No. 18-881

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN FUEL & PETROCHEMICAL MANUFACTURES, 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

BRIEF IN OPPOSITION OF OREGON RESPONDENTS AND STATE OF WASHINGTON

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QUESTIONS PRESENTED

Oregon's Clean Fuels Program sets standards for the sale of transportation fuel sold in Oregon on the basis of its carbon intensity, calculated using an accepted scientific methodology that accounts for the fuel's full lifecycle. The same lifecycle analysis applies to all fuel sold in Oregon, regardless whether it was produced in or outside of the State. The questions presented are:

1. By setting standards for products sold in the State, does the program regulate commerce occurring wholly outside of Oregon?

2. Does the program discriminate against out-of-state economic interests in favor of in-state competitors where the State's market incentives for producing lower-carbon fuel are available to all fuel producers, regardless of location?

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INTRODUCTION

Oregon regulates fuel sold in Oregon based on carbon intensity, a scientific measure of the greenhouse gas emissions that result from using that fuel. In rejecting petitioners' challenges to those regulations, the court of appeals merely applied well-settled principles of law established by this Court, creating no conflict with any other circuits decisions. While a State may not regulate wholly out-of-state commerce, Oregon is free to set standards for products that are sold within Oregon itself. And while a State may not discriminate against out-of-state economic interests in favor of in-state competitors, Oregon's regulations distinguish among fuels based on their carbon intensity—not their geographic origin. There is no constitutional bar to a State regulating its market in this way based on products' objectively measured contributions to in-state harms. The application of well-settled principles to the particular regulatory regime at issue here does not warrant this Court's review.

Nor is this Court's review needed to prevent the parade of horribles that petitioners speculate may occur if the decision below is left in place. *See* Pet. 23–25. California is in its ninth year of enforcing similar carbon-intensity standards for fuels sold in that State. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013), *cert. den.*, 134 S. Ct. 2875 (2014). Those regulations have not fractured national markets or spurred other States to enact the sort of retaliatory regulations that petitioners fear. Petitioners' hyperbolic predictions about what might happen in the future provide no sound basis for reviewing this case now. And as discussed below, Oregon's regulatory regime has changed significantly since petitioners filed their complaint, addressing some of the very concerns they have raised.

STATEMENT

1. Oregon's Clean Fuels Program regulates the sale of transportation fuel within Oregon. Or. Rev. Stat. §§ 468A.265–468A.277; Or. Admin. R. 340-253-0000 to 340-253-2100. That program is part of the state's efforts to mitigate the effects of climate change on its residents and territory. *See* Or. Rev. Stat. §§ 468A.200–458A.205. As a coastal state that relies heavily on the snowpack in its mountains for water supply, Oregon faces particularly severe risks from climate change. *Id.* § 468A.200(3). Communities along more than 300 miles of Oregon coastline are threatened by rising sea levels, and reduced snow pack will affect stream flows needed for hydropower production, municipal water supplies, watershed health, and irrigated agriculture. *Id.* § 468A.200(4). Oregon has adopted a number of measures to reduce Oregon's contribution to the greenhouse gas emissions, with the goals of reducing the State's emissions by 10% from 1990 levels by 2020, and reducing levels by 75% by 2050. Or. Rev. Stat. § 468A.205(1)(b), (c).

Under the Clean Fuels Program, Oregon's Environmental Quality Commission (EQC) has adopted low-carbon fuel standards—standards that encourage the use, in Oregon, of alternatives to petroleum-based fuels, and specifically alternatives that produce the fewest greenhouse gas emissions over the course of their entire lifecycles. Or. Rev. Stat. § 468A.266. The rules accomplish that by establishing increasingly stringent carbon-intensity standards for the transportation fuels sold in Oregon in a given year. Pet. App. 3a.

