No. 15-35834

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

JANE O'KEEFE, 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. 15-cv-00467-AA (Hon. Ann Aiken, Chief Judge)

BRIEF OF DEFENDANT-INTERVENORS-APPELLEES OREGON ENVIRONMENTAL COUNCIL, INC., CLIMATE SOLUTIONS, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Defendant-Intervenors-Appellees Oregon Environmental Council, Inc., Climate Solutions, Natural Resources Defense Council, Inc., Sierra Club and Environmental Defense Fund have no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 29th day of April, 2016.

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INTRODUCTION

A third of Oregon's greenhouse gas emissions come from transportation. To help reduce these emissions, Oregon adopted low-carbon fuel standard rules (the "Oregon Clean Fuels Program") that will decrease the carbon intensity of transportation fuels sold for use in Oregon. The Oregon Clean Fuels Program is a critical component of Oregon's comprehensive strategy to reduce its greenhouse gas emissions to limit the harm that climate change threatens to Oregon's people, economy, and environment.

Petroleum industry Appellants American Fuel and Petrochemical Manufacturers, *et al.* ("AFPM") allege that the Oregon Clean Fuels Program discriminates against out-of-state fuels, regulates extraterritorially, and is preempted by a federal rule relating to ground level ozone. But this Court has already rejected many of these claims in upholding California's nearly identical clean fuels program. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *rehearing en banc denied,* 740 F.3d 507, *cert. denied*, 134 S.Ct. 2875 (2014). Like the California rule this Court has already upheld, Oregon's Clean Fuels Program regulates transportation fuels evenhandedly, based solely on differences in the greenhouse gas emissions associated with different fuels, and does not discriminate based on origin nor regulate conduct in other states. Oregon is acting within its traditional sphere of authority to protect its citizens from

harmful pollutants, and the Clean Fuels Program is not preempted by a rule relating to ground level ozone. The district court properly dismissed all of AFPM's claims, and this Court should affirm the district court's dismissal with prejudice.

To avoid duplication, Appellees Oregon Environmental Council, *et al.* adopt by reference the brief of Appellees California Air Resources Board and State of Washington, *see* Fed. R. App. Pro. 28(i), and provide brief supplemental points below.

STATEMENT OF THE CASE

Climate change threatens the health and welfare of Oregon's citizens in many ways. As the Oregon legislature has found, reduced snowpack and water supply will harm Oregon's major agricultural and fishing industries; rising sea levels threaten Oregon's coastal lands and tourism industry; and the increased spread of vector-borne diseases could have devastating impacts on communities throughout the state. *See* Or. Rev. Stat. § 468A.200. Oregon has a legitimate interest in reducing these threats to the health and welfare of its citizens by reducing the greenhouse gas emissions that result from Oregon's consumption of transportation fuels.

Oregon is confronting this challenge head on, beginning with the adoption of ambitious greenhouse gas reduction targets. Pursuant to state legislation, Oregon

is working to reduce statewide greenhouse gas emissions by 10% below 1990 levels by 2020, and at least 75% below 1990 levels by 2050. Or. Rev. Stat. § 468A.205(1). These targets represent the legislature's assessment of the reductions Oregon needs to do its fair share to limit global temperature rise to levels that will avoid the most drastic effects of climate change.

Oregon has recognized that meeting these targets will require a comprehensive approach to reducing emissions across all sectors of the economy. To guide this effort, the state legislature has created and tasked the Oregon Global Warming Commission with developing recommendations for how Oregon should meet the state's targets. Or. Rev. Stat. § 468A.215; *id.* § 468A.260. As the Global Warming Commission's 2015 report to the legislature[1] describes, Oregon's transportation sector is the single largest contributor to the state's greenhouse gas emissions. Report at 17. Energy use for the residential, commercial, and industrial sectors also contributes a large share, and the agricultural sector contributes a smaller but significant share. Report at 17-24.

