CREDITING THE ENVIRONMENT: A CHALLENGE TO THE OREGON CLEAN FUELS PROGRAM

I. INTRODUCTION

On September 7, 2018, in *American Fuel and Petrochemical Manufacturers et al. v. O'Keeffe* et al (*American Fuel*), the United States Court of Appeals for the Ninth Circuit ruled on challenges to Oregon's Clean Fuels Program (OCFP).[1] The Ninth Circuit held that the implementation and enforcement of the OCFP by Officials of Oregon Environmental Quality Commission (OEQC) and Oregon Department of Environmental Quality (ODEQ) was not in violation of the Commerce Clause, U.S. Constitution Article I, section 8, Cl. 3.[2] More specifically, the OCFP was not discriminatory, did not burden out-of-state fuel producers, nor benefit in-state producers, did not impose a burden on interstate com-

1. American Fuel & Petrochemical Mfr.'s v. O'Keeffe, 903 F.3d 903 (9th Cir. 2018).
2. *Id.* at 903.

merce, and did not legislate extraterritorially.[3] Nor was the OCFP preempted by section 211 (c) of the Clean Air Act (CAA), 42 U.S.C. sections 7401 and 7545.[4]

The stated goal of the OCFP is to lower Oregon's contribution to global greenhouse gas emissions (GHGs) while at the same time, reducing impacts of those emissions within the state.[5] To accomplish this goal, the OCFP set forth low carbon fuel standards for transportation fuels produced within the state and transportation fuels imported into the state.[6] The OCFP was modeled on a California program known as the California Low Carbon Fuel Standard (LCFS).[7] In *American Fuel*, the Ninth Circuit recognized the similarities between the two programs, and followed to a great extent, its own earlier decision from a challenge to the LCFS in *Rocky Mountain Farmers Union v. Corey* (*Rocky Mountain*).[8] While the OCFP and California's LCFS are similar programs,[9] Oregon and California themselves are two vastly different states. Therefore, the practical effects of the programs must also be addressed in relation to the harboring state and not merely in a general sense.[10]

In *Rocky Mountain*, the Ninth Circuit was similarly presented with the issue of whether the LCFS discriminated against out-of-state crude oil.[11] In its assessment, the Ninth Circuit looked to whether the LCFS favored in-state sources over out-of-state sources.[12] California is one of the country's largest holders of oil reserves, and one of the largest producers of crude oil.[13] On the other hand, Oregon has neither crude oil reserves, nor any crude oil exploration and production.[14] Therefore, the exact reasoning used in *Rocky Mountain* should not successfully support the Oregon OCFP as a simple matter of precedent because of the differences between Oregon and California.[15]

In upholding the OCFP, the *American Fuels* court found that the program was not discriminatory when viewing the GHGs from various types of fuel on the stand-alone basis, not on the basis of origin.[16] Furthermore, the court assert-

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3. *Id.*

4. *Id.*

5. OR. ADMIN. R. 340-253-0000 (Nov. 17, 2017).

6. *Id.*

7. *American Fuel*, 903 F.3d at 911; CAL. CODE REG. tit. 17, § 95480 (2010).

8. *American Fuel*, 903 F.3d at 908-09, 911; Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

9. *American Fuel*, 903 F.3d at 911.

10. *Id.* at 918.

11. *Rocky Mountain Farmers Union*, 730 F.3d at 1087.

12. *Id.* at 1099.

13. U.S. ENERGY INFO. ADMIN., CAL. STATE ENERGY PROFILE (Nov. 15, 2018) [hereinafter CAL. STATE ENERGY PROFILE].

14. U.S. ENERGY INFO. ADMIN., OR. STATE ENERGY PROFILE (Nov. 15, 2018) [hereinafter OR. STATE ENERGY PROFILE].

15. *Compare* OR. STATE ENERGY PROFILE, *supra* note 14 *with* CAL. STATE ENERGY PROFILE, *supra* note 13.

16. *American Fuel*, 903 F.3d at 903.

ed that in this case, Oregon's interests override the potential for discrimination.[17] The court states that "[o]ur federal system recognizes 'each State's freedom to 'serve as a laboratory'; and try novel social and economic experiments.' This freedom would be meaningless if officials could not promote the economic benefits of these experiments to their states without running afoul of the Commerce Clause."[18] However, as noted by the dissent, there could be other nondiscriminatory means for advancing Oregon's goal of reducing GHGs.[19] Asking the Oregon legislature to adopt an alternate nondiscriminatory program would not impede on the states interest to serve as an experiment to combat GHGs.[20]

II. BACKGROUND

A. American Fuel and Petrochemical Manufactures et al. v. O'Keeffe

In March 2015, various trade associations[21] brought an action against officials of the OEQC and ODEQ alleging that the OCFP violated the Commerce Clause and was preempted by section 211(c) of the CAA.[22] The Defendants filed a motion for summary judgment alleging that Plaintiffs failed to state a claim upon which relief can be granted under the Federal Rules of Civil Procedure 12(b)(6).[23] The district court granted the motion, finding that Plaintiff's claim of a Commerce Clause violation was barred by a Ninth Circuit decision in *Rocky Mountain*, and that the clear language of section 211(c) of the CAA does not preempt the regulation of fuels through the OCFP.[24]

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17. *Id.* at 913.

