No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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January 7, 2019

QUESTIONS PRESENTED

1. Whether the Oregon Fuel Program—which restricts transportation fuel imports based upon a "life-cycle analysis" that regulates the manner in which the fuels are produced and transported in interstate and foreign commerce—is an impermissible extraterritorial regulation that violates the United States Constitution.

2. Whether the Oregon Fuel Program—which is designed to require and has the effect of requiring out-of-state competitors to subsidize in-state producers—violates the Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioners, American Fuel & Petrochemical Manufacturers ("AFPM"), American Trucking Associations, Inc. ("ATA"), and Consumer Energy Alliance ("CEA"), were the plaintiffs-appellants below.

Respondents, Jane O'Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, Melinda Eden, Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, and Sue Langston, in their official capacities as officers and employees of the Oregon Department of Environmental Quality, Ellen F. Rosenblum, in her official capacity as Attorney General of the State of Oregon, and Kate Brown, in her official capacity as Governor of the State of Oregon, were the defendants-appellees below.

Respondents, California Air Resources Board, State of Washington, Oregon Environmental Council, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Climate Solutions, were the intervenor-defendants-appellees below.

RULE 29.6 STATEMENT

AFPM is a national trade association. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in AFPM. ATA is a national trade association. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in ATA. CEA is a national trade association of more than 400,000 individual members. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in CEA.

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Chad DeVeaux, *One Toke too Far: the Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. Rev. 953 (2017) 25

Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467 (2003) 17

Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992) 20

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987) 17, 20

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Fuel & Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance (collectively, "AFPM"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 903 F.3d 903 (9th Cir. 2018), and is reproduced at Petition Appendix ("Pet. App.") 1a–27a. The district court's opinion is reported at 134 F. Supp. 3d 1270 (D. Or. 2015), and is reproduced at Pet. App. 28a–60a.

JURISDICTION

The Ninth Circuit entered its judgment on September 7, 2018. On November 15, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 7, 2019. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS

The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Relevant

provisions of Oregon's Clean Fuel Program, Or. Admin. R. 340-253-0000, *et seq*. (2015), are reproduced at Pet. App. 61a-114a.[1]

INTRODUCTION

The Oregon Clean Fuel Program (the "Fuel Program") is designed to restructure the market for transportation fuels in Oregon by regulating the manner in which such fuels are extracted, produced and transported in interstate and foreign commerce.

The Fuel Program is modeled on the California Low Carbon Fuel Standard ("LCFS"), which the Ninth Circuit has described as the vehicle through which California "'has essentially assumed legal and political responsibility for emissions of carbon resulting from the production and transport, regardless of location, of transportation fuels actually used in California.'" *Rocky Mountain Farmers Union* v. *Corey*, 730 F.3d 1070, 1105–06 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014). Like the LCFS, the Fuel Program subsidizes the development of an in-state transportation fuel industry by imposing burdens on competing imported fuels. The Fuel Program applies a "life-cycle" analysis that restricts imports of transportation fuels based on where (and how) they are produced and transported in interstate and foreign commerce.

Petitioners seek review of the Ninth Circuit's decision rejecting their constitutional challenges to the Fuel Program. Review should be granted because the

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[1] The Petition Appendix contains relevant portions of the January 2015 version of the Oregon Program, which was the version in effect when the Complaint was filed. On December 9, 2015 and November 16, 2018, amended versions of the Program were adopted. Citations herein are, unless otherwise specified, to the January 2015 version.

decision below implicates an established circuit conflict concerning the ability of a state to regulate economic conduct occurring outside of its borders under the United States Constitution and conflicts with this Court's precedents. The decision further implicates a conflict among the circuit courts and with decisions of this Court regarding the standards that apply to assess a state regulation that discriminates against interstate and foreign commerce.

Resolution of these conflicts is critically important because they raise core issues of state sovereignty inherent in the Constitution's structure. That structure guarantees that each of the 50 states remains a co-equal sovereign protected from encroachment by other states seeking to exert control over conduct within the territory of another state. This case presents an ideal vehicle to resolve both of these conflicts. AFPM's challenge to the Fuel Program's "life-cycle" analysis squarely presents the question whether the Constitution protects state sovereignty because the life-cycle analysis is Oregon's means of regulating and controlling conduct occurring outside of its territorial bounds. Further, that life-cycle analysis is the cornerstone of a discriminatory program designed to spark the development of an in-state fuel industry at the expense of out-of-state competitors.

STATEMENT OF THE CASE

Because the Ninth Circuit affirmed the dismissal of AFPM's complaint under Rule 12(b), the "well-pleaded allegations of material fact" are accepted "as true" and construed "in the light most favorable to [AFPM]." Pet. App. 7a.

A. Regulatory Background

1. The Fuel Program was authorized by Oregon's legislature and governor and implemented by Oregon's Department of Environmental Quality ("DEQ"). Pet. App. 123a (Compl. ¶¶ 34–38). It was designed to benefit the local transportation fuel industry at the expense of out-of-state competitors. As explained by the governor, "'[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.* at 134a–135a (quoting Press Release, Or. Governor's Office, *Governor Kitzhaber Announces New Clean Fuels Initiative* (Feb. 13, 2014)). The governor highlighted that "[t]here 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." *Id.* at 135a. Accordingly, the governor sought "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.*

2. The Fuel Program regulates transportation fuels based on life-cycle "carbon intensity." Pet. App. 124a–125a. A fuel's "carbon intensity" is not a measure of the "carbon" in the fuel or "carbon" released during fuel combustion. *Id.* at 125a. Rather, "carbon intensity" is "'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).'" *Id.* at 124a (quoting Or. Admin. R. 340-253-0040(9)). Thus, "life-cycle" carbon intensity assesses "all stages of fuel production, from feedstock genera-

tion or extraction, production, distribution, and combustion of fuel by the consumer." *Id.* at 125a (quoting Or. Admin. R. 340-253-0040(37)).

