No. 18-881

IN THE

# Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,

*Petitioners,*

v.

JANE O'KEEFFE, ET AL.,

*Respondents.*

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

## REPLY BRIEF


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## INTRODUCTION

Review should be granted because the decision below entrenches a square conflict concerning a State's authority to regulate commerce outside its borders. Further, the decision below conflicts with this Court's decisions addressing the standards for assessing whether a regulation discriminates against interstate commerce. The Oregon Respondents ("Oregon") offer no persuasive reason to deny review.

First, Oregon fails to rebut the showing by AFPM and its *amici curiae* (which Oregon ignores) that the Ninth Circuit's extraterritoriality holding conflicts with decisions of this Court and other circuits, and embraces a principle with radical implications for both the national market and State sovereignty. Certiorari should be granted to end this misbegotten—and rapidly expanding—effort by States to engage in extraterritorial regulation.

Second, the Ninth Circuit's discrimination ruling conflicts with multiple circuit decisions holding that a State's justification for a discriminatory law is no substitute for strict scrutiny. Oregon cannot avoid review by disguising the forthright discrimination appearing on the face of prior versions of the Fuel Program by replacing it with individualized carbon intensity scores derived from factors tied to a fuel's origin. The Ninth Circuit's approval of the Fuel Program's discriminatory purpose and design also conflicts with this Court's decisions striking down both forthright and ingenious efforts to promote local industry over out-of-state competitors. The petition should be granted.

## ARGUMENT

### I. THE NINTH CIRCUIT'S EXTRATERRITORIALITY HOLDING WARRANTS REVIEW.

The fundamental question presented by the Ninth Circuit's extraterritoriality holding is this: May a State, consistent with the Commerce Clause and horizontal federalism, use a product's sale in the State as a jurisdictional "hook" to regulate out-of-state commercial practices that do not affect the physical properties of the product and cause no adverse effects when the product is used in the State? The answer is no because States "may not attach restrictions to exports or imports in order to control commerce in other States," because "to do so would extend the [State's] police power beyond its jurisdictional bounds." *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994) (citing *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

Respondents mischaracterize AFPM's position as an attack on health and safety regulations that restrict the physical properties of products imported into California. AFPM has no quarrel with such regulations. States have undisputed authority to regulate the physical properties of goods sold in the State, including their packaging and labeling, based on harms the goods could cause when used in the State. But that is not what Oregon's Fuel Program does. Rather, it penalizes imported fuels based on the GHG emissions associated with their production and transportation in other States and countries, where the only asserted harms to Oregon from these activities flow not from the fuels' use in Oregon, but from the effect of out-of-state emissions on the global atmosphere. See Law Professors Br. 7 (explaining that Fuel Program is "an archetypal extraterritorial

regulation" because it "regulate[s] how companies do their business in other states").

### A. The Circuits Are Divided On The Extraterritoriality Doctrine.

As AFPM showed, the Ninth Circuit's extraterritoriality holding conflicts with decisions of the First, Fourth, and Seventh Circuits. Pet. 12-17. Oregon's efforts to distinguish these cases are unavailing. See Indiana Br. 2-3 (explaining that the circuit conflict "creates a grossly unfair playing field among the States").

Oregon tries to distinguish *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), on the ground that the law there "tie[d] together unrelated commercial transactions occurring in different jurisdictions." Opp. 16. But so does Oregon's Fuel Program. The law in *Natsios* was extraterritorial because it penalized companies' in-state transactions based on their unrelated conduct in another jurisdiction. 181 F.3d at 69-70. That is precisely what the Fuel Program does. It penalizes transportation fuel imports based on the producers' out-of-state activities that have no relation to any effects the fuels will have when used in Oregon. As in *Natsios*, the Fuel Program is unconstitutional because its "intention and effect . . . is to change conduct beyond [Oregon's] borders." *Id.* at 69.

Oregon's effort to distinguish *Ass'n for Accessible Medicines* v. *Frosh*, 887 F.3d 664 (4th Cir. 2018), fares no better. Oregon cites the court's holding that Maryland's law was not limited to drugs sold in Maryland. Opp. 17. But the court also held that, even if the law was so limited, it was still impermissibly extraterritorial because it "target[ed]" the "upstream

pricing and sale of prescription drugs," and "nearly all of these transactions occur outside Maryland." 887 F.3d at 671. The Fuel Program is impermissibly extraterritorial for the same reason—the conduct it targets and controls occurs almost entirely outside Oregon.