18. *Id.* at 913 (quoting San Antonio Indep. Sch. Dist v. Rodriquez, 411 U.S. 1 (1973)).

19. *Id.* at 919.

20. *Id.*

21. Plaintiffs in the case at hand were comprised of American Fuel & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance. American Fuel & Petrochemical Manufactures is an organization that represents nationwide manufactures of "gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life." *American Fuel*, 903 F.3d at 903; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ABOUT AFPM, https://www.afpm.org/about-afpm/. Similarly, the American Trucking Associations is a national trade organization that represents the trucking industry. AMERICAN TRUCKING ASSOCIATIONS, ABOUT ATA, https://www.trucking.org/About.aspx. Finally, the Consumer Energy Alliance is an advocate group that works to promote "energy policies for all consumers, such as families and small businesses, by providing sound, unbiased information on energy issues." CONSUMER ENERGY ALLIANCE, ABOUT CONSUMER ENERGY ALLIANCE, https://consumerenergyalliance.org/about/. While the main interest of the American Fuel & Petrochemical Manufactures, as well as that of the American Trucking association has been more focused on that of the viability of the business interests of those that they represent, the Consumer Energy Alliance has had a somewhat different purpose for opposing the OCFP. CONSUMER ENERGY ALLIANCE, CEA WARNS AGAINST COSTLY FUEL PROGRAM IN OREGON, (May 14, 2012) https://consumerenergyalliance.org/2012/05/cea-warns-against-costly-fuel-program-in-oregon/. Based upon statements made by the Executive Vice President of the Consumer Energy Alliance, the group was more focused on Oregon's fuel purchasers, and claimed that the OCFP would merely raise their prices while not actually causing much change to the amount of greenhouse gas producing fuels from being produced and brought into the state. *Id.*

22. *American Fuel*, 903 F.3d at 909.

23. *Id*. at 910.

24. *Id*.

After the district court granted the motion for summary judgment, the case was then reviewed on appeal by the United States Court of Appeals for the Ninth Circuit.[25] The Ninth Circuit upheld the district courts findings, and the case was dismissed.[26] On May 13, 2019, the Supreme Court denied a petition for writ of certiorari from the United States Court of Appeals for the Ninth Circuit.[27]

B. History of the Oregon Clean Fuels Program

In 2004, the Oregon Governor's Advisory Group on Global Warming released a report titled the "Oregon Strategy for Greenhouse Gas Reductions."[28] The group was formed as part of a larger global warming initiative formed collectively by the Governors of the states of California, Oregon and Washington. The aim of the Oregon group was to reduce the amount of greenhouse gas emissions at the state level.[29] The advisory group found that "[a]bsent decisive actions across the globe of the sort proposed in this report, the warming already underway is expected to lead to changes in the earth's physical and biological systems that would be extremely adverse to human beings, their communities, economies and culture."[30] In its report, the group recommended that Oregon should do its part to combat warming by implementing a program to regulate greenhouse gasses by 2010.[31] Furthermore, the group recommended that the program itself should have a goal of reducing greenhouse gas emissions by 10% as measured from the years of 1990 to 2020.[32] Finally, the group sought to achieve "climate stabilization" of at least a 75% reduction below the levels of greenhouse gas emissions measured in 1990.[33] To meet its reduction goal, the advisory group outlined 46 recommendations to the State of Oregon.[34] The report was then supported by a consensus statement from scientists throughout Oregon.[35]

After the Governor's Advisory Group published the report and with the full support of the state-wide scientific community,[36] the Oregon Legislature began

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25. *Id.* at 918.

26. *Id.* at 907.

27. *American Fuel & Petrochemical Mfr.'s v. O'Keeffe*, 139 S. Ct. 2043 (2019).

28. OR. DOE, GOVERNOR'S ADVISORY GRP. ON GLOB. WARMING, OR. STRATEGY FOR GREENHOUSE GAS REDUCTIONS (2004) [hereinafter ADVISORY GRP.].

29. *Id*. at i.

30. *Id*.

31. *Id.* at ii.

32. *Id*.

33. ADVISORY GRP., *supra* note 28.

34. *See* OR. REV. STAT. ANN. § 468A.200 (West 2007) (promulgating the recommendations discussed in GOVERNOR'S ADVISORY GRP. ON GLOB. WARMING, OR. STRATEGY FOR GREENHOUSE GAS REDUCTIONS, at 48-114 (2004)).

