No. 18-881

In the Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL., PETITIONERS,

v.

JANE O'KEEFFE, ET AL.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

STEVEN P. LEHOTSKY
MICHAEL B. SCHON
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5948

Counsel for Chamber of Commerce of the United States of America

[Additional counsel listed inside cover]

PETER C. TOLSDORF
MANUFACTURERS'
CENTER FOR LEGAL
ACTION
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for National Association of Manufacturers

KEVIN W. BROOKS
VINSON & ELKINS LLP
2001 Ross Avenue,
Suite 3900
Dallas, Texas 75201
(214) 220-7805

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its membership includes businesses across all segments of the economy and, in particular, the transportation fuel industry. The Chamber also represents many other industry sectors that support, or depend upon, transportation fuels.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice and have consented to this filing.

manufacturers compete in the global economy and create jobs across the United States.

Both *amici* represent their members' interests in matters before Congress, the Executive Branch, and the courts. The Chamber and the NAM regularly file *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including the petroleum and natural gas industries—such as cases involving challenges to state and federal environmental regulations. *Amici* have a strong interest in the Oregon Clean Fuel Program (the "Fuel Program"), which has an immediate impact on the transportation fuel industry nationwide, and could have broader adverse effects on upstream and downstream sectors and end users.

Amici also have a strong interest in this case because the Fuel Program, and the panel's novel rationale upholding it, will impede the free flow of transportation fuels in interstate commerce and hinder the operation of the Nation's integrated market. The Fuel Program discriminates against out-of-state fuels in favor of in-state fuels, and attempts to export Oregon's policy preferences about means of production, methods of transportation, and land use throughout the United States and abroad.[2]

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[2] Because the underlying state program in this case relates to Oregon's concerns about climate change, the Chamber notes that it believes the global climate is changing, and that human activities contribute to those changes. Global climate change poses a serious long-term challenge that deserves serious solutions. Businesses, through technology, innovation, and ingenuity offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change and

The panel decision may embolden other States to discriminate against out-of-state interests in the guise of health and safety regulation, resulting in a complex web of inconsistent and competing extraterritorial regulations. Fragmentation of the interstate market in transportation fuel and other products will create inefficiencies and could impose significant costs on industry and consumers.

SUMMARY OF ARGUMENT

Concluding that its decision was controlled by *Rocky Mountain Farmers Union* v. *Corey*, 730 F.3d 1070 (9th Cir. 2013), a divided panel of the Ninth Circuit once again departed from settled constitutional law to uphold a discriminatory "low carbon fuel standard," this time Oregon's Clean Fuel Program. Citing the State's "legitimate interest in combating the adverse effects of climate change on [its] residents," Pet. App. 13a, the majority sanctioned Oregon's ability to export its policy preferences beyond the State's borders, effectively eliminating the application of strict scrutiny to state laws that discriminate against interstate commerce.

The panel majority departed sharply from the long-settled constitutional prohibition on extraterritorial state laws. Like California's Low Carbon Fuel Standard ("LCFS") at issue in *Rocky Mountain*—the model for the Fuel Program, *id.* at

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therefore must be a part of any productive conversation on how to address global climate change. If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change, then under our system of government those policies should come from Congress and the Executive Branch, and not through the courts or ad hoc efforts from state and local officials.

8a-9a—Oregon is using the Fuel Program to "project its legislation" into other States. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). In design and practical effect, the Fuel Program regulates conduct wholly outside of Oregon, including means of production and transportation. The Fuel Program cannot be justified on the ground that it merely provides "incentives" for regulated parties. The Fuel Program will also conflict with other States' laws, which already take divergent approaches to issues ranging from land use change to carbon intensity, risking the creation of regional mini-markets.

The panel decision also undermines strict scrutiny's role as an important safeguard against state protectionism. Rigorous application of strict scrutiny is particularly important for complex environmental and other technical regulations, where state laws that plausibly appear to serve non-discriminatory purposes may conceal protectionism.

If left undisturbed, the decision will undermine the proper functioning of the Nation's integrated market in transportation fuels and embolden States to enact discriminatory and extraterritorial laws. Litigants are already invoking the Ninth Circuit's precedents to defend a range of dubious laws against constitutional challenge.