For fuel imports, the life-cycle analysis regulates greenhouse gas ("GHG") emissions relating to (i) the extraction and production of fuels occurring outside Oregon and (ii) the transport and distribution of fuels in interstate and foreign commerce outside Oregon. Pet. App. 125a. For example, in setting carbon intensities for gasoline and diesel, DEQ considered "[t]he sources of crude and associated factors that affect emissions such as flaring rates, extraction technologies, capture of fugitive emissions and energy sources." *Id.* at 128a. Because Oregon refines no petroleum, these aspects of fuel production all occur outside of Oregon. *Id.* at 131a.

For biofuels, the Fuel Program assigns different carbon intensities to physically identical fuels based, in part, on where and how individual biofuels are produced and brought to the Oregon market. Pet. App. 125a. Because the Fuel Program applies to biofuels produced outside Oregon, it also regulates the production and transport of fuels in other states and countries. *Id.* at 133a (describing burden imposed on Midwest ethanol producers).

The Fuel Program requires fuel providers to reduce the average carbon intensity of the transportation fuels they import or produce in Oregon to meet the annual "clean fuel standard" or to purchase "credits" from competing producers. Pet. App. 129a. The maximum average carbon intensity of transportation fuels is ratcheted down each year through 2025. *Id.* at

128a.[2] The carbon intensity assigned to gasoline and diesel fuels exceeds the annual average carbon intensity fuel standard for 2016 and every year thereafter. *Id.* at 129a. As a result, "importers of gasoline would need to replace existing sources of ethanol with ethanol that has lower calculated carbon intensities or purchase credits from other parties to meet their annual average carbon intensity requirements." *Id.* at 129a; see also *id.* (same for imported diesel fuel). In contrast, in-state producers of ethanol and biodiesel "already meet the proposed average annual carbon intensity," face "no additional costs" associated with reducing carbon, and instead "generate credits" that can be sold to out-of-state competitors. *Id.* 128a–130a.

3. Oregon officials responsible for the Fuel Program highlighted that it would promote Oregon biofuels production at the expense of existing out-of-state fuel producers. *E.g.*, Pet. App. 133a–138a. The Governor's Office explained that the Fuel Program would counteract the net outflow of billions of dollars and promote the development of a competing in-state market. *Id.* at 134a–135a. 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.* at 136a–

[2] When the Oregon Program was adopted in 2015, the baseline carbon intensity assigned for gasoline was 89.31 gCO2e/MJ, which is a single weighted average of gasoline supplied to Oregon. Pet. App. 129a. Importers of gasoline were required, in 2016, to meet an average carbon intensity cap of 89.08 gCO2e/MJ. Likewise, the baseline carbon intensity value for diesel fuel was 87.09 gCO2e/MJ. *Id.* At the time of adoption, importers of diesel were required, in 2016, to meet an average carbon intensity of 86.87 gCO2e/MJ, which is lower than the carbon intensity for their diesel fuel. *Id.*

137a (quoting Press Release, Or. Sen. Majority Office, *Senate takes historic step advancing Oregon's economy and fuel alternatives* (Feb. 17, 2015)). In turn, DEQ agreed with Oregon's governor and legislators, explaining that the Fuel 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." *Id.* at 137a (quoting DEQ, *Clean Fuels Program Phase II Rulemaking* at 9 (Jan. 7–8, 2015). One adviser to DEQ frankly acknowledged that "the whole intent of the [Fuel Program] is to reduce the use of petroleum, which is going to have a significant impact in the petroleum industry out of state." *Id.* at 138a.

The Fuel Program has a stated goal of achieving, by 2025, a 10 percent reduction in the annual average carbon intensity for transportation fuels sold in Oregon. Pet. App. 121a–122a. The intended design and effect of the Fuel Program is that importers of gasoline and diesel will generate deficits and therefore will be required to either change the composition of the fuel they import or purchase credits from competitors that produce substitutes for gasoline and diesel fuel. *Id.* at 129a–130a. Oregon's 2018 Forecast confirms that all deficits under the Fuel Program are attributable to "Gasoline blendstock" and "Diesel blendstock," neither of which is produced in Oregon; in contrast, in-state ethanol and biodiesel producers generate credits that can be sold to competitors, thereby providing in-state producers a direct subsidy from their out-of-state competitors. See AFPM Supplemental Authority Under Federal Rule of Appellate Procedure 28(j) at 1–2 (Feb. 27, 2018).

B. Proceedings Below

1. On March 23, 2015, AFPM, whose members include parties regulated by the Fuel Program, filed suit seeking declaratory and injunctive relief. Pet. App. 116a–121a. AFPM alleged that the Fuel Program regulates activity that occurs wholly outside Oregon—*i.e.*, the extraction, production, and transport of transportation fuels in other states and countries—through application of a "life-cycle" analysis. Pet. App. 138a–139a. By doing so, the Oregon Fuel Program extends Oregon's regulatory reach beyond its borders in violation of the federal structure of the United States Constitution. *Id.* at 141a–143a. AFPM further alleged that the Fuel Program discriminates against transportation fuels imported into Oregon through the assignment of carbon-intensity scores that favor in-state fuels over imported fuels like gasoline and diesel fuel (which are not produced in Oregon) and Midwest ethanol. Pet. App. 128a–138a.