Likewise, Oregon has no good answer to the Seventh Circuit's repeated holdings that a State may not restrict imports to control extraterritorial conduct. The Indiana law in *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825 (7th Cir. 2017), which denied a permit to companies whose out-of-state manufacturing operations diverged from Indiana's requirements, applied only to Indiana sales. But it was nonetheless an "extraterritorial regulation." *Id.* at 834. If anything, the law in *Legato Vapors* was less objectionable than the Fuel Program because Indiana argued that its requirements were "vital to protect vaping products from contamination." *Id.* at 833. The court of appeals held that Indiana could address that concern through "purity requirements on vaping products sold in Indiana," but could not "try to achieve that goal by direct extraterritorial regulation of the manufacturing processes and facilities of out-of-state manufacturers." *Id.* at 834. Here, the out-of-state practices Oregon penalizes do not affect the fuels' "purity" or have any adverse effect when the fuels are used in Oregon.[1]

Nor can *National Solid Wastes Management Ass'n* v. *Meyer*, 63 F.3d 652 (7th Cir. 1995), be distinguished because Wisconsin applied its recycling requirements

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[1] The "risk of inconsistent regulation," Opp. 18, also provides no basis to distinguish *Legato Vapors*. The court cited that risk as merely "reinforc[ing]" its conclusion, not as essential to it. 847 F.3d at 834. And the same risk of inconsistent regulation exists here. *See* Pet. 23; Chamber of Commerce & NAM Br. 15-16.

to waste generated in other jurisdictions "whether it was to be dumped in Wisconsin or not." Opp. 18. Respondents ignore that the Seventh Circuit again struck down the law after it was narrowed to apply only to Wisconsin-bound waste. *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 165 F.3d 1151, 1152-53 (7th Cir. 1999) (per curiam). And there is no material difference between laws that restrict imports based on "action *by* other jurisdictions," Opp. 18 (emphasis added), and laws that restrict imports based on action *in* other jurisdictions. Either way, the law regulates extraterritorially. See *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidating New York law that restricted resale of imported milk based on prices charged by producers in Vermont, not on Vermont's minimum milk price).

Oregon argues that it merely "incentivize[s] conduct with respect to products sold in" the State. Opp. 19. But the same could be said of the laws invalidated by the First, Fourth, and Seventh Circuits. Those courts correctly hold that a State cannot leverage access to its market as an "incentive" to change out-of-state conduct. And it makes no difference whether such access is denied entirely or fettered by disadvantageous conditions. See *Natsios*, 181 F.3d at 70 (access was fettered by 10% bidding penalty). The Ninth Circuit's contrary rule creates a clear circuit conflict.

### B. The Ninth Circuit's Decision Conflicts With This Court's Precedents.

Oregon also tries in vain to reconcile the decision below with this Court's precedents. It attempts to dismiss this Court's decisions in *Carbone* and *Baldwin* as protectionism cases. Opp. 13-14. But both cases squarely rested on extraterritoriality concerns. And the rule they stand for—that States "may not attach

restrictions to exports or imports in order to control commerce in other States," *Carbone*, 511 U.S. at 393—fits this case like a glove.

Oregon's cases, by contrast, are inapposite. The law in *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), incentivized manufacturers to provide rebates on in-state sales and was indifferent to upstream prices charged to wholesalers. The law in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), regulated the provision of gasoline in Maryland to remedy "inequitable distribution of gasoline among retail stations" in the State, *id.* at 121, not to address perceived harms from producers' out-of-state activities. And the law in *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)—which was not even an extraterritoriality case—banned plastic milk containers to help address Minnesota's "solid waste disposal problems." *Id.* at 473. None of these cases addressed a law that penalized imports in an effort to change manufacturers' out-of-state conduct.

