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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, **AMERICAN TRUCKING ASSOCIATIONS, INC.**, and **CONSUMER ENERGY ALLIANCE**,

Plaintiffs,

v.

JANE O'KEEFFE, **ET AL.**,

Defendants,

and

CALIFORNIA AIR RESOURCES BOARD, ET AL.,

Defendant-Intervenors.

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Plaintiffs' Complaint more than adequately pleads facts showing that Oregon's Clean Fuels Program (the "Oregon Program") violates the United States Constitution and is invalid under federal law. In evaluating the motions to dismiss and for judgment on the pleadings (collectively, the "Motions") filed by Defendants and their Intervenors (collectively, "Defendants"), the Complaint's allegations are taken as true and construed in the light most favorable to Plaintiffs. *See Taylor v. Yee*, 780 F3d 928, 935 (9th Cir 2015); *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F3d 938, 945 (9th Cir 2014). The Motions should be denied because the Complaint states claims for relief under all four counts advanced by Plaintiffs.

On all counts, the Complaint advances allegations sufficient to rebut Defendants' arguments. *First*, the Oregon Program violates the Commerce Clause of the United States Constitution by impermissibly discriminating against out-of-state transportation fuels and in favor of in-state transportation fuels. Compl. ¶¶ 50-84, 107-119. *Second*, the Oregon Program's regulation of the life cycle of transportation fuels—including greenhouse gas ("GHG") emissions associated with their production and transport before their entry into Oregon—violates the Commerce Clause's prohibition on extraterritorial regulation, as well as the federal structure of the United States Constitution. *Id.* ¶¶ 85-90, 120-130. *Third*, the Oregon Program controls methane emissions, and is therefore expressly preempted because the Environmental Protection Agency ("EPA") has determined that methane should not be regulated under Section 211(c)(1) of the Clean Air Act (the "CAA"). *Id.* ¶¶ 91-98, 131-136. *Finally*, the Oregon Program conflicts with and frustrates the purposes of Section 211(o) of the CAA because it is designed to close Oregon as a market for certain renewable fuels, contrary to that statute's command. *Id.* ¶¶ 99-106, 137-145.

Defendants and their Intervenors disagree with the Complaint's allegations and advance a laundry list of arguments for their dismissal. As to discrimination under the

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Commerce Clause, Defendants simply ignore the Complaint's allegations and insist that the Oregon Program is not discriminatory on its face, in its purpose, or in its effect, notwithstanding the detailed allegations set forth in the Complaint.[1] They rely heavily on the Ninth Circuit's decision in *Rocky Mountain Farmers Union v. Corey*, 730 F3d 1070 (9th Cir 2013), *cert denied*, 134 S Ct 2875 (2014), addressing similar discrimination claims at the summary judgment stage with regard to the California Low Carbon Fuel Standard ("LCFS"), Or. Mot. 13; State Mot. 10, but that decision did not address this case's administrative record or the distinct circumstances concerning the adoption and implementation of the Oregon Program. Defendants also argue that a discriminatory purpose is not enough to support Plaintiffs' claims, Or. Mot. 13, but under governing Supreme Court case law, a discriminatory purpose standing alone makes a state law virtually per se invalid. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 US 263, 270 (1984). In any event, Plaintiffs plead both discriminatory purpose and effect. *See* Compl. ¶¶ 57-84. Nor are Plaintiffs' claims premature, Or. Mot. 14-16; State Mot. 11, because the Oregon Program's intended effects are clear, and delaying resolution would force regulated parties to suffer under an unconstitutional law while this case is pending.

Second, with regard to the claim of impermissible extraterritorial regulation, Defendants again rely almost exclusively on the Ninth Circuit's decision in *Rocky Mountain*, 730 F3d 1070. Or. Mot. 16-18; State Mot. 11-14; NGO Mot. 3. Unlike in *Rocky Mountain*, Plaintiffs here have also alleged that the Oregon Program impermissibly violates principles of interstate federalism inherent in the Constitution, quite apart from the Commerce Clause violations. The Ninth Circuit did not address these claims in *Rocky Mountain*, and here there is

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[1] *See* State Defs.' Mot. to Dismiss and Mem. in Supp., *Am. Fuel & Petrochemical Mfrs., Am. Trucking Ass'ns, Inc. & Consumer Energy Alliance v. O'Keeffe*, No. 15-cv-00467 (D Or June 5, 2015), ECF No. 51 ("Or. Mot."); Def.-Intervenors Cal. Air Res. Bd.'s and State of Wash.'s Mot. to Dismiss, *Am. Fuel & Petrochemical Mfrs., Am. Trucking Ass'ns, Inc. & Consumer Energy Alliance v. O'Keeffe*, No. 15-cv-00467 (D Or June 5, 2015), ECF No. 52 ("State Mot."); Conservation Def.-Intervenors' Mot. for J. on the Pleadings, *Am. Fuel & Petrochemical Mfrs., Am. Trucking Ass'ns, Inc. & Consumer Energy Alliance v. O'Keeffe*, No. 15-cv-00467 (D Or June 17, 2015), ECF No. 54 ("NGO Mot.").

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no question that the Oregon Program seeks to regulate out-of-state economic activity—the emissions of greenhouse gases associated with the production and transport of transportation fuels occurring wholly outside Oregon. Furthermore, Plaintiffs respectfully disagree with the extraterritoriality ruling in *Rocky Mountain*, where the Ninth Circuit held that the California LCFS did not violate the Commerce Clause's prohibition against extraterritorial regulation and present that claim in the Complaint to preserve it for further review.[2]

Third, Defendants argue that the Oregon Program is not expressly preempted because the Oregon Program is not a control or prohibition of fuels within the meaning of Section 211(c)(4)(A) of the CAA; that EPA has not triggered preemption of the Oregon Program by declining to regulate methane emissions under Section 211(c)(1); and that EPA's greenhouse gas Endangerment Finding signals a change in EPA's position with regard to regulation of methane. Or. Mot. 22-26; State Mot. 15-16; NGO Mot. 6. The Complaint, however, alleges that the Oregon Program is a control under Section 211(c), and the Ninth Circuit has concluded that the California LCFS, on which the Oregon Program was modeled, is in fact a control or prohibition of fuels under the CAA. *Rocky Mountain*, 730 F3d at 1106. Further, the Complaint alleges that the Oregon Program regulates methane emissions, whereas EPA has expressly concluded that no regulation of methane emissions is necessary under Section 211(c), thus triggering express preemption under Section 211(c)(4)(A). *See infra* at 9, 33-35. EPA's Endangerment Finding was made under a different section of the CAA and is thus irrelevant to express preemption under Section 211(c). The Complaint's allegations thus state a claim that the Oregon Program is expressly preempted by federal law because the Oregon Program regulates

[2] Indeed, six judges of the Ninth Circuit agreed that the California LCFS was an impermissible extraterritorial regulation. *Rocky Mountain Farmers Union v. Corey*, 740 F3d 507, 517 (9th Cir 2014) (mem.) (M. Smith, J., joined by O'Scannlain, Callahan, Bea, Ikuta, and N.R. Smith, JJ., dissenting from denial of rehearing en banc) (stating that California's regulations "plainly have extraterritorial reach, as they seek to influence out-of-state land use decisions and production methods").

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methane emissions notwithstanding EPA's decision that such regulation is unnecessary. *See* Compl. ¶¶ 41-42, 91-98, 131-136.

Finally, Defendants argue that the Oregon Program cannot conflict with the CAA because it contains a savings clause and because, in fact, the Oregon Program does not frustrate the goals underlying CAA Section 211(o). Or. Mot. 26-35; State Mot. 18-24; NGO Mot. 6. These arguments should be rejected because they ask the Court to disregard the Complaint's factual allegations and the administrative record, which reflect Oregon's prediction that the Oregon Program would eliminate the use of Midwest ethanol in Oregon in direct contravention of Congress's commands under Section 211(o) of the CAA. Likewise, the existence of a savings clause, even if it applied, would not eliminate the operation of conflict-preemption principles, as the Supreme Court has repeatedly explained. *See Sprietsma v. Mercury Marine*, 537 US 51, 65 (2002) (savings clause does not affect "the ordinary working of conflict pre-emption principles"); *Geier v. Am. Honda Motor Co.*, 529 US 861, 869 (2000) (explaining that "the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles").

II. BACKGROUND

A. The Oregon Program

The Oregon Program was authorized by Oregon's legislature and Governor and implemented through regulations by Oregon's Department of Environmental Quality ("DEQ"). Compl. ¶¶ 34-38. The Oregon Program requires fuel providers to reduce the average "carbon intensity" of the transportation fuels they import or produce in Oregon by 10 percent by the year 2025. *Id.* ¶ 50. Reductions in average carbon intensity are mandated to begin in 2016; the permitted average carbon intensity is capped at a lower amount each year through 2025. *Id.* Fuel providers may meet these carbon-intensity caps by blending low-carbon biofuels with their gasoline or purchasing credits from providers of "low-carbon" fuels. *Id.* ¶¶ 55-57.

1. The Oregon Program depends on the concept of carbon intensity. Carbon intensity is not a measure of how much carbon a fuel contains. Instead, it is defined as "the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO2e per MJ)." Compl. ¶ 40. In other words, carbon intensity measures the emission of all greenhouse gases over the entire course of the fuel's production, transport in interstate and foreign commerce, and use, including "feedstock generation or extraction, production, distribution, and combustion of fuel by the consumer." Compl. ¶ 43. As used in the Oregon Program, the term "greenhouse gas" includes, *inter alia*, carbon dioxide and methane. *Id.* ¶ 41. Under the Oregon Program's regulations, a fuel's carbon intensity is calculated based in part on its methane emissions. *See id.* ¶¶ 41-42.

Because a fuel's carbon intensity is assigned based on greenhouse gas emissions associated with the location of its production and distribution (in addition to emissions associated with its combustion), the Oregon Program assigns different carbon intensities to fuels that are physically and chemically identical. Compl. ¶ 43. The Oregon Program thus regulates *how* a fuel is produced and brought to the Oregon market. *Id.* Because many of the fuels to which the Oregon Program applies are produced outside Oregon, the Oregon Program thus regulates the production and transport of fuels in other states and other countries. *See, e.g., id.* ¶ 69.

2. In addition to imposing a cap on the average carbon intensity of fuels for regulated parties, the Oregon Program also creates opportunities for low-carbon fuel producers to generate credits. Fuels provided in Oregon that are below the carbon-intensity cap will generate credits. *See* Compl. ¶ 53. These credits can be sold to fuel producers, which may use them to bring their average carbon intensities below the cap. *Id.* ¶ 54.

By capping fuel producers' average carbon intensities, the Oregon Program makes fuels with lower carbon intensities (*e.g.*, those produced in Oregon) more valuable than fuels with higher carbon intensities (*e.g.*, those produced outside Oregon). That is because producers whose fuels have carbon intensities higher than the cap—such as conventional gasoline and diesel produced outside Oregon, *see* Compl. ¶¶ 55-56—must reduce their average carbon intensity, which may be accomplished by buying low-carbon fuel to blend with their conventional fuel or by buying credits from low-carbon fuel producers. *Id.* ¶¶ 55-57. Low-carbon fuel becomes more valuable because it can help bring a fuel producer into compliance with the Oregon Program's cap, while petroleum-based fuels become less valuable because their carbon intensity exceeds the average carbon-intensity cap under the Oregon Program. *See id.* ¶¶ 55-57, 60.