ARGUMENT

I. The Panel Decision Cannot Be Reconciled With The Long-Settled Prohibition On Extraterritorial State Laws

Certiorari is warranted because the panel decision, which upholds Oregon's regulation of

conduct occurring entirely outside that State, conflicts with precedents of this Court and others.

The Constitution prohibits States from "regulating commerce occurring wholly outside [their] borders." *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989). This principle has deep roots in the Constitution's structure and the Nation's history. "The sovereignty of each State * * * implie[s] a limitation on the sovereignty of all of its sister States" that is inherent in "the original scheme of the Constitution." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). As a result, "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881); see also *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914) (calling this territorial limit an "obvious[]" and "necessary result of the Constitution"). When States "pass beyond their own [territorial] limits * * * there arises a conflict of sovereign power * * * which renders the exercise of such a 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) (opinion of Johnson, J.); see also *Boyle* v. *Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Ogden* majority).

Today, the prohibition on extraterritorial laws applies not only where state provisions explicitly regulate extraterritorial conduct, but also where "the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 332, 336; see also *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S.

573, 583-584 (1986). Courts ask how a challenged statute "may interact" with other States' regulatory regimes, and prospectively consider "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336-337.

A. The Fuel Program Impermissibly Regulates Commerce Outside Oregon

In both conscious design and "practical effect," the Fuel Program regulates conduct "wholly outside [of Oregon's] boundaries." *Healy*, 491 U.S. at 336. The program is designed to regulate the means of production and transportation for fuels consumed in Oregon but produced elsewhere. Through the "lifecycle analysis," which targets production and transportation of fuels and fuel feedstocks, Pet. App. 4a-5a, the Fuel Program seeks to regulate and control activity that occurs outside Oregon's territorial jurisdiction.

This regulation is a quintessential example of a state "projecting its legislation into other States." *Healy*, 491 U.S. at 334 (alterations omitted) (quoting *Brown-Forman*, 476 U.S. at 583). The Fuel Program restricts the importation of fuel based on the manner in which it is produced and transported, activities that take place "wholly outside [of Oregon's] boundaries." *Id.* at 336. And "States * * * 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) (citing *Baldwin*, 294 U.S. 511).

Although the panel emphasized that the Fuel Program "applies only to fuels sold in, [or] imported

to" Oregon, Pet. App. 21a, the Fuel Program does not seek to reduce *Oregon's residents'* consumption of transportation fuels, and it does not address land use and transportation issues *inside Oregon*. Rather, the Fuel Program, like California's LCFS, is "directed at the supply side," *Rocky Mountain*, 730 F.3d at 1079-1081, assigning a carbon intensity value based on conduct undertaken where the fuels are produced, thus encroaching on decisions within the exclusive purview of other States.[3]

For both fuels and biofuels, the Fuel Program specifically accounts for "all stages of fuel production," including "extraction, production, [and] distribution," regardless of where those activities occur. See Pet. App. 4a-5a, 16a, 63a-64a. As the panel correctly noted, the lifecycle analysis allows Oregon to compare "the carbon effects of fuels" based on a detailed review of "different production methods and source materials," *id.* at 5a, thus bringing everything from farming practices and land use decisions under Oregon regulators' authority. *Rocky Mountain*, 730 F.3d at 1103; *POET, LLC* v. *State Air Resources Bd.*, 160 Cal. Rptr. 3d 69, 80-81 (Cal. Ct. App. 2013).

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[3] Highlighting the extraterritorial reach of clean fuel standards, nine Midwestern states filed an *amicus* brief supporting rehearing en banc in *Rocky Mountain*, arguing that California's LCFS "impinge[d] on the[ir] sovereign interests * * * to regulate farming, ethanol production, and other activities within their own borders." *Rocky Mountain Farmers Union* v. *Corey*, 740 F.3d 507, 512-513 (9th Cir. 2014) (M. Smith, J., dissenting from denial of rehearing en banc).

