No. 18-881

IN THE

Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,

Petitioners,

v.

JANE O'KEEFE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* WESTERN STATES PETROLEUM ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the Western States Petroleum Association ("WSPA") and the American Petroleum Institute ("API") respectfully submit this brief in support of petitioners American Fuel & Petrochemical Manufacturers Association, et al. ("Petitioners").

WSPA and API support the position of Petitioners that the Ninth Circuit's ruling on both extraterritoriality and discrimination warrants review and the petition for certiorari should be granted. WSPA and API submit, however, that there is need for additional argument, as provided in this brief.

WSPA is a non-profit trade association that represents more than twenty companies that explore for, develop, produce, refine and transport petroleum and petroleum products in the five western states of Arizona, California, Nevada, Oregon and Washington. Founded in 1907, WSPA is the oldest petroleum association in the United States. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date for this brief under Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

API is the only national trade association representing all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 47 million Americans.

Many members of WSPA and API are directly affected by the Oregon Fuel Program that is at issue in this case. WSPA, API and their members have a strong interest in the need for policies that can realistically and practically reduce greenhouse gas emissions without jeopardizing fuel supplies, eliminating jobs, and destabilizing fuel markets. Members of WSPA and API have a direct interest in the Oregon Fuel Program and the issues in this case.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling on extraterritoriality conflicts with this Court's precedent, which recognizes that "[T]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) (internal quotation marks omitted). This Court has recognized that "one state may not put pressure" on other states "to reform their economic standards." *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511, 524 (1935). Contrary to that principle, the Oregon Fuel Program was designed to impact the production and transport of fuels in other states. (*See* Pet., pp. 4-7 (describing the regulatory background of the Oregon Fuel Program)).

Moreover, the Ninth Circuit's ruling threatens a core value of the Commerce Clause and the structural federalism of the U.S. Constitution by opening the door to "economic Balkanization." *See Granholm v. Heald*, 544 U.S. 460, 472 (2005). The threat of "economic Balkanization" is inherent in any State scheme that attempts to penalize fuels based on their out-of-state production and transportation.[2]

ARGUMENT

I. THE NINTH CIRCUIT'S RULING ON EXTRATERRITORIALITY WARRANTS REVIEW.

In ruling that the Commerce Clause's prohibition on extraterritorial regulation does not apply to the Oregon Fuel Program, the Ninth Circuit has held that States are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants. Pet. App. 20a-21a. In its ruling below, the Ninth Circuit found Petitioners' extraterritoriality claims "squarely barred" by the Ninth Circuit's prior ruling in *Rocky Mountain Farmers Union v. Corey,* 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014), which upheld California's fuels program. Pet. App. 20a. The Ninth Circuit adhered to its prior reasoning that a State could assume "legal and political responsibility for emissions of carbon resulting from the

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2. Also, as set forth in the Petition, the Oregon Fuel Program has "both the purpose and effect of discriminating in favor of local products." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984); *see* Pet., pp. 25-31.

production and transport" of fuels "regardless of location" of that production and transport. *See* Pet. App. 20a-21a (following *Rocky Mountain*, 730 F.3d at 1105-06). The Ninth Circuit's ruling is contrary to this Court's decisions on extraterritoriality and should be reviewed.

This Court has recognized that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Thus, a State may not extend its police power "beyond its jurisdictional bounds." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994).

Indeed, this Court has expressly noted that "[o]ne state may not put pressure" on other states "to reform their economic standards." *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511, 524 (1935) (striking down extraterritorial pricing regulation). That principle should apply with full force here, where the Oregon Fuel Program was designed to impact the production and transport of fuels in other states. *See* Pet. App. 138a.[3]

3. The Ninth Circuit has suggested that California's similar scheme was permissible because it resembled "incentives" that did not mandate out-of-state compliance. *Rocky Mountain*, 730 F.3d at 1103.

Judge Milan Smith's dissent from the denial of rehearing en banc in *Rocky Mountain* refutes that view: "whether California's scheme is characterized as providing 'incentives' or establishing 'mandates', it has the practical effect of regulating interstate commerce." *Rocky Mountain Farmers Union v. Corey,* 740 F.3d 507, 518 (9th Cir. 2014) (M. Smith, J., dissenting from denial of rehearing en banc); *see id.* at 513 ("Because a fuel's carbon intensity depends largely on out-of-state production and land use decisions, California's scheme necessarily affects those processes.").

To comply with the Oregon Fuel Program, importers of gasoline must either purchase credits to meet their annual average carbon intensity requirements or, alternatively, change the composition of the fuel they import. Pet. App. 129a-130a. Both alternatives impose a significant burden on out-of-state fuel producers.