The standards are based on a science-based, generally accepted lifecycle analysis. That analysis provides the only accurate way to compare the greenhouse gas emissions associated with different fuels. *See* Pet. App. 5a. For example, to compare the emissions consequences of using electricity rather than gasoline to power a car, one must take into account the emissions associated with the generation of the electricity even though they do not come out of the tailpipe. Congress has recognized the importance of lifecycle analysis in this context, using it as the basis of mandates for renewable fuel standards. 42 U.S.C. § 7545(o)(1)(B), (D), (E), (H); *see also, e.g.*, 78 Fed. Reg. 14,190, 14,209 (2013). The Oregon program calculates carbon intensity using a lifecycle analysis based on a model (GREET) that was published by scientists at the U.S. Department of Energy's Argonne National Laboratory. Or. Admin. R. 340-253-0040(72). This is the same model used by the United States Environmental Protection Agency in implementing Congress' renewable fuels program. *See, e.g.*, 78 Fed. Reg. 14,190, 14,209 (2013).

The standards established under Oregon's Clean Fuels Program require increasing reductions from the average carbon intensity of fuels sold in Oregon in 2015. For example, the standards for 2016 for gasoline and other fuels typically used in passenger cars required a reduction of .25% from the 2015 baseline. Pet. App. 85a (reproducing Or. Admin. R. 340-253-8010, tbl. 1 (2015)). The standards for 2019 require a reduction of 1.5%, and the standards for 2025 and beyond require a reduction of 10% from the 2015 baseline. *Id.*

All fuels sold in Oregon generate either credits or deficits, depending on whether the fuel's carbon intensity is lower or higher than the applicable carbon-intensity standard for the year. Pet. App. 3a. The sale of petroleum-based fuels typically generates deficits, because their carbon intensities are higher than the standards established by the Program. *See id.* at 6a. In contrast, the sale of alternative (non-petroleum) fuels, such as ethanol, biodiesel, electricity, or renewable diesel, typically generates credits because these fuels often have carbon intensities lower than the applicable standard. *See id.* at 15a. Because gasoline sold in Oregon must contain 10% ethanol, *see* Or. Rev. Stat. § 646.913, choosing an ethanol with lower carbon intensity yields a lower average carbon intensity for the blended fuel and potentially generates credits rather than deficits.

The carbon intensities of alternative fuels, and therefore the credits they generate, vary significantly. Forty ethanols from outside the State currently have carbon intensities lower than the value approved for Oregon's single producer of ethanol (53.81

gCO2e/MJ).[1] *Cf. Rocky Mountain Farmers Union*, 730 F.3d 1070, 1090 (9th Cir. 2013) ("To date, the lowest ethanol carbon intensity values, providing the most beneficial market position, have been for pathways from the Midwest and Brazil."). The lowest carbon intensity assigned to any ethanol (21.58) is for an ethanol produced in Iowa. Those figures reflect the fuels' actual lifecycle emissions as determined through scientific modeling.

Although at one time EQC's regulations allowed most fuels to use values in standardized "look-up tables" that relied on *average* carbon intensities, the current rules instead generally mandate the calculation of the *individualized* carbon intensity of fuels such as ethanol. *Compare* Pet. App. 87a–106a (reproducing Or. Admin. R. 340-253-8030, tbl. 3 (2015)), *with* Or. Admin. R. 340-253-0400 to 340-253-0450(1).

Parties regulated under the Clean Fuels Program—businesses selling ready-to-use fuels in Oregon—must hold and surrender credits sufficient to cover any deficits they generate from the sale of high-carbon fuels. Pet. App. 3a. Regulated parties may acquire credits either by selling low-carbon fuels in Oregon (such as the low-carbon ethanols described above) or by purchasing credits from other regulated parties who have generated excess credits. *Id.* This system of credits and deficits ensures that, on aver-

[1] The values in this paragraph are from the full list of approved carbon intensities for alternative fuels, available for download at https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuel-Pathways.aspx (last visited February 14, 2019).

age, the carbon intensity of transportation fuels sold in Oregon does not exceed the applicable standards. *See id.* The state's goal, encouraging the use of fuels with lower carbon intensity, is thus met. But the program does not prohibit or require any particular fuel or combination of fuels be sold in Oregon. *See* Or. Admin. R. 340-253-0000(2).

2. Petitioners filed their complaint in March 2015, just two months after EQC enacted its first set of regulations requiring compliance with low-carbon fuel standards and before those fuel standards were to take effect in 2016. They sought declaratory and injunctive relief to prevent the implementation and enforcement of the Clean Fuels Program.