Because "there are no producers of gasoline or diesel fuel located in Oregon,"[4] Pet. App. 131a, the inputs used to assign a carbon intensity to petroleum-based fuels "all occur outside of Oregon," Pet. 5 (citing Pet. App. 131a). The Fuel Program also assigns "different carbon intensity values to biofuels that are physically and chemically identical." Pet. App. 125a; see also *Rocky Mountain*, 730 F.3d at 1088. This result is possible because the carbon intensity score includes such considerations as what extraction technologies were used and indirect land-use changes that occurred *in other States*. See Or. Admin. R. 340-253-0040(59), (63), -0400(2). The "practical effect," *Brown-Forman*, 476 U.S. at 583, of increasing a fuel's carbon intensity based on out-of-state activity is to make those fuels less commercially valuable compared to identical fuel produced in a manner Oregon favors—a stated goal of the program. Pet. App. 133a-137a, 142a.

The Fuel Program plainly attempts to "control conduct in other states." See *Rocky Mountain Farmers Union* v. *Corey*, 740 F.3d 507, 517-518 (9th Cir. 2014) (M. Smith, J., dissenting from denial of rehearing en banc) (discussing "practical effect" of California's LCFS). By focusing on the supply side, the Fuel Program is expressly designed to affect out-of-state conduct, rather than activity occurring within Oregon's territorial jurisdiction. The Fuel Program does not represent Oregon's attempt to "account for the ill effects of [its] fuel consumption." *Rocky Mountain*, 730 F.3d at 1106. Instead, the Fuel

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[4] Oregon does, however, have significant agricultural and logging industries, both of which are exempted from the Fuel Program. See Or. Admin. R. 340-253-0250(2)(a).

Program represents Oregon's effort to regulate disfavored out-of-state production methods. That the out-of-state production methods might produce negative effects for Oregonians does not authorize the State to regulate "commerce that takes place wholly outside of the State's borders * * * ." See *Healy*, 491 U.S. at 336 ("[T]he Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*[.]" (emphasis added) (citation, alteration, and internal quotation marks omitted)). No matter how "wise" the Fuel Program may be, Oregon may not "impose its own policy choice on neighboring States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 570-571 (1996).

B. Framing the Fuel Program's Requirements as "Incentives" Does Not Change their Extraterritorial Nature

The panel insisted that because the Fuel Program does not require other jurisdictions to adopt "a particular regulatory standard for its producers to gain access to [Oregon]," the regulation involves only "incentives." Pet. App. 20a-21a (quoting *Rocky Mountain*, 730 F.3d at 1101). But courts have invalidated analogous state "incentives." *E.g.*, *Brown-Forman*, 476 U.S. at 575-576 (New York law giving distillers incentive to charge in-state residents lowest possible prices in exchange for right to do business there); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 272 (1988) (incentive for other States to grant Ohio reciprocal tax credit); *Nat'l Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 654-655 (7th Cir. 1995) (similar, as to

recycling laws and access to Wisconsin landfills). And if the credits envisioned by the Fuel Program are not available (or not economically priced), the supposed "choice" could become illusory, forcing regulated parties either to comply with the annual target without credits or withdraw from Oregon's market.

The panel reasoned that "[f]irms in any location may elect to respond to the incentives provided by the [Fuel Program]," Pet. App. 20a (emphasis added) (quoting *Rocky Mountain*, 730 F.3d at 1101)—among other ways, by generating or obtaining credits, *id*. at 3a, 19a. But that "choice" heavily depends on the availability of credits. Oregon has scored carbon intensity in such a way that the kinds of energy sources produced *in-state*—like natural gas and electricity—generate credits. See Or. Admin. R. 340-253-0040(34), -0100(2), -0200(3); see also Pet. App. 25a (N.R. Smith, J., dissenting). Conversely, importers of petroleum-based fuels must purchase credits to comply with the regulations. Pet. App. 5a-6a. Fossil-fuel importers will be unable to meet the Fuel Program's requirements "with blending alone." *Department of Justice should force Oregon's super-secret gas tax into the sunshine*, THE BEND BULLETIN (Jan. 2, 2019), https://bit.ly/2t0kOML; compare Or. Admin. R. 340-253-8040, with Or. Admin. R. 340-253-8010, and -8020.