Oregon further ignores this Court's cases recognizing the limits on State power inherent in the Constitution's federal structure. Pet. 19-21; see Pacific Legal Foundation Br. 14-16 (explaining that efforts by States to "reach beyond their borders . . . and control activity that is properly the subject of direct regulation by other states undermines the basic principles of federalism"); Law Professors Br. 15-17 (explaining that extraterritorial regulation undermines state sovereignty). Contrary to Oregon's suggestion, Opp. 9-10, no case of this Court holds that the mere sale of a product in a State empowers the State to regulate the seller's out-of-state activities, as opposed to the attributes of the product (as in product liability cases) or the seller's in-state activities (such as the

disclosures in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996)). Any such rule would undermine "the autonomy of the individual States within their respective spheres." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989).

### C. The Question Presented Is Important.

Finally, Oregon ignores the far-reaching implications of the Ninth Circuit's erroneous rule. It does not—because it cannot—dispute that under the decision below, Oregon (or California or any other State in the Ninth Circuit) could regulate the "carbon intensity" of *every* product imported into the State, not just transportation fuels. And it does not—because it cannot—articulate any limiting principle that would prevent States from regulating other aspects of out-of-state production processes. If, for example, Oregon believed its social services were being strained by economic migrants from other jurisdictions who are attracted by its minimum wage, Oregon could impose a surcharge on all imported goods that were made by workers who were not paid Oregon's minimum wage, in order to "incentivize" out-of-state manufacturers to pay workers more. But see *Baldwin*, 294 U.S. at 524 ("The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop.").

These concerns are not hypothetical. See Chamber of Commerce & NAM Br. 21-22. Given the green light by the Ninth Circuit, California in particular has exerted its economic muscle to export its regulatory standards. See, *e.g.*, *Missouri ex rel. Koster* v. *Harris*, 847 F.3d 646 (9th Cir.) (rejecting challenge by group of States to California law banning sale of eggs from hens on farms that do not comply with California's animal-care standards), *cert. denied sub nom. Missouri ex rel. Hawley* v. *Becerra*, 137 S. Ct. 2188 (2017) (mem.); *Ass'n des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*,

729 F.3d 937 (9th Cir. 2013) (rejecting challenge to California law banning products that result from force-feeding birds).

The time for this Court to step in is now. Already the Ninth Circuit's outlier rule is causing disparate treatment and discord among the States. See Indiana Br. 18-20 (explaining that the Ninth Circuit's rule creates "a cluster of 'super' States to set commercial standards nationwide"); Western States Petroleum Ass'n & American Petroleum Institute Br. 2-3 (highlighting threat of "economic Balkanization"). Further delay will only exacerbate the "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin*, 294 U.S. at 522.

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

The petition further showed that the Ninth Circuit's refusal to apply strict scrutiny conflicts with decisions of other circuits and of this Court. Pet. 25-31. Oregon opposes review principally because "[c]hanges to the regulations since the complaint in this case was filed undermine petitioners' claim of facial discrimination." Opp. 20. But Oregon cannot avoid review by amending the Fuel Program to omit facially discriminatory Look-Up Tables while carrying forward their discriminatory design and effect by requiring individualized determinations that burden out-of-state competitors based on factors tied to geographic origin.

1. Oregon does not dispute that the Ninth Circuit ruled that "the fact that the [Fuel] Program labels fuels by state of origin does not render it discriminatory" because the "[P]rogram distinguishes among fuels not on the basis of origin, but rather on carbon intensity." Pet. App. 10a. Oregon acknowledges

that the "January 2015 regulations included 'lookup tables'" that "used a shorthand method to identify each pathway" and that "some of those pathways used geographic descriptors." Opp. 20-21. The Fuel Program discriminates because the "geographic descriptors" accurately convey its differential treatment of physically identical products based upon their place of origin. The purported justification for that discrimination cannot immunize the Program from strict scrutiny, Pet. 25-27 & n.8, and the Ninth Circuit's contrary conclusion conflicts with multiple circuits that have followed this Court's ruling that the justification for facial discrimination cannot exempt a discriminatory law from strict scrutiny. *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 (1994). The decision below "eviscerate[s] strict scrutiny as an important check against discriminatory state laws." Chamber of Commerce & NAM Br. 16-21.