35. OR. REV. STAT. ANN. § 468A.200 (West 2007); SCIENTIFIC CONSENSUS STATEMENT ON THE LIKELY IMPACTS OF CLIMATE CHANGE ON THE PACIFIC NORTHWEST (2004) [hereinafter SCIENTIFIC CONSENSUS STATEMENT].

36. SCIENTIFIC CONSENSUS STATEMENT, *supra* note 35.

work to implement the goals of reducing greenhouse gasses.[37] The Oregon Legislative Assembly specifically pointed out that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and environment of Oregon."[38] Furthermore, the legislature enacted polices designed to "[i]nform and shape national policies and actions in ways that are advantageous to Oregon residents and businesses," as well as "[d]irectly benefit the state and local governments, businesses and residents."[39]

In 2009, the Oregon Legislature introduced House Bill 2186, the first legislative effort to curb greenhouse gas emissions from fuels related to the transport industry.[40] With the adoption of House Bill 2186, the Oregon Legislature directed the ODEQ to conduct a study and outline necessary regulations for the program to be fully implemented.[41]

In 2010, the ODEQ formed a 29-member advisory committee whose goal was to help design a program that aligned with the directive outlined in House Bill 2186.[42] The advisory committee was comprised of members whose interests aligned with both sides of the energy debate.[43] On the one hand, members were chosen which represented the environmentalist community and their concerns pertaining to the need for an exacting reduction of GHGs and of the effects of climate change.[44] On the other hand, there were also members whose interests aligned with the petroleum industry and their fears pertaining to the more stringent regulation of fossil fuels.[45] The committee's final report was published on January 25, 2011, and outlined what the committee determined was the most realistic method to implement the Legislature's goals of reducing greenhouse gasses by 10% between 2010 and 2020.[46] The committee called for a two-phase approach to implement the OCFP.[47] Phase one, which began on January 1, 2013, mandated registration for all Regulated Parties who fell under the program's provisions.[48] Phase two of the program began in January 2015, and marked the point from which Regulated Parties would begin to be regulated.[49] In between

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37. OR. REV. STAT. ANN. § 468A.200 (West 2007).

38. *Id*.

39. *Id*.

40. H.B. 2186, 75th Leg. Assemb. (Or. 2009).

41. *Id.* at 1. The ODEQ is the state regulatory agency whose "mission is to be a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water." OR. DEQ, ABOUT US, ,https://www.oregon.gov/deq/about-us/Pages/default.aspx.

42. OR. DEQ, THE HISTORY OF THE OREGON CLEAN FUELS PROGRAM, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels-History.aspx.

43. OR. DEQ, LOW CARBON FUEL ADVISORY COMMITTEE, https://www.oregon.gov/deq/FilterDocs/cfp-advCommittee2010.pdf (last updated Aug. 24, 2010).

44. *Id.*

45. *Id.*

46. OR. DEQ, FINAL REPORT, OR. LOW CARBON FUEL STANDARDS ADVISORY COMM. PROCESS & PROGRAM DESIGN (Jan. 25, 2011).

47. *Id.*

48. OR. DEQ DIV. 253, OR. CLEAN FUELS PROGRAM 340-253-0000 (Dec. 7, 2012).

49. *Id*.

these two phases, the ODEQ formed another advisory committee.[50] This committee's goals were to provide the standards to implement phase two of the program as well as to further the goal of reducing the carbon intensity of transportation fuels within Oregon by 10% over the 10-year span.[51]

In 2015, the Oregon Legislature passed SB 324 which charged the OEQC with "adopt[ing] by rule low carbon fuel standards" and allowed the ODEQ to fully implement the OCFP.[52] Moreover, the low carbon fuel standards were to be implemented so that a 10% overall reduction of the average quantity of greenhouse gas emissions occurred between the years of 2010 and 2020.[53]

C. Content of the Oregon Clean Fuels Program

The OCFP works to reduce the average carbon intensity of Oregon's transportation fuels by implementing a credit and deficit system.[54] Beginning in 2016, Regulated Parties must have held more credits than deficits on an annual basis.[55] A Regulated Party, as defined by the provisions of the OCFP, is any party that produces or imports any Regulated Fuel in Oregon.[56] Regulated Fuels include: gasoline, diesel, ethanol, biodiesel, renewable hydrocarbon diesel, any blend of the above fuels, and any other liquid or non-liquid transportation fuel not considered as a clean fuel.[57] Clean Fuels consist of: bio-based CNG, bio-based L-CNG, bio-based LNG, electricity, fossil CNG, fossil L-CNG, fossil LNG, hydrogen or a hydrogen blend, and LPG.[58] The Regulated Parties generate a deficit in any year when they produce or import a fuel that contains a carbon intensity that is higher than the clean fuel standard set by the ODEQ.[59] Program exemptions are allowed for small volume producers and importers that produce or import less than 360,000 gallons of fuel per year.[60] The OCFP also includes exemptions for fuel that is being used for aircrafts, racing activity, military vehicles, locomotives, watercrafts, farm vehicles, or vehicles whose primary objective is not to transport people or property, such as construction vehicles.[61]

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50. THE HISTORY OF THE OREGON CLEAN FUELS PROGRAM, *supra* note 42.