But many predict the credit market will face significant cumulative shortages within only a few years. See, *e.g.*, Boston Consulting Group, *Understanding the Impact of AB 32* at 9-10 (June 19, 2012), https://bit.ly/2TuvheR. Recent data from both Oregon and California show that these risks are

more than speculation. The Fuel Program's "required reductions increase each year through 2025," Pet. App. 128a, and the ever-more-stringent requirements have caused the average cost of credits to rise. See DEQ, Data for the Clean Fuels Program (last visited Jan. 28, 2019), https://bit.ly/2G6JknR. In addition, deficits have begun to outpace credits. See *ibid.* While Oregon officials claimed the Fuel Program would incentivize companies to innovate to meet the new requirements, Pet. App. 6a, 133a-138a—underscoring that Oregon seeks to affect out-of-state conduct—the nationwide supply of biofuel has barely increased. See U.S. Energy Information Admin., *EPA finalizes Renewable Fuel Standard for 2019, reflecting cellulosic biofuel shortfalls* (Dec. 6, 2018), https://bit.ly/2S5t90v.

The California program that serves as Oregon's model illustrates the problem. In 2016, "a market shortage in the supply of LCFS credits * * * caused the market price for credits to increase to as much as $123 per ton from about $20 per ton." Hyunok Lee & Daniel A. Sumner, *Dependence on policy revenue poses risks for investments in dairy digesters*, California Agriculture 72(4): 226-235 (Dec. 17, 2018), https://bit.ly/2t3cAU2. The cost of LCFS credits then soared by more than 127% between 2017 and 2018. David R. Baker, *California drivers pay growing cost for climate program*, SAN FRANCISCO CHRONICLE (Aug. 9, 2018), https://bit.ly/2RyYqE5; see also Sonia Yeh & Julie Witcover, Univ. of Cal., Davis, *Status Review of California's Low Carbon Fuel Standard* at 1 (Jan. 2014), https://bit.ly/VTOhof (showing highly volatile nature of LCFS credit prices, which spiked from

$16/credit in 2012 to $75-$80/credit in November 2013, before receding to $50/credit one month later). That spike was caused by the widespread belief that LCFS credits would become "increasingly scarce in the future," leading companies to stockpile credits. Baker, *supra*; accord Argus White *Paper, California Environmental Markets: Factors that Affect LCFS and GHG Trading* at 1, 3 (2012), https://bit.ly/2UEN2bQ. Thus, the purported "choice" faced by regulated parties under Oregon's program could be illusory.

C. Oregon's Fuel Program Conflicts with Other States' Regulations, Fragmenting the Transportation Fuels Market

The panel's rationale also conflicts with the longstanding rule that courts must consider "how [a] challenged [regulation] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar [rules]." *Healy*, 491 U.S. at 336. The risk is hardly hypothetical. Underscoring the need for immediate review, North American jurisdictions "implementing or considering LCFS make up 34 percent of the US gasoline market and nearly 50 percent of the Canadian gasoline market." IHS CERA, *Oil Sands, Greenhouse Gases, and US Oil Supply: Getting the Numbers Right* at 6 (Sept. 2010), https://bit.ly/2G6d5VY.

1. *Other U.S. States Are Developing Low Carbon Fuel Standard Programs*

Other States and regions have taken steps towards implementing similar fuel standards. In 2014, the Washington Office of Financial Management commissioned a study examining how to tailor existing LCFS laws "to take into account a range of Washington specific factors," including the kinds of crude oil refined and used in Washington and the State's unique access to hydroelectric power. Life Cycle Associates, LLC et al., *A Clean Fuel Standard in Washington State: Revised Analysis with Updated Assumptions* at 7, 20-35 (Dec. 12, 2014), https://bit.ly/2HMQFe8. And earlier this year, a bill was introduced in the Washington legislature that would require the State's Department of Ecology to create rules implementing a low carbon fuel standard in harmony with California's and Oregon's programs. See HB 1110-S, 66th Legislature (2019), https://bit.ly/2UCmvvQ.

Ten Northeast and Mid-Atlantic States committed to finalize a "proposed program framework" in early 2011 for a "regional low carbon fuel program." See *Northeast and Mid-Atlantic Low Carbon Fuel Standard*, *Memorandum of Understanding* (Dec. 30, 2009) (signed by Governors of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey,[5] New York, Pennsylvania, Rhode Island, and Vermont), https://bit.ly/2HP3Zyz. In August 2011, Northeast States for Coordinated Air Use Management

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[5] Governor Chris Christie later withdrew New Jersey from the agreement.