Respondents and their Intervenors filed Motions to Dismiss the Complaint, which Chief Judge Ann Aiken granted. Pet. App. 29a. The court held that the Fuel Program was not an extraterritorial regulation based on the Ninth Circuit's prior conclusion that "the analogous LCFS 'does not control conduct wholly outside the state.'" *Id.* at 48a (quoting *Rocky Mountain*, 730 F.3d at 1103–07). Further, the court concluded that AFPM's "discrimination claim is largely barred by" the Ninth Circuit's decision in *Rocky Mountain*, but then addressed "all aspects of [the] discrimination claim." *Id.* at 37a–38a. The court acknowledged "that Oregon does not produce any petroleum in-state," *id.* at 41a, and that in assigning carbon intensities to imported fuels, the Fuel Program considered factors such as "location" in assessing "GHG emissions attributable to a default pathway," *id.* at 42a (quoting *Rocky Mountain*,

730 F.3d at 1089–93). The court dismissed, without substantive discussion, statements by the governor, legislators, and DEQ reflecting that the Fuel Program was intended to benefit local industry at the expense of out-of-state competitors. *Id*. at 43a–45a.

2. A divided panel of the Ninth Circuit affirmed, based largely upon the Ninth Circuit's ruling in *Rocky Mountain*. With regard to extraterritoriality, the panel rejected AFPM's allegations "that the [Fuel Program] violates the Commerce Clause and 'principles of interstate federalism' by attempting to control 'commerce occurring wholly outside the boundaries' of the state." Pet. App. 20a (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)). The panel ruled that "these claims are squarely barred by *Rocky Mountain*" because "[l]ike the LCFS, the Program expressly applies only to fuels sold in, imported to, or exported from Oregon." *Id.* at 21a.

As to discrimination, the panel again relied upon *Rocky Mountain* to rule that, even though "the Program labels fuels by state of origin," that "does not render it discriminatory." Pet. App. 10a.[3] Like the district court, the Ninth Circuit dismissed statements by Oregon's Governor and legislators, which supported AFPM's allegation that the "[Fuel Program] was enacted with the intent to 'foster Oregon biofuels production at the expense of existing out-of-state fuel producers.'" *Id.* at 11a. The panel reasoned that the statements of the Oregon officials "are no more probative of a discriminatory or protectionist purpose than the

[3] The panel explained that the second phase of the Fuel Program "provides two default ethanol pathways—Midwest and Oregon averages—which assume production using the same inputs but different energy sources." Pet. App. 5a n.4.

statements by California state officials we found insufficient to establish discriminatory purpose in *Rocky Mountain*." *Id*. at 12a. Lastly, the panel concluded that that there was no discriminatory effect even though in-state producers uniformly benefit from the Fuel Program, and out-of-state petroleum producers will be required to subsidize instate competitors. *Id.* at 19a–20a.

Judge N.R. Smith dissented. Recognizing that the panel was bound by *Rocky Mountain*, Judge Smith voiced his disagreement with that earlier decision, stating that "the incorporation of location and distance data into the calculation of carbon intensity values is facially discriminatory under the Supreme Court's Commerce Clause analysis." Pet. App. 22a n.1 (citing *Rocky Mountain Farmers Union* v. *Corey*, 740 F.3d 507, 515–16 (9th Cir. 2014) (M. Smith, J., dissenting from denial of rehearing en banc)). Judge Smith further explained the Fuel Program is discriminatory because it is designed so that "*all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits." *Id.* at 25a (citing *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994)).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision implicates a conflict concerning the standards for determining whether a State law that restricts imports as a means of controlling conduct in another state is impermissibly extraterritorial within the meaning of the United States Constitution. See *Healy*, 491 U.S. at 335–37 (1989). Oregon's "life-cycle" analysis restricts the import of transportation fuels into Oregon in an effort to control conduct—the production and transport of fuel in interstate and foreign commerce—occurring outside of Oregon's territorial boundaries. The decision below

held that the Fuel Program was not extraterritorial because it applied only to fuels "sold in" or "imported to" Oregon. Pet. App. 21a. That ruling conflicts with decisions of the First, Fourth and Seventh Circuits, which have held that an importing state may not make access to its markets contingent on compliance with its preferred way of conducting interstate commerce. See *infra* 12-14. Those conflicting decisions adhere to this Court's holding that a state "may not attach restrictions to exports or imports in order to control commerce in other states." *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994); see also *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). Proper resolution of that conflict is critically important to maintaining the Constitution's structure, which recognizes and protects a union of 50 "coequal sovereigns" that operate as "indestructible States." *PPL Mont., LLC* v. *Montana*, 565 U.S. 576, 591 (2012); *New York* v. *United States*, 505 U.S. 144 (1992).

II. Predictably, the Fuel Program's regulation of conduct occurring outside its borders is designed to discriminate in favor of local interests at the expense of out-of-state competitors. The Ninth Circuit's approval of that discriminatory scheme warrants further review because it too implicates a conflict among the circuit courts on the standard for assessing whether a statute is facially discriminatory. Further, the majority's dismissal of allegations concerning the Fuel Program's discriminatory design and effect violates this Court's settled precedent. See *W. Lynn Creamery*, 512 U.S. at 194; *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 271–73 (1984). As explained in Judge Smith's dissent, under the Fuel Program, (i) "[o]ut-of-state entities bear the full brunt of the law's burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions," while (ii) in-

state competitors actually "receive a subsidy from the out-of-state entities in the sale of their valuable credits." Pet. App. 26a (N.R. Smith, J., dissenting). By doing so, Oregon has sought, in the words of Justice Cardozo, to enhance the competitive position of local industry by "'neutraliz[ing] advantages belonging to the place of origin.'" *Id.* at 23a (quoting *W. Lynn Creamery*, 512 U.S. at 196 (quoting *Baldwin*, 294 U.S. at 527)). The Fuel Program discriminates in violation of the Commerce Clause.

The petition should be granted.

I. THE NINTH CIRCUIT'S RULINGS ON THE EXTRATERRITORIALITY DOCTRINE IMPLICATE A CIRCUIT SPLIT AND CONFLICT WITH DECISIONS OF THIS COURT.

