No. 15-35834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, et al.,
Plaintiffs-Appellants,

v.

JANE O'KEEFFE, et al.,
Defendants-Appellees,

CALIFORNIA AIR RESOURCES BOARD, et al.
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon

Case No. 3:15-cv-00467-AA
The Honorable Ann Aiken, Chief Judge

DEFENDANTS-APPELLEES' MOTION TO ASSIGN APPEAL TO PRIOR PANEL

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MOTION TO ASSIGN APPEAL TO PRIOR PANEL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Defendants-Appellees Jane O'Keeffe, et al. ("Defendants") and Intervenors-Defendants-Appellees California Air Resources Board, et al. ("Intervenors"), move this Court to assign the above-captioned appeal involving Oregon's low carbon fuel standard (called the Clean Fuels Program) to the Ninth Circuit panel that decided *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) ("*Rocky Mountain*"). In *Rocky Mountain*, Plaintiffs-Appellants American Fuel & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance ("Plaintiffs"), along with other industry groups, alleged California's Low Carbon Fuel Standard ("LCFS") violated the dormant Commerce Clause. *Rocky Mountain* concerned many of the same factual and legal issues that are raised in this appeal, where the same Plaintiffs contend that Oregon's Clean Fuels Program violates the dormant Commerce Clause. The panel that decided *Rocky Mountain* already has extensive experience with the complex factual and legal issues that concern state low carbon fuel standards, and that panel already analyzed and rejected many of the claims and arguments Plaintiffs raise again in this appeal. Further, the trial court order being appealed in this case relies extensively on the *Rocky Mountain* decision. Therefore, to promote judicial

economy and efficiency, Defendants and Intervenors request that the instant appeal be assigned to the *Rocky Mountain* panel.

On April 28, 2016, counsel for Plaintiffs informed counsel for Defendants and counsel for Intervenors that Plaintiffs oppose this motion.

BACKGROUND

Oregon adopted its Clean Fuels Program to reduce greenhouse gas emissions from Oregon's use of transportation fuels to at least 10 percent below 2010 levels. Or. Admin R. 340-253-000. To accomplish this, the Program requires regulated parties—those who produce fuel in Oregon or import fuel into Oregon—to meet carbon-intensity standards that become more stringent each year through 2025. *Id.* 340-253-0100(1), (6).

Oregon's Program determines carbon-intensity values for each fuel sold for use in Oregon. A carbon-intensity value is based on a fuel's contribution to greenhouse gas emissions and is determined using a scientific modeling tool (OR-GREET 2.0) designed to calculate lifecycle greenhouse gas emissions associated with transportation fuels. Or. Admin R. 340-253-0040(17), (63); 340-253-0400(1). Fuels with carbon-intensity values below the applicable standard generate credits, and fuels with carbon-intensity values above the applicable standard generate deficits. *Id.* 340-253-1000(5). To comply, regulated parties must hold and retire enough credits to cover their deficits in a given compliance period. *Id.* 340-253-1030. Thus, fuels with carbon-intensity values above and below the standard can

be sold in Oregon, so long as the standard is met on an average basis, across all fuels sold for use in Oregon in a given year.

Oregon's Program was modeled on California's LCFS. As with Oregon's Program, under California's LCFS, each transportation fuel has a carbon-intensity value that determines, along with the applicable standard, whether the fuel generates credits or deficits. *See Rocky Mountain*, 730 F.3d at 1080-1081. As with Oregon's Program, California's LCFS uses a scientific, lifecycle-modeling tool (CA-GREET) to calculate fuels' carbon-intensity values. *Id.* at 1081.

Not surprisingly, the district court in this matter found that Oregon's Program is comparable to California's LCFS, and that "it is undisputed that the Oregon Program was modeled after the LCFS and is analogous thereto in *all relevant respects*." Excerpts of Record ("ER") 1:8 (emphasis added).

Plaintiffs challenged California's LCFS in *Rocky Mountain* and now contest Oregon's Program in the current lawsuit, mostly on the same or similar grounds. Opening Brief of Plaintiffs-Appellants ("AOB") at 1-2; *Rocky Mountain*, 730 F.3d at 1077-1078. The district court held that *Rocky Mountain* "largely barred" Plaintiffs' discrimination claim, ER 1:13, and required dismissal of Plaintiffs' extraterritorial regulation claim, ER 1:25. Plaintiffs now contest those decisions, as well as the district court's dismissal of their preemption claim. AOB at 1-2. In this appeal, however, Plaintiffs concede that *Rocky Mountain* controls and bars significant parts of their claims —at a minimum, their facial discrimination claim

concerning Midwest ethanol and their extraterritorial regulation claim under the dormant Commerce Clause. AOB at 39 n.25, 46.

ARGUMENT

Defendants and Intervenors respectfully request that this matter be assigned to the panel that adjudicated the *Rocky Mountain* appeal, given the substantial overlap in factual and legal issues present in both cases. Oregon's Program is analogous to California's LCFS, and the *Rocky Mountain* panel is already familiar with the complexities of state low carbon fuel standards, including the use of scientific modeling tools to calculate lifecycle emissions and the variety of methods that can be used to produce ethanol. *See Rocky Mountain*, 730 F.3d at 1080-85.

In addition, the *Rocky Mountain* panel has already addressed Plaintiffs' discrimination and extraterritorially claims. *Rocky Mountain*, 370 F.3d at 1077-1078, 1087-1106. Plaintiffs' arguments here concern many of the same legal and factual issues, as the district court and Plaintiffs both recognize. ER 1:13, 1:25; AOB at 39, n.25, 46. Indeed, Plaintiffs concede that *Rocky Mountain* controls at least some of their claims here and dedicate significant portions of their brief to attacking that decision. AOB at 37-39, 46-50. The *Rocky Mountain* panel has already evaluated and developed expertise concerning many of the legal issues present in the instant appeal, including this Court's and the Supreme Court's case law under the dormant Commerce Clause and how that case law applies to the lifecycle analysis used in both California's and Oregon's programs. Assigning this

case to the *Rocky Mountain* panel that has already developed extensive knowledge and expertise on the factual and legal issues present in this case would facilitate judicial economy and efficiency, and promote the efficient and economic use of the Court's resources and time.

CONCLUSION

For the reasons outlined above, Defendants and Intervenors respectfully request that this appeal be assigned to the *Rocky Mountain* panel in order to promote judicial efficiency and economy and conserve resources, given the factual and legal issues common to this case and the *Rocky Mountain* matter.

I attest that all other parties on whose behalf this filing is submitted concur in the filing's content.

Dated: April 29, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 29, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

April 29, 2016
Dated

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