROGRAM IS NOT PREEMPTED BY EPA'S REFORMULATED GASOLINE RULE

The district court also correctly dismissed Plaintiffs' claim that Oregon's Program is preempted by EPA's 1994 Reformulated Gasoline Rule (RFG Rule) under Section 211(c)(4)(A)(i) of the Clean Air Act. That provision of the Clean Air Act preempts state regulation of a particular characteristic or component of fuel only "if the [EPA] Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive … is necessary and has published his finding in the Federal Register." 42 U.S.C. § 7545(c)(4)(A). Plaintiffs claim that EPA made such a finding regarding methane emissions as part of the RFG Rule. The district court properly rejected this claim because EPA did not make any such finding.

A. EPA Has Not Decided That Controlling Methane Is Unnecessary

The RFG Rule was promulgated pursuant to EPA's mandatory duty, under Section 211(k) of the Clean Air Act, to regulate gasoline in order to reduce emissions of ozone-forming volatile organic compounds (VOCs) and other specified pollutants. 59 Fed. Reg. 7,716, 7,716-7,717 (Feb. 16, 1994) (citing 42 U.S.C. § 7545(k)). To fulfill that duty, EPA needed to complete three discrete steps: (1) determine which VOCs emitted by gasoline combustion contribute to ozone formation, (2) calculate the baseline emissions of those VOCs, and (3) devise a standard for gasoline formulation that would reduce emissions of those VOCs by the required amount. *See* 42 U.S.C. § 7545(k)(1)(A); *see also* 59 Fed. Reg. at 7,716, 7,722-7,723.

Once EPA determined, as part of the first step, that methane emissions did not contribute significantly to ozone formation, the agency had no need to address methane emissions at the second and third steps or to otherwise regulate methane emissions in the RFG Rule. *See id*. at 7,722. Thus, the agency did not take methane into account either in calculating the baseline emissions of ozone-forming VOCs or in devising a gasoline formulation that would reduce ozone-forming emissions. *See id*. at 7,723.

As Plaintiffs acknowledge, EPA's decision "not to regulate methane *in the RFG Rule*," was based entirely on its finding that methane does not contribute to ozone formation. AOB at 53-54 (emphasis added). That finding did not speak to the need to regulate methane emissions in any future fuel regulation at either the state or federal level. And it did not constitute the preemptive determination, under Clean Air Act Section 211(c)(4)(A)(i)

(Clause (i)), "that no control or prohibition of [methane emissions] is necessary."

Plaintiffs' reliance on EPA's brief discussion of preemption under Section 211(c) in the RFG Rule's preamble is misplaced. *See* AOB at 54. That discussion does not contemplate preemption of state controls of methane emissions or any other characteristics not regulated by the RFG Rule. Rather, in that discussion, EPA referred only to preemption of state controls of those fuel characteristics that the RFG Rule actually regulates, namely emissions of ozone-forming VOCs and other pollutants specified by Section 211(k). 59 Fed. Reg. at 7,723. In doing so, EPA was invoking preemption not under Clause (i), but under Section 211(c)(4)(A)(ii) (Clause (ii)). That latter provision, which Plaintiffs do not and cannot allege applies in this case, prohibits States other than California from controlling a "characteristic or component of a fuel or fuel additive, unless the State prohibition or control is identical to the prohibition or control prescribed by [EPA]."[19] EPA underscored its intent to invoke Clause (ii) by expressing concerns about "potentially conflicting regulations" concerning "gasoline production and distribution." 59 Fed. Reg. at 7,809. And EPA invoked its

[19] Under 42 U.S.C. § 7545(c)(4)(B), California is exempt from EPA preemption.

ability to "preempt non-identical State controls," parroting the language of Clause (ii). *Id.*

EPA knows how to make a Clause (i) finding when it wants to do so. Indeed, EPA has used an entirely separate rulemaking process to make that finding. Regulation of Fuel and Fuel Additives; Administrator's Finding That No Control or Prohibition on Maximum Oxygen Content of a Winter Oxygenated Gasoline Program is Necessary Under Section 211(c)(4)(A) of the Clean Air Act as Amended by the Clean Air Act Amendments of 1990, 57 Fed. Reg. 47,849 (Oct. 20, 1992). In that rulemaking, EPA "propose[d] to find under section 211(c)(4)(A)(i) that no control or prohibition on the maximum oxygen content of oxygenated gasoline at or above 2.7% by weight is necessary under section 211(c)(1) of the Act." *Id.* at 47,850. In contrast, in the RFG Rule, EPA did not mention the "no control is necessary" standard, let alone make the "explicit[]" finding required by EPA's regulations. *See* 40 C.F.R. § 80.1(b).[20]

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[20] EPA need not recite "magic words" to find regulation unnecessary, *see* AOB at 55, but it must do more than merely decide "not to regulate." *Cf. Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (holding that "laundry list of reasons not to regulate" greenhouse gases did not equate to decision that statutory criteria for regulation were not satisfied); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It is quite wrong to view that decision [not to promulgate a federal regulation] as the functional equivalent of a
(continued…)

In another context, EPA itself has refused to read a Clause (i) finding into the RFG Rule, noting that the Rule's establishment of controls on fuel oxygen content in some States did not constitute a decision that similar controls in other States were unnecessary. 62 Fed. Reg. 10,690, 10,693 (March 10, 1997). EPA explained that the RFG Rule merely fulfilled the agency's statutory duty to establish fuel oxygen content requirements for certain States, and did not constitute a finding as to whether fuel oxygen requirements were necessary in other States. *Id*.[21]

Finally, even if EPA had made a finding that regulation of methane emissions was not necessary (which it did not), that would not resolve the matter. Oregon's Program regulates carbon intensity of fuels sold for in-state use in order to address climate-change threats, not VOCs to address ozone formation. Plaintiffs cannot plausibly allege that the RFG Rule and Oregon's Program address the same characteristic or component, as would be required for preemption. *See* 42 U.S.C. § 7545(c)(4)(A); *see also* 62 Fed.