3. Oregon officials responsible for the Oregon Program made very clear that they supported it because they wanted to foster Oregon biofuels production at the expense of out-of-state refiners. For instance, the Governor's Office explained that "[i]n 2012, Oregonians sent more than $6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market". Compl. ¶ 74 (internal quotation marks omitted). The Governor's objective in supporting the Oregon Program was "to try to spark this home-grown industry that can capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy." *Id.* ¶ 76. Oregon's legislators agreed with the Governor's objectives: to "encourag[e] innovating investments," "reduc[e] [Oregon's] dependence on petroleum and channe[l] those dollars into Oregon's economy," and "help support the growing green energy sector [and] power [Oregon's] economy." *Id.* ¶ 79.

DEQ agreed with Oregon's Governor and legislators. The agency explained that the Oregon Program would "result[] in an influx of economic activity, including growth in employment, income and gross state product," and that "[p]ositive economic impacts in Oregon stem from importing less petroleum fuel." Compl. ¶ 82. Indeed, one adviser to DEQ frankly acknowledged that "the whole intent of the [Oregon Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state." *Id.* ¶ 84.

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B. The CAA

Title II of the CAA regulates mobile sources of air pollution, including fuels. 42 USC § 7521 *et seq*. Section 211 of the CAA authorizes EPA to regulate fuels, thereby controlling vehicle emissions while ensuring a nationally uniform market for fuels. *Id.* § 7545. Section 211(a) gives EPA the authority to require registration of any fuel or fuel additive. *Id.* § 7545(a). Section 211(c) allows EPA to "control or prohibit" a fuel or fuel additive if the "emission product" of the fuel "may reasonably be anticipated to endanger the public health or welfare." *Id.* § 7545(c)(1).

Section 211(c)(4)(A) contains an express preemption provision, which provides:

> (A) Except as otherwise provided in subparagraph (B) or (C), no State * * * may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—
>
> (i) if the [EPA] has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published [that] finding in the Federal Register, or
>
> (ii) if the [EPA] has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the [EPA]. Id. § 7545(c)(4)(A).

EPA has implemented Sections 211(c)(1) and (4) in, *inter alia*, a national reformulated gasoline standard that regulates emission of volatile organic compounds ("VOCs"). *See Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 Fed Reg 7716 (Feb. 16, 1994). In this rule (the "RFG rule"), EPA decided that methane would be excluded from regulation. *Id.* at 7722-23. Specifically, EPA provided that methane emissions would be excluded from analysis when assessing "the performance of fuels meeting the VOC emission requirements," *id.* at 7723, and from EPA's formulas for calculating VOC emissions, *see id.* at 7816, 7826.

Another provision of Title II of the CAA, Section 211(o), establishes a "renewable fuel program." This renewable fuel standard ("RFS") program was initially mandated by the Energy Policy Act of 2005, Pub L No. 109-58, 119 Stat 594, which was later modified by the Energy Independence and Security Act of 2007 (the "EISA") § 201 et seq., Pub L No. 110-140, 121 Stat 1492. Section 211(o)(2) requires "that transportation fuel sold or introduced into commerce in the United States * * * on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel" mandated by the EISA. EISA § 202(a)(1), 42 USC § 7545(o)(2). The categories of advanced biofuel, cellulosic biofuel, and biomass-based diesel are defined in terms of their "lifecycle greenhouse gas emissions, as determined by the Administrator" of EPA. 42 USC § 7545(o)(1)(B).

Section 211(o) exempts certain existing biofuel production plants (that were either in production or had completed construction before certain specified deadlines) from the EISA's requirements for demonstrating reduced GHG lifecycle emissions. 42 USC § 7545(o)(2)(A)(i). The EISA also provides that EPA's regulations may not "restrict geographic areas in which renewable fuel may be used." *Id.* § 7545(o)(2)(A)(iii)(II)(aa). As discussed below, the Oregon Program is in direct conflict with these federal laws and is therefore preempted.

C. The Complaint

The Complaint sets forth four claims for declaratory and injunctive relief, each of which challenges the Oregon Program under federal law.

First, the Complaint alleges that the Oregon Program violates the Commerce Clause because it discriminates against transportation fuels imported into Oregon through the assignment of a carbon-intensity score for transportation fuels that—on its face and in its purpose and effect—discriminates in favor of in-state transportation fuels over imported transportation fuels, including petroleum-based fuels (none of which is produced in Oregon). Compl. ¶¶ 50-84. The Oregon Program is designed to shift revenue from out-of-state producers of gasoline and diesel to in-state "biofuel producers, feedstock growers, a burgeoning electric vehicle industry, and propane, natural gas, and other innovative fuel companies ready to invest in the state." *Id.* ¶ 18.

The Commerce Clause prohibits Oregon from adopting a program that discriminates in favor of its own economic interests and against those of out-of-state competitors. *See Bacchus*, 468 US at 273; *Hunt v. Wash. State Apple Adver. Comm'n*, 432 US 333, 348-51 (1977). The Complaint alleges, Compl. ¶¶ 50-70, that the Oregon Program impermissibly puts transportation fuel produced out of state at a "commercial disadvantage" vis-à-vis transportation fuel produced in Oregon. *New Energy Co. of Ind. v. Limbach*, 486 US 269, 275 (1988). The statements by Oregon officials and materials on which they relied in creating the Oregon Program all confirm that the Oregon Program will have the intended discriminatory effect. *See* Compl. ¶¶ 58, 76, 78-79, 84.

Second, the Complaint alleges that the Oregon Program achieves its discriminatory purpose and effect by regulating activity that occurs wholly outside Oregon—the emission of greenhouse gases associated with the production and transport of transportation fuels in other states and countries—through application of a "life-cycle" analysis. Compl. ¶¶ 85-90. By doing so, the Oregon Program seeks to extend Oregon's regulatory reach beyond its borders in violation of the Commerce Clause and the interstate federal structure of the United States Constitution. *Id.* ¶¶ 120-130. Defendants cannot project Oregon's regulatory authority to control conduct outside Oregon's borders. *See Healy v. Beer Inst., Inc.*, 491 US 324, 336 (1989); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 US 383, 393 (1994).

Third, the Complaint alleges that (1) like the California LCFS on which it was modeled, the Oregon Program is a control of fuels under Section 211(c) of the CAA, Compl. ¶ 91-93; (2) the Oregon Program regulates the emission of methane, *id.* ¶ 94; and (3) EPA has expressly found regulation of methane emissions under Section 211(c) unnecessary, *id.* ¶¶ 95-98. As a result, the Oregon Program is expressly preempted by the CAA because it regulates methane emissions for the purpose of controlling vehicle emissions even though EPA has determined that there should be no control of methane emissions under Section 211(c)(1) of the CAA. *Id.* ¶ 136.

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Finally, the Complaint alleges that the Oregon Program conflicts with Section 211(o) of the CAA because it "is designed to close Oregon as a market for certain renewable fuels (in particular, certain forms of corn ethanol) produced in existing refineries necessary to meet national renewable fuel standards set by Congress and implemented by EPA." Compl. ¶ 139. The Oregon Program penalizes ethanol produced in "existing" biofuel production plants in the Midwest so that they will no longer be able to export their fuels to Oregon. *Id.* ¶¶ 106, 139. Indeed, each of the compliance scenarios relied on by Defendants predicts that importation of ethanol from existing Midwestern ethanol plants will end by 2019.[3] As a result, the Complaint states a claim that the Oregon Program is preempted because it conflicts with and stands as an obstacle to the accomplishment and execution of the purposes and objectives of the CAA. *See Geier*, 529 US at 878-80.

III. STANDARD OF REVIEW

The governing legal standards are well settled. This Court will grant a motion to dismiss only if "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Taylor*, 780 F3d at 935. "The Court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.* (internal quotation marks and citation omitted). The Court also "draw[s] all reasonable inferences in favor of the nonmoving party," *Retail Prop. Trust*, 768 F3d at 945, and "resolve[s] all doubts in the [nonmovant's] favor," *Hebbe v. Pliler*, 627 F3d 338, 340 (9th Cir 2010). The same standards apply to the NGO Intervenors' motion for judgment on the pleadings. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F3d 1047, 1054 n.4 (9th Cir 2011) ("Rule 12(c) is functionally identical to Rule 12(b)(6)") (internal quotation marks and citation

[3] *See* ICF Int'l, Final Report, Task 3—*Updated Compliance Scenarios* 20, 26 (Aug. 2014), *available at* http://www.deq.state.or.us/aq/cleanFuel/docs/ComplianceScenarios_ICF.pdf (tables showing that Oregon's imports of ethanol from Midwestern ethanol plants will decrease from 130 million gallons in 2016 to 0 gallons in 2019 and beyond).

omitted).[4] Under these standards, the motions to dismiss filed by Defendants and the State Intervenors and the motion for judgment on the pleadings filed by the NGO Intervenors should be denied.

IV. ARGUMENT

A. The Complaint Sufficiently Alleges a Claim for Discrimination Under the Commerce Clause.

The "Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, 502 US 437, 454 (1992). This limitation on state authority "presumes a national market free from local legislation that discriminates in favor of local interests," *C & A Carbone, Inc.*, 511 US at 393, and forecloses any state's "attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade," *Chem. Waste Mgmt., Inc. v. Hunt*, 504 US 334, 339-40 (1992). State regulations thus may not discriminate against interstate commerce by "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 US 93, 99 (1994); *see also New Energy Co. of Ind.*, 486 US at 275 (Commerce Clause precludes discrimination that puts out-of-state products at "commercial disadvantage").

A discriminatory state law is "virtually *per se* invalid," *Or. Waste Sys.*, 511 US at 99-101, and must be struck down unless it satisfies "strict scrutiny," *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F3d 521, 524 (9th Cir 2009). Strict scrutiny is satisfied only if the state "can 'sho[w] that [the state law] advances a legitimate local

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[4] The Court may properly consider documents incorporated by reference in the Complaint in ruling on the motion to dismiss. *See United States v. Ritchie*, 342 F3d 903, 908 (9th Cir 2003). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Id.* Furthermore, "[j]udicial notice is appropriate for records and reports of administrative bodies." *United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F3d 943, 955 (9th Cir 2008) (internal quotation marks and citation omitted) (approving judicial notice of study as report of administrative body).

purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys.*, 511 US at 100-101 (internal quotation marks and citation omitted). To be "legitimate," the local purpose must be "unrelated to economic protectionism." *Id.* at 106. A state law "can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, [and] (c) in practical effect." *Nat'l Ass'n of Optometrists*, 567 F3d at 525.

The Oregon Program is invalid because it discriminates in favor of Oregon's biofuels industry and against out-of-state petroleum-based and ethanol fuels.

1. <u>The Oregon Program Discriminates in Its Purpose and Effect</u>.

a. *The Oregon Program's Purpose Is Discriminatory.*

When a state law is enacted with the purpose of discriminating against interstate commerce, that law is subject to strict scrutiny. *See, e.g.*, *Bacchus Imports, Ltd.*, 468 US at 270 ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of * * * discriminatory purpose"); *Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 471 n.15 (1981) (same). The record is rife with evidence compelling the conclusion that the Oregon Program was enacted to discriminate in favor of Oregon's "home-grown" biofuels industry against the petroleum and ethanol industries of other states. Compl. ¶¶ 71-84.