Oregon has already taken significant steps to reduce its greenhouse gas emissions from the energy sector. Oregon has implemented a renewable portfolio standard, which requires electric utilities to rely on renewable energy sources for

[1] Oregon Global Warming Commission, Biennial Report to the Legislature (2015), *available at* http://www.keeporegoncool.org/view/ogwc-reports (last viewed Apr. 28, 2016). This report is a public record and an official publication.

specified percentages of the power they deliver to customers, and has committed to close the only coal-fired power plant in Oregon by 2020. Report at 8. *See also* Or. Rev. Stat. § 469A.050. Most recently, in legislation signed into law on March 8, 2016, *see* SB 1547, Or. Laws 2016, Oregon has committed to end its reliance on imported coal-fired power for electric generation entirely, and to increase the percentage of electricity generated from renewable resources to 50% by 2040. These steps will substantially reduce Oregon's greenhouse gas emissions from the energy sector, but as the Global Warming Commission found, Oregon must reduce emissions from all sectors of the economy to meet its targets.

To rein in its greenhouse gas emissions, Oregon must address the transportation sector. As the Oregon Transportation Commission has found, to meaningfully reduce emissions from that sector, Oregon must implement measures that reduce the carbon intensity of transportation fuels, reduce vehicle miles traveled, and encourage the development of more fuel-efficient vehicles. *See* SB 1059, Ch. 85, Or. Laws 2010 (directing the Transportation Commission to develop a statewide transportation strategy on greenhouse gas emissions); Strategy at 11.[2] Only by making progress on all of these fronts – cleaner fuels, smarter vehicles,

[2] Oregon Department of Transportation, Oregon Statewide Transportation Strategy (Mar. 20, 2013), *available at* http://www.oregon.gov/ODOT/TD/OSTI/pages/STS.aspx (last viewed Apr. 28, 2016). This report is a public record and an official publication.

and fewer miles traveled – will Oregon be able to reduce emissions enough to reach its targets. *See* Strategy at 11 n.1.

The Oregon Clean Fuels Program will increase reliance on cleaner, lower-carbon transportation fuels and is a critical step toward reducing Oregon's emissions from the transportation sector. The Program was adopted in 2015 at the direction of the legislature, *see* SB 324, §§ 2-3, Or. Laws 2015, and is closely modeled on a similar rule adopted in California, *see* Brief of Appellees California Air Resources Board and State of Washington ("CARB Br.") at 6-14. Like the California rule, the Oregon Clean Fuels Program assigns transportation fuels a carbon intensity score based on the emissions associated with a fuel's entire lifecycle, including production, transportation, distribution and consumption, calculated using the widely acclaimed and peer-reviewed "GREET" modeling tool. *See id*. Producers and importers of transportation fuels must meet an average annual carbon intensity limit that declines over time, either by reducing the carbon intensity of their fuels or by purchasing credits from importers or producers of lower-carbon fuels. *See id*. The Oregon Program will reduce the carbon intensity of transportation fuels sold for use in the state by 10% over the course of a decade, leading to meaningful reductions from the sector that contributes the single largest share to Oregon's greenhouse gas emissions.

SUMMARY OF ARGUMENT

Oregon is pursuing a comprehensive program to reduce its greenhouse gas emissions, and the Oregon Clean Fuels Program is a critical component of the state's strategy to reduce emissions from the transportation sector. The Oregon Clean Fuels Program regulates evenhandedly, distinguishing between fuels based on their lifecycle greenhouse gas emissions. As this Court has already held in rejecting AFPM's challenge to the California rule on which Oregon's Program is based, states have a clear and legitimate interest in reducing the greenhouse gas emissions associated with transportation fuels, and distinguishing between fuels based on their lifecycle carbon intensity is neither discriminatory nor impermissible extraterritorial regulation. *See Rocky Mountain*, 730 F.3d 1070.

AFPM's challenges to the Oregon Clean Fuels Program are largely foreclosed by this Court's precedent in *Rocky Mountain*. The constitutional challenges that this Court has not yet addressed lack merit for the same fundamental reason: the Oregon Program regulates evenhandedly, based on neutral principals, and does not discriminate based on origin.

AFPM's argument that Oregon's program is preempted rests upon an obvious mischaracterization of the relevant federal statute and of an EPA determination that was explicitly limited to whether methane causes ground-level ozone pollution. Oregon's actions to protect the health and welfare of its citizens

are well within its traditional sphere of authority and the federal government has not acted to displace the State's powers. This Court should affirm the district court's dismissal of each of AFPM's claims.