51. *Id*.

52. H.B. 2186, 75th Leg. Assemb. (Or. 2009). The OEQC is a "panel appointed by the governor of Oregon . . . to serve as the Oregon Department of Environmental Quality's policy and rulemaking board." OR. DEQ, OR. DEQ'S POLICY AND RULEMAKING BOARD, https://www.oregon.gov/deq/about-us/eqc/Pages/default.aspx.

53. *Id.* The OCFP is codified in ORS 468A.275 and adopted in Chapter 240 Division 253 of the Oregon Administrative Rules. THE HISTORY OF THE OREGON CLEAN FUELS PROGRAM, *supra* note 42.

54. OR. ADMIN. R. 340-253-0100 (Dec. 7, 2012).

55. *Id*.

56. *Id*.

57. OR. ADMIN R. 340-235-0200 (Dec. 7, 2012).

58. *Id*.

59. OR. DEQ, CLEAN FUELS PROGRAM REG. https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels-Regulations.aspx.

60. OR. ADMIN. R. 340-253-0250 (Dec. 7, 2012).

61. *Id*.

Regulated Parties under the OCFP generate a credit when a fuel is imported that contains a carbon intensity that is lower than the clean fuel standard.[62] On a yearly basis, a Regulated Party's credits and deficits must either be balanced or the weight must be shifted to the credit side of the equation to comply with the program.[63] If a Regulated Party has more deficits than credits at the end of the calendar year, it has the opportunity to buy credits from Regulated Parties that produce excess credits in order to remain compliant.[64] Inversely, a Regulated Party may also sell, hold over, or give away any excess credits that it may have generated over the calendar year.[65]

D. The Commerce Clause

The Commerce Clause grants Congressional authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[66] In *Rocky Mountain*, the Ninth Circuit reviewed a challenge to the California LCFS, a program after which the OCFP was almost identically modeled.[67] In *Rocky Mountain*, the Ninth Circuit also upheld the California LCFS against a Commerce Clause challenge.[68] The legal rule espoused by the Ninth Circuit after its ruling in *Rocky Mountain* is that "state regulation violates the Dormant Commerce Clause if it discriminates against out-of-state economic interests (in either purpose or effect) or if it regulates conduct occurring entirely outside of a state's borders."[69]

The *American Fuel* court began their discussion of the Commerce Clause by recognizing that the Commerce Clause can be read to imply a "Dormant Commerce Clause" meaning that an individual state cannot put into place, "regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors."[70]

The Ninth Circuit in *American Fuel* went on to discuss that while the Dormant Commerce Clause is a constitutional tool meant to prevent economic protectionism, the state's interests must still be recognized for their local autonomy.[71] The court added that "[t]hus, we must uphold a nondiscriminatory law against a Dormant Commerce Clause challenge "unless the burden imposed on

62. OR. ADMIN. R. 340-253-1030 (Dec. 7, 2012).

63. *Id*.

64. *Id*.

65. *Id*.

66. U.S. CONST. art I, § 8, cl. 3.

67. *American Fuel*, 903 F.3d at 911; *see also Rocky Mountain Farmers Union*, 739 F.3d 1070 (9th Cir. 2013).

68. *Id.* at 910.

69. *Id. See also* Harvey Reiter, *Removing Unconstitutional Barriers to Out-Of-State and Foreign Competition from State Renewable Portfolio Standards: Why the Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 39 ENERGY L.J. 45, 48 (2015).

70. *American Fuel*, 903 F.3d at 910 (quoting Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008)).

71. *Id.*

[interstate] commerce is clearly excessive in relation to the putative local benefits."[72]

E. Section 211(c) of the Clean Air Act

The original Clean Air Act was passed in 1963 to provide "funding for the study and clean-up of air pollution."[73] However, there was a lack of federal response until Congress passed the Clean Air Act of 1970, followed by the creation of the Environmental Protection Agency (EPA).[74] In 1990, the Clean Air Act (CAA) was revamped, "providing EPA even broader authority to implement and enforce regulations reducing air pollutant emissions."[75] Section 211 of the CAA deals specifically with the regulation of fuels.[76] Section 211(c) of the CAA provides that:

> [N]o state may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel . . . if the Administrator has found that no control or prohibition . . . of a fuel . . . is necessary and has published his findings in the Federal Register.[77]