A. The Circuits Are Split As To The Constitutionality Of Extraterritorial State Regulation.

This Court's review is needed because the Ninth Circuit's extraterritoriality ruling conflicts with decisions of the First, Fourth, and Seventh Circuits.

1. In *National Foreign Trade Council* v. *Natsios*, the First Circuit struck down a law restricting the ability of Massachusetts agencies to purchase goods or services from companies that engaged in business with Burma, in order to pressure the Burmese government regarding "violations of human rights." 181 F.3d 38, 46-47 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). The First Circuit held that the law was unconstitutionally extraterritorial, reasoning that "Massachusetts's desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma does not permit it to act to regulate activities beyond its borders," *id.* at 65, by "conditioning state

procurement decisions on conduct that occurs in Burma," *id*. at 69. The First Circuit also rejected the state's argument that the law was not extraterritorial because companies could continue to do business in Burma and simply "forgo contracts with Massachusetts" or pay a bidding penalty. *Id*. at 70.

Similarly, the Fourth Circuit recently struck down a Maryland law regulating certain price increases by drug manufacturers and wholesale distributors as unconstitutionally extraterritorial. *Ass'n for Accessible Meds*. v. *Frosh*, 887 F.3d 664 (4th Cir. 2018).[4] The court ruled that, even if the law were interpreted to "require a nexus to an actual sale in Maryland, it is nonetheless invalid because it still controls the price" of upstream sales of drugs by manufacturers or wholesalers "that occur wholly outside the state." *Id*. at 671. The fact that the drugs would ultimately be sold in Maryland did not permit the state to "compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland." *Id*. at 672.

And in *National Solid Wastes Management Association* v. *Meyer*, the Seventh Circuit struck down a waste regulation as unconstitutionally extraterritorial because it "condition[ed] the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards." 63 F.3d 652, 658 (7th Cir. 1995). Rejecting the state's argument that the extraterritoriality doctrine is

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[4] The Attorney General of Maryland filed a petition for a writ of certiorari from this decision on October 19, 2018. *Frosh* v. *Ass'n for Accessible Medicines*, No. 18-546 (U.S. filed Oct. 19, 2018). On November 13, 2018, this Court called for a response to the petition, which is due on January 14, 2019.

"limited to th[e] context" of "price affirmation statutes," the court found the regulation unconstitutional because "[i]t essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce." *Id*. at 659.

More recently, in *Legato Vapors, LLC* v. *Cook*, the Seventh Circuit applied the same analysis in striking down an Indiana law as an extraterritorial "direct regulation of out-of-state manufacturing processes and facilities" for "vaping products" sold in Indiana. 847 F.3d 825, 831 (7th Cir. 2017). The Court concluded that the sale of the product in Indiana did not permit Indiana to "dictate[] how out-of-state manufacturers must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers." *Id*. at 830. The court struck down the Indiana law because its "provisions control conduct 'beyond the boundaries of the state' and tell out-of-state companies how to operate their businesses.'" *Id.* at 834 (citing *Edgar* v. *MITE Corp*., 457 U.S. 624, 643 (1982) (plurality opinion)).

In contrast, the Ninth Circuit adopts a narrow view of extraterritoriality that conflicts with the First, Fourth, and Seventh Circuits. The decision below found that the extraterritoriality "claims are squarely barred by" the Ninth Circuit's earlier ruling upholding the similar California low carbon fuel standard in *Rocky Mountain*. See Pet. App. 20a. *Rocky Mountain* recognized that "[w]ith the Fuel Standard, California 'has essentially assumed legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels actually used in California.'" 730 F.3d at 1105–06 (emphasis added). The *Rocky Mountain* Court further recognized that the "lifecycle"

regulation turned on numerous out-of-state "factors," including "transportation, farming practices, and land use" in other states and countries. *Id*. at 1103.

Nonetheless, the Ninth Circuit in *Rocky Mountain* held that the low carbon fuel standard was not extraterritorial, concluding that California "does not control these factors . . . simply because it factors them into the lifecycle analysis." *Id*. Stating that the extraterritoriality doctrine is limited to "price-affirmation statutes," *id*. at 1101, the Ninth Circuit held that "States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants," *id*. at 1103; see also *Ass'n des Eleveurs de Canards et d'Oies du Quebec* v. *Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (ruling that extraterritoriality doctrine applies only to price-fixing statutes).

The conflict between the circuits is outcome determinative: The Oregon Fuel Program (and California LCFS) are extraterritorial under the test adopted in *Natsios*, *Frosh*, and *Meyer*, while those cases would be wrongly decided under the standard in *Rocky Mountain*. There, the Ninth Circuit concluded that a state may restrict access to its market "with the goal of influencing the out-of-state choices of market participants," 730 F.3d at 1103, while the First, Fourth, and Seventh Circuits have all concluded that a state may *not* require a company to "conform to [that state's] way of doing things" in its nationwide operations "[a]s a price for access to the [state's] market." See *Meyer*, 63 F.3d at 658–61. Further, these circuits have rejected the argument—adopted in *Rocky Mountain*—that imposing economic "incentives" or penalties based on out-of-state conduct, rather than an

outright ban, prevents a law from operating extraterritorially. See *Natsios*, 181 F.3d at 70. As the Ninth Circuit's dissent from denial of rehearing explained, "[b]y penalizing certain out-of-state practices, California's regulations control out-of-state conduct just as surely as a mandate would, particularly in view of California's economic clout." *Rocky Mountain*, 740 F.3d at 518.[5]

Decisions of other circuits, including the Eighth and Tenth Circuits, also show that the lower courts are in need of this Court's guidance. The Tenth Circuit has remarked that the "extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence," and that it is unclear—among other things—whether the doctrine is limited to the context of price control or price affirmation statutes, and whether it requires an analysis of discriminatory impact. *Energy & Envtl. Legal Inst.* v. *Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.) (considering extraterritoriality as an aspect of the Commerce Clause, not as a principle of horizontal structural federalism). And while the Eighth Circuit has considered the doctrine, a majority was unable to come to a conclusion as to its proper scope. See *North Dakota* v. *Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (Loken, J.) (concluding that a Minnesota law regulating imported energy was unconstitutionally exterritorial because it "seek[s] to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside

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[5] *See* James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357, 1384 (2014) ("By necessity, states only regulate transactions within their borders; the point of the prohibition on extraterritorial regulation is that states cannot leverage in-state regulation to control actions elsewhere.").