Oregon lawmakers made no secret of their purpose of fostering Oregon biofuels production at the expense of out-of-state fuel refiners. The Oregon Program was a centerpiece of Oregon's "ten-year energy action plan." Compl. ¶ 72. In 2014, the Governor's Office explained that "[i]n 2012, Oregonians sent more than $6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market." *Id.* ¶ 74. The Governor's Office further explained that the Oregon Program's purpose was to shift revenue away from out-of-state refineries to Oregon's own fuel producers: "There are no oil refineries in Oregon but there are biofuel producers, feedstock growers, a burgeoning electric vehicle industry, and propane, natural gas, and other innovative fuel companies ready to invest in the state if they have regulatory certainty." *Id.* ¶ 75. The Governor touted the "opportunity to spark

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a homegrown clean fuels industry right here," and committed "to using every tool at [his] disposal to support 21st century industries and innovation, and to attract investment and new jobs to [Oregon]." *Id.* ¶ 76.[5]

Time and again, the Governor explained that the Oregon Program was designed to steer revenues and investment away from out-of-state refiners and into Oregon's economy by "try[ing] to spark this home-grown industry" to "capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy." Compl. ¶ 76. Again, the Governor highlighted that Oregon had "only scratched the surface of the potential for alternative fuels to create a homegrown industry to tap into the billions we spend on gasoline every year" and that the state "should keep more of those dollars in Oregon to grow, produce, and deliver fuels that benefit our communities with new good-paying jobs." *Id.* ¶ 77. Indeed, the Governor explained that rather than "export[ing] fuel dollars out of state, out of the country and out of Oregon," Oregonians should "invest in clean fuels here at home." *Id.* ¶ 78.

State lawmakers in Oregon agreed with the Governor. According to Senator Chris Edwards, the chief sponsor of the bill that repealed the Oregon Program's sunset provision and thus paved the way for the latest regulation in the Oregon Program, *see* Compl. ¶ 38, the Oregon Program was designed to "create jobs right here at home." *Id.* ¶ 79. Senators Beyer and Rosenbaum agreed. *See id.* The Oregon Senate Majority Office touted the Oregon Program's economic benefits to Oregon, explaining that the Oregon Program

[5] The Complaint attributes this quotation to a news article, *see* Compl. ¶ 76; in fact, the press release cited in the preceding paragraphs of the Complaint contains this quotation from the Governor. *See id.* ¶¶ 74-75; Press Release, Or. Governor's Office, *Governor Kitzhaber Announces New Clean Fuels Initiative* (Feb. 13, 2014), *available at* http://us2.campaign-archive1.com/?u=41b11f32beefba0380ee8ecb5&id=a4eced804d. Press Release, Or. Sen. Majority Office, *Senate Takes Historic Step Advancing Oregon's Economy and Fuel Alternatives* (Feb. 17, 2015), *available at* https://www.oregonlegislature.gov/edwardsc/ Documents/Press%20Release_Caucus_CleanFuels_2-17-15.pdf; *see* Compl. ¶ 79.

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> "give[s] investors and entrepreneurs the certainty they need to expand production of alternative fuels and build additional facilities. That means new jobs in both rural and urban communities across Oregon. The Clean Fuels industry in Oregon has already generated hundreds of millions of dollars in economic activity and created thousands of jobs. Independent analysis has found that extending the program could save Oregonians more than $1.6 billion in fuel costs, create up to 29,000 jobs, and add $2.6 billion to Oregonians' personal income."
> Press Release, Or. Sen. Majority Office, *Senate Takes Historic Step Advancing Oregon's Economy and Fuel Alternatives* (Feb. 17, 2015), *available at* https://www.oregonlegislature.gov/edwardsc/Documents/Press%20Release_Caucus_CleanFuels_2-17-15.pdf; *see* Compl. ¶ 79.

Discrimination against out-of-state fuel producers and in favor of Oregon's in-state biofuels industry pervaded the rulemaking process that implemented the Oregon Program. A member of a committee convened to advise DEQ during the rulemaking process complained that "[t]he state currently exports over $5 billion every year for transportation fuels," and explained that the Oregon Program "provides a market incentive for locally produced fuels" and "establishes a strong incentive policy for investment and new business in Oregon." Compl. ¶ 83. Another committee member acknowledged that "the whole intent of the [Oregon Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state." *Id.* ¶ 84; *see also* DEQ, Final Report, *Oregon Low Carbon Fuel Standards: Advisory Committee Process and Program Design* ("Advisory Final Report"), App. A, *Summary of Advisory Committee Input* 136 (Jan. 25, 2011), *available at* http://www.deq.state.or.us/aq/committees/docs/lcfs/appendixA.pdf ("[N]one of the petroleum used in Oregon is produced in the state, so the negative economic impacts that would fall out from an LCFS would be felt in Washington and other states.").[6] Yet another member agreed that the Oregon Program "will help create a market for new fuels that will create new businesses related to production, distribution, and refueling" and will "reduce demand for oil," and

[6] The Complaint extensively relied on the Advisory Final Report and its exhibits; they were cited at Compl. ¶¶ 33, 42, 43, 81, 83, 84, 86, and 89. They may be considered in resolving the pending motions, *see Ritchie*, 34 F3d at 908, and are subject to judicial notice as "reports of [an] administrative bod[y]." *14.02 Acres of Land*, 547 F3d at 955.

explained that "Oregon's proximity to [the California and Washington low-carbon fuels] markets gives low-carbon fuel producers an advantage to exporting to these other markets, especially California's large fuels market." *Id.* at 113.

During the course of developing the Oregon Program, DEQ commissioned a study to analyze the Oregon Program's economic effects. The study confirmed the conclusion reached by the advisory committee members: "Positive economic impacts in Oregon stem from the importation of less petroleum fuel and its replacement with Oregon produced products." DEQ, Advisory Final Report, App. D, *Economic Impact Analysis of the Low-Carbon Fuel Standard Rule for the State of Oregon* 28 (Jan. 25, 2011), *available at* http://www.deq.state.or.us/aq/committees/docs/lcfs/appendixDeconimpact.pdf ("Economic Impact Analysis"). The study likewise observed that "Oregon produces no petroleum fuel in-state, and so the losses incurred to the petroleum sector would be felt elsewhere in the country." *Id.* at 32.

DEQ officials agreed with the assessment of their advisers and the Economic Impact Analysis. In the analysis accompanying the draft rule that DEQ submitted for approval to Oregon's Environmental Quality Council, the agency explained the regulation's economic impacts: (1) "To achieve compliance, significant investment in infrastructure and fuel production and capacity results in an influx of economic activity, including growth in employment, income and gross state product," (2) "Positive economic impacts in Oregon stem from importing less petroleum fuel," and (3) "Many of the lower carbon fuels that replace gasoline and diesel cost less and would result in lower costs at the pump for fuel users." Compl. ¶ 82. Likewise, the agency explained in a 2011 report that "the existence of an Oregon[] low carbon fuel standards would be a significant incentive to increase the production capacity of Oregon's existing Biofuels facilities and attract new biofuels production." DEQ, Advisory Final Report, at 121, *available at* http://www.deq.state.or.us/aq/committees/docs/lcfs/reportFinal.pdf, *quoted in* Compl. ¶ 81; *see also id.* at 8 ("Low carbon fuel standards will * * * help promote the development of in-state low carbon biofuels production, as well as increased electric vehicle use. DEQ's economic analysis suggests that low carbon fuel standards will facilitate growth in these low carbon fuel sectors, which in turn is expected to produce significant economic benefits for Oregon, creating new jobs and personal income that stays and circulates within this state.").

In short, the Complaint compellingly alleges facts to support the conclusion that the Oregon Program was enacted for a discriminatory purpose. At the very least, it is "plausible" that Oregon's lawmakers intended to discriminate against out-of-state petroleum and ethanol, and that is all that Plaintiffs must show to prevail at this stage. *See Taylor*, 780 F3d at 935 ("To survive a motion to dismiss, the complaint must allege enough facts to state a claim to relief that is plausible on its face.") (internal quotation marks and citation omitted).

b. *Defendants' Objections Are Unpersuasive.*

Defendants do not—and cannot—contest that these statements were made or interpret them as evidence of anything other than discrimination in favor of in-state biofuels production and against out-of-state industry. Instead Defendants assert a grab bag of arguments. None is persuasive.

First, Defendants assert that the Court must accept at face value the purpose of the Oregon Program as stated in the regulations. *See* Or. Mot. 13. That is wrong. "[W]hen considering the purpose of a challenged statute, this Court is not bound by [t]he name, description or characterization given it by * * * the State." *Hughes v. Oklahoma*, 441 US 322, 336 (1979) (internal quotation marks and citation omitted); *see also Rocky Mountain*, 730 F3d at 1098 (court is not "bound by the [law's] stated purpose").

Second, Defendants claim that a footnote in *Rocky Mountain* addressing statements of discriminatory purpose by *California* somehow precludes a finding of discriminatory purpose here by *Oregon*. Or. Mot. 13; State Mot. 10. That too is wrong, because *Rocky Mountain* involved a different state's officials, a different statute and regulations, a different record, and different statements. The *Rocky Mountain* panel's assessment of the record

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in that case cannot be used to assess whether the allegations in this case support the conclusion that the Oregon Program was adopted for a discriminatory purpose. Indeed, *Rocky Mountain* involved an appeal from the grant of summary judgment. *See* 730 F3d at 1086. The panel's task was therefore to determine whether adequate evidence had in fact been adduced to support the parties' various contentions. *Id.* at 1087. By contrast, in this case, the Court's role is simply to assess whether the "complaint * * * allege[s] enough facts to state a claim to relief that is plausible on its face," after "accept[ing] all factual allegations in the complaint as true and constru[ing] the pleadings in the light most favorable to" Plaintiffs. *Taylor*, 780 F3d at 935.

Third, Defendants argue that it is "not clear" whether discriminatory purpose, standing alone, may be the basis of a claim. Or. Mot. 13. The argument is both wrong and irrelevant. The Supreme Court has been perfectly clear: "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of *either* discriminatory purpose *or* discriminatory effect." *Bacchus*, 468 US at 270 (emphasis added) (citations omitted); *see also Clover Leaf Creamery*, 449 US at 471 n.15 ("A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect, or of discriminatory purpose.") (citations omitted)). Thus, in *Bacchus*, the Court held that "[e]xamination of the State's purpose in this case *is sufficient* to demonstrate the" discriminatory character of the state law at issue. 468 US at 270 (emphasis added).[7] So too here: The manifest intent of Oregon's lawmakers to benefit Oregon biofuels producers at the expense of out-of-state industry is sufficient to demonstrate that the Oregon Program's purpose is discrimination.

Defendants rely on a footnote in the Supreme Court's recent decision in *Comptroller of Treasury of Md. v. Wynne*, 135 S Ct 1787 (2015), for the proposition that "[t]he Commerce Clause regulates effects, not motives, and it does not require courts to inquire into

[7] As the Oregon Defendants point out, *see* Or. Mot. 13-14, the *Bacchus* Court also concluded that the challenged statute had discriminatory effect, *see* 468 US at 271, but the Court made it clear that either discriminatory purpose or effect, standing alone, was sufficient to prove a law discriminatory. *See Bacchus*, 468 US at 270-71.

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voters' or legislators' reasons for enacting a law that has a discriminatory effect." Or. Mot. 14 (quoting *Wynne*, 135 S Ct at 1801 n.4). Defendants pluck the language from that footnote out of context. In *Wynne*, the petitioner—like Defendants here—tried to collapse the tests for discriminatory purpose and discriminatory effect, arguing that "Maryland is free to adopt any tax scheme that is not actually intended to discriminate against interstate commerce." *Wynne*, 135 S Ct at 1801 n.4. The Supreme Court rejected the petitioner's argument, observing that a plaintiff may prove discriminatory effect without *also* proving discriminatory purpose. *Id.* The converse is true: Plaintiffs may prove discriminatory purpose without proving discriminatory effect. *See, e.g.*, *Bacchus*, 468 US at 270. At any rate, *Wynne*, which held that the state law violated the Commerce Clause, does not purport to overrule the Supreme Court's decades-old rule that a state law may be held discriminatory on the basis of an illicit, protectionist purpose. *Cf. United States v. Fonseca-Caro*, 114 F3d 906, 907 (9th Cir 1997) ("It is unlikely in the extreme that the Supreme Court intended by this single sentence to overrule *sub silentio* years of decisional law * * *."). Defendants' position is nothing more than an attempt to read the discriminatory purpose test out of the law.