(…continued)
regulation prohibiting all States and their political subdivisions from adopting such a regulation.").

[21] EPA has said similar things of other fuel regulations required by Section 211. For example, the agency's establishment of requirements for Reid Vapor Pressure did not constitute a finding that more stringent state regulations were unnecessary. 55 Fed. Reg. 18,005, 18,006 (April 30, 1990).

Reg. 10,690, 10,692 (March 10, 1997) ("[B]oth Congress and the Agency have clearly indicated that EPA's fuel requirements do not preempt states from regulating a specific characteristic or component that the Agency has not addressed."). For one thing, Plaintiffs cannot argue that Oregon is attempting to alter the physical characteristics or components of reformulated gasoline, as established in the RFG Rule, because they allege that carbon intensity is not a physical attribute of fuel.[22] *See* ER 2:187 at ¶ 43. For another, by 1991, EPA had already expressed concern about methane's status as "a major greenhouse gas." 56 Fed. Reg. 24,468, 24,474 (May 30, 1991). EPA's conclusion three years later that methane did not contribute to ground-level ozone formation should not be understood as relevant to, let alone preemptive of, state regulation of methane's other properties—particularly harmful ones EPA itself had already recognized.[23]

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[22] EPA has interpreted the RFG Rule as addressing only a limited set of fuel characteristics. 62 Fed. Reg. 10,690, 10,693 (finding "characteristic or component" should not be read "generally, as in 'oxygen content,' but rather, "specifically, as in 'oxygen content in RFG areas'").

[23] Plaintiffs may claim, as they did below, that distinguishing the control of ozone formation from the control of carbon intensity would lead to a slippery slope where States could pretextually regulate one characteristic or component in order to actually regulate a different characteristic or component already addressed by EPA. Plaintiffs allege no facts that even remotely suggest that any such pretext is at issue here. In any

(continued…)

In sum, the RFG Rule merely fulfilled EPA's duty to establish a gasoline formulation that would limit emissions of ozone-forming VOCs; it did not constitute a finding that it was unnecessary to limit emissions of other pollutants (including methane). Accordingly, there can be no preemption under Section 211(c)(4)(A)(i).

B. Since Its 1994 RFG Rule, EPA Has Indicated that State Low Carbon Fuel Standards, Like Oregon's Program, Are Not Preempted and that Control of Methane Emissions Is Necessary

EPA's actions since promulgating the 1994 RFG Rule confirm that state low-carbon fuel standards like Oregon's Program are not preempted by that Rule or any EPA regulation. As part of EPA's 2010 Renewable Fuel Standard rulemaking (16 years after promulgation of the RFG Rule), one commenter urged EPA to "preempt state programs designed to address carbon content and lifecycle analysis of fuels" including "state low-carbon fuel standards" like Oregon's Program. SER 52. EPA rejected the suggestion that it should preempt regulations like Oregon's. *Id*. at 53. Neither EPA nor the commenter would have engaged in such a discussion if they thought such programs were already preempted by the RFG Rule, as

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(…continued)
event, States may regulate "characteristic[s] and component[s]" other than those preempted by EPA action. *See* 42 U.S.C. § 7545(c)(4)(A).

Plaintiffs claim. The Court should defer to EPA's interpretation of the preemptive effect of its own regulations, and reject Plaintiffs' preemption claim. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

Further, EPA's decision not to include methane in the RFG Rule was based on EPA's finding that methane did not contribute to the problem addressed in the RFG Rule, namely formation of ground-level ozone. But since the 1994 RFG Rule, EPA has repeatedly and emphatically recognized that methane emissions contribute to climate change and pose a threat to public health and welfare. 61 Fed. Reg. 9905, 9906 (March 12, 1996); 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009); 79 Fed. Reg. 1430, 1455 (Jan. 8, 2015); 80 Fed. Reg. 56,593, 56,602-05 (Sept. 18, 2015). Thus, had EPA made a finding that regulation of methane emissions was unnecessary (which it did not), that finding would since have been reversed, at least with respect to methane's contribution to climate change, as the district court noted. ER 1:30.[24] Plaintiffs cannot plausibly claim that EPA's 1994 determination that methane does not contribute to the formation of ground-

[24] Plaintiffs argue that EPA could have decided no control of methane is necessary for some reason other than a lack of danger and that later findings of danger would not overrule such a decision. AOB at 56. But Plaintiffs have not alleged and cannot allege that the RFG Rule contains a Clause (i) preemptive finding as to methane on some basis other than a purported lack of risk to public health or welfare.

level ozone bars States from addressing methane's significant contribution to dangerous, atmospheric greenhouse gases.

The district court correctly dismissed Plaintiffs' preemption claim.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: April 29, 2016

Respectfully submitted,

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*As the filer of this document, I attest that all other parties on whose behalf the filing is submitted concur in the filing's content.

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases pending in this Court.

Dated: April 29, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

April 29, 2016	*/s/ M. Elaine Meckenstock*
Dated	M. Elaine Meckenstock Deputy Attorney General

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 April 29, 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.

April 29, 2016	*/s/ M. Elaine Meckenstock*
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