The district court dismissed the complaint. As relevant here, the district court held that the low-carbon fuel standards for fuels sold in Oregon do not regulate or control wholly out-of-state conduct. Pet. App. 48a-49a. The court also rejected petitioner's argument that the standards discriminate against out-of-state economic interests in favor of in-state competitors. Pet. App. 36a–47a. The court noted that petitioners had failed to plead that fossil fuels and biofuels are similarly situated—in other words, that they compete against one another in a market—and observed that many biofuels that generate credits are produced outside Oregon. Pet. App. 38a–40a. The court also noted that the statements upon which petitioners relied for their claim of discriminatory purpose were taken out-of-context and were "'easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.'" Pet. App. 45a (quoting *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 463 n.7 (1981)).

The court of appeals affirmed. With respect to the extraterritoriality claim, it recognized that a state may not "regulat[e] conduct that 'takes place wholly outside the State's borders.'" Pet. App. 20a (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). It concluded that Oregon's Clean Fuels Program does not do so. Pet. App. 21a. Although the court recognized that the program might, through Oregon's market, provide an economic incentive for firms both within and outside of Oregon to develop low-carbon fuels, the program did not *control* any conduct outside of Oregon. Pet. App. 20a–21a.

The court also rejected petitioner's argument that the Oregon regulations discriminate against out-of-state economic interests in favor of in-state competitors. It held that the program distinguishes fuels "based on lifecycle greenhouse gas emissions, not state of origin," and "assigns credits and deficits to fuels evenhandedly." Pet. App. 10a, 14a. The court observed that "[t]he number of credits assigned to fuels does not depend on their state of origin" and that several out-of-state producers generate more credits "than Oregon producers of the same fuels." Pet. App. 14a–15a; *see also id.* at 19a ("Under the structure of the Oregon Program, * * * out-of-state producers are able to—and do—generate credits and thus share in the Program's benefits.").

One judge dissented, contending that the procedural context, an appeal from a motion to dismiss, required that the court accept plaintiffs' allegations of discrimination. Pet. App. 25a–27a.

REASONS TO DENY THE PETITION

The court of appeals relied on and correctly applied principles of law long established by this Court. The Oregon rules challenged here do not regulate any conduct that occurs wholly outside Oregon, and they apply the same lifecycle analysis to fuels regardless of geographic origin. Further, substantial changes in the regulations since the complaint in this case was filed would limit the effect of any decision this court might render. Further review is not warranted.

A. The court of appeals' extraterritoriality ruling does not warrant further review.

1. The ruling applied well-settled principles of law and does not conflict with any ruling of this Court.

1. A state law regulates extraterritorially only where it applies to or otherwise controls "commerce occurring *wholly outside* the boundaries of a State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (emphasis added). Thus, a State "may regulate the sale of [products] within its borders," including the prices of those sales, but may not regulate sales or prices in other States. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582–83 (1986).

Thus, in one of its rare dormant Commerce Clause cases invalidating a law as an extraterritorial regulation, this Court struck down a New York law requiring liquor producers to declare the prices they would offer in New York and prohibiting producers from offering lower prices in other States. *Id.* at 575; *see also Healy*, 491 U.S. at 338 (invalidating Connecticut law that controlled prices of sales in other States).

By contrast, a state law that does not *control* wholly extraterritorial conduct is valid, even if it *incentivizes* conduct beyond state borders. For example, this Court upheld a Maine law that strongly encouraged pharmaceutical manufacturers to offer significant rebates for drugs sold in Maine by imposing substantial penalties on manufacturers who chose not to do so. *Pharmaceutical Research & Mfrs. of Am. v. Walsh* (*PhRMA*), 538 U.S. 644, 669 (2003). The fact that the manufacturers were all located outside of Maine, and that some of the effects of the law therefore occurred there, did not change the fact that Maine's law did no more than regulate in-state sales. *See id.*

Similarly, although one State may not punish a car dealer for selling a vehicle in another State without disclosing repairs previously made to those vehicles, it may "insist that [the company] adhere to a particular disclosure policy [for sales] in [its own] State," even when the activity requiring disclosure—the repairs—occurred out-of-state. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572, 563 n.1 (1996); *see also Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct.