In any event, Defendants' argument is irrelevant because Plaintiffs further allege that the Oregon Program will have its intended discriminatory effect of creating a "commercial disadvantage" for petroleum and ethanol from outside Oregon. *New Energy*, 486 US at 269. This result is inherent in the Oregon Program's design, which (1) requires regulated parties to comply with the standard for carbon intensity, and (2) assigns lower carbon-intensity values to Oregon ethanol and other biofuels than to petroleum, and lower carbon-intensity values to Oregon ethanol than to identical Midwest ethanol. Compl. ¶¶ 55-57. The Oregon Program thus makes Oregon biofuels more economically attractive to regulated parties than petroleum, and makes Oregon ethanol more economically attractive than identical Midwest ethanol. Indeed, because the assigned carbon intensity of petroleum is higher than the required carbon-intensity standard, *see* OAR 340-253-8010 tbl 1, -8030 tbl 3, the Oregon Program effectively forbids a

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regulated party from importing solely petroleum, while creating incentives for such parties to buy Oregon biofuels. This "commercial disadvantage" is all Plaintiffs need show to recover, let alone to survive the pending motions. *New Energy*, 486 US at 269.

Even if Plaintiffs were required—and they are not—to claim that the "commercial disadvantage" at which the Oregon Program places them will result in loss of market share, the Complaint makes precisely such a claim. *Oregon's own* advisers and analysts predicted that the advantage that Oregon would reap would come at the expense of out-of-state fuels. *See, e.g.*, Compl. ¶ 84 (advisory committee member stating that "the whole intent of the [Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state"); *see also* Economic Impact Analysis at 32 ("the losses incurred to the petroleum sector would be felt elsewhere in the country"). DEQ and Oregon lawmakers agreed. *See, e.g.*, Compl. ¶ 58 (DEQ: "'Increased use of clean fuels will displace fuels produced from petroleum sources,'" all of which are located out of state); *id.* ¶ 79 (state Senator Beyer: the Oregon Program will "reduc[e] [Oregon's] dependence on petroleum and channe[l] those dollars into Oregon's economy") (alterations in original). Furthermore, Oregon lawmakers supported the Oregon Program for the *express purpose* of replacing Oregon's out-of-state fuel imports with "home-grown" biofuels. *See, e.g.*, *id.* ¶ 76 (Oregon Program's purpose was to "capture a portion of the billions of dollars that Oregonians send out of the state every year to purchase diesel and gasoline and keep those dollars circulating here in our own economy"); *id.* ¶ 78 (Oregon was faced with the choice "to invest in clean fuels here at home or continue to export fuel dollars out of state"). Plaintiffs need not wait until 2016, after they suffer the economic harms predicted by Defendants, to seek declaratory and injunctive relief.

Defendants argue that the question of the Oregon Program's effects is not ripe for review, *see* Or. Mot. 14-16; State Mot. 11, but this issue is "fit[] * * * for judicial decision," and "hardship to the parties [would arise from] withholding court consideration." *Abbott Labs. v. Gardner*, 387 US 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*,

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430 US 99 (1977). The issue is fit for review because the question of the Oregon Program's effects is already clear, and "further factual development" is unnecessary. *Ohio Forestry Ass'n v. Sierra Club*, 523 US 726, 733 (1998). As noted above, Plaintiffs need only show that the Oregon Program has the effect of imposing a "commercial disadvantage," *New Energy*, 486 US at 269, and this is inevitable from the Oregon Program's purpose and design. Nor need the Court wait to assess the *degree* of commercial disadvantage, which is irrelevant for Commerce Clause purposes. *See id.* at 276 ("where discrimination is patent, * * * neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown"); *Bacchus*, 468 US at 269 ("[w]e need not know how unequal the [state law] is before concluding that it unconstitutionally discriminates") (first alteration in original) (internal quotation marks and citation omitted).

Defendants cite no authority for their remarkable position that a plaintiff can never state a claim for declaratory and injunctive relief under the Commerce Clause until *after* the intended harm is fully realized. The Ninth Circuit instead requires that for a plaintiff to prevail under the Commerce Clause on an effects theory, the record must support the claim that the challenged statute has a discriminatory effect, *see Black Star Farms LLC v. Oliver*, 600 F3d 1225, 1231 (9th Cir 2010)—a condition amply satisfied here, for the reasons given above. *Black Star* does not limit the record to economic harm that a plaintiff has already experienced. *See id.* To the contrary, the Ninth Circuit has found a dormant Commerce Clause challenge ripe before the regulated parties had experienced economic harm—and indeed, before the final regulations that would impose the harm had even issued. *See Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F3d 851, 871-72 & n.22 (9th Cir 2003) (rejecting ripeness objection to Commerce Clause challenge in a case in which California rule required railroads to cooperate to develop performance-based standards but these standards had not yet issued, because "it is clear that any standard required would impermissibly burden interstate commerce"). Here, as in *Union Pacific*, the record demonstrates the state law's discrimination without the need to wait until full realization of the economic harm brought about by that discrimination. Defendants suggest that Plaintiffs' challenge is not ripe because the first standard for carbon intensity does not take effect until 2016, Or. Mot. 16, but "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect," *Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F2d 398, 402 (9th Cir 1981) (adjudicating declaratory judgment action).[8]

The issue of the Oregon Program's effects is also ripe because "hardship to the parties [would arise from] withholding court consideration." *Abbott Labs*., 387 US at 149. Forcing Plaintiffs to wait to sue until after the Oregon Program's intended harm is fully realized in 2016 would mean that for at least several months, Plaintiffs would experience commercial disadvantage vis-à-vis Oregon biofuels producers while this case is adjudicated. Further, recovering market share lost to Oregon competitors during this period will be difficult, since regulated parties will have entered into new contractual relationships that they will be reluctant to abrogate.

In short, even if Defendants were correct—contrary to Supreme Court precedent—that the purpose and effects tests are inextricably intertwined, both theories are ripe for adjudication.

[8] Oregon Defendants cite the Second Circuit's decision in *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F3d 393 (2d Cir 2013), *see* Or. Mot. 15, but that decision does not support them. In *Entergy,* the plaintiffs claimed that Vermont had violated the Commerce Clause in the course of negotiating a new power purchase agreement. *See* 733 F3d at 428. The Second Circuit concluded that the evidence about the negotiations submitted by the plaintiffs did not show that Vermont was seeking to impose a disadvantage on out-of-state industry. *See id.* at 430. Because no power purchase agreement had been negotiated yet and its future terms were therefore unknown, the Second Circuit could not assess the future agreement's effects on interstate commerce. *Id.* at 430-31. The Second Circuit never suggested that courts could never adjudicate Commerce Clause claims until after the challenged statute's harm is fully realized. *See id.* Here, unlike in *Entergy*, the Oregon Program's terms are finalized and there is extensive record evidence predicting the Oregon Program's harmful effect on out-of-state industry. Compl. ¶¶ 50-84.

2. The Oregon Program Discriminates On Its Face Against Out-of-State Petroleum Refiners.

As set forth in the Complaint, Oregon produces biofuels but not petroleum. *See, e.g.*, Compl. ¶ 63. The Oregon Program assigns petroleum a higher carbon intensity than ethanol and other Oregon biofuels, thus placing petroleum at a "commercial disadvantage" vis-à-vis biofuels. *New Energy*, 486 US at 275; OAR 340-253-8030 tbl 3, -8040 tbl 4; Compl. ¶¶ 55-59, 66-68. The Commerce Clause forbids discrimination in favor of an in-state industry at the expense of an out-of-state industry.

Defendants attempt to evade this conclusion by arguing that the Oregon Program also favors biofuels from places other than Oregon. Or. Mot. 9; State Mot. 5-6. But under governing Supreme Court precedent, such treatment of biofuels from some other states cannot immunize the Oregon Program's intentional discrimination against competing imported petroleum fuels. For instance, in *Bacchus*, the Supreme Court struck down a state law exempting fruit wine from taxation. *See* 468 US at 265, 273. The Court later explained that "[a]lthough this exemption was *general in nature and did not specify an indigenous product*, there was evidence that it was enacted to promote the local pineapple-wine industry." *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 US 66, 76 (1989) (emphasis added). Likewise, in *Hunt*, the Supreme Court struck down a North Carolina statute prohibiting closed containers of apples sold in the state to bear any "grade other than the applicable [USDA] grade or standard." 432 US at 335. The Court reasoned that the statute burdened Washington apple growers, which had developed their own well-recognized grading system, by removing the Washington grading system from the North Carolina market. *Id.* at 348-51. The statute benefited North Carolina growers, who had never used any grading system other than the USDA system. *Id.* at 351. It also benefited the growers of at least six other states that had never developed their own grading systems, *id.* at 349, but this incidental benefit did not save the statute from invalidity under the Commerce Clause. *See also New Energy*, 486 US at 274 (rejecting argument that "availability of the [discriminatory] tax credit to some out-of-state manufacturers" saves otherwise impermissible law); *Brimmer v. Rebman*, 138 US 78, 82 (1891) (state "may not, under the guise of exerting its police powers, * * * make discriminations against the products and industries of some of the States in favor of the products and industries of its own *or of other* States") (emphasis added).

The decision in *Exxon Corp. v. Governor of Md.*, 437 US 117 (1978), does not support Defendants. *See* Or. Mot. 8-9. The Maryland law at issue in *Exxon* forbade petroleum refiners (all of which happened to be located outside Maryland) from operating service stations within the state, but permitted both in-state and out-of-state independent retailers to operate in-state service stations. *Exxon*, 437 US at 120, 125-26. The Supreme Court rejected the Commerce Clause challenge, reasoning that (a) the statute did not discriminate in the refining market, because there were no local refiners to favor, and (b) the statute did not discriminate in the retailing market, because it did not "distinguish[] between in-state and out-of-state companies in the retail market." *Id.* at 126. The Court distinguished the scenario in *Exxon* from situations in which "local producers and refiners" are favored. *Id.* at 125. In this case, unlike in *Exxon*, Oregon *does* have a local biofuel industry that the Oregon Program is expressly designed to favor.[9]

Defendants also rely on the Ninth Circuit's decision in *Rocky Mountain*, Or. Mot. 9; State Mot. 7; NGO Mot. 3-5, but that reliance is misplaced. In *Rocky Mountain*, the Ninth Circuit expressly based its decision on the fact that while the California LCFS favored an important variety of in-state petroleum, it disfavored other varieties of petroleum also produced in-state. *See* 730 F3d at 1099-1100. The court explained that this "burden on major in-state interests . . . is a powerful safeguard against legislative abuse," and that California had not

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[9] Defendants also assert that Plaintiffs have not adequately plead that biofuels and petroleum compete in the same market. Or. Mot. 8; State Mot. 7 n.5. This argument is wrong. Plaintiffs allege that "[t]he Oregon Program * * * is designed to displace imported fuels produced from petroleum sources" and replace them with biofuels produced in Oregon. Compl. ¶ 58; *see also id.* ("[i]ncreased use of clean fuels will displace fuels produced from petroleum sources").