ARGUMENT

The Oregon Clean Fuels Program does not facially discriminate against interstate commerce, and AFPM's arguments to the contrary are foreclosed by this Court's precedent. This Court held in *Rocky Mountain* that regulating transportation fuels based on their scientifically calculated lifecycle carbon intensity is evenhanded and non-discriminatory. 730 F.3d at 1089-90. This Court further found that California's low-carbon fuel standard does not isolate California nor does it protect in-state producers against out-of-state competition. *See id.* at 1090-97. The Oregon Program, like the California rule on which it is based, regulates transportation fuels evenhandedly, and does not isolate Oregon nor protect in-state industry from out-of-state competition. *See* CARB Br. at 23-36, 38-45. Indeed, like the California rule, under Oregon's Program it is out-of-state producers that receive the most favorable treatment – for example, there are numerous Midwestern ethanol fuel producers and Louisiana biodiesel fuel producers with lower carbon intensity values than their Oregon counterparts. *See id.* at 13-14, 30-31. AFPM does not seriously attempt to distinguish the Oregon Program from the California rule upheld in *Rocky Mountain*, and that decision

forecloses their facial discrimination arguments here.

AFPM's claim that the Oregon Clean Fuels Program is motivated by a discriminatory purpose fares no better. Just like its failed attempt to make this argument as to California's program, AFPM relies solely on cherry-picked statements from state officials that, when properly viewed in their complete context, instead support the conclusion that the rule's purpose is to reduce greenhouse gas emissions. *See* CARB Br. at 36-38; *Rocky Mountain*, 730 F.3d at 1100 n.13. Viewing the Oregon Program in the context of the State's extensive efforts to reduce its greenhouse gas emissions from all sectors of the economy further undermines AFPM's claims of discriminatory purpose. *See supra* at pp. 2-4. The Oregon Clean Fuels Program is one piece of a comprehensive and longstanding state effort to reduce greenhouse gas emissions, motivated by Oregon's legitimate interest in protecting its citizens from the worst impacts of climate change.

AFPM's claim that the Oregon Clean Fuels Program regulates extraterritorially is also foreclosed by this Court's decision in *Rocky Mountain*. Like California's rule, the Oregon Program neither prohibits the sale of any particular fuel, nor attempts to dictate the price of any fuel in any other state. AFPM appears to believe that any in-state regulation that sends a price signal to out-of-state producers is impermissible, a theory that would radically reduce states'

abilities to regulate activity within their borders. Supreme Court precedent provides no support for this expansive new theory, and this Court has already rejected it, as even AFPM concedes. *See* CARB Br. at 45-57.

Finally, AFPM's argument that the Oregon Clean Fuels Program is preempted by a federal rule concerning ground level ozone likewise fails. Oregon is acting within its traditional sphere of authority in regulating harmful greenhouse gas pollution to protect the health and welfare of its citizens, and this Court should not lightly assume that federal law displaces that authority. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Under the Clean Air Act, state regulation of a characteristic or component of a fuel is preempted only if EPA either affirmatively regulates that characteristic or component, or affirmatively finds that no regulation is necessary. 42 U.S.C. § 7545(c)(4)(A). In the rule AFPM claims has preemptive effect, EPA regulated pollutants that are precursors to ground level ozone. Because methane is not such a precursor, it was not included in the rule. *See* CARB Br. at 58-63. AFPM attempts to transform this logical omission into an affirmative finding that no regulation of methane for any purpose is necessary, but nothing in EPA's ground level ozone rule supports such a conclusion. Nor could such a strained reading of the ground level ozone rule be squared with EPA's repeated findings that methane poses grave risks as a potent greenhouse gas. *See id.* at 65. EPA's acknowledgement that methane does not

contribute to ground level ozone is a far cry from an affirmative, preemptive finding that no regulation of methane is necessary.

CONCLUSION

For the foregoing reasons and for the reasons articulated in the brief of Appellees California Air Resources Board, *et al.*, this Court should affirm the district court's dismissal of AFPM's complaint with prejudice.

Dated: April 29, 2016 Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendant-Intervenors-Appellees hereby state that to the best of their knowledge, there are no related cases pending in this Court.

Respectfully submitted this 29th day of April, 2016.

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

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