("NESCAUM") published a report that drew on a broad range of data beyond the LCFS in customizing a regional program. See NESCAUM, *Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region* at 5-7 (Aug. 2011), https://bit.ly/2t97N3I. While implementation of a regional low-carbon fuel standard has been delayed, in part because of the "many complexities" presented by "achieving agreement on how to implement a uniform policy," States in those regions remain interested in pursuing the policy. Massachusetts Executive Office of Energy & Environmental Affairs, *2015 Update: Clean Energy and Climate Plan for 2020* at 78-79 (Dec. 31, 2015), https://bit.ly/2ne1lVQ.

Minnesota also has taken steps to implement such a program. In 2012, a study analyzed the employment impacts of a low carbon fuel standard in Minnesota. Heidi Garrett-Peltier, *The Employment Impacts of a Low-Carbon Fuel Standard for Minnesota* at 4 (Sept. 2012), https://bit.ly/2t38jAc. Legislation has been introduced to establish standards to reduce the carbon intensity of transportation fuels, though it has not yet won passage. See HF-86, 86th Legislature (Jan. 12, 2009), https://bit.ly/2S66jG2; SF-13, 86th Legislature (Jan. 8, 2009), https://bit.ly/2SkYzzh.

In October 2013, California, Oregon, Washington, and British Columbia signed an agreement to align their energy policies. Pac. Coast Action Plan on Climate & Energy (Oct. 28, 2013), https://bit.ly/2RB8UTi. Out of that agreement grew the Pacific Coast Collaborative, a coalition of states

and cities in the United States and Canada, established for the express purpose of creating "a vibrant, low carbon regional economy." Pac. N. Am. Climate Leadership Agreement (last visited Jan. 30, 2019), https://bit.ly/2MSqhyx. The rise of regional low carbon fuel initiatives suggests fragmentation of the national market will include the formation of small trade zones. Contra *Granholm* v. *Heald*, 544 U.S. 460, 472-473 (2005) ("a proliferation of trade zones is prevented" by constitutional prohibition on extraterritorial regulation); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 356 (1951) (Constitution prohibits the "multiplication of preferential trade areas").

2. Differences in State-Specific Low Carbon Fuel Standard Programs Will Adversely Affect Interstate Commerce

There is no guarantee that States' low carbon fuel standard programs will be "complementary," *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J., dissenting from denial of rehearing en banc); such laws present a real threat of a conflicting network of cross-border regimes. As just one example of many: States take conflicting approaches to indirect land-use change, assigning inconsistent land-use penalties for identical biofuels. In California, corn ethanol is assigned a land-use change value of 19.8, Cal. Code Regs. tit. 17, § 95488.3, tbl. 6, but Oregon assigns the same product a change value of 7.60, Or. Admin. R. 340-253-0040(59), -8100. Oregon and California also have differing CI benchmarks and reduction timelines. Compare Or. Admin. R. 340-253-0000(2), -8010, -8020, with Cal. Code Regs. tit. 17, § 95484.

If the same fuels are assigned a lower carbon intensity in one State than another, experts explain that using that fuel to achieve a given reduction will be more onerous in the latter jurisdiction—as "[t]he closer the GHG emissions of the low carbon fuel are to the [baseline] standard, the more of that fuel must be supplied of the total amount of fuel in the marketplace" to achieve a given reduction. Michael Canes & Edward Murphy, George C. Marshall Institute, *Economics of a National Low Carbon Fuel Standard* at 10 (2009), https://bit.ly/2SporKs. That one State defines carbon intensity differently from other States, and the practical difficulty of maintaining multiple parallel distribution systems tailored to specific submarkets, demonstrates "[t]he ease with which [the Fuel Program] can interfere with [producers'] operations in other States." See *Brown-Forman*, 476 U.S. at 583. The resulting regulatory patchwork will transform our national economy into a series of potentially contradictory mini-markets. *Rocky Mountain*, 740 F.3d at 518 (M. Smith, J., dissenting from denial of rehearing en banc). Indeed, as a matter of basic geography, if each State penalizes fuels based on the distance they are transported, schemes will *necessarily* produce conflicting values.