1773, 1781 (2017) (holding that California did not have jurisdiction over nonresidents' claims against the manufacturer of the drug Plavix when they "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California"). A State also "does not exceed its powers" by asserting authority "over [an out-of-state] corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-99 (1980).

And even when a state law effectively requires a company to change its out-of-state practices to be able to sell a product in the State, that does not constitute extraterritorial regulation. This Court has consistently recognized that States may impose standards on the products sold in their States, even when some or all of those products are imported. In *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), for example, Minnesota banned certain types of milk containers, requiring milk suppliers, including those located outside Minnesota, to change their packaging if they wanted to continue to sell in-state. And in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), out-of-state oil refiners were required to divest themselves of company stations in Maryland to continue in-state sales of gasoline. While those laws imposed requirements on producers with respect to in-state sales, neither was unconstitutional.[2]

2. The court of appeals applied those well-established principles in an unremarkable way here. Although Oregon's low-carbon fuel standards may provide economic incentives for producers—both in Oregon and elsewhere—to lower the carbon intensity of the fuels they produce if they want to generate more credits in Oregon, the standards apply only to fuels sold in Oregon and say nothing about fuel sales in other States. Or. Rev. Stat. § 468A.280(1)(b); Or. Admin. R. 340-253-0100(6).

Contrary to the assertions by the petitioners, the rules do not regulate the manner in which fuels are extracted, produced, and transported in interstate and foreign commerce. Pet. 2. Accounting for lifecycle emissions from a fuel's extraction, production, and transportation is a far cry from regulating those same activities. The program does not require or ban any fuel or any methods of extraction, production, or transportation. It simply establishes carbon intensity standards applicable only to fuels sold in Oregon, and a system of credits and deficits that allows each fuel provider to decide how best to comply—through changing the mix of fuels it offers in Oregon, through

[2] Contrary to petitioners' suggestion, the constitutionality of state laws does not turn on whether they regulate an "inherent quality" of a product (Pet. 22), whatever petitioners mean by that phrase. For example, the way in which gasoline is brought to market is not an "inherent quality" of gasoline, yet Maryland could regulate those distribution methods.

purchasing credits from others, or through some combination of the two that best suits the particular fuel provider's interests. *See* Or. Admin. R. 340-253-1000 to 340-243-1030.

The use of ethanol in Oregon illustrates the point. Oregon is among a handful of states that require that regular gasoline be blended with ethanol at a 90/10 ratio for use in motor vehicles. Or. Rev. Stat. § 646.913(1). As a result, those who sell gasoline in Oregon have the opportunity to generate credits by offsetting the high carbon intensity of the clear gasoline with low-carbon ethanol. But Oregon does not require that ethanol produced by any particular source or by any particular method be used, nor does it ban any ethanols. It simply incentivizes the use of low-carbon-intensity ethanol, from wherever it might be produced. Gasoline providers have free rein to decide the source of the ethanol they use, and can choose to purchase credits rather than generate credits with low-carbon ethanol.

To be sure, the purpose of the rules is to reduce the emissions that result from Oregon's use of transportation fuels by 10% over 10 years; to accomplish that, Oregon hopes to encourage the production of lower-carbon alternatives to petroleum, in Oregon and elsewhere, so that such fuels are available to be sold and used in Oregon. But this court has never held that a "carrot and stick" approach such as this violates the Commerce Clause. Like the Maine statute at issue in *PhRMA*, Oregon's Clean Fuels Program incentivizes the decisions of firms who participate in the State's market, but it does not regulate the terms of any out-of-state transaction.

Even if Oregon's program *required* changes in the practices of fuel importers in order to sell fuel in Oregon—which it does not—that would not constitute extraterritorial regulation. In *Clover Leaf*, milk producers were required to change from certain packaging products and suppliers to others, and hence to change their business practices as to their Minnesota sales. 449 U.S. at 472. That requirement is analogous (and, at least arguably, more burdensome) to what is encouraged (but not required) by Oregon's program: a shift to practices that render fuels sold for use in Oregon less harmful to Oregon and its residents.

3. Petitioners cite *C & A Carbone v. Town of Clarkston*, 511 U.S. 383 (1994), and *Baldwin v. G.A.F. Selig, Inc.*, 294 U.S. 511 (1935), as supporting their position that a state may not attempt to influence business conduct outside of its borders. Pet. 11, 19, 21. Neither case stands for such a sweeping proposition.