Minnesota. And their practical effect is to control activities taking place *wholly* outside Minnesota").[6]

This Court should grant the petition to resolve the conflict among the circuits and end the uncertainty as to the scope of the extraterritoriality doctrine.

B. The Ninth Circuit's Ruling Conflicts With Decisions Of This Court.

In addition, the petition should be granted because the decision below—which applied the earlier Ninth Circuit decision in *Rocky Mountain*—"places the law of this circuit squarely at odds with Supreme Court precedent." *Rocky Mountain*, 740 F.3d at 513 (M. Smith, J., dissenting from denial of rehearing en banc).[7] Under this Court's precedent, the Fuel Program violates the Constitutional principle of interstate federalism

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[6] Scholarly commenters have likewise remarked on the "considerable difficulty" and "uncertainty" that federal courts have faced in interpreting the extraterritoriality doctrine. Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467, 491–92 (2003); *see* Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1884 (1987) ("[W]e do not understand the extraterritoriality principle . . . nearly as well as we should").

[7] The Court's denial of certiorari of the interlocutory decision in *Rocky Mountain* does not undermine this Court's prior precedent or signal approval of *Rocky Mountain*. *See Missouri* v. *Jenkins*, 515 U.S. 70, 85 (1995) ("[T]he denial of a writ of certiorari imports no expression of opinion upon the merits of a case, as the bar has been told many times."); *accord* Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 5.7 at 335 (10th ed. 2013) (citing cases). Indeed, the California Respondents opposed review in *Rocky Mountain* because, among other reasons, the Ninth Circuit had remanded the case to the district court for "consider[ation of Plaintiffs'] remaining claims." *Rocky Mountain Farmers Union* v. *Corey*, No. 13-1148, Brief in Opp. 34 (U.S. May 27, 2014).

because it "impinge[s] on the sovereign interests of [other] States to regulate farming, ethanol production, and other activities within their own borders as they see fit." *Id.*

Both in the Commerce Clause context and elsewhere, this Court's cases recognize that the Constitution protects the inherent sovereignty of states by prohibiting one state from exceeding its territorial jurisdiction and seeking to impose its policy preferences on other states. For instance, in *Healy,* the Court held that the Constitution "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." 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43 (plurality opinion)). Under *Healy*, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* This restriction on state authority reflects "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36 (footnote omitted). Both *Healy* and *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), struck down statutes that prohibited sales of alcohol within a state at higher prices than it was sold out-of-state, holding that the laws "fall[] within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids." *Id.* at 579. The Court rejected the argument that the laws were not extraterritorial because they regulated only products sold within the state, holding that the "mere fact that the effects of [the] Law are triggered only by sales of liquor within the State . . . does not validate the law

if it regulates the out-of-state transactions of distillers who sell in-state." *Id*. at 580.

The Ninth Circuit's ruling also conflicts with *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994). The ordinance in *Carbone* required that all waste be processed in a local transfer station before leaving the municipality. The Town of Clarkstown sought to justify its ordinance based upon its extraterritorial effect, that is, as a means "to steer solid waste away from out-of-town disposal sites that [the Town] might deem harmful to the environment." 511 U.S. at 393. The Court rejected that extraterritorial goal and held instead that "[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other States," and that the ordinance impermissibly "extend[ed] the town's police power beyond its jurisdictional bounds." *Id.*

This Court has applied the same extraterritoriality principle outside the Commerce Clause context, under the Due Process Clause and as an aspect of structural federalism. As *Edgar* explained, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." 457 U.S. at 643 (plurality opinion). Whether the State is acting through judicial or regulatory decrees, "[i]n either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" *Id*. (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977)). For instance, *BMW of North America, Inc*. v. *Gore*, 517 U.S. 559 (1996), ruled that "no single State [can] ... impose its own policy choice on neighboring States," and that therefore "a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *Id.* at 571–72. And in considering the

jurisdictional reach of state courts, this Court recently held that the Constitution limits "the coercive power of a State" over non-resident litigants as "a consequence of territorial limitations on the power of the respective states." *Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)); *id.* at 1781 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980)) (the constitutional principle "of interstate federalism" "may sometimes act to divest the State of its power").

The extraterritoriality doctrine ultimately is rooted in the Constitution's structure, which creates a federal union of 50 "coequal sovereigns," *PPL Mont., LLC*, 565 U.S. at 591, whose spheres of authority are defined by their territorial boundaries. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315–18 (1992) ("The territorial allocation of state authority is a fundamental constitutional principle"); Regan, *supra*, 85 Mich. L. Rev. at 1885 (describing the extraterritoriality doctrine as "one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole"). As this Court has explained, "'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" *New York*, 505 U.S. at 162 (quoting *Texas* v. *White*, 7 Wall. 700, 725 (1869)).

Just as the Constitution's structure protects state sovereignty by limiting the power of the federal government, *Printz* v. *United States*, 521 U.S. 898 (1997),

so too the sovereignty of each State places a reciprocal "limitation on the sovereignty of all of its sister States." *Woodson*, 444 U.S. at 293; see *Shelby Cty*. v. *Holder*, 133 S. Ct. 2612, 2621 (2013) (recognizing the "historic tradition that all the States enjoy equal sovereignty"). Each "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 U.S. 66, 70 (1954). That is because the "several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Brown* v. *Fletcher's Estate*, 210 U.S. 82, 89 (1908). As a result, "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882). 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 U.S. (12 Wheat.) 213, 369 (1827).