Nor can Oregon avoid review through amendments to the Fuel Program that eliminate the "geographic descriptors" and instead require applicants to calculate individual carbon intensities based upon geographic factors that carry forward the same discriminatory design against competing imports. See *Amerada Hess Corp.* v. *Dir., Div. of Taxation*, 490 U.S. 66, 76 (1989) (explaining that a law does not "need to be drafted explicitly along state lines in order to demonstrate its discriminatory design").

Thus, the regulations dictate the manner that "Carbon intensities for fuels must be calculated." Or. Admin. R. 340-253-0400(1) (requiring applicants to use OR-GREET 3.0 model or another "model approved" by Oregon DEQ). To complete this calculation, applicants must provide Oregon with the "geographical coordinates (for each [fuel production] facility covered by the application)." *Id.* 340-253-

0450(3)(f). The "geographical coordinates" are essential because individual carbon intensities are based upon factors tied to a fuel's place of origin. Thus, applicants must "[s]elect [a] [r]egional [e]lectricity [m]ix" used to produce their fuel and fuel feedstock; Oregon sets carbon intensities for Oregon electricity at a substantially lower level than those for ethanol produced in the Midwest.[2] Likewise, applicants are penalized for each mile a fuel travels to reach Oregon. *Id.* The "geographic descriptors" in the Look-Up Tables reflected this geographic discrimination forthrightly; Oregon cannot avoid strict scrutiny by mandating individualized pathways based upon the same geographic factors underlying the Look-Up Tables. See *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994); ("The commerce clause forbids discrimination, whether forthright or ingenious"); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 271-73 (1984) (striking down tax scheme that discriminated in favor of alcoholic beverages produced using local products).

2. Review also should be granted because the decision below conflicts with this Court's decisions striking down efforts by States to benefit local industry at the expense of out-of-state competitors. Pet. 6-7. As Judge Smith explained, the Oregon Fuel Program discriminates in the same manner as the "tax and subsidy in *West Lynn Creamery*" by (1) "exempt[ing] in-state entities from any burden under the law," (2) "afford[ing] them an additional subsidy in the form of

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[2] Under OR-GREET 3.0, the "carbon intensity" for the electricity used to produce biofuels such as ethanol in Oregon (462.3 gCO2e/kWh) is significantly lower than for electricity used to produce ethanol in the Midwest (*e.g.*, 683.65 gCO2e/kWh; 791.91 gCO2e/kWh). *See OR-GREET 3.0 Calculators*, Or. DEQ, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuel-Pathways.aspx (last visited Apr. 19, 2019) (release date Sept. 2018).

valuable carbon credits" while (3) "out-of-state regulated entities . . . generate deficits and experience the full impact of the law." Pet. App. 25a-26a (Smith, J., dissenting).

This discriminatory design is not happenstance. Oregon offers no response to statements from the Governor's office that the Oregon Fuel Program would address the problem that in 2012 "Oregonians sent more than $6 billion out of state to import gas and diesel, while homegrown, low carbon fuel producers remain locked out of a promising market." Pet. App. 134a; see *Bacchus,* 468 U.S. 263 (invalidating tax system designed to develop local industry by granting only in-state products tax rebates).[3]

Finally, Oregon asserts that the Fuel Program's discrimination "between gasoline"—which Oregon does not produce—"and ethanol"—which is produced by in-state entities—presents a threshold issue "whether [gasoline and ethanol] compete in a single market." Opp. 25 n.4. Pointedly, Oregon itself does not (and cannot) dispute that gasoline and ethanol "compete in the same market." The Fuel Program identified ethanol as a direct substitute for gasoline, and Oregon acknowledges that the two compete with

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[3] The decision below avoids addressing whether the statements of Oregon officials reflect a protectionist purpose; it instead observes that they are "*no more probative of a discriminatory or protectionist purpose* than the statements by California state officials" that the Ninth Circuit "found insufficient to establish discriminatory purpose in *Rocky Mountain.*" Pet. App. 12a (emphasis added). *Rocky Mountain* set an unjustifiably high bar. There, California officials stated that they designed California's fuel program to "'keep more money in the State' and 'ensure that a significant portion of the biofuels used in the LCFS are produced in California.'" *Id.* at 12a n.10.

respect to every gallon of gas sold. Opp. 4 ("[G]asoline sold in Oregon must contain 10% ethanol").

## CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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