Carbone was about economic protectionism, not extraterritoriality. It involved an ordinance that required a recycler to dispose of non-recyclable waste at a particular municipal facility, rather than ship it out of town. 511 U.S at 387. This Court struck down that ordinance because it "allow[ed] only the favored operator to process [the town's] waste," thereby depriving competitors "of access to a local market." *Id.*

at 386, 391. But it did not purport to overrule the well-established precedent upholding state laws that regulate products *sold within* their markets. This Court has never pointed to *Carbone* as establishing or illuminating any principles related to extraterritoriality. *See PhRMA*, 538 U.S. at 669. It certainly has never suggested, as petitioners do, that *Carbone*'s analysis of a protectionist waste ordinance somehow eliminated well-established state authority to regulate the products sold in their own markets.

Baldwin involved a price-tying scheme that banned selling milk in New York unless it was purchased from the producer, wherever located, at a price no less than the minimum price set by New York. 294 U.S. at 521–22. The result was to prohibit cheaper milk from other states from entering New York. That protectionism is a classic violation of the dormant Commerce Clause, but no such arrangement is present here. Oregon does not set prices for any product; the operation of the market makes lower-carbon-intensity fuels, wherever produced, more desirable and thus more valuable, but that rule of supply and demand, which is limited to Oregon's market, does not violate the Constitution.

Petitioners' argument reduces to this: that no state may regulate its own market in a way that may influence business decisions made in interstate commerce, because such a law is an "extraterritorial regulation." There is no support for such a categorical rule in this Court's precedent. Indeed, if that were the law, state health and safety regulations could hardly exist at all, since such regulations either incentivize or require behavioral change, often by companies with out-of-state management.[3]

2. The court of appeals' decision does not conflict with any other circuit's rulings.

There is no circuit split about the validity of laws that, like Oregon's Clean Fuels Program, impose standards on in-state sales and are "indifferent to sales occurring out-of-state." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995). Consistent with this Court's precedents, the courts of appeals have rejected extraterritoriality challenges to such laws. *See, e.g.*, *id.*; *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 373 (3d Cir. 2012); *Star Scientific Inc. v. Beales*, 278 F.3d 339, 356 (4th Cir. 2002). And they have done so specifically where the standards for in-state sales were based on conduct that may occur out-of-state. *See, e.g.*, *VIZIO, Inc. v. Klee*, 886 F.3d 249, 260 (2d Cir. 2018) (rejecting extraterritorial regulation challenge to "Connecticut's consideration of out-of-state sales as a basis for its e-waste fees"); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir.

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[3] Then-Judge Gorsuch voiced this very concern: "After all, if any state regulation that 'control[s] ... conduct' out of state is *per se* unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?" *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir.), *cert. den.*, 136 S. Ct. 595 (2015).

2001). As then-Judge Gorsuch wrote, such standards "may be amenable to scrutiny under the generally applicable *Pike* balancing test [for excessive burdens on interstate commerce], or scrutinized for traces of discrimination * * *, but the Court has never suggested they trigger near-automatic condemnation" as extraterritorial regulations. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir.), *cert. den.*, 136 S. Ct. 595 (2015).

Petitioners assert that the court of appeals' decision here conflicts with decisions from the First, Fourth, and Seventh Circuits, but none of those cases involved a statute at all like Oregon's Clean Fuels Program that regulates only in-state sales of a product and does not control any wholly out-of state commerce.

National Foreign Trade Council v. Natsios, 181 F.3d 38, (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000), involved a state law that prohibited state agencies from purchasing goods or services from firms engaged in unrelated business in Burma (Myanmar). 181 F.3d at 45. That law was unconstitutional under this Court's cases invalidating laws that tie together unrelated commercial transactions occurring in different jurisdictions. *See, e.g.*, *Healy*, 491 U.S. at 338 (concluding that extraterritorial regulation flowed from a state law tied "to the regulatory schemes of the border states"); *cf. PhRMA*, 538 U.S. at 669 (concluding that a law was not extraterritorial in part because it did not tie "the price of its in-state products to out-of-state prices"). But Oregon's Clean Fuel Program does not tie fuel sales in Oregon to unrelated commerce in another jurisdiction.