In *American Fuel,* the Ninth Circuit focuses on the wording "if the Administrator has found that no control or prohibition . . . is necessary."[78] This clause in the CAA requires an action by the Administrator to show that regulation of a fuel is unnecessary, and thus a state would be prohibited from regulating that fuel themselves. Through a plain meaning interpretation of the clause, an omission by the Administrator to conduct any findings to whether a control or prohibition of a fuel is necessary would not restrict a state from controlling or prohibiting the fuel themselves.[79]

III. ANALYSIS

In *American Fuel*, the Court of Appeals for the Ninth Circuit looked at the OCFP on the basis of the Commerce Clause, looking solely at the state of Oregon and not comparing it to how the LCFS works particularly in California as may have been suggested by *Rocky Mountain*.[80] To be wholly consistent with the holding in *Rocky Mountain*, the court would have taken into consideration the nature of the in-state interests within Oregon compared to its' neighbors in

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72. *Id.* (quoting Pike v. Bruce Church, Inc. 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970)) (alteration in original).

73. OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 2 (2007); Air Pollution Prevention and Control, 42 U.S.C.S. § 1857 (1963) (current version at 42 U.S.C. §§ 7401-7671(q)).

74. OFFICE OF AIR QUALITY PLANNING AND STANDARDS, *supra* note 73; 81 Stat. 485 (1970).

75. OFFICE OF AIR QUALITY PLANNING AND STANDARDS, *supra* note 73; 104 Stat. 2300 (1990).

76. 42 U.S.C. § 7545(c)(4)(A).

77. *Id*.

78. *American Fuel*, 903 F.3d at 917.

79. *Id*.

80. *Id*. at 911-914.

determining whether the statute was discriminatory.[81] The test found in *Rocky Mountain* states that, "[i]f a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it "serves a legitimate local purpose, and this purpose could not be served as well by other available nondiscriminatory means."[82] *American Fuel* found itself before the court by way of summary judgment.[83] Therefore, no discovery was allowed regarding the practical effect of the OCFP on Oregon's neighbors and to find whether or not there were any other non-discriminatory means that could be advanced by the Oregon Legislature or the OEQC.[84]

A. Findings Not in Question

Plaintiffs claim that the OCFP was preempted by section 211(c) of the CAA was determined by the court not to be at issue.[85] The statute states that generally the States have control over air pollution, but the statute also states that there can be no regulation when it has been deemed unnecessary.[86] Therefore, the Plaintiffs in *American Fuel* assumed that since there is no mention of methane in the CAA, it is inappropriate for Oregon to place regulatory measures upon the fuel.[87] The court found that the Plaintiffs incorrectly interpreted section 211(c) because the statute shows that the regulation has to be deemed unnecessary, not an instance where there has been no discussion to the matter altogether.[88]

B. Holdings at Issue

In *American Fuel*, the Plaintiffs alleged that the OCFP facially discriminates against out-of-state interests by assigning a higher rating to those fuels transported into the state.[89] However, the Ninth Circuit found that the OCFP assigns fuels by carbon intensity rating and not by origin.[90] Plaintiffs also claimed that the OCFP is patently discriminatory because its intent was to give preference to Oregon biofuels.[91] Here, the court reasoned that the OCFP does not give preference to Oregon biofuels, but rather to all biofuels.[92] Plaintiffs further claimed that the OCFP places an undue burden on producers or importers of petroleum because it forces them to purchase credits.[93] Similar to its previous rea-

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81. *Id.* at 919 (Smith, J., dissenting).

82. *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (citing Maine v. Taylor, 477 U.S. 131,138 (1986)).

83. *American Fuel*, F.3d at 918 (Smith, J., dissenting).

84. *Id.* at 919.

85. *Id.* at 917.

86. 42 U.S.C. § 7545.

87. *American Fuel*, F.3d at 917.

88. *Id.*

89. *Id.* at 910.

90. *Id. at* 911.

91. *Id.* at 912.

92. *American Fuel*, F.3d at 913.

93. *Id.*

soning, the Ninth Circuit found that the OCFP does not base the credit program on the origin of the fuels,[94] and even cites that "[m]any out-of-state producers generate credits, and several fare better in this respect than Oregon producers of the same fuels.[95] As for the claim that the OCFP violated the Dormant Commerce Clause, even though the case arose as an appeal of a decision on summary judgement, the court found *American Fuel* to fall within the reasoning of *Rocky Mountain* stating that "[l]ike the LCFS, the [OCFP] expressly applies only to fuels sold in, imported to, or exported from Oregon."[96] Therefore, the court found that the OCFP does not attempt to regulate commerce occurring wholly outside the boundaries of the state.[97]