"chose[n] to support a uniquely local industry at the expense of one in which it held no particular advantage." *Id.* (omission in original) (internal quotation marks and citation omitted).[10] By contrast, the Oregon Program disfavors petroleum (which is not produced in Oregon) and favors biofuels (which are produced in Oregon). Compl. ¶¶ 57-58. Thus, the "burden on major in-state interests," which the Ninth Circuit ruled was a "powerful safeguard against legislative abuse," is absent; instead, the Oregon Program favors a "local industry at the expense of one in which [Oregon holds] no particular advantage," or even presence. *Rocky Mountain*, 730 F3d at 1099-1100 (internal quotation marks and citation omitted).[11] Furthermore, in *Rocky Mountain* the Ninth Circuit concluded that California's LCFS did not discriminate in its purpose and effect against out-of-state petroleum in favor of in-state petroleum. *See id.* at 1097.[12] The Ninth Circuit never addressed whether California's LCFS facially discriminated against out-of-state petroleum in favor of in-state biofuels, as the Oregon Program does.

3. <u>The Oregon Program Discriminates On Its Face Against Midwest Ethanol</u>.

The Oregon Program also discriminates against out-of-state ethanol from the Midwest. The Oregon Program requires regulated parties to use the carbon-intensity score from the lookup tables "that best matches" their fuels' production method. OAR 340-253-400; Compl. ¶ 69. The lookup tables consistently give higher scores to ethanol produced in the Midwest than to ethanol produced using the same process in Oregon. *See* Compl. ¶ 70; OAR 340-253-8030

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[10] The Ninth Circuit also supported its decision by asserting that the record in that case contained no explicit statement of discrimination. *See Rocky Mountain*, 730 F3d at 1100 & n.13. For the reasons given *supra* at 12-16, that conclusion, even if correct, would not apply here given the statements in the Complaint. *See* Compl. ¶¶ 71-84.

[11] Contrary to State Intervenors' suggestion, *see* State Mot. 6-7, *Rocky Mountain*'s discussion of which pathways are similarly situated for purposes of comparison involved the ethanol claims, not petroleum. *See* 730 F3d at 1088.

[12] This conclusion was incorrect for the reasons given in the petition for rehearing en banc in *Rocky Mountain*. Plaintiffs recognize that *Rocky Mountain* is controlling in this jurisdiction, but respectfully preserve for review their claim that the case was wrongly decided.

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tbl 3.[13] Because Oregon ethanol is assigned a lower carbon-intensity score than Midwest ethanol, Oregon ethanol is more economically valuable than Midwest ethanol. *See* Compl. ¶¶ 69-80. Under Supreme Court case law, the Oregon Program's preference for Oregon ethanol violates the Commerce Clause. *See, e.g.*, *Wyoming*, 502 US at 455 ("preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin").

Plaintiffs cite *Rocky Mountain* for the proposition that facial discrimination among ethanols on the basis of origin is permissible under these circumstances. Or. Mot. 12; State Mot. 10-11; NGO Mot. 3-5. Plaintiffs respectfully submit that *Rocky Mountain* is inconsistent with Supreme Court precedent, which holds that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc.*, 511 US at 100. The *Rocky Mountain* court characterized that precedent as "archaic formalism," 730 F3d at 1107, a decision that led six Ninth Circuit judges to dissent from denial of en banc rehearing in that case, *see Rocky Mountain*, 740 F3d at 514 (M. Smith, J. dissenting from denial of rehearing en banc). Nevertheless, Plaintiffs recognize that *Rocky Mountain* controls in this jurisdiction and therefore respectfully preserve this argument for review.

B. The Complaint Sufficiently Alleges That the Oregon Program Regulates Conduct That Occurs Wholly Outside the State in Violation of the United States Constitution.

The Oregon Program also violates the United States Constitution by regulating interstate and foreign commerce that occurs wholly outside Oregon. Compl. ¶¶ 121-130. Defendants' principal argument is that this claim should be dismissed in light of *Rocky*

[13] The lookup tables do not expressly state the carbon intensity scores for fuels originating in Oregon, *see* OAR 340-253-8030, tbl. 3, but Defendants do not dispute that a fuel originating in Oregon would "best match[]" the pathway of a fuel made in California (rather than in the Midwest or Brazil, the other two points of origin listed). Indeed, the intensity score for Oregon ethanol producers may be lower than for California producers, in light of the shorter distance that Oregon fuels must travel. *See* OAR 340-253-400(3)(b) (parties may apply for scores lower than those given in lookup tables). In any event, as explained in the Complaint, DEQ acknowledged that "biofuels produced in Oregon already meet the proposed average annual carbon intensity." Compl. ¶ 58.

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Mountain's rejection of the plaintiffs' claims regarding California's LCFS. Or. Mot. 16-18; State Mot. 11-14; NGO Mot. 3-5. Defendants' argument should be rejected. Plaintiffs acknowledge that the Ninth Circuit's decision controls this Court's consideration of Plaintiffs' claim that the Oregon Program violates the Commerce Clause's prohibition against extraterritorial regulation, and respectfully preserve this argument for review. Nevertheless, Plaintiffs' claim should not be dismissed because the Ninth Circuit did not address whether the California LCFS violated principles of structural federalism, which prohibit states from engaging in extraterritorial regulation. Compl. ¶¶ 4, 85-90, 120-130.

As explained below, the Oregon Program is unconstitutional even apart from the Commerce Clause, because it disrupts the coequal status of the states and violates the principles of structural federalism by regulating conduct that occurs wholly outside Oregon.

1. The Oregon Program Violates the Prohibition Against Extraterritorial Regulation Under the Commerce Clause.

As explained in the Complaint, the Oregon Program violates the Commerce Clause, which "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 US 324, 336 (1989). Under Supreme Court precedent, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336. By penalizing imported fuels based on the way they are produced and transported *outside* Oregon, the Oregon Program impermissibly "attach[es] restrictions to * * * imports in order to control commerce in other States." *C & A Carbone*, 511 US at 393.

Here, the success of the Oregon Program unquestionably turns on its ability to control conduct beyond the state's borders. It assigns carbon intensity values to fuels based on out-of-state activities, including "'feedstock generation * * *, production, [and] distribution.'" Compl. ¶ 43 (quoting OAR 340-253-0040(37)). Regulated parties, in turn, must reduce the

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carbon intensity of their fuels beginning in 2016. *Id.* ¶ 50 (citing OAR 240-253-0100(6), 340-253-8010 tbl 1). The Oregon Program classifies fuels based on their "fuel pathway," which includes regulation based on the fuel's geographic origin, the manufacturing process used to produce the fuel, the power sources used to produce the fuel, and the transportation of the fuel to market from outside Oregon. *Id.* ¶ 88 (citing OAR 340-253-8030 tbl 3, and OAR 340-253-0400(3)(b)(B), which defines "fuel pathway"). Thus, the Oregon Program is designed to regulate the GHG emissions associated with the extraction, production, and transportation of fuels outside Oregon if those fuels are to compete in the Oregon market. *Id.* ¶ 89. Indeed, because Oregon imports all its petroleum-based fuels, the Oregon Program's regulation of these fuels must, by necessity, regulate commercial activities that occur outside Oregon. *Id.* (citing DEQ, Rulemaking Action Item, *Clean Fuels Program Phase II Rulemaking* 10 (Jan. 7-8, 2015); Final Advisory Report at 41).

The Oregon Program is invalid because it attempts to coerce entities outside Oregon to modify the manner through which they manufacture and transport fuels to market from outside Oregon to be able to compete in the Oregon transportation fuels market. The Oregon Program penalizes fuels produced or transported outside Oregon in a manner disfavored by Oregon even though a state may not "attach restrictions to * * * imports in order to control commerce in other States." *C & A Carbone*, 511 US at 393. The purpose of the life-cycle analysis is to coerce producers of fuel outside Oregon to reduce their extraterritorial emissions to avoid the penalties that Oregon imposes on them once their fuels are imported into the state. Compl. ¶ 89. Again, the Supreme Court has held that "[o]ne state may not put pressure * * * upon others to reform their economic standards" by restricting imports. *Baldwin v. G.A.F. Seelig, Inc.*, 294 US 511, 524 (1935).

In *Baldwin*, the Supreme Court struck down a New York law prohibiting the resale of milk imported into New York if it had been bought in another state at a price lower than New York's minimum price. *Id.* The Court held that New York lacked the authority to "project

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its legislation" into another state by erecting "obstructions to the normal flow of commerce." *Id.* at 521, 524. The same is true here. Oregon has erected obstructions to the normal flow of commerce by regulating the production methods of fuel wholly outside the state. Because the Oregon Program seeks to "directly control[] commerce occurring wholly outside the boundaries of [the] State," it "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 US at 336.

Plaintiffs respectfully submit that the Ninth Circuit incorrectly decided this issue in *Rocky Mountain*. Its holding that California's LCFS is not a regulation of out-of-state economic activity is irreconcilable with decisions from the Supreme Court and other federal courts of appeals. First, the Ninth Circuit characterized the LCFS as merely a system of "incentives" that "might encourage ethanol producers to adopt less carbon-intensive policies," rather than as a "control" or a "mandate" over out-of-state activity. *Rocky Mountain*, 730 F3d at 1103. Financial penalties, however, serve the same coercive goals as mandates. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S Ct 2566, 2580 (2012) (discussing the penalty for not complying with the individual mandate to purchase health insurance); *Bailey v. Drexel Furniture Co.*, 259 US 20, 34 (1922) (discussing tax penalizing use of child labor). Second, the Ninth Circuit concluded that the LCFS "regulates only the California market" because it covers only fuel ultimately sold in California and therefore, according to the Ninth Circuit, applies only to firms that "wish to gain market share in California." *Rocky Mountain*, 730 F3d at 1101. That contradicts the Supreme Court's holding that a state's authority over in-state transactions does not give it authority over the preceding chain of commerce. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("The mere fact that the effects of [a State law] are triggered only by sales of [a commodity] within the State * * * does not validate the law if it regulates the out-of-state transactions of [producers] who sell in-state.").

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Like the Oregon Program, California's LCFS seeks to impose environmental standards on fuel producers in other states and countries by taking into account emissions generated at "all stages of fuel * * * production and distribution," no matter where they take place. Cal Code Regs tit. 17, § 95481(a)(38); Compl. ¶ 43. As the Ninth Circuit recognized, the express purpose of this analysis is to coerce fuel producers to reduce their extraterritorial GHG emissions to avoid the penalty that California imposes on fuels with high carbon-intensity scores. *Rocky Mountain*, 730 F3d at 1081-82. And, as six Ninth Circuit judges recognized in their dissent from denial of rehearing en banc, such regulations "plainly have extraterritorial reach, as they seek to influence out-of-state land use decisions and production methods." *Rocky Mountain*, 740 F3d at 517 (M. Smith, J., dissenting from denial of rehearing en banc). The panel's contrary conclusion "disregards controlling precedent and departs from the holdings of the Supreme Court and * * * sister circuits." *Id.*

The Ninth Circuit recently recognized this limitation of state authority. Sitting en banc, the Ninth Circuit struck down a California statute that required payment of a royalty to California artists after the sale of their art whenever "'the seller resides in California or the sale takes place in California.'" *Sam Francis Found. v. Christies, Inc.*, 784 F3d 1320, 1322 (9th Cir 2015) (*en banc*) (quoting Cal Civ Code § 986(a)). The court held that the "royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause." *Id.* at 1323. In doing so, the Ninth Circuit reaffirmed the fundamental principle that the Commerce Clause "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Id.* (quoting *Healy*, 491 US at 336).

Though the Ninth Circuit suggested that *Rocky Mountain* was distinguishable because the California program regulates fuels consumed in California, the cases are no different. *Christies*, 784 F3d at 1324. Like the requirement of California residency in *Christies*, the fact that fuel is consumed in Oregon does not grant DEQ or the Oregon legislature authority to regulate all out-of-state activities associated with the manufacturing and transportation of that fuel. *See C & A Carbone*, 511 US at 393 (a state "may not attach restrictions to exports or imports in order to control commerce in other States," since this "would extend the [state's] police power beyond its jurisdictional bounds"); *Baldwin*, 294 US at 521, 524 (a state "has no power to project its legislation" into other states by erecting "obstructions to the normal flow of commerce"). The Oregon Program is unconstitutional because it regulates and attempts to control wholly out-of-state activities.

2. <u>The Oregon Program Violates Principles of Structural Federalism</u>.

Notwithstanding the decision in *Rocky Mountain*, the Complaint states a claim that the Oregon Program violates principles of structural federalism. The constitutional prohibition on extraterritorial regulation is rooted not only in the Commerce Clause but also, separately, in structural "principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 293 (1980). "Preservation of the States as independent political entities" was "the price of union," *Printz v. United States*, 521 US 898, 919 (1997), and the Supreme Court has struck down even federal statutes that infringe the "residual * * * sovereignty" reserved to each state, *id.* at 918. The same principle applies as between states: Because our constitutional system is based on a federal union of 50 sovereign states whose spheres of authority are defined by territorial boundaries, the sovereignty of each state places a reciprocal "limitation on the sovereignty of all of its sister States." *Woodson*, 444 US at 293; *see also PPL Mont., LLC v. Montana*, 132 S Ct 1215, 1227 (2012) ("[T]he States in the Union are coequal sovereigns under the Constitution."); *Brown v. Estate of George N. Fletcher*, 210 US 82, 89 (1908) ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."). Because the states in our federal system are coequal sovereigns, "a state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson v. Emp'rs Liab. Assurance Corp.*, 348 US 66, 70 (1954).

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It is long-standing doctrine that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Appeal Tax Court of Balt.*, 104 US 592, 594 (1881).[14] When states "pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict * * * which renders the exercise of such power incompatible with the rights of other States, and with the constitution of the United States." *Ogden v. Saunders*, 25 US 213, 369 (1827). This principle derives from the "historic tradition that all the States enjoy equal sovereignty." *Shelby Cnty., Ala. v. Holder*, 133 S Ct 2612, 2621 (2013); *see also Brown*, 210 US at 89 ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."). The Oregon Program purports to regulate activities that occur beyond the jurisdictional limits of Oregon—i.e., the emission of GHG *outside* Oregon associated with the production and transportation of transportation fuels *outside* Oregon—and therefore upsets the coequal status of the states on which our constitutional structure rests.

The Supreme Court has held that states lack authority to regulate conduct outside their borders in a variety of contexts quite apart from the Commerce Clause. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 US 559, 572 (1996) ("[I]t follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); *Bigelow v. Virginia*, 421 US 809, 827-28 (1975) ("Virginia is * * * advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach."); *Hanson v. Denckla*, 357 US 235, 251 (1958) (discussing the "territorial limitations on the power of the respective States"); *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 440 (1943) ("Texas is without power to give extraterritorial effect to its laws."); *Osborn v. Ozlin*,

[14] *See also* Joseph Story, *Commentaries on the Conflicts of Law* 20 (1834) ("[N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein * * * for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.").

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310 US 53, 62 (1940) (a state may not "reach[] beyond her borders to regulate a subject which [i]s none of her concern because the Constitution has placed control elsewhere"); *N.Y. Life Ins. Co. v. Head*, 234 US 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York * * *. [A]ll the States are restricted within the orbits of their lawful authority * * *."); *Bonaparte*, 104 US at 594 ("No State can legislate except with reference to its own jurisdiction.").

Here, the Oregon Program regulates and attempts to control conduct that occurs in other states and upsets the balance of coequal state sovereignty. The Oregon Program regulates transportation fuels based on their "fuel pathway," which, as stated above, includes the manufacturing process used to produce the fuel, the power sources used to produce the fuel, and transport of the fuel occurring outside of Oregon. Compl. ¶ 88 (citing OAR 340-253-8030 tbl 3, 340-253-0400(3)(b)(B)). Regulated parties, in turn, must reduce the carbon intensity of their fuels. *Id.* ¶ 50 (citing OAR 240-253-0100(6), 340-253-8010 tbl 1). Thus, by design, the Oregon Program regulates the out-of-state emission of GHGs associated with the out-of-state extraction, production, and transportation of fuels. It thus transgresses the long-standing principle that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte*, 104 US at 594.

By doing so, the Oregon Program opens the door to unprecedented state regulation of extraterritorial activity. Defendants' position is not limited to transportation fuels. Because all human activity generates greenhouse gas emissions, every imported product could be assigned a carbon-intensity score based on the emissions from its production and transportation. Thus, the inescapable conclusion of Defendants' logic is that Oregon may also regulate the manufacturing and transportation process of every other imported product, and so can every other state in the Union.

As with the Commerce Clause claim, Defendants argue that the Ninth Circuit already decided this issue "with respect to California's LCFS." Or. Mot. 16-18; State Mot. 11-14; NGO Mot. 5. The Ninth Circuit, however, considered only claims under the

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Commerce Clause and did not address issues of structural federalism. *Rocky Mountain*, 730 F3d at 1077, 1086. The issue presented before the Ninth Circuit was whether the California LCFS "is constitutional under the United States Constitution's Commerce Clause." *Id.* at 1077; *see id.* at 1086 ("American Fuels moved for summary judgment on its Commerce Clause claims" and the district court held "that the Fuel Standard violated the dormant Commerce Clause"). *Rocky Mountain* does not address Plaintiffs' structural federalism claim.

C. The Complaint Sufficiently Alleges That the CAA Preempts the Oregon Program.

The CAA preempts the Oregon Program because Congress gave EPA power to set uniform fuel standards for the nation, and the Oregon Program contradicts EPA's standards. *See* Compl. ¶¶ 41-42, 91-98. The Complaint sufficiently alleges that the Oregon Program is preempted because it contravenes EPA's uniform national standards. *See id.* ¶¶ 131-136.

1. <u>The CAA Expressly Preempts the Oregon Program</u>.

As explained in the Complaint, Congress enacted CAA Section 211(c) to give EPA power to regulate the emissions of motor vehicle fuels. *See* Compl. ¶ 92. Section 211(c)(4) plays an important role in Congress's regulatory scheme: It gives EPA power to preempt state fuel standards that contradict EPA's own. Section 211(c)(4) provides as follows:

> (A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—
>
> > (i) if the [EPA] has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published [that] finding in the Federal Register, or
> >
> > (ii) if the [EPA] has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the [EPA].

The two subparts of Section 211(c)(4)(A) fit together to ensure that EPA plays the primary role in setting fuel standards for the nation. Section 211(c)(4)(A)(ii) guarantees that if EPA sets a

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control for a particular characteristic of a fuel, states may not set a different control. Section 211(c)(4)(A)(i) covers the other possible scenario by ensuring that if EPA decides that a particular fuel characteristic needs no control, EPA's decision preempts state decisions to control that characteristic. Together, the two provisions guarantee that when EPA speaks regarding fuel standards, its word is law. Congress's grant of preemptive authority to EPA makes good sense: As EPA has explained, "gasoline produced in one area is often distributed to other areas. The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations." 59 Fed Reg at 7809.

As set forth in the Complaint, the Oregon Program is expressly preempted by the CAA. *See* Compl. ¶¶ 131-136. In 1994, EPA issued the RFG rule, which prescribes standards for gasoline emissions. In the RFG rule, EPA decided which emissions to make subject to emission-reduction requirements by including them within the term "volatile organic compounds" (or "VOCs"). 59 Fed Reg at 7722-23. EPA decided that methane would be excluded from regulation under Sections 211(c) and 211(k). *Id.* at 7722-23, 7809.

The Complaint alleges—and Defendants do not dispute—that the Oregon Program controls methane emissions. *See* Compl. ¶ 133. The Complaint explains that under the Oregon statute authorizing the Oregon Program, the term "greenhouse gas" includes methane. *See id.* ¶ 41. And the Complaint also alleges that, by DEQ's own admission, a fuel's carbon intensity value is in part the product of its methane emissions. *See id.* ¶ 42. These allegations alone are enough to defeat the pending motions. Section 211(c)(4)(A)(i) preempts state controls whenever EPA "has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published [that] finding in the Federal Register." *Id.* EPA's discussion of methane emissions satisfied each of these conditions: (a) EPA found that control of methane emissions was not necessary in the federal fuel standard promulgated under Section 211(c)(1); and (b) EPA published that decision in the Federal Register.

Nevertheless, EPA went further still and included a separate section expressly discussing the RFG rule's preemptive effect. EPA noted that the RFG rule "will affect virtually all of the gasoline sold in the United States," and explained that "[t]he national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations." 59 Fed Reg at 7809. The agency then stated: "EPA, therefore, is issuing today's final rule under the authority of sections 211(k) and (c), and promulgate[s] under section 211(c)(4) that dissimilar State controls be preempted unless either of the exceptions to federal preemption specified by section 211(c)(4) applies." *Id.*[15]

This statement published in the Federal Register eliminates any doubt that EPA wanted its fuel standard—including its decision not to regulate methane emissions—to preempt all dissimilar state standards. 59 Fed Reg at 7809. To permit states to include methane regulations in their fuel standards after EPA decided in the federal fuel standard that methane needed no regulation would create precisely the "inefficient patchwork of potentially conflicting regulations" that motivated EPA to displace dissimilar state standards. *Id.*

2. <u>Defendants' Arguments to the Contrary Are Meritless</u>.

Defendants try to muddle this straightforward analysis, but their objections lack merit. *First*, Defendants argue that the Oregon Program is not preempted because "Congress did not expressly preempt state controls of *emissions products* of fuels" in Section 211(c)(4). Or. Mot. 22. That is wrong. Section 211(c)(4) expressly preempts state controls of emissions products: "[N]o State * * * may prescribe or attempt to enforce, *for purposes of motor vehicle emission control*, any control or prohibition." 42 USC § 7545(c)(4)(A) (emphasis added).

[15] Neither of the two exceptions "specified by section 211(c)(4)" is at issue in this case.

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Indeed, the entire purpose of Section 211(c) is the regulation of emissions products of fuels. EPA agrees that Section 211(c)(4) preempts state fuel emissions regulations. *See* 59 Fed Reg at 7809 (invoking Section 211(c)(4) to preempt state regulations contrary to EPA's regulation of fuel emissions).

Second, the Oregon Defendants argue that the Oregon Program does not constitute a "control or prohibition respecting any characteristic or component of a fuel or fuel additive" "for purposes of motor vehicle emission control." 42 USC § 7545(c)(4)(A); *see* Or. Mot. 22. But the Ninth Circuit has already concluded that the analogous California LCFS is "'a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.'" *Rocky Mountain*, 730 F3d at 1106. Furthermore, in *Rocky Mountain* the Ninth Circuit concluded that the California LCFS fell within the scope of Section 211(c)(4)(B), the sole purpose of which is to provide a unique exception for California to the preemptive reach of Section 211(c)(4)(A). *See id.* The Ninth Circuit has held that subsections 211(c)(4)(A) and (B) "are precisely coextensive," *Oxygenated Fuels Ass'n v. Davis*, 331 F3d 665, 670 (9th Cir 2003), so the California LCFS necessarily fell within the scope of Section 211(c)(4)(A) as well. The Oregon Program tracks the California LCFS for preemption purposes; under *Rocky Mountain*, it therefore constitutes a "control or prohibition respecting [a] characteristic or component of a fuel or fuel additive" under Section 211(c)(4)(A). But, importantly, unlike the California LCFS, the Oregon Program is ineligible for the unique California exception contained in Section 211(c)(4)(B). *See Rocky Mountain*, 730 F3d at 1106. The Oregon Program therefore is subject to Section 211(c)(4)(A)'s preemptive scope: The Oregon "Program qualifies as a control or prohibition respecting a characteristic or component of a fuel or fuel additive for the purposes of motor vehicle emission control within the meaning of Section 211(c)." Compl. ¶ 132.

Third, Defendants argue that the RFG rule addresses whether ozone-forming emissions, not carbon intensity, should be regulated, and therefore does not preempt the Oregon Program's regulation of carbon intensity. Or. Mot. 24; State Mot. 15 ("At most, the [RFG] Rule's definition of ozone-forming VOCs implied only that EPA thought it unnecessary to regulate the *ozone-forming aspect* of other volatile organic compounds, *e.g.*, methane, under section 211(k).") (emphasis added); NGO Mot. 6. That is incorrect. EPA's decision not to regulate methane emissions under Section 211(c) was made for purposes of motor vehicle emissions. The CAA asks only whether a state regulation was enacted "for purposes of motor vehicle emission control." CAA § 211(c)(4)(A). If so, then the regulation is preempted unless it is identical to EPA's own fuel standard. *See id.*, § 211(c)(4)(A). The express preemption clause does not permit a state to avoid preemption by arguing that that state's fuel standard serves a different purpose from EPA's.

Such an interpretation would wreak havoc on the national uniformity that Section 211(c)(4) was designed to foster, and would encourage precisely the "inefficient patchwork of potentially conflicting regulations" that EPA intended to avert with its fuel standards regulation. 59 Fed Reg at 7809. On Defendants' view, a state could require lower emissions than the federal fuel standard authorizes, or even rewrite EPA's formulas, as long as the state claimed that the emissions were somehow related to any phenomenon other than ozone formation. Indeed, a state could undermine every aspect of the federal fuels standard simply by regulating every characteristic or component of fuel that the federal standard regulates, while specifying that the state's purpose was to address some problem allegedly not on EPA's mind when it issued the federal standard.

Fourth, although EPA properly published its decision that no methane emission control was necessary in the Federal Register and even expressly invoked its powers under Section 211(c)(4), Defendants argue that EPA did not intend to preempt state methane emissions controls. Or. Mot. 24-25. But EPA need not use the words "no control * * * is necessary" when it wishes to preempt. *See Magallanes v. Bowen*, 881 F2d 747, 755 (9th Cir 1989) (agencies need not "recite * * * magic words" for their findings to be given effect). Here, EPA "found that no control or prohibition of" methane emissions "is necessary and * * * published [that] finding in the Federal Register." CAA § 211(c)(4)(A)(i). That is all that the statute requires.[16]

Having specifically referenced Section 211(c)(4), EPA did not need to cite subsection 211(c)(4)(A)(i) in particular, as Oregon Defendants argue. Or. Mot. 25. As explained above, Section 211(c)(4) addresses preemption in two subsections that work together to cover the waterfront of possible EPA regulatory choices. EPA was not required to cite both individually to take advantage of their combined preemptive effect. These two subsections ensure that whenever EPA reaches a decision regarding a control for a characteristic or component of fuel, all dissimilar state standards are preempted.[17] A state standard that controls a fuel characteristic that EPA has elected not to control in the federal standard is just as dissimilar as a state standard that imposes a higher or lower threshold on a characteristic that EPA has chosen to control in the federal standard.[18]

Finally, Defendants suggest that EPA "reversed course" in its 2009 Endangerment Finding from its earlier position in the RFG rule. Or. Mot. 26; State Mot. 17; NGO Mot. 6 n.1. But the Endangerment Finding was issued under Section 202 of the CAA, which governs *vehicle* standards—not Section 211(c), which governs *fuel* standards. *See* 74 Fed Reg 66,496 (Dec. 15, 2009). The Endangerment Finding does not and cannot purport to change the federal fuel

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[16] State Intervenors argue that "section 211(c)(1) regulations are not implicit findings that State regulations are unnecessary," State Mot. 16, but that is not Plaintiffs' claim. Rather, Plaintiffs allege that the RFG rule makes express findings—that regulation of methane is unnecessary and that the federal fuels standard preempts state standards—that invoke Section 211(c)(4)(A)'s preemption power. Compl. ¶¶ 96-98.

[17] Moreover, in cases which states may need different fuels for air quality purposes, Congress has provided a special, limited exception for "boutique" fuels not relevant here. *See* 42 USC § 7545(c)(4)(C)(i), (v).

[18] State Intervenors, but not Oregon Defendants, contend that the RFG rule regulation is not sufficiently "explicit[]" to preempt the Oregon Program. State Mot. 15-16. But the RFG rule expressly finds that no control of methane emissions is necessary, and even expressly finds that dissimilar state standards are preempted under CAA Section 211(c)(4). 59 Fed Reg at 7722-23, 7809. A finding need not use "magic words" to be "explicit." *Cf. Henderson ex rel. Henderson v. Shinseki*, 562 US 428, 436 (2011) ("Congress, of course, need not use magic words in order to" satisfy a clear statement rule). State Intervenors' citation of a single notice of proposed rulemaking in which EPA proposed a stand-alone preemption finding, State Mot. 16, lends no support to their notion that EPA decisions entitled to preemptive effect under Section 211(c)(4)(A)(i) are ineffective unless issued as stand-alone orders.

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standard in any way, including EPA's preemptive determination that there is no need for a control of methane emissions under Section 211(c). That determination is still in effect. *See, e.g.*, 40 CFR §§ 80.42, 80.45 (continuing to exclude methane from VOC analysis).

Defendants take the view that regulating methane emissions in the federal vehicle standard automatically makes them suitable for regulation in state fuel standards. That is not correct. In the first place, Congress has rejected this argument. Congress requires EPA to "consider[] * * * other technologically or economically feasible means of achieving emission standards under section [202]," the vehicle standard provision, before EPA issues a fuel standard. CAA § 211(c)(2)(A). EPA has explained that Congress enacted this provision because it understood that "[f]uel controls might * * * lead to greater government involvement in the regulation of the manufacturing process than would be expected from vehicle controls." 59 Fed Reg at 7751. Because EPA's grant of power to issue fuel standards is permissive, *see* CAA § 211(c)(1) (EPA "*may* * * * control" emissions using a fuel standard) (emphasis added), EPA need not issue a fuel standard if it finds that a vehicle standard adequately controls emissions of a particular pollutant. Congress was thus well aware that vehicle standards and fuel standards play different roles and impose different regulatory costs. It required EPA to consider whether a vehicle standard would adequately control emissions before the agency issues a fuel standard because it knew that sometimes a vehicle standard would be enough to control emissions. Here, EPA has not revised the federal fuel standard to require—or even permit—regulation of methane emissions. *See* 40 CFR §§ 80.42, 80.45. Defendants' position that emissions regulated under a vehicle standard must always be suitable for regulation under a fuel standard is contrary to both Congress's and EPA's judgment.

Oregon therefore may not ignore EPA's determination that methane emissions do not need to be regulated in a fuel standard. Allowing a state to ignore EPA's considered judgment would permit just the "inefficient patchwork of potentially conflicting regulations" that EPA sought to prevent in its fuel standards regulation. 59 Fed Reg at 7809.

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D. The Complaint Sufficiently Alleges That the Oregon Program Is Preempted by Federal Law.

The CAA exempts biofuel production plants built before December 19, 2007, from reducing the life-cycle greenhouse gas emissions of their products. 42 USC § 7545(o)(2)(A)(i). As set forth in the Complaint, the Oregon Program conflicts with the CAA because it penalizes the use of ethanol from existing out-of-state biofuel plants and incentivizes regulated parties to cease importing these fuels from the Midwest, where almost all existing ethanol plants are located. Compl. ¶¶ 99-106, 137-145.[19] On this basis, the CAA conflicts with and therefore preempts the Oregon Program. *Id.* ¶ 142. Defendants' arguments ignore the allegations in the Complaint—which are accepted as true for purposes of deciding the pending motions—and are contrary to controlling precedent setting forth the governing conflict preemption standards.

1. <u>The Oregon Program Frustrates and Stands as an Obstacle to the Federal Renewable Fuel Program</u>.

The Supremacy Clause, US Const art VI, cl 2, "invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 US 707, 712 (1985) (internal quotation marks and citation omitted). "[T]he purpose of Congress is the ultimate touchstone" in determining whether a federal statute has preemptive effect. *Medtronic, Inc. v. Lohr*, 518 US 470, 485-86 (1996). Conflict preemption exists either when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US 52, 67 (1941).

Under principles of conflict preemption, a state law or regulation is preempted by federal law if, "under the circumstances of th[e] particular case, the State's law stands as an

[19] *See, e.g.*, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed Reg 14,670, 14,745 (Mar. 26, 2010) (Midwest "accounts for over 94% * * * of today's estimated ethanol production capacity").

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 US 519, 526 (1977) (internal quotation marks and citation omitted). Even if the federal statute contains a savings clause, a state regulation is preempted if it conflicts with federal law, *i.e.*, a savings clause does not affect "the ordinary working of conflict pre-emption principles." *Sprietsma*, 537 US at 65 (internal quotation marks and citation omitted); *see also Geier*, 529 US at 869 ("saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles").

Here, the Oregon Program conflicts with and is preempted by Section 211(o) of the CAA. Compl. ¶¶ 99-106, 137-145. The purposes of the EISA are to "reduce the dependence of the United States on energy imported from volatile regions of the world," and to "stabilize the cost and availability of energy." EISA § 806; *see* Compl. ¶ 104. The EISA attempts to achieve these goals, in part, by expressly exempting certain existing ethanol plants (that either were in production or had completed construction by December 19, 2007) from the EISA's requirements for reduced life-cycle GHG emissions. 42 USC § 7545(o)(2)(A)(i); *see* Compl. ¶ 102. Section 211(o) also provides that EPA's regulations may not "restrict geographic areas in which renewable fuel may be used." 42 USC § 7545(o)(2)(A)(iii)(II)(aa); *see* Compl. ¶ 103. Finally, while setting targets for new "advanced" and "cellulosic" biofuel, the EISA also retains targets for existing renewable biofuel. 42 USC § 7545(o)(2)(B). These provisions reflect a congressional purpose to ensure a continued nationwide market for ethanol from existing ethanol plants, which Congress deemed necessary to "stabilize the cost and availability of energy." EISA § 806; *see* Compl. ¶ 106.

The Oregon Program is preempted by Section 211(o) because it penalizes and inhibits the sale of fuels from existing ethanol plants. Compl. ¶ 105. Contrary to the purposes of Section 211(o), the Oregon Program's effect is to penalize ethanol produced in ethanol plants in the Midwest so that they will no longer be able to export their fuels to Oregon. Compl. ¶¶ 106, 139. Each of the compliance scenarios projected by the Oregon Program predicts Oregon's ending its importation of fuels from existing Midwestern ethanol plants.[20] The study commissioned and relied on by DEQ in its rulemaking found that "[Midwest] corn carbon intensity will exceed the gasoline standard in 2019 and * * * by 2019 only ethanol meeting the standard will be consumed within Oregon with low carbon intensity corn * * * mak[ing] up the balance of ethanol consumed in Oregon to meet the state's [10% ethanol blend] requirement." *Id.* at 10. Furthermore, the Oregon Program was designed to promote the growth of a biofuels industry in Oregon at the expense of biofuels producers in the Midwest. *See* Compl. ¶¶ 69-71. Thus, both by its design and in its effect, the Oregon Program is directly opposed to Congress's goal of ensuring continued use of renewable fuels produced in *existing* ethanol plants by constricting the market for the fuels produced by those existing ethanol plants. Compl. ¶¶ 81, 102.