The Fuel Program violates the restriction on extraterritorial legislation because, as explained in *Carbone*, a government may not attach "restrictions to exports or imports," 511 U.S. at 393, to control out-of-state conduct. The Constitution prohibits such an "exten[sion of] the [state's] police power," *id.*, over its sister states. *Edgar*, 457 U.S. at 643 (plurality opinion). The Fuel Program's "lifecycle analysis" of imported fuels is inherently exterritorial because it "depends largely on out-of-state production and land use decisions," thereby "sweep[ing] beyond the borders" of the regulating state. *Rocky Mountain*, 740 F.3d at 513 (M. Smith, J., dissenting from denial of rehearing en banc). The "carbon intensity" regulated by the lifecycle

analysis "is not an inherent quality of the finished product that is sold in state—two chemically identical gallons of ethanol or gasoline could have drastically different carbon intensities depending on how they were produced and transported across the globe." Coleman, *supra*, 83 Fordham L. Rev. at 1374.

Specifically, the Fuel Program requires companies to reduce carbon intensity values that are based on out-of-state activities, including "feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer," Pet. App. 125a (quoting Or. Admin. R. 340-253-0040(37)); *id.* at 128a. By penalizing imported fuels based on how they are produced and transported in other states and countries, the Fuel Program "regulate[s] and control[s] activities wholly beyond its boundaries," *Watson*, 348 U.S. at 70, thus transgressing the "limitation on [its] sovereignty [put in place by] all of its sister States," *Woodson*, 444 U.S. at 293. Indeed, "[t]hat forbidden effect is the *aim* of exported state energy regulation": the Fuel Program "is designed to limit greenhouse gas emissions from production of fuels all over the world." Coleman, *supra*, 83 Fordham L. Rev. at 1381. As the Ninth Circuit itself recognized, a state that enacts such a regulation is "essentially assum[ing] legal and political responsibility for emissions of carbon resulting from the production and transport, *regardless of location*, of transportation fuels." 730 F.3d at 1105–06 (emphasis added).

Because the Ninth's Circuit's approval of this "clear attempt to project [one state's] authority into other states" is "in open defiance of controlling Supreme Court precedent," the petition for certiorari should be granted. *Rocky Mountain*, 740 F.3d at 519 (M. Smith, J., dissenting from denial of rehearing en banc).

C. The Question Presented Is Highly Important.

The petition also should be granted because the question presented is highly important. It allows the Court to assess whether states may adopt a life-cycle analysis designed to control conduct occurring outside of the regulating state. If the ruling below is left in place, states will be able to leverage access to their markets to regulate a wide range of crucial conduct in other states, impinging upon their sovereign status. The question presented thus has critical nationwide implications.

Already, at least two "states that import energy are now exporting their energy regulations," and other states are considering following suit. Coleman, *supra*, 83 Fordham L. Rev. at 1357, 1374. These fuel standards create the "daunting prospect of navigating several interlocking, if not entirely contradictory, regulatory regimes," along with the risk that "[f]ragmentation of the national economy may ensue." *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J. dissenting from denial of rehearing en banc). Nor is the issue limited to fuel regulations. Under the Ninth Circuit's ruling, a state "may just as legitimately seek to influence any out-of-state conduct with perceived local effects." *Id.* "For instance, transport of fruits and vegetables leads to greenhouse gas emissions," and Oregon or California could therefore use the same rationale to penalize the import of oranges from Florida or peaches from Georgia as more "carbon intensive" than locally-grown fruit, since they must necessarily be transported longer distances. Coleman, *supra*, 83 Fordham L. Rev. at 1392. "[I]f a state could prevent the sale of produce that required significant greenhouse gas emissions to reach its consumers, national food markets would break down." *Id.*

Through such laws, individual states can "leverage access to [their] markets to regulate every station in the supply chain," and impose nationwide their "own views of what constitutes virtuous farming practices." Mot. for Leave to File Bill of Complaint at 6, *Indiana* v. *Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017). Further, under the Ninth Circuit's ruling, a state such as California could "require manufacturers in Texas to pay higher wages to their employees if they intend to sell their products in California." *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J., dissenting from denial of rehearing en banc). As this Court has held, "one state may not put pressure of that sort upon others to reform." *Baldwin*, 294 U.S. at 524 (striking down extraterritorial pricing regulation, and noting that "the next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop"); see *Midwest Title Loans, Inc.* v. *Mills*, 593 F.3d 660, 669 (7th Cir. 2010) ("The consequences of a commercial transaction can be felt anywhere. But that does not permit New York City to forbid New Yorkers to eat in cities in other states that do not ban trans fats from their restaurants.").

If the Ninth Circuit's ruling is allowed to stand, then, as *Baldwin* warned, "the door has been opened to rivalries and reprisals" between the states "that were meant to be averted" by the Constitution, 294 U.S. at 522, including the risk of "destructive interstate retaliation" as well as fracturing interstate markets, *Rocky Mountain*, 740 F.3d at 519 (M. Smith, J., dissenting from denial of rehearing en banc). In addition, state sovereignty will suffer as more populous states increasingly exercise their market power to impose their preferred policies on the rest of country. Contrary to the Ninth Circuit's contention that enforcing the extraterritoriality doctrine would "destroy the

states' ability to experiment with regulation," 730 F.3d at 1105, in fact "[t]he extraterritoriality doctrine protects regional variation." Chad DeVeaux, *One Toke Too Far: the Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. Rev. 953, 978 (2017) (emphasis omitted). It "enables states to 'try novel social and economic experiments' within their own borders, but prohibits them from conscripting the citizens or property of neighboring states as guinea pigs in their experiments." *Id.* at 980; see *Midwest*, 593 F.3d at 667–68 (7th Cir. 2010).