C. The California Program

In *Rocky Mountain*, the Ninth Circuit addressed the constitutionality of California's LCFS.[98] The LCFS is "virtually identical" to the OCFP.[99] The jumping off point for the court began with the resolution that "[i]f a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served well by available nondiscriminatory means."[100] The court furthermore advanced that "[a]bsent discrimination, [the Court] will uphold the law 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'"[101]

In its assessment of whether the LCFS discriminated against out-of-state crude oil producers and transporters, the Ninth Circuit looked to whether the LCFS favored in-state sources over out-of-state sources.[102] The court noted that "[i]f a state law purporting to promote environmental purposes is in reality simple economic protectionism, we have applied a virtually *per se* rule of invalidity."[103] The court found that burdened in-state sources "made up 22.6% of the 2006 market" while "the benefited California sources formed only 16.1%."[104] The court pointed out that the "burden on 'major in-state interests is a powerful safeguard against legislative abuse."[105] The court therefore concluded that since

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94. *Id.*; *see also Rocky Mountain Farmers Union*, 730 F.3d at 1089.

95. *American Fuel*, 903 F.3d at 914. The fuel being referenced here is Oregon Biofuel production. *Id.* at 913.

96. *Id.* at 917.

97. *Id. at* 916.

98. *Rocky Mountain Farmers Union*, 730 F.3d at 1087.

99. *American Fuel*, 903 F.3d at 910.

100. *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (citing Maine v. Taylor, 477 U.S. 131,138 (1986)).

101. *Id.* at 1087-88 (citing Pike v. Bruce Church, 397 U.S. 137, 142 (1970)) (alteration in original).

102. *Id.* at 1087.

103. *Id.* (citing Minnesota v. Cloverleaf Creamery Co., *449* U.S. 456, 471 (1981)).

104. *Id. at* 1099.

105. *Rocky Mountain Farmers Union*, 730 F.3d at 1099 (citing W. Lynn Creamery Inc., v. Healy, 512 U.S. 186 (1994)).

in-state sources were also burdened that the LCFS could not be considered as discriminatory to out-of-state sources.[106]

D. Oregon Petroleum Production

American Fuel is distinguishable from *Rocky Mountain* because of the nature of fuel production within the state of Oregon compared to the state of California.[107] According to the U.S. Energy Information Administration State Energy Profile:

> Oregon does not have any crude oil reserves or production and has not had an operating oil refinery since 2008. The Puget Sound refineries in the state of Washington provide more than nine-tenths of the refined petroleum products in Oregon. Those products arrive in the state by way of the Olympic Pipeline and by barge. Refineries in Utah and in British Columbia also provide refined petroleum products to Oregon, and small amounts come by tanker from California and the Pacific Rim countries.
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> Federal regulations require the use of oxygenated motor gasoline throughout Oregon. Fuel ethanol is used as an oxygenate and is blended with the motor gasoline sold in the state. Oregon has one corn-based fuel ethanol production plant and another small plant that uses food waste as its feedstock. Additional fuel ethanol supplies are brought in from out of state. Diesel fuel sold in the state must be blended with at least 5% biodiesel. Limited amounts of biodiesel are produced at facilities in Oregon.[108]

As a comparison to Oregon, "California has the fourth-largest share of the nation's crude oil reserves . . . and the state is the fourth-largest producer of crude oil among the 50 states."[109] Furthermore, "California ranks third in the nation in petroleum refining capacity after Texas and Louisiana, and the state accounts for one-tenth of the total U.S. refining capacity."[110]

As outlined by the dissent in *American Fuel*, when this situation in Oregon is applied to the credit and deficit generating parameters of the OCFP, the result is such "that all in-state fuel producers generate credits and only out-of-state fuel producers generate deficits."[111] This means that, as a practical effect, in-state producers are free from the burden of having to purchase credits from their competitors.[112] Furthermore, in-state producers are also gifted credits while not altering the inherent nature of their business.[113]

By applying the reasoning used in *Rocky Mountain* observers may conclude that since there is no burden on in-state interests, then there is no "powerful safeguard against legislative abuse."[114] If the statute is discriminatory in practical

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106. *Id.* at 1100.

107. *Compare* OR. ST. ENERGY PROFILE, *supra* note 14 *with* CAL. ST. ENERGY PROFILE *supra* note 13.

108. OR. ST. ENERGY PROFILE, *supra* note 14.

109. CAL. ST. ENERGY PROFILE, *supra* note 13.

110. *Id.*

111. *American Fuel*, 903 F.3d at 919 (Smith, J., dissenting).

112. *Id.*

113. *Id.*

114. *Rocky Mountain Farmers Union*, 730 F.3d at 1099 (citing W. Lynn Creamery Inc., v. Healy, 512 U.S. 186 (1994)).

effect, the issue then turns to whether or not the statute "serves a legitimate local purpose, and such purpose could not be served well by available nondiscriminatory means."[115] If the answer to that question is no, then the statute is unconstitutional. [116] While it can be conceded that the statute serves a legitimate local purpose, it is not so easy to dispel of whether the purpose could be "served as well by available nondiscriminatory means."[117]

E. Alternative Available Nondiscriminatory Means

There are several available nondiscriminatory regulatory responses that could serve as an alternative to the credit and deficit system imposed by the OCFP.