At the outset, defendants dispute whether, in fact, the Oregon Program will have an adverse effect on Midwest ethanol and thus conflict with or frustrate the purposes of Section 211(o). *See* State Mot. 23. A motion to dismiss is not an appropriate mechanism to test whether a party will ultimately prove the facts underlying its well-pleaded claims. *See In re Gilead Scis. Sec. Litig.*, 536 F3d 1049, 1057 (9th Cir 2008) ("a district court ruling on a motion to dismiss is not sitting as a trier of fact"). As a result, the fact-intensive arguments advanced by Defendants cannot support the pending motions. To the contrary, they confirm that the Motions should be denied.

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[20] *See* ICF Int'l, Final Report, Task 3—*Updated Compliance Scenarios* 20, 26 (Aug. 2014), *available at* http://www.deq.state.or.us/aq/cleanFuel/docs/ComplianceScenarios_ICF.pdf ("Updated Compliance Report") (showing over 130 million gallons of corn ethanol for 2016 to 2018 from Midwestern ethanol plants and 0 gallons of corn ethanol for 2019 and beyond from these same plants for each of the contemplated compliance scenarios).

Defendants ignore that Section 211(o) was also enacted to ensure a continued market for ethanol from existing ethanol plants. Compl. ¶¶ 104, 106.[21] The Oregon Program frustrates and undermines this purpose. *Id.* ¶¶ 105-106. In each of the compliance scenarios projected by the Oregon Program, the volume of Midwestern ethanol sold in Oregon drops from over 130 million gallons to 0 after 2019. *See* Updated Compliance Report at 10, 19. Indeed, if a regulation such as the Oregon Program were adopted in every state, domestic demand for ethanol from existing ethanol plants would plummet in conflict with the EISA. Consequently, the Oregon Program cannot survive preemption: "If one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 US 246, 255 (2004). On Defendants' view, any state would be entitled to decide that the EISA's purposes are well and good for the rest of the country, but not for that state.

Defendants argue that Section 211(o) does not conflict with the Oregon Program because Section 211(o) does not "require, or guarantee, the use of corn ethanol to meet the increased volume requirement in any market." Or. Mot. 32. Defendants' argument appears to be that Section 211(o)'s volume requirements can be satisfied without resort to biofuels produced in existing facilities, even though Congress, in Section 211(o), gave sellers the option to meet the federal volume requirements using biofuels from existing *and* new facilities. 42 USC § 7545(o). That argument is indistinguishable from the one rejected by the Supreme Court in *Geier*.

In *Geier*, the Supreme Court addressed whether liability under state law could be imposed against a car manufacturer for failure to provide air bags in its vehicle. 529 US at 874-81. Under federal law, car manufacturers were permitted (but were not obligated) to

[21] Defendants suggest that Congress did not intend "to maintain the existing market for the corn ethanol industry," arguing that "the opposite appears to be true," because "Congress intended to increase the market for advanced biofuel, which does not include corn ethanol." Or. Mot. 34. But the notion that Congress intended to curtail existing sales of corn ethanol cannot be reconciled with Congress's explicit decision to exempt existing ethanol plants from life-cycle greenhouse gas requirements. Compl. ¶¶ 102, 105 (citing 42 USC § 7545(o)(2)(A)(i)).

provide air bags. Although federal law encouraged manufacturers to include air bags as one type of passive safety restraint, the Court concluded that state law could not take away the discretion afforded by federal law. *Id.* at 878-80. Similarly, in this case, although Congress has not forbidden regulated parties from meeting their obligation through purchase of biofuels from other sources, such as advanced renewable fuel production plants, Congress explicitly allowed regulated parties the option of purchasing a certain quantity of fuel from existing ethanol plants. Compl. ¶¶ 105-106; *see also* 42 USC § 7545(o)(2)(A)(i).

Here, Oregon's own compliance projections demonstrate that the Oregon Program would close off its market for biofuels from existing facilities even while the EISA mandates increased reliance on biofuels. *See* Updated Compliance Report at 20, 26. As a result, regulated parties would be required to meet the volume requirements of Section 211(o) without the benefit of ethanol from existing out-of-state facilities. The Oregon Program would limit the options that Congress made available to sellers, thereby frustrating the flexibility inherent in Section 211(o). *See Geier*, 529 US at 874–81. Congress believed this flexibility was an important means of achieving Section 211(o)'s goals; a state law—even if it has the same objective as a federal law—"is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Qwest Corp. v. Ariz. Corp. Comm'n*, 567 F3d 1109, 1118 (9th Cir 2009) (internal quotation marks and citation omitted).[22]

Intervenors argue that EPA did not intend for its RFS to conflict with state low-carbon fuel standards. State Mot. 21-23; *see also* NGO Mot. 6. They argue that "EPA rejected the suggestion that it should preempt state low carbon fuel standards (like Oregon's Program)" and that "EPA saw no conflict between such state programs and its [RFS] program." State

[22] Defendants suggest that the Oregon Program is not preempted because the "federal Renewable Fuel Standard program creates a *minimum* requirement that was intended to provide a floor." Or. Mot. 34. But in fact, the statute *exempts* ethanol from existing ethanol plants from the floor imposed on new plants, thereby indicating Congress's intent to preserve a market for such ethanol—an intent thwarted by the Oregon Program.

Mot. 22.[23] Even if these characterizations by defendants were taken at face value, an agency's views on whether some state laws conflict with its regulations are not relevant to the determination whether the state's program—not directly reviewed or considered by that agency—in fact conflicts with federal law and Congress's objectives. In any event, as noted *supra* at 42, this fact-intensive issue whether the Oregon Program in fact conflicts with the EISA's objectives is not a proper issue for resolution on a motion to dismiss.[24]

Defendants have predicted that, however importers attempt to comply, by 2019 they will no longer be able to sell Midwestern ethanol in the Oregon market. *See* Updated Compliance Report at 20, 26. The Oregon Program conflicts with the manifest purpose of CAA Section 211(o). *See* 42 USC § 7545(o)(2)(A)(i).

2. Defendants' Remaining Arguments Do Not Support Dismissal.

Defendants are likewise mistaken in arguing that the CAA's express preemption clauses preclude conflict preemption based on Section 211(o). Or. Mot. 28-31. Defendants argue that "State fuel regulation authority is preserved by the savings clause, and may be preempted only pursuant to the requirements of section 211(c)(4)(A), which is specifically carved out from the savings clause." *Id.* at 31. That argument ignores controlling law. As the Supreme Court has held, repeatedly, "Congress' inclusion of an express pre-emption clause does

[23] Defendants base these assertions on a brief statement by EPA that state low-carbon fuel programs are "not germane" to the RFS program, RJN Ex. G, at 13-15, but EPA had no reason to anticipate that a state would implement a program that, like the Oregon Program, erects barriers to the free flow of ethanol from other states.

[24] Defendants also contend that the Oregon Program is a regulation within Oregon's traditional police powers and is consequently presumed not to be preempted. Or. Mot. 31. But the Oregon Program is not a traditional state health and safety regulation. Instead, it regulates all stages of the "lifecycle[]" of the fuel, which includes the "emissions from the production, storage, transportation and combustion of the fuels," whether or not these activities occur in Oregon. Complaint ¶ 31 (quoting 2009 Or Laws ch 754, § 6(2)(b)(B)). Further, given Section 211's comprehensive fuel regulations, no presumption against preemption applies: "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 US 89, 108 (2000). Indeed, the Oregon Program takes aim at international, as well as interstate, commerce. Compl. ¶¶ 85-90. "Preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs." *Nat'l Foreign Trade Council v. Natsios*, 181 F3d 38, 73 (1st Cir 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 US 363 (2000).

not bar the ordinary working of conflict pre-emption principles." *Sprietsma*, 537 US at 65 (internal quotation marks and citation omitted); *see also Freightliner Corp. v. Myrick*, 514 US 280, 288 (1995).

Similarly, a savings clause does not "bar the ordinary working of conflict pre-emption principles." *Geier*, 529 US at 862; *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 US 341, 342 (2011). As the Ninth Circuit has held, "state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the ordinary working of conflict pre-emption principles." *Chicanos Por la Causa, Inc. v. Napolitano*, 558 F3d 856, 866 (9th Cir 2009) (internal quotation marks and citation omitted); *see also Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F3d 835, 854 (9th Cir 2002) (similar savings clause did not "eviscerate the primacy of federal authority" when federal and state laws conflict). This is especially true when "'giv[ing] broad effect to savings clauses * * * would upset the careful regulatory scheme established by federal law.'" *Qwest*, 567 F3d at 1120 (quoting *Geier*, 529 US at 870).

Further, the specific savings clauses cited by Defendants (Or. Mot. 28-31) are simply inapplicable to the Oregon Program. The EISA savings clause only purports not to preempt a "more environmentally protective requirement." EISA § 204(b). Defendants have not shown that the Oregon Program imposes a "more environmentally protective requirement." Or. Mot. 28-31. Defendants' argument omits any showing that the Oregon Program is "more environmentally protective"; to the contrary, it may instead increase GHG emissions (or at the very least hide them) by reshuffling higher carbon-intensity fuels to different markets, and may affect other federally regulated pollutants. (For instance, increased use of ethanol can lead to higher NO_x emissions. *See* Final Advisory Report at 162.) In any event, this is a factual issue not capable of resolution on a motion to dismiss.

Finally, Defendants argue that Plaintiffs brought this claim on behalf of others and lack prudential standing. Or. Mot. 27; State Mot. 19-21. Oregon Defendants claim that "Plaintiffs appear to assert the rights of others—namely, the rights of others who produce the unidentified type of biofuel Plaintiffs claim the Clean Fuel Program somehow penalizes." Or. Mot. 27. Similarly, State Intervenors claim that "[t]hese interests should be asserted by the exempted biofuel facilities and not by these Plaintiffs who do not purport to represent those facilities." State Mot. 19.

These arguments ignore the allegations in the Complaint, which include the following: (a) "AFPM's members produce and sell gasoline, diesel and ethanol used as transportation fuels in Oregon, and several of AFPM's members import such gasoline, diesel and ethanol themselves into Oregon"; (b) "other AFPM members sell gasoline, diesel and ethanol to companies that then import the products into Oregon"; and (c) "AFPM brings this lawsuit on behalf of its members." Compl. ¶¶ 8-10; *see id.* ¶¶ 17-20. Contrary to Defendants' claims, Plaintiffs' members "in fact produce or sell the type of biofuel that the Oregon Program penalizes." Or. Mot. 27; State Mot. 19-21. Plaintiffs have standing to assert this right on behalf of their members. *See, e.g.*, *Oregon Advocacy Ctr. v. Mink*, 322 F3d 1101, 1109 (9th Cir 2003).

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V. CONCLUSION

For these reasons, the motions to dismiss and motion for judgment on the pleadings filed by Defendants and their Intervenors should be denied.

DATED this 10th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

In compliance with LR 7-2 (b), plaintiffs have submitted to the Court an Unopposed Motion to Exceed Word Limit for this Omnibus Response in Opposition to Defendants' and Intervenors' Motions (see Dkt. No. 58). Accordingly, this brief responds to three separate motions and therefore contains 16,955 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel. This word count is less than the total word count permitted if plaintiffs had filed three separate responses.

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