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

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts.

The Ninth Circuit's decision affirming the dismissal of AFPM's discrimination claim also warrants review.

The Ninth Circuit held that the Fuel Program is not facially discriminatory under the Commerce Clause, even though it recognized "that the Program labels fuels by state of origin." Pet. App. 10a. Indeed, the Fuel Program facially assigns less favorable "carbon intensity" scores to "Midwest" corn ethanol than to "Oregon" corn ethanol, *id.* at 133a; *id.* at 140a, even though "ethanol from every source has 'identical physical and chemical properties,'" *Rocky Mountain*, 730 F.3d at 1088. Yet the court below held that the Fuel Program is not facially discriminatory and refused to apply heightened scrutiny because of its prior decision in *Rocky Mountain*. In turn, *Rocky Mountain* concluded that a similar California low carbon fuel standard that expressly established "categories [that are] formed with reference to state boundaries" was not facially discriminatory because

there was a "nondiscriminatory reason for the distinction," *Rocky Mountain*, 730 F.3d at 1089, 1094; Pet. App. 37a–38a. It held that the Ninth Circuit would "not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason." *Rocky Mountain*, 730 F.3d at 1107.

This ruling conflicts with decisions from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, which apply strict scrutiny to all "facially discriminatory" state laws, regardless of whether the state provides a "nondiscriminatory reason" for the facial discrimination.[8] In *American Trucking Associations, Inc.* v. *Whitman*, for example, the Third Circuit rejected the argument that a state

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[8] *See Used Tire Int'l, Inc*. v. *Diaz-Saldana*, 155 F.3d 1, 3–4 (1st Cir. 1998) (holding that law is facially discriminatory without reference to purported justification and striking it down under strict scrutiny); *SSC Corp*. v. *Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. 1995) (same); *Am. Trucking Ass'ns, Inc.* v. *Whitman*, 437 F.3d 313, 320–21 (3d Cir. 2006) (same); *Envtl. Tech. Council* v. *Sierra Club*, 98 F.3d 774, 785–88 (4th Cir. 1996) (concluding that law "is not facially neutral" from face of the provision and does not withstand strict scrutiny); *Pelican Chapter, Associated Builders & Contractors, Inc*. v. *Edwards*, 128 F.3d 910, 917–18 (5th Cir. 1997) (discrimination on face of provision triggers strict scrutiny); *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 750–51 & n.12 (5th Cir. 2006) (explaining that under the Foreign Commerce Clause "differential treatment . . . without more, [is] facial discrimination subject to strict scrutiny"); *Waste Mgmt., Inc. of Tenn.* v. *Metro. Gov't of Nashville*, 130 F.3d 731, 735–36 (6th Cir. 1997) (differential treatment on face of law triggers strict scrutiny); *Jones* v. *Gale*, 470 F.3d 1261, 1267–70 (8th Cir. 2006) (finding facial discrimination from face of state law); *Nat'l Solid Wastes Mgmt. Ass'n* v. *Ala. Dep't of Envtl. Mgmt.*, 910 F.2d 713, 720 (11th Cir. 1990) (holding that differential treatment on the face of law is facial discrimination, and that environmental purpose cannot be pursued by origin-based distinctions), *modified on denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991).

law that imposed burdens only on trucks that were traveling interstate was not facially discriminatory because it was intended to reduce "pollution" and "waste disposal costs." 437 F.3d 313 (3d Cir. 2006). The court held that "the purpose of the law would not be relevant to whether the statute was discriminatory," and that the regulation's "explicit distinction and consequent burdening of out-of-state economic interests requires that heightened scrutiny be applied." *Id.* at 321.

As Judge Murguia explained in her dissent from the decision in *Rocky Mountain*, "[d]etermining whether a regulation facially discriminates against interstate commerce begins and ends with the regulation's plain language." 730 F.3d at 1108. This Court should grant the petition to resolve the conflict between the Ninth Circuit and numerous other circuits on this issue.

B. The Ninth Circuit's Discrimination Ruling Conflicts With This Court's Precedent.

Further, the petition should be granted because the Ninth Circuit's discrimination ruling squarely conflicts with this Court's precedents in at least two respects. First, the Ninth Circuit's refusal to apply strict scrutiny to facially discriminatory provisions conflicts with this Court's "longstanding dormant Commerce Clause precedent." *Rocky Mountain*, 740 F.3d at 514 (M. Smith, J., dissenting from denial of rehearing en banc). Second, the Ninth Circuit's ruling that a provision cannot be discriminatory if it may benefit some out-of-state businesses is directly contrary to several of this Court's decisions.

1. Under this Court's precedent, facial discrimination against interstate and foreign commerce must be judged based on the language of the

state law—irrespective of any asserted justification for differing treatment—and facially discriminatory statutes must be subjected to the "'strictest scrutiny.'" *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 100–01 (1994). In the decision below, the Ninth Circuit recognized that the Fuel Program "labels fuels by state of origin," Pet. App. 10a, thereby facially discriminating between "Midwest" and "Oregon" ethanol. Assigning Midwest ethanol a higher carbon intensity score than Oregon ethanol confers a commercial advantage on Oregon ethanol because fuels with lower carbon intensity scores make compliance with the Fuel Program easier and hence are more valuable. *Id.* at 133a. This is discrimination, which "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99.