1. Performance Standards

One such solution could be a mere performance standard where there is no specific outlined directive that affected Regulated Parties must follow, but merely an established pollution reduction goal or emission quota.[118] The reason that a government may prefer a credit and deficit system over a performance standard is that there is more of an incentive to comply when there is a monetary deficit to be collected upon.[119] However, by not implementing a credit and deficit system, the Oregon Legislature would ensure that no in-state interests were being advanced at the expense of out-of-state interests.[120]

2. Tax-Based Responses

Another nondiscriminatory means to Oregon's low carbon fuel standard goals could be through a tax-based response.[121] Instead of attempting to regulate the entities who fall under the OCFP, the state government could simply impose a tax for not complying with the standard.[122] The tax also provides for a double dividend in the same, or possibly even more successful way than the credit and deficit system.[123] Double-dividend means that taxes not only provide incentives for Regulated Parties to comply with the regulations, but also allows money to be put back into the government to be spent on more environmentally related concerns.[124]

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115. *Id.* at 1087 (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).
116. *Id.*
117. *Id.* (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).
118. JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 31 (2nd ed. 2012).
119. *Id*.
120. *Id.*
121. *American Fuel*, 903 F.3d at 919 (Smith, J., dissenting).
122. JAN G. LAITOS, *supra* note 118, at 36.
123. *Id*. at 38.
124. *Id*. at 31.

F. Summary Judgment

Another distinguishing factor between *American Fuel* and *Rocky Mountain* is that the former came before the Ninth Circuit on a motion for summary judgment whereas the latter came before the Ninth Circuit on a motion to dismiss.[125] Therefore, since *American Fuel* came to the court on a motion for summary judgment, the court "must take all factual allegations and reasonable inferences therefrom in the light most favorable to American Fuel."[126] Therefore, the test from *Maine v. Taylor*[127] that *Rocky Mountain* used in their ruling must be applied in the light most favorable to American Fuel.[128]

The standard is two part, and the court must first decide in the light most favorable to American Fuel, whether the statute discriminates against out-of-state interests.[129] The court must then decide in the light most favorable to American Fuel, whether the statute "serves a legitimate local purpose and this purpose could not be served as well by available nondiscriminatory means."[130] The claim must be "plausible" on its face rather than simply possible for the case to move forward.[131] Since the reasoning in *Rocky Mountain* cannot apply across the board due to vast differences between the state of California and the state of Oregon, it is plausible on the face of the claim that the OCFP discriminates against out-of-state interests since in-state interests are benefited and not burdened from the program.[132] Furthermore, it is plausible that there could be a non-discriminatory means for advancing the goal of the Oregon legislature if the case were allowed to move forward to discovery.[133]

G. The Ninth Circuit Opinion

The Ninth Circuit in *American Fuel* began its discussion "from the premise established in *Rocky Mountain*: state regulation violates the Dormant Commerce Clause if it discriminates against out-of-state economic interests on its' face, in purpose or in effect, or if it regulates conduct occurring entirely outside of a state's borders."[134]

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125. *American Fuel*, 903 F.3d at 918 (Smith, J., dissenting).

126. *Id.* at 919; *see also* FED. R. CIV. P. 56.

127. Maine v. Taylor, 477 U.S. 131, 138 (1986).

128. *Rocky Mountain Farmers Union*, 730 F.3d at 1087.

129. *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (citing Maine v. Taylor, 477 U.S. 131,138 (1986)).

130. *Id.*

131. *See generally* Bell Atlantic Corp. v. Twombly, 550 U.S. 554 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

132. *Compare* U.S. ENERGY INFORMATION ADMINISTRATION, OREGON STATE ENERGY PROFILE (Nov. 15, 2018) *with* OR. ADMIN. R. 340-253-0200 (Dec. 7, 2012).

133. *See* JAN G. LAITOS, *supra* note 118, at 31-38 (giving examples of alternative non-discriminatory means for advancing the goal of the Oregon legislature if the case were allowed to move forward with discovery).

134. *American Fuel*, 903 F.3d at 911.