II. The Panel Decision Eviscerated Strict Scrutiny As An Important Check Against Discriminatory State Laws

In the context of the dormant Commerce Clause, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.* v. *Dep't of Envtl.*

Quality, 511 U.S. 93, 99 (1994). Whenever a statute discriminates against interstate commerce, strict scrutiny applies. *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 338 (2008). And because discriminatory state laws must "pass the strictest scrutiny," *Or. Waste*, 511 U.S. at 101 (citation and internal quotation marks omitted), such laws "face 'a virtually *per se* rule of invalidity,'" *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (quoting *Granholm*, 544 U.S. at 476).

Strict scrutiny has long served as an important safeguard against "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Or. Waste*, 511 U.S. at 98. Applying strict scrutiny to discriminatory state laws is compelled not only by doctrine, but also practical necessity. "[W]hen a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of simple economic protectionism." *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (citations and internal quotation marks omitted). This Court has "often f[ou]nd discrimination when a State shifts the costs of regulation to other States, because when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *Id.* at 345 (quoting *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768 n.2 (1945)).

As petitioners explained, the predictable result of the Fuel Program's regulation of out-of-state

conduct is Oregon's discrimination against out-of-state interests for the benefit of in-state industry. Pet. 11. Yet despite patent discrimination on the face of the regulation and in its design, purpose, and effect, the panel applied a highly deferential standard in judging the Fuel Program, one that allows a State to bypass the strict scrutiny inquiry simply by identifying an environmental rationale for its discriminatory regulation.

In *Rocky Mountain*, the Ninth Circuit concluded that facial discrimination does not warrant strict scrutiny when a law "incorporate[s] state boundaries" based on "legitimate goals of regulation." 730 F.3d at 1095, 1107 (citing *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 347 & n.11 (1992)). The Ninth Circuit held that California's interest in protecting its citizens from the "tremendous risks from climate change" justified discrimination against out-of-state interests mandated by California's LCFS, dismissing the application of strict scrutiny as "archaic formalism" that "prevent[s] action against a new type of harm." See *id.* at 1096-1097, 1106-1107. By making "the interstate transportation of any good in commerce a negative factor on climate change and thereby justif[ying] state regulation of any and all interstate commerce," *Rocky Mountain* "change[d] the constitutional analysis." Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?*, 93 NEB. L. R. 807, 832-834 (2015).

As it did in *Rocky Mountain*, the Ninth Circuit panel here allowed Oregon to evade strict scrutiny based on its environmental justification for the Fuel Program, Pet. App. 13a, breaking with

well-established principles governing state regulations that discriminate against interstate commerce. As a general matter, "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste*, 511 U.S. at 100; accord *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979) ("Such facial discrimination by itself may be a fatal defect, *regardless of the State's purpose*, because 'the evil of protectionism can reside in legislative means as well as legislative ends.'" (emphasis added) (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 626 (1978))). A State may not achieve a "presumably legitimate goal" by discriminating against out-of-state interests or products, *Philadelphia*, 437 U.S. at 626-627, and this Court has never suggested that environmental regulations are "an avenue to negate application of the dormant Commerce Clause," Ferrey, *Ninth Circuit*, 93 NEB. L. R. at 834.

This Court has long held that "[w]hen legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (collecting cases). For that reason, discriminatory state laws that "purport[] to promote environmental purposes" are subject to "a 'virtually *per se* rule of invalidity.'" *Ibid.* (quoting *Philadelphia*, 437 U.S. at 624); see also, *e.g.*, *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 204 n.20 (1994) ("[E]ven if environmental preservation were the central purpose of the pricing order, that would not be sufficient to uphold a

discriminatory regulation." (citing *Philadelphia*, 437 U.S. at 626-627)).

Many of this Court's leading cases invalidating discriminatory state legislation would have been decided differently if, as here, merely articulating a reasonable-sounding justification sufficed to spare a facially discriminatory statute from strict scrutiny. For example, in another case involving a State's asserted effort to derive environmental benefits from using ethanol as a transportation fuel, this Court applied the "strictest scrutiny" and held that the State's proffered justification was insufficient in light of the fact that the law discriminated "on its face" against out-of-state producers. *New Energy*, 486 U.S. at 274, 278-279. Similarly, in *Oregon Waste Systems*, Oregon defended a surcharge for out-of-state waste on the ground that the law would ensure out-of-state waste generators would "bear the full costs of in-state disposal." 511 U.S. at 106. This Court rejected Oregon's argument, holding that even if the surcharge could be characterized as "resource protectionism," that justification alone did not allow the State "'to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.'" *Id.* at 106-107 (quoting *Chem. Waste*, 504 U.S. at 339-340).