Association for Accessible Medicine v. Frosh, 887 F.3d 664 (4th Cir. 2018), *cert. den.*, __ U.S. __ (Feb. 15, 2019), involved a state law prohibiting "price-gouging" in pharmaceutical sales. Unlike the Oregon Clean Fuels Program, the statute—as understood by the Fourth Circuit—"allows Maryland to enforce the Act against parties to a transaction that did not result in a single pill being shipped to Maryland" and "instructs manufacturers and wholesale distributors as to the prices they are permitted to charge in transactions that do not take place in Maryland." 887 F.3d at 671–72. Oregon's regulations, by contrast, do not control the terms of transactions in other States or otherwise regulate any wholly out-of-state transactions. The Fourth Circuit expressly distinguished the statute in *Frosh* from a law it had previously upheld that, like Oregon's Program, set standards that applied only to products "actually sold in the state." *Id.* at 671 (citing *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 346 (4th Cir. 2002)). And it cited the Ninth Circuit precedent relied on here without any suggestion of tension, let alone conflict. 887 F.3d at 672.

National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995), struck down a statute that required other jurisdictions to adopt Wisconsin's recycling requirements in order to use the State's landfill. *Id.* at 654–55. Those requirements would then apply to all waste generated in those other jurisdictions, whether it was to be dumped in Wisconsin or not. Oregon's Clean Fuels Program, by contrast, requires no action by other jurisdictions, and certainly does not require other jurisdictions to change their laws.

Legato Vapors, LLC v. Cook, 847 F.3d 825 (7th Cir. 2017), involved a statute requiring each manufacturer that wished to sell vaping products in Indiana to obtain a permit, and to comply with Indiana standards for security and clean rooms. The law specifically applied to manufacturers "located inside *or outside Indiana.*" *Id.* at 828 (emphasis in original). The court described the law as directly regulating "the design and operation of out-of-state production facilities, including requirements for sinks, cleaning products, and even the details of contracts with outside security firms and the qualifications of those firms' personnel." 847 F.3d at 827. The court distinguished those requirements, which applied directly to manufacturers "if *any* of their products are sold in Indiana," from standards that, like those under Oregon's program, apply only to products sold in the State. *Id.* at 830, 832 (emphasis added). The court noted that, unlike product standards for in-state sales, Indiana's sweeping manufacturer standards created an "obvious risk of inconsistent regulation" for manufacturers selling their products in multiple States. *Id.* at 833. Oregon's Clean Fuels Program regulates only the fuels sold in Oregon, leaving other States free to regulate (or not) the fuels sold in their States. Thus, like the other product standards described by the court, Oregon's program creates no risk of inconsistent regulation; and, indeed, petitioners point to no such inconsistent regulations even though California has applied carbon-intensity standards in its market since 2011.

None of those cases presents a conflict with the decision of the Ninth Circuit here. No court has held that a state standard that does no more than incentivize conduct with respect to products sold in the regulating State is an extraterritorial regulation. There is no conflict among circuits that is relevant to the outcome of this case.

Petitioners assert that there is a circuit split about whether the extraterritoriality doctrine "is limited to price controls or price affirmation statutes." Pet. 16. There is not, but even if there were, this case would not implicate that split. No party argued below that Oregon's regulations were lawful merely because they did not control prices, and the court of appeals did not base its ruling on any such proposition. Indeed, the Ninth Circuit applied the extraterritorial doctrine here, although Oregon's Program is not a price control, and has repeatedly invalidated state laws as extraterritorial regulations outside the price-control context. *See Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018) (invalidating California's application of its waste management standards to medical waste generated in California but ultimately disposed of in other States); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc) (invalidating royalty payment requirements for out-of-state sales); *NCAA v. Miller*, 10 F.3d 633 (9th

Cir. 1993) (invalidating application of state procedural requirements to wholly out-of-state disciplinary proceedings). Thus, review is not warranted here to address any alleged conflict over application of extraterritoriality principles to laws that do not control prices.

B. The court of appeals' discrimination ruling does not warrant further review.

1. Changes to the regulations since the complaint in this case was filed undermine petitioners' claim of facial discrimination.