1. Facial Discrimination

The Ninth Circuit in *American Fuel* found that the OCFP did not facially discriminate against out-of-state fuels because it distinguished fuels based on their carbon intensity and not on their basis of origin.[135] To support this conclusion, the court cited that the OCFP "assigned twelve out-of-state ethanols, including five Midwest ethanols, lower carbon intensities than those assigned to Oregon biofuels."[136]

2. Discriminatory Purpose

The Ninth Circuit found that the OCFP did not have a discriminatory purpose since the stated purpose of the OCFP is to "reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impact of those emissions in Oregon."[137] The court furthermore noted "that the states have a legitimate interest in combating the adverse effects of climate change on their residents."[138]

3. Discriminatory Effect

American Fuel argued that the OCFP burdens out-of-state producers and importers of petroleum because it forced these Regulated Parties to purchase credits while in-state producer generated credits that they could in turn sell to the Regulated Parties who produce deficits.[139] The court recognized that "[a] facially neutral statute can violate the Commerce Clause if it effectuates 'differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter."[140] The court breaks their assessment as to why the OCFP did not have a discriminatory effect into two issues based upon this precedent criterion.[141] First, there must be a burden on out-of-state fuels and second, there must be a benefit on in-state fuels.[142]

a. Burdens on Out-of-State Fuels

The Ninth Circuit advanced that the OCFP does not burden out-of-state fuels because "the [OCFP] does not require or even incentivize "an out-of-state operator to become a resident in order to compete on equal terms."[143] This conclusion relates back to the assertion that the program assigns credits and deficits based upon carbon intensity and not on origin.[144]

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135. *Id.*

136. *Id.*

137. *Id.* at 912; Or. Admin. R. 340-253-0000(1), (2).

138. *American Fuel*, 903 F.3d at 913.

139. *Id.*

140. *Id.* (citing Or. Waste Sys., Inc., 511 U.S. at 99, 114 S. Ct. 1345).

141. *American Fuel*, 903 F.3d at 913.

142. *Id.*

143. *Id.* at 914 (citing Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72, 83 S. Ct. 1201 (1963)).

144. *American Fuel*, 903 F.3d at 913.

b. In-State Benefits

The Ninth Circuit contends that the OCFP does not benefit only in-state fuel producers by allowing them to generate credits for Oregon biofuels because the OCFP "assigns lower carbon intensity scores to *all* biofuels (regardless of origin) in comparison to other fuels because of their lower GHG emissions.[145] Furthermore, the court notes that the biodiesel industry is not an industry that is uniquely local to Oregon.[146] The court goes on to state that the OCFP cannot be considered to benefit only in-state producers merely because they allow in-state producers to benefit from the structure of the program.[147] By doing so, the OCFP is rewarding responsible practices and not attempting to participate in a form of economic protectionism for the state of Oregon.[148]

IV. CONCLUSION

While the Ninth Circuit could have possibly arrived at the same outcome—that the OCFP was not discriminatory in any way, and that the program did not violate the Commerce Clause—the facts were not such that they aligned with the reasoning nor the procedural posture found in *Rocky Mountain*.[149] The OCFP and the California LCFS are very similar programs.[150] However, the practical effect of the programs differ due to the differences between the two states.[151]

In *Rocky Mountain*, the Ninth Circuit assessed whether the LCFS program favored California over out-of-state sources when addressing whether or not the program was discriminatory in nature.[152] Therefore, this factor could be equally as important when addressing whether or not the OCFP was discriminatory. While California is one of the country's largest holders of the nation's oil reserves, and one of the largest producers of crude oil,[153] Oregon has no crude oil reserves, nor any crude oil production.[154] Consequently, the reasoning used in *Rocky Mountain*, when applied to the OCFP would potentially show that the program has the possibility of being discriminatory in nature.[155] However, while asking the state to consider an alternative nondiscriminatory means to accomplish its goal of reducing GHG's would ensure that the state was able to retain its freedom while also respecting the Commerce Clause, the Ninth Circuit in *Ameri-*

145. *Id.* at 915.

146. *Id.*

147. *Id.* at 916.

148. *Id.*

149. *American Fuel*, 903 F.3d at 918-20 (Smith, J., dissenting).

150. *Compare* CAL. AIR RES. BD., LOW CARBON FUEL STANDARD, https://www.arb.ca.gov/fuels/lcfs/lcfs.htm *with* OR. DEQ, OR. CLEAN FUELS PROGRAM, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels.aspx. *See also American Fuel*, 903 F.3d at 910.

151. *Compare* OR. ST. ENERGY PROFILE, *supra* note 14 *with* CAL. ST. ENERGY PROFILE, *supra* note 13.

152. *Rocky Mountain Farmers Union*, 730 F.3d at 1087.

153. CAL. ST. ENERGY PROFILE, *supra* note 13.

154. OR. ST. ENERGY PROFILE, *supra* note 14.

155. *American Fuel*, 903 F.3d at 919 (Smith, J., dissenting).

can Fuel displays a strong desire to protect "each State's freedom to 'serve as a laboratory'; and try novel social and economic experiments."[156]

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156. *Id.* at 913 (quoting San Antonio Indep. Sch. Dist v. Rodriquez, 411 U.S. 1 (1973)).

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