The panel's analysis was a far cry from the "strictest scrutiny" that has long applied to facially discriminatory laws. *Or. Waste*, 511 U.S. at 100-101. States will almost invariably be able to articulate some reasonable-*sounding* explanation beyond bare protectionism for discriminatory regulations, and those pretextual rationales may well pass muster under the panel's diluted and deferential form of

review. Only strict scrutiny adequately guards against the States' natural tendency to advance their own economic self-interest. The need for a robust strict scrutiny analysis is especially acute now, where state laws may superficially appear to serve a variety of non-discriminatory purposes, while actually concealing economic protectionism in the details of ever-more technical, complex regulations. Even where a State begins with a legitimate purpose, regulators often face pressures to favor in-state interests as they make the myriad technical decisions inherent in administering a complex regulatory scheme.

III. The Ninth Circuit's Precedent Is Having Negative Effects Nationwide

In addition to being foreclosed by precedent, the Ninth Circuit's rule would have sweeping consequences for the national economy. The Ninth Circuit's decisions in this area have freed California and Oregon, and other States within its jurisdiction, of the "constitutional concerns visited upon states in other parts of the country." Steven Ferrey, *Moving the Legal Needle of Western Climate And Energy Options*, 8 SAN DIEGO J. CLIMATE & ENERGY L. 129, 131-132, 154-160 (2016-2017). Litigants have taken notice of these "out-of-norm decisions," *id.* at 154, and have begun relying on them to support market-distorting legislation.

A broad range of litigants have invoked the panels' rationale to support a number of policies, including the regulation of pesticides and genetically

engineered plants,[6] the prohibition on the possession and sale of shark fins,[7] and minimum wage ordinances.[8] Litigants in other parts of the country have also recognized the expansive reach of the Ninth Circuit's precedent. One state cited *Rocky Mountain* to justify its attempt to regulate the manufacture and distribution of products used in e-cigarettes. Defs.' Mot. for Summ. J. at 17, 19-20, *Legato Vapors, LLC* v. *Cook*, No. 1:15-cv-761 (S.D. Ind. Mar. 21, 2016), ECF No. 70. In holding that the law violated the Commerce Clause, the Seventh Circuit noted the law's "unprecedented" extraterritorial reach. *Legato Vapors, LLC* v. *Cook*, 847 F.3d 825, 827 (7th Cir. 2017).

But there is an even more troubling consequence of the panel's decision. A fundamental principle underlying the Commerce Clause is that "States should not be compelled to negotiate with each other regarding favored or disfavored status for their own

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[6] Intervenor-Defs.' Reply in Supp. Partial Mot. for Summ. J. at 18, *Syngenta Seeds* v. *Cty. of Kaua'i*, No. 1:14-cv-14 (D. Haw. July 18, 2014), ECF No. 129.

[7] Defs.' Reply in Supp. of Mot. to Dismiss at 6, *Chinatown Neighborhood Ass'n* v. *Harris*, No. 3:12-cv-3759 (N.D. Cal. Feb. 6, 2014), ECF No. 63. The Ninth Circuit upheld the validity of California's "Shark Fin Law," concluding that the law's "extraterritorial reach" did not render it invalid. See *Chinatown Neighborhood Ass'n* v. *Harris*, 794 F.3d 1136, 1145-1146 (9th Cir. 2015) ("[E]ven when state law has significant extraterritorial effects, it passes Commerce Clause muster when * * * those effects result from the regulation of in-state conduct." (citing, *inter alia*, *Rocky Mountain*, 730 F.3d at 1101-1104)).