If importers choose to comply with the Oregon Fuel Program by purchasing credits so that they can continue to purchase gasoline from out-of-state producers, then Oregon will in effect have created a protective tariff. Gasoline from out-of-state producers will be burdened by a de facto tariff that is not imposed on any in-state fuel producers. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 197, 199 (1994).

Alternatively, importers may choose to comply with the Oregon Fuel Program by purchasing fuel that has a lower carbon intensity than both (1) “clear” gasoline and (2) blended gasoline containing 90% “clear” gasoline and 10% ethanol (which the Program’s table uses as a default). Pet. App. 129a; *see* Pet. App. 86a-87a. That would require out-of-state producers to change the composition of the fuel they produce—out-of-state producers would have to replace existing sources of ethanol contained in their blended gasoline with sources of ethanol that have lower carbon intensities. Pet. App. 129a-130a.

But changing the composition of the fuel to comply with the Oregon Fuel Program imposes a significant burden on out-of-state fuel producers. As a practical matter, there is a limited supply of ethanol that has carbon intensities low enough to allow out-of-state producers to produce a blended gasoline meeting the current standards in the Oregon Fuel Program. Moreover, that ethanol with low carbon intensity is available only at a higher price. To replace existing sources of ethanol would thus impose a direct financial burden on out-of-state fuel producers.

Moreover, allowing individual States to attempt to influence and control the production and transport of fuel in other States could easily undermine the provision of adequate, reliable and affordable fuel supplies. Disruptions or reductions of supply can result in higher costs potentially borne by consumers.

Significantly, the overwhelming bulk of transportation fuel regulated by Oregon's Fuel Program is currently produced outside of Oregon. Thus, most of the practical effect of Oregon's Fuel Program on the production and transportation of fuels will be beyond the boundaries of Oregon—in other words, its effect is primarily extraterritorial. Oregon is almost entirely dependent on out-of-state fuel producers; it is essentially a fuel island that receives almost all of its gasoline from other states. If, as it apparently hopes, Oregon succeeds in using its Fuel Program to change the out-of-state production and transportation of fuels that are ultimately used in Oregon, then it will control conduct beyond its borders, in violation of the Commerce Clause.[4]

4. The proposed Oregon Fuel Program will provide, at best, minimal actual greenhouse gas reductions in the state and even smaller proportional reductions when compared with global greenhouse gas emissions (by many orders of magnitude).

II. THE NINTH CIRCUIT'S RULING ON EXTRATERRITORIALITY OPENS THE DOOR TO BALKANIZATION OF THE ECONOMY.

The Ninth Circuit's ruling on extraterritoriality threatens a core value of the Commerce Clause—the ruling opens the door to "economic Balkanization." *See Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979)). The Oregon Fuel Program, along with California's similar scheme, creates "the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337.

The example of the Oregon Fuel Program demonstrates that the threat of "economic Balkanization" arising from the extraterritorial regulation approved by the Ninth Circuit is inherent in any State scheme that attempts to penalize fuels based on their out-of-state production and transportation. Refineries in the state of Washington provide more than 90% of the refined petroleum products used in Oregon.[5] The Oregon Fuel Program imposes a de facto tariff on gasoline produced by refineries in Washington that is intended to change the composition of fuel produced by those Washington refineries for the Oregon market. That would force Washington refineries to produce a special blend of fuel for the Oregon market—a classic example of "economic Balkanization."

5. *Oregon State Energy - Profile Analysis*, U.S. Energy Information Administration (EIA) (Nov. 15, 2018), *https://www.eia.gov/state/analysis.php?sid=OR*.

A multitude of state programs in various states creates exponentially more difficult, costly and unintended consequences affecting fuel markets in the western United States. And, as explained in the Petition, the Ninth Circuit's decision opens the door to a multitude of state laws designed to pressure companies in other states, with a purported goal of reducing greenhouse gas emissions. *See* Pet., pp. 23-25. All States should be constrained by the Commerce Clause's prohibition on extraterritorial regulation.

Moreover, as set forth in the Petition, the Oregon Fuel Program has "both the purpose and effect of discriminating in favor of local products." *Bacchus Imports*, 468 U.S. at 273; *see* Pet., pp. 25-31. A State "may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *W. Lynn*, 512 U.S. at 199 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). As explained in the dissent in this case, "[o]ut-of state entities bear the full brunt of the law's burden" while 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).

CONCLUSION

For the foregoing reasons, *amici curiae* Western States Petroleum Association and American Petroleum Institute respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

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