The court of appeals held that Oregon's Clean Fuels Program does not discriminate against out-of-state economic interests in favor of in-state competitors. Pet. App. 10a–20a. Petitioners' primary argument for further review of that issue is premised on the assertion that Oregon's regulations *facially* discriminate against interstate commerce. Pet. 25. That assertion is incorrect even as to the January 2015 version of the regulations on which petitioners rely. Regardless, however, those regulations have been amended in significant ways that undermine petitioners' characterization.

The January 2015 regulations included "lookup tables" for carbon intensity that allowed regulated parties to use the *average* carbon intensity for biofuel produced using a particular pathway. Pet. App. 87a–114a (reproducing Or. Admin. R. 340-253-8030, tbl. 3; 340-253-8040, tbl. 4). The lookup tables used a shorthand method to identify each pathway, such as (for one pathway for ethanol from corn) "Midwest; Wet Mill, 100% NG [natural gas]." Pet. App. 88a. As that example reflects, some of those pathways used geographic descriptors, and it is those geographic descriptors that petitioners cite as the basis for their facial discrimination argument. Pet. 25.

But today the regulations no longer rely on average carbon intensities or any geographic descriptors for biofuels. The regulatory text referred to in petitioners' complaint—which cited Table 3 (Pet. App. 133a)—was removed and "functionally replaced by the temporary fuel pathway codes in the newly created Table 9." Oregon Department of Environmental Quality, "March 2018: Program Update," at 2, *available at* https://www.oregon.gov/deq/FilterDocs/cfpprgupdate03-2018.pdf (last visited Mar. 21, 2019). All biofuels "must now have an individual [carbon intensity] or request to use the applicably temporary" carbon intensity in Table 9. *Id.* Table 9 contains no labels referring to a fuel's origin, and petitioners do not, and cannot, claim otherwise. Or. Admin R. 340-253-8090, tbl. 9.

Despite petitioners' assertion that facial discrimination "must be judged based on the language of the state law" (Pet. at 27), the petition contains not a single quotation from the regulatory text. Where petitioners claim that Oregon's Program "facially assigns less favorable carbon intensity scores to Midwest corn ethanol than to Oregon corn ethanol," they cite only their own complaint. Pet. 25 (quotation marks omitted). The complaint relied on the geographic descriptions included in Table 3 of the 2015 regulations. Pet. App. 133a. But that table is no longer part of the Clean Fuels Program. Any decision of this court as to the constitutionality of the 2015 lookup tables would have limited legal effect.

2. The court of appeals' decision does not conflict with decisions of this Court or other circuits.

The court of appeals' discrimination rulings merely applied well-settled precedent from this Court. For purposes of the dormant Commerce Clause, discrimination means "economic protectionism": "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Kentucky v. Davis*, 553 U.S. 328, 338 (2008). Although discrimination under the dormant Commerce Clause can be found on the face of a state law or in its design and effects, the fundamental meaning of discrimination remains the same—differential treatment that favors in-state interests over their out-of-state competitors. *E.g.*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99, (1994) (facial discrimination favoring in-state waste); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984) (discrimination favoring in-state liquors through statute's design and effects).

Contrary to petitioners' assertion (Pet. 27), the court of appeals did not depart from the well-established dormant Commerce Clause rule that facially discriminatory laws are subject to strict scrutiny. Rather, the court concluded that Oregon's Program was *not* facially discriminatory, and, thus, the court had no reason to apply strict scrutiny. Pet. App. 10a-11a.

That conclusion follows easily from settled law. A facially discriminatory law is one in which "[t]he statutory determinant for which [treatment] applies to any particular [product] is whether or not [it] was generated out-of-state." *Oregon Waste*, 511 U.S. at 99 (quotation marks omitted). Thus, this Court invalidated the law in *Oregon Waste* because, on its face, it imposed a higher fee for disposal of waste originating out of state. *Id.* The court of appeals cases petitioners cite likewise involved laws under which a product or service's treatment was determined by its out-of-state origin. *See, e.g.*, *Used Tires Int'l, Inc. v. Diaz-Solana*, 155 F.3d 1 (1st Cir. 1998) (prohibition against importing certain tires); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (restrictions, including quotas, only applicable to out-of-state wastes).