[8] Def.'s Opp'n to Mot. for Preliminary Injunction at 7, 9-10, *Int'l Franchise Ass'n, Inc.* v. *City of Seattle*, No. 2:14-cv-848 (W.D. Wash. Sept. 29, 2014), ECF No. 61.

citizens." *Granholm*, 544 U.S. at 472. Preventing such inter-state negotiations keeps "[r]ivalries among the States * * * to a minimum" and prevents "a proliferation of trade zones." *Ibid.* (citing *C&A Carbone*, 511 U.S. at 390). To that end, the dormant Commerce Clause analysis considers how the regulation "interact[s] with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. If every State asserted the authority claimed by Oregon and California (and sanctioned by the Ninth Circuit), the result would be the creation of "just the kind of competing and interlocking economic regulation that the Commerce Clause was meant to preclude." *Id.* at 337. And nowhere is the threat of "'rivalries and reprisals' between the states," Pet. 24 (quoting *Baldwin*, 294 U.S. at 522), more acute than in the area of energy and environmental regulation.

In 2007, Minnesota passed legislation that prohibited "import[ing] [into Minnesota] or commit[ting] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions," defined to include emissions from the generation of electricity imported from outside, but consumed within, Minnesota. Minn. Stat. § 216H.03, subd. 2-3 (2007). In response to a challenge from North Dakota, which transmits electricity to Minnesota, environmental groups invoked *Rocky Mountain* to defend the law.[9] See Br.

[9] The Eighth Circuit concluded that the statute impermissibly regulated out-of-state conduct. See *North Dakota* v. *Heydinger*, 825 F.3d 912, 919-922 (8th Cir. 2016).

of *Amici* Minn. Ctr. for Envt'l Advocacy et al. at 13, *North Dakota* v. *Heydinger*, No. 11-cv-3232 (D. Minn. Sept. 20, 2013), ECF No. 159. More recently, eight States and the District of Columbia, citing the panel's decision in this case, argued that the States' interest in combatting climate change allowed the City of New York to bring common law claims against multinational oil and gas companies for their contribution to global warming. Br. of *Amici Curiae* States and the District of Columbia at 5, *City of New York* v. *Chevron Corp.*, No. 18-2188 (2d Cir. Nov. 16, 2018), ECF No. 122; see also Appellee Answering Br., *Cty. of San Mateo* v. *Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir. Jan. 22, 2019), ECF No. 88 (similar). There is no indication that these sorts of inter-state rivalries are waning, see, *e.g.*, Heather Richards, *Wyo. legislators eye lawsuit over coal port*, WYOMING TRIBUNE EAGLE (Jan. 28, 2019), https://bit.ly/2St6MBT (discussing potential lawsuit by Wyoming alleging that Washington state denied a state water permit because "the powers that be in Washington don't like coal"), and the logic of the Ninth Circuit's decisions does not end with energy regulation. See *Rocky Mountain*, 740 F.3d at 518-519 (M. Smith, J., dissenting from denial of rehearing en banc); see also, *e.g.*, *Missouri ex rel. Koster* v. *Harris*, 847 F.3d 646 (9th Cir. 2017).

The consequences of the Ninth Circuit's rule for the national economy—not to mention the affront to the States' sovereignty, see *PPL Montana, LLC* v. *Montana*, 565 U.S. 576, 591 (2012)—are not difficult to imagine. The Ninth Circuit's decisions incentivize States to create regional trade zones, see *supra*

Section I(C), leading to the sort of "economic Balkanization" that the Commerce Clause was intended to prevent. *Granholm*, 544 U.S. at 472-473; see also *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 402 (1984) ("[T]he very purpose of the Commerce Clause was to create an area of free trade among the several States." (citations and internal quotation marks omitted)). The proliferation of such trade zones inevitably will "excite * * * jealousies and retaliatory measures" from States excluded from these blocs. See *C&A Carbone*, 511 U.S. at 390. As one Ninth Circuit judge recognized in dissenting from this line of cases, the creation of "interlocking, if not entirely contradictory, regulatory regimes" will result in "[f]ragmentation of the national economy." *Rocky Mountain*, 740 F.3d at 518-519 (M. Smith, J., dissenting from denial of rehearing en banc). This Court's review is urgently needed.

CONCLUSION

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

Respectfully submitted.

MICHAEL B. SCHON
STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

PETER C. TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for National Association of Manufacturers

KEVIN W. BROOKS
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
(214) 220-7805

Counsel for Amici Curiae

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