Nonetheless, the Ninth Circuit held that the Fuel Program was not facially discriminatory, Pet. App. 10a–11a, reaffirming its prior ruling that it will "not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason." *Rocky Mountain*, 730 F.3d at 1107. But this Court has rejected the argument that a "good and non-discriminatory reason" insulates a law from strict scrutiny, *Rocky Mountain*, 730 F.3d at 1107, holding that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste*, 511 U.S. at 100; see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 575–76 (1997) ("[i]t is not necessary to look beyond the text . . . to determine that it discriminates against interstate commerce"); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 274 (1988) ("Ohio provision . . . explicitly deprives certain

products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face" is discriminatory). The Ninth Circuit declined to follow these precedents, dismissing them as "archaic formalism." *Rocky Mountain*, 730 F.3d at 1107.[9]

2. The Ninth Circuit's ruling that the Fuel Program is not discriminatory in design or effect because it does not burden *every* out-of-state company also conflicts with this Court's precedents.

As the dissent explained, "the discrimination arises from Oregon's decision to draw the maximum allowed carbon intensity value in such a manner that *all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits." Pet. App. 25a (N.R. Smith, J., dissenting). Thus, "[o]ut-of-state entities bear the full brunt of the law's burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions (and consequently global warming)." *Id.* at 26a. "At the same time," the dissent explained, "in-state entities not only avoid the burden of the law, they also receive a subsidy from the out-of-state entities in the sale of their valuable credits." *Id.*; see *id.* at 131a–132a (Oregon explaining that the fuels produced in Oregon "already meet the proposed clean fuel standards" and

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[9] This issue is also currently before this Court in *Tennessee Wine and Spirits Retailers Association* v. *Blair*, No. 18-96. *See* Brief of Respondent Tennessee Fine Wines and Spirits, LLC at 21–22, *Tenn. Wine & Spirits Retailers Ass'n* v. *Blair*, No. 18-96 (U.S. Dec. 13, 2018) ("The court of appeals correctly determined that Tennessee's durational residency requirements are 'facially discriminatory.' . . . Accordingly, under this Court's Commerce Clause precedents, Tennessee's discriminatory requirements are subject to 'a virtually *per se* rule of invalidity.'") (quoting *Granholm* v. *Heald*, 544 U.S. 460, 476 (2005)).

can "generate credits and benefit from the sale of those credits").

The Ninth Circuit majority's ruling that the Fuel Program is nondiscriminatory directly contradicts this Court's decisions, including *West Lynn Creamery*, 512 U.S. at 194, and *Bacchus*, 468 U.S. at 273. In *West Lynn Creamery*, the Court found a Massachusetts state law "clearly unconstitutional" because it combined an evenhanded and neutral tax on all milk for consumption with a subsidy to in-state Massachusetts dairy farmers that "entirely (indeed more than) offset" the tax for in-state producers. *West Lynn Creamery* explained that, "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." 512 U.S. at 200. Similarly, *Bacchus* held that a Hawaii law was unconstitutional because it "had both the purpose and effect of discriminating in favor of local products," 468 U.S. at 273, "in effect creat[ing] a protective tariff" in which "[g]oods produced out of State were taxed, but those produced in State were subject to no net tax." *W. Lynn Creamery*, 512 U.S. at 197 (discussing *Bacchus*, 468 U.S. 263).

The Oregon Program similarly operates like a protective tariff by forcing out-of-state fuel producers to subsidize in-state fuel producers, thus "violat[ing] the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *Id*. at 199 (quoting *New Energy*, 486 U.S. at 273–74).

The Ninth Circuit held that the fact that some "out-of-state producers are able to—and do—generate

credits and thus share in the Program's benefits" prevents the law from being discriminatory. Pet. App. 19a. However, this Court has rejected that argument, holding that a benefit to some out-of-state producers does not make a law nondiscriminatory; it "merely reduce[s] the scope of the discrimination." *Fort Gratiot Sanitary Landfill, Inc.* v. *Mich. Dep't of Nat. Res.*, 504 U.S. 353, 363 (1992). As the Court explained in *New Energy*, "where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." 486 U.S. at 276 (striking down tax credit as discriminatory despite "the availability of the tax credit to some out-of-state manufacturers"); see *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 349–51 (1977) (holding that a state law was unconstitutionally discriminatory notwithstanding that it benefitted companies in some other states).

By designing the Fuel Program so that all in-state producers benefit and that all burdens fall only on out-of-state competitors, the Fuel Program impermissibly "aspire[s] to reap some of the benefits of tariffs by other means." *W. Lynn Creamery*, 512 U.S. at 193. Because the Ninth Circuit's ruling that the law is nondiscriminatory conflicts with this Court's precedent, the petition should be granted.

C. The Issue Is Highly Important.

Finally, the Court should review the question presented because it is highly important. The Ninth Circuit has refused to apply heightened scrutiny "[i]n the name of combating 'a new type of harm'" from climate change. *Rocky Mountain*, 740 F.3d at 514 (M. Smith, J., dissenting from denial of rehearing en banc), *quoting Rocky Mountain*, 730 F.3d at 1107. But this Court has "often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve

it by 'the illegitimate means of isolating the State from the national economy.'" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 456–57 (1992); see *Hunt*, 432 U.S. at 352. The Ninth Circuit's ruling to the contrary gives States free rein to engage in protectionism so long as they cloak it with purportedly worthy aims, thereby "threaten[ing] to Balkanize our national economy." *Rocky Mountain*, 740 F.3d at 512 (M. Smith, J., dissenting from denial of rehearing en banc).

Indeed, "protectionism is ubiquitous" in this realm, as even initially "well-intentioned" laws are typically altered during the legislative and regulatory process to address "parochial concerns." Coleman, *supra*, 83 Fordham L. Rev. at 1386. For instance, the governor of Oregon admitted that the Oregon Program is designed "to spark this home-grown [fuel] 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." Pet. App. 135a. Preventing this type of "legislative abuse," where a state imposes burdens exclusively on out-of-state entities while funneling the rewards to in-state interests, is a crucial purpose of the Commerce Clause. *W. Lynn Creamery*, 512 U.S. at 193; 3 M. Farrand, *Records of the Federal Convention of 1787*, at 478 (1911) (James Madison) (the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2019