In contrast, under Oregon's Clean Fuels Program, the determinant of a fuel's treatment is not whether it was generated out-of-state. All competing fuels are subject to the same rigorous, scientific lifecycle analysis. And the result of that evenhanded application of scientific analysis is that—for ethanol, which is the focus of petitioners' facial discrimination claim (Pet. 25)—the program's most favorable carbon intensity values are assigned to out-of-state ethanols. Even in the superseded look-up tables from 2015 on which petitioners rely, the lowest carbon intensity values are for six ethanols from Brazil. Pet. App. 100a–102a. And under the current approach of using individualized values, the lowest (and most favorable) values still correspond to out-of-state ethanols. *See supra*, at 4. Petitioners cite no case in which a state law like Oregon's Clean Fuels Program was determined to be economic protectionism.

The different values for different ethanols reflect real differences in the emissions that result from the use of different fuels. Petitioners notably do not dispute this fact. As the court of appeals concluded, Oregon's Program "distinguishes among fuels based on" these real differences, "not origin or destination." Pet. App. at 40a. That conclusion reflects application of this Court's "principle of nondiscrimination" that requires "some reason, apart from origin" for differential treatment. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978); *see also Carbone*, 511 U.S. at 390 (invalidating law that "discriminate[d] against an article of commerce by reason of its origin or destination out of State"). The decision here creates no conflict in the law.

Petitioners try to manufacture a conflict by asserting that the court of appeals improperly considered the justification for Oregon's program as part of its facial discrimination analysis. Pet. 26-27; 28. But the court did nothing of the sort. Rather, it noted that the regulations then in place employed some labeling of emission pathways by the shorthand of origin and concluded that this fact did not "render [the program] discriminatory, as these labels are *not the basis for any differential treatment*." Pet. App. 10a (emphasis added). In other words, the court of appeals explicitly applied this Court's definition of discrimination—namely "*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.

The court of appeals also applied well-settled law to petitioners' claims concerning the Clean Fuel Program's design or effect. The Program does not require any party to buy anything—credits or low-carbon fuel—from in-state entities. As discussed above, and as the court of appeals noted, the single ethanol produced in Oregon has a carbon intensity in the middle of the wide range of ethanols, and forty out-of-state ethanols have approved values below Oregon's. *See supra*, at 4; Pet. App. 15a ("Many out-of-state producers generate credits, and several fare better in this respect than Oregon producers of the same fuels.").[4] Thus, there are numerous *out-of-state* producers from whom petitioners' members can acquire the low-carbon ethanols or credits they need to comply.

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[4] To the extent petitioners are arguing that the Program discriminates between gasoline and ethanol (*cf.* Pet. App. 38a–39a), the Court would first have to address whether the two types of fuel are "similarly situated for constitutional purposes"—that is, whether they compete in a single market. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299–300 (1997).

That sets this case apart from the purportedly conflicting decisions cited by petitioners. In *West Lynn Creamery v. Healy*, 512 U.S. 186, 194 (1994), this Court invalidated a "subsidy provided exclusively to [in-state] dairy farmers." Even if the purchase and sale of credits by *private parties* were a "subsidy" akin to the *government* payments in *West Lynn Creamery*, it is simply not the case that any such subsidies go exclusively to in-state biofuel producers under Oregon's Program, as discussed above. This Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), likewise creates no conflict because the law challenged there also provided its most favorable treatment exclusively to in-state businesses—namely "locally produced beverages." *Id.* at 269. Oregon's Program does not do that. Petitioners identify no case finding discrimination where a regulation evenhandedly applies the same evaluation methodology to all competing products, with the result that some out-of-state fuels obtain a potential competitive advantage.

Oregon's Clean Fuels Program provides incentives for all fuel producers to lower the carbon intensity of the fuels they sell in Oregon, and uses a market approach to achieve that goal. But there are a variety of ways that fuel providers can comply with the Program's requirements, and none of those ways requires fuel providers to "subsidize" any in-state business. There is no discrimination against out-of-state producers, who are as able as in-state producers to produce low-carbon fuels that generate credits, if they choose. The program does not discriminate against out-of-state economic interests in favor of in-state competitors, and the court of appeals' conclusion to that effect is entirely consistent with existing precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 5, 2019