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ENVIRONMENTAL  
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LAW PROGRAM

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# State Resource Guide

Drafting a Clean Fuel Standard  
to Manage Legal Risks

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# Executive Summary

As state leaders seek ways to engage in the transition to clean energy, one key consideration is whether to enact a clean fuel standard. Many states are exploring how to write a clean fuel standard to incentivize the use of lower-carbon fuels to decrease the emissions from the transportation sector. Under a clean fuel standard, state regulators calculate the full lifecycle emissions, or carbon intensity (CI), associated with various transportation fuels, and establish a benchmark CI against which they measure all fuels sold or produced there.<sup>1</sup> As a result, producers and importers whose fuels emit less than the benchmark earn credits and those that emit more than the benchmark accrue deficits.<sup>2</sup> Producers and importers with deficits must purchase credits to comply with the standard.<sup>3</sup> Thus, a clean fuel standard credit differs from an allowance in a cap-and-trade program in that an allowance represents one ton of carbon dioxide (CO<sub>2</sub>) while a clean fuel standard credit reflects an emission reduction relative to a benchmark CI.

Of the three states with clean fuel standards, California and Oregon have both faced multiple legal challenges, and Washington is currently in the rulemaking process.<sup>4</sup> The cases provide important lessons for states considering clean fuel standards, including which design approaches might help to mitigate legal risks. For example, both California and Oregon have successfully defended their standards in litigation involving the federal dormant Commerce Clause doctrine, federal preemption, and state administrative law. These results can be attributed to important design choices they made when crafting their rules. In particular, the litigation outcomes demonstrate the importance of treating importers the same as in-state producers, basing the standards on science, and clearly stating the environmental purposes of the program.

Our previous review of state clean energy laws, [Minimizing Constitutional Risk: Crafting State Energy Policies that can Withstand Constitutional Scrutiny](#) provides a background of the dormant Commerce Clause and federal preemption.

With this new clean fuel standard roadmap, we leverage our prior legal analysis to assist states that are exploring the design and implementation of a program to reduce transportation fuel emissions. Here we apply lessons learned from prior cases and recommend design considerations regarding preemption, the dormant Commerce Clause doctrine, the Equal Protection Clause, and state law obstacles. The following pages provide a brief history of the existing clean fuel standards, descriptions of prior cases challenging them, the legal theories behind these cases, and other potential legal challenges. In addition, we have included drafting considerations and messaging considerations based on the above-described legal challenges.



# I. Existing Clean Fuel Standards

California, Washington, and Oregon have each implemented clean fuel standards in response to a legislative directive to reduce emissions, including those from the transportation sector.<sup>5</sup> The legislative and regulatory history for each clean fuel standard is important to understand, as they differ in the discretion they provide to the state regulators in shaping the policy. In the sections below, we describe the legislative and regulatory history for each clean fuel standard. Having survived federal and state legal challenges, California and Oregon provide blueprints for states looking to write standards that are resilient in the face of these actions. Washington—the most recent state to pass a clean fuel standard statute—benefitted from these lessons and included new language to manage legal risks.

## A. California’s standard

California’s Global Warming Solutions Act of 2006 (AB 32) does not expressly require a clean fuel standard, but instead, provides the California Air Resources Board (CARB) broad authority to adopt regulations that reduce GHG emissions.<sup>6</sup> AB 32 requires CARB to develop a scoping plan that describes how California will reduce emissions to meet AB 32’s goals.<sup>7</sup> Citing the authority and goals of AB 32, in a 2007 executive order, Governor Schwarzenegger directed CARB to establish California’s clean fuel standard.<sup>8</sup> Under AB 32 and the Governor’s directives, CARB included a clean fuel standard as part of its first scoping plan in 2008.<sup>9</sup> CARB finalized the clean fuel standard regulation in 2009, which became effective in 2011 and runs through 2030.<sup>10</sup>

With the objective of helping the state meet the goals of AB 32 by reducing the full lifecycle of GHG emissions of fuels in California’s transportation sector, the regulations define the types of fuels subject to the program, which fuels are exempt, and the types of fuel producers that may opt into the program.<sup>11</sup>

Under its initial rules, California categorized fuels into default pathways based on how the fuel was produced and delivered to the state and then estimated the lifecycle

emissions based on each production and transportation pathway.<sup>12</sup> The state also allowed fuel producers and importers to apply for individualized assessments if they could demonstrate that the default pathways did not accurately represent their fuel’s lifecycle emissions.<sup>13</sup>

In 2015, in response to litigation explained below, California changed how it assesses fuels under the standard. The revised, and still effective, standard no longer uses these categories, but instead allows fuel producers and importers to opt into a “tier” based on the level of detail to which producers and importers elect to have their production methods evaluated.<sup>14</sup> Tier 1 applies to common fuels and uses a simplified approach to calculate lifecycle emissions.<sup>15</sup> Tier 2 is reserved for “innovative, next generation fuel pathways,” requires many inputs, and uses the full CA-GREET calculator.<sup>16</sup> Individualized assessments under Tier 2 are time-consuming, but they can help to incentivize the development and deployment of cleaner fuels.

## B. Oregon’s standard

In 2009, Oregon’s legislature passed a statute that included a clean fuel standard.<sup>17</sup> The Oregon legislation directed the Environmental Quality Commission (EQC) to develop a clean fuel standard and compliance system for gasoline and diesel with exemptions for entities importing fewer than 500,000 gallons of gasoline or diesel annually into the state.<sup>18</sup> The statute requires EQC to evaluate many factors, including how the clean fuel standard might affect safety, cost, public health, and the environment when issuing regulations.<sup>19</sup> Under the legislation, EQC may, among other things, provide for a phased-in implementation period, create additional low-volume exemptions, and allow cleaner fuels to participate in the program.<sup>20</sup> Additionally, EQC has the authority to defer the program in response to forecasted fuel shortages and to allow regulated entities to carry a small deficit in credits from year-to-year.<sup>21</sup>

EQC finalized the rule in 2016,<sup>22</sup> and similar to California’s initial program, EQC uses pathways and allows fuel producers and importers to opt into an individualized assessment.<sup>23</sup> Other than this difference, Oregon’s regulations are generally consistent with California’s provisions.<sup>24</sup> EQC is currently undertaking a rulemaking process to update the program.<sup>25</sup>



## C. Washington's standard

In 2021, the Washington legislature enacted a clean fuel standard.<sup>26</sup> Compared to the legislation passed in California and Oregon, Washington's legislation is more detailed.<sup>27</sup> Though regulators are still in the rulemaking process, the statute includes provisions that are consistent with Oregon's and California's.<sup>28</sup> Additionally, the statute made clear that the objective of the program is to "[n]eutrally consider the life-cycle emissions associated with transportation fuels with respect to the political jurisdiction in which the fuels originated and... not discriminate against fuels on the basis of having originated in another state or jurisdiction."<sup>29</sup> As explained below, this wording may be helpful to address potential legal challenges under the dormant Commerce Clause.

## II. Legal Challenges to Clean Fuel Standards

Challengers to the California and Oregon clean fuel standards did so under federal and state laws. In federal court, the petitioners argued that the programs violated the dormant Commerce Clause doctrine and were preempted by the Clean Air Act (CAA) and the federal Energy Independence and Security Act of 2007 (EISA), which established a federal Renewable Fuels Standard (RFS). Petitioners also brought state law claims challenging the clean fuel standards, including claims that the standards were issued in violation of the state regulatory processes based on inadequate environmental reviews, and that the standards violated state transportation spending restrictions.

The following section explores the four clean fuel standard cases, as well as additional constitutional challenges to state energy policies. Together, these cases highlight key considerations for states considering a clean fuel standard:

- Both of the currently effective programs faced multiple legal challenges. In California and Oregon, two distinct groups of plaintiffs challenged the standards in separate state and federal suits.

- The Ninth Circuit held that California's clean fuel standard, which distinguished fuels based on their lifecycle emissions, did not violate the dormant Commerce Clause doctrine because it did not discriminate against importers and regulated only California's market.
- Recognizing the similar design of Oregon's clean fuel standard, the Ninth Circuit rejected challenges to that program and determined that statements by public officials promoting in-state benefits of the program did not provide evidence of unconstitutional discrimination. The court held that the statute and regulations established a legitimate environmental purpose.
- The Ninth Circuit found that the federal Renewable Fuel Standard and Clean Air Act did not preempt either standard.
- Other dormant Commerce Clause cases illustrate the importance of clearly limiting obligated parties to entities transacting in the state and favoring energy products using science-based criteria.
- A California court found that CARB made procedural errors but that the public interest favored allowing the standard to remain in effect while the state fixed those deficiencies. As with any environmental regulation, following the state procedural and environmental review requirements and applicable statutory authorities helps to support a state's ability to implement a program on the timeline anticipated.
- Because many states have constitutional or statutory provisions that limit agency discretion to spend fuel tax revenue, a state should consider how parties can trade clean fuel standard credits without transferring any funds to a state entity.

## A. The dormant Commerce Clause doctrine

In cases challenging the California and Oregon programs, industry trade associations argued that the states' clean fuel standards violated the US Constitution by discriminating against importers in favor of in-state industry.<sup>30</sup> Invoking the dormant Commerce Clause



doctrine, the trade associations claimed that the states' clean fuel standards unlawfully benefited in-state fuel producers at the expense of fuel importers.<sup>31</sup>

In practice, courts have read the dormant Commerce Clause doctrine to involve three primary questions.<sup>32</sup>

*Whether a state discriminates against out-of-state economic interests on its face, in its purpose, or through its practical effects*

If a court determines that the law discriminates against out-of-state economic interests, then the law is “virtually *per se* invalid”... “and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”<sup>33</sup>

*Whether a state regulates extraterritorially by controlling conduct occurring entirely outside of its boundaries*

The Supreme Court has held that a state law that regulates entirely outside of its borders “is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”<sup>34</sup> Some courts have interpreted this language to mean that extraterritorial statutes are also *per se* invalid.<sup>35</sup> Other courts have held that extraterritoriality is extremely narrow, and might not exist as its own independent doctrine.<sup>36</sup> While the circuit courts are currently split on how to apply extraterritoriality, the Supreme Court has agreed to hear extraterritoriality questions next term in *National Pork Producers Council v. Ross*.<sup>37</sup> The Court’s opinion in that case could provide further clarity on the doctrine.

*Whether a state violates the Pike balancing test by imposing burdens on interstate commerce that are “clearly excessive” in relation to the described local benefits*

Under the test established by the Supreme Court case, *Pike v. Bruce Church*, courts must consider whether a state statute “regulates even-handedly to effectuate a legitimate local public interest, and [if] its effects on interstate commerce are only incidental.”<sup>38</sup> If the statute is even-handed, it is upheld unless the burden is “clearly excessive in relation to the putative local benefits.”<sup>39</sup> On this third inquiry, courts apply a less exacting standard, “proceed[ing] with deference” to the purported local purposes and benefits of state law.<sup>40</sup> *National Pork Producers Council v. Ross* may also address this test.<sup>41</sup>

The Ninth Circuit’s case law provides a strong foundation for how states can design clean fuel standards to withstand a dormant Commerce Clause challenge. In addition to considering how these cases can guide other states’ clean fuel standards, policymakers can also consider how other courts may apply the dormant Commerce Clause doctrine. The sections below discuss the Ninth Circuit cases as well as related dormant Commerce Clause cases in other courts.

## **CALIFORNIA’S DORMANT COMMERCE CLAUSE CHALLENGE: ROCKY MOUNTAIN CASES**

In *Rocky Mountain*, agricultural producers, agricultural trade groups, fuel industry trade groups, and consumer advocates challenged California’s clean fuel standard, arguing, among other things, that the standard violated the dormant Commerce Clause by discriminating against out-of-state commerce on its face, in its purpose and effect, and by regulating activity occurring wholly outside of California.<sup>42</sup> During its first review of the standard, the District Court for the Eastern District of California agreed with the petitioners that the program discriminated against importers.

In ruling against provisions of the standards that regulated ethanol, that court found that the fuel pathways were facially discriminatory because they assigned different CIs to chemically identical corn ethanol produced in different locations.<sup>43</sup> The district court also held that the standard regulated extraterritorially because the conduct accounted for certain inputs into California’s emissions calculator, including transportation and indirect land use changes, effectively regulated conduct occurring wholly outside of California.<sup>44</sup> According to the court, the standard, therefore, regulated “deforestation in South America, how Midwest farmers use their land, and how ethanol plants in the Midwest produce animal nutrients.”<sup>45</sup> Additionally, the court explained that the standard’s legitimate purpose did not justify unconstitutional discrimination and granted a preliminary injunction, temporarily halting California’s enforcement of the clean fuel standard.<sup>46</sup>

In a separate opinion issued the same day, the court also ruled against the standard’s crude oil regulations. The district court found that the crude oil provisions were not facially discriminatory, but that the provisions discriminated in their purpose and effect because California had admitted that the provisions “make it



unlikely that California will see a significant increase in new [high carbon intensity crude oil] use.”<sup>47</sup>

California appealed the decisions, and in 2013, the Ninth Circuit consolidated the ethanol and crude oil cases and reversed them in part in *Rocky Mountain Farmers Union v. Corey (Rocky Mountain I)*. The Ninth Circuit held that the regulations did not discriminate against importers.<sup>48</sup> The court explained that the lower court erred on facial discrimination by failing to consider that some imported ethanol fared well under the standard and by ignoring how electricity source, efficiency of the plant, and transportation caused actual differences in the CI.<sup>49</sup> The court highlighted that even the default pathways that relied on assumptions based on origin, were reasonable because those assumptions reflected actual differences in emissions.<sup>50</sup> The court explained that even if the pathways were applied evenly, no plant would match the average exactly.<sup>51</sup> However, “the effects of any inaccuracies...fall evenly on the various default pathways.”<sup>52</sup> Moreover, the court noted that more efficient producers—whether in or out of state—could apply for individualized assessments.<sup>53</sup>

The Ninth Circuit also held that the crude oil provisions did not discriminate in their purpose or effect.<sup>54</sup> In reviewing the legislation’s purpose, the Ninth Circuit explained, courts should “assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [courts] to conclude that they could not have been a goal of the legislation.”<sup>55</sup> Here, the Ninth Circuit found no such circumstances and held that the standard served a legitimate purpose.<sup>56</sup> Examining the standard’s effect, the Ninth Circuit pointed out that the standard burdened many in California.<sup>57</sup> Though industry petitioners highlighted an example of an in-state producer’s benefit to demonstrate discriminatory effects, the Ninth Circuit noted that all California producers did not uniformly experience this benefit.<sup>58</sup>

The Ninth Circuit also reversed the district court’s ruling that the standard regulated extraterritorially. The Ninth Circuit found that the fuel standard controls “only the California market” because “[f]irms in any location may elect to respond to the incentives...but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.”<sup>59</sup> The court also held that cross-border price setting was not a

concern because “[s]o long as California regulates only fuel consumed in California, the Fuel Standard does not present the risk of conflict with similar statutes.”<sup>60</sup>

Finally, the Ninth Circuit remanded several issues to the district court. First, because the lower court held the ethanol provisions were facially discriminatory, it did not consider whether they discriminated in purpose or effect. Having reversed the lower court’s finding on facial discrimination, the Ninth Circuit instructed the district court to consider these two issues. Second, the Ninth Circuit asked the district court to consider whether the provisions of the standard that regulate ethanol and crude oil violated the Pike balancing test by imposing burdens that were clearly excessive in relation to their benefits.<sup>61</sup>

As a result, the Ninth Circuit directed the lower court to allow California to enforce the standard while the litigation continued in the lower court.<sup>62</sup>

While litigation was ongoing, California repealed and replaced its original standard in response to a state procedural challenge.<sup>63</sup> On remand, the lower court heard the remaining questions in the case and the case again reached the Ninth Circuit in a challenge known as *Rocky Mountain II*. Of note, the industry petitioners dropped their Pike claims before the Ninth Circuit reviewed the case; therefore, the court never ruled on the question of how Pike applies to California’s standard.<sup>64</sup> The Ninth Circuit dismissed the remaining challenges to the 2011 version of the regulations as moot. Ruling on challenges to the 2015 version of the standard, the Ninth Circuit found that the new standard does not discriminate facially or by regulating extraterritorially for the same reasons given in *Rocky Mountain I*.<sup>65</sup>

## **OREGON’S DORMANT COMMERCE CLAUSE CHALLENGE: AMERICAN FUEL V. O’KEEFFE**

In 2015, fuel and trucking trade associations challenged Oregon’s clean fuel standard in the District Court for the District of Oregon on similar grounds raised in *Rocky Mountain I*.<sup>66</sup> The petitioners argued that the standard discriminated on its face, in its purpose and effect, and regulated extraterritorial conduct.<sup>67</sup> Citing *Rocky Mountain* and Supreme Court precedent, the District Court dismissed all these claims. Petitioners appealed to the Ninth Circuit.<sup>68</sup>

In 2018, the Ninth Circuit agreed with the district court’s



dismissal. On the facial discrimination question, the court reiterated that the program’s grading of fuels based on CI and not state of origin was an important factor.<sup>69</sup>

In response to petitioners’ arguments that Oregon’s governor and legislators’ comments about in-state benefits of the program illustrated the discriminatory purpose, the court rejected the use of these off-the-record statements. Instead, it looked to the program’s stated goal to “reduce the amount of lifecycle greenhouse gas emissions.”<sup>70</sup> Certain off-the-record statements by politicians, the Ninth Circuit explained, are “easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.”<sup>71</sup>

In examining the effect of the standard, the court explained that because many importers generate credits, and several generate even more credits than Oregon biofuel producers do, the standard cannot be viewed as discriminatory. The Ninth Circuit explained that the “dormant Commerce Clause does not require [a state] to ignore the real differences in carbon intensity among imported ethanol pathways,” including emissions from transporting fuels and other “important contributors to GHG emissions.”<sup>72</sup> Differences are real, the court reasoned, when the state relies on a data-driven approach “based on real risks” associated with production sources that contribute to greenhouse gas emissions.<sup>73</sup> For example, while the court acknowledged that the in-state producers were all biofuel producers and, therefore, were generating credits, the court saw the fact that some importers had the lowest CI scores as illustrating that the program did not discriminate against importers. The court also noted that biofuel production is not an industry that is unique to Oregon. By contrast, the dissent would have requested more evidence on the fact that only importers were incurring deficits.<sup>74</sup>

The Ninth Circuit also reviewed the standard’s effect under the Pike balancing test, examining whether the burden on importers was “clearly excessive in relation to the...local benefits.”<sup>75</sup> The court held that the burden of either producing cleaner fuels or purchasing credits is not clearly excessive in light of the substantial state interest of mitigating the effects of climate change.<sup>76</sup>

Finally, on the extraterritoriality question, the Ninth Circuit held that only fuels sold in, imported to, or exported from Oregon are subject to Oregon’s clean fuel standard.<sup>77</sup>

## OTHER CIRCUITS’ APPROACHES TO EXTRATERRITORIALITY UNDER THE DORMANT COMMERCE CLAUSE DOCTRINE

The dormant Commerce Clause doctrine is grounded in Supreme Court interpretation of the Commerce Clause, however, there are some differences in how lower courts apply the doctrine. It will be important for states to consider how their local federal appeals court might apply the dormant Commerce Clause doctrine.<sup>78</sup> Below, we explore how other federal courts have applied the doctrine to renewable energy programs.

In the Second Circuit, a renewable generator raised a facial discrimination claim on the basis that a Connecticut program required energy retailers (such as utilities) to purchase renewable energy credits from generators in New England or in a neighboring region.<sup>79</sup> The Second Circuit rejected this argument, holding that requiring retailers to support regional renewable producers furthered Connecticut’s legitimate environmental and energy goals.<sup>80</sup>

Cases in the Eighth and Tenth Circuits focused on extraterritoriality. In the Tenth Circuit, an advocacy organization argued that Colorado’s renewable portfolio standard (RPS) regulated extraterritorially because Colorado is a net-importer of electricity and the state’s law therefore effectively regulated production of out-of-state generators.<sup>81</sup> Rejecting this argument, then-Judge Gorsuch noted that extraterritoriality is a very narrow doctrine and the Supreme Court has only used it to invalidate statutes in three cases—one involving price control, one that linked in-state prices to prices paid out-of-state, and one where the state was discriminating against out-of-state consumers and rival businesses.<sup>82</sup> The Tenth Circuit found that none of those three narrow circumstances were present in this case and refused to expand extraterritoriality to state regulations that may lead firms to change production practices.<sup>83</sup>

A year later, the Eighth Circuit reviewed a challenge to a Minnesota law that aimed to limit the state’s reliance on coal-fired power.<sup>84</sup> North Dakota and coal interests in that state focused on the law’s prohibition on “importing” coal-fired power into Minnesota. They argued that because the grid is regional and energy moves across state lines pursuant to the laws of physics, a non-Minnesotan coal-fired generator could not



prevent its energy from being consumed in Minnesota.<sup>85</sup> Therefore, petitioners reasoned, a generator operating wholly outside of Minnesota and selling power to a non-Minnesota consumer could still be regulated under the Minnesota law, a result that they claimed would violate the extraterritoriality prong of the dormant Commerce Clause.<sup>86</sup> While the Eighth Circuit struck down Minnesota’s law, only one of the three judges held that Minnesota’s law regulated extraterritorially.<sup>87</sup> A clean fuel standard regulates a different market, but the case nonetheless reinforces the legal significance of clearly stating that the clean fuel standard only applies to in-state transactions.

## B. Preemption

In addition to the dormant Commerce Clause challenges, industry and trade groups have also argued that the Clean Air Act (CAA) and the Energy Independence Security Act (EISA) preempt clean fuel standards. Preemption, derived from the Supremacy Clause of the US Constitution, prohibits state regulations in areas where the federal government has exclusive jurisdiction and prohibits state regulations that conflict with federal law.<sup>88</sup> Preemption can be express, through statutory language, or implied, through the federal law’s “structure and purpose.”<sup>89</sup> However, if a law does not expressly prohibit state action and the law controls an area that the states traditionally regulate, courts apply a presumption against preemption.<sup>90</sup> Under this presumption, courts find preemption only if it is “the clear and manifest purpose of Congress.”<sup>91</sup> Recognizing this high bar, preemption challenges to states’ clean fuel standards have not been successful, but petitioners may raise them by challenging other states’ clean fuel standards.

### **CALIFORNIA’S PREEMPTION CHALLENGE: ROCKY MOUNTAIN V. GOLDSTENE**

Trade groups argued that the federal Renewable Fuel Standard preempted California’s clean fuel standard.<sup>92</sup> The court never reached this issue in *Rocky Mountain*. In 2017, the district court held that California’s program does not conflict with the federal Renewable Fuel Standard because the two programs serve different purposes.<sup>93</sup> The court reasoned that the purpose of the CAA’s Renewable Fuel Standard is “to increase the quantity of renewable fuels in the marketplace” and is

not at odds with the clean fuel standard’s purpose to “to improve, among other things, the well-being of California’s citizens and environment... ‘an area of traditional state control.’”<sup>94</sup> Moreover, the court noted that the CAA has a “sweeping” retention of state authority clause, which “explicitly protects the authority of the states to regulate air pollution.”<sup>95</sup> Codified at the CAA section 116, the court noted that this clause allows states to adopt standards to control air pollution if the standards are at least as stringent as any federal standards.<sup>96</sup>

In *Rocky Mountain II*, the Ninth Circuit affirmed the district court’s preemption opinion.<sup>97</sup>

### **OREGON’S PREEMPTION CHALLENGE: AMERICAN FUEL V. O’KEEFFE**

In *American Fuel*, the industry petitioners argued that the standard is preempted by section 211(c) of the CAA, which prohibits state laws that “prescribe...any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine” if the EPA administrator has published a formal finding that such a control is unnecessary.<sup>98</sup> Petitioners argued that EPA does not list methane as a volatile organic compound and therefore had determined that its regulation was unnecessary.<sup>99</sup> The Ninth Circuit, however, disagreed and held that the CAA requires an affirmative finding that “no control or prohibition ... under’ § 211(c) is necessary in order to effect preemption.”<sup>100</sup> Because EPA had never published such a finding, it held that CAA section 211(c) does not preempt Oregon’s standard.

## C. State procedural and environmental review requirements

California and Oregon also faced state challenges to their clean fuel standards. Industry trade associations sought to invalidate the programs on the grounds that the state regulatory boards failed to meet the requirements of state procedural acts, state environmental review acts, and state public records acts. While procedural and environmental review requirements vary by state, the cases in California and Oregon illustrate potential procedural challenges.



**CALIFORNIA’S PROCEDURAL CHALLENGE: POET V. STATE AIR RESOURCES BOARD**

In 2013, the biofuel producer POET successfully challenged CARB’s rulemaking process. First, the petitioners argued that CARB violated California’s Administrative Procedure Act by failing to include in the record emails on which it relied on in its rulemaking process.<sup>101</sup> The California Appeals Court agreed with this claim and ordered CARB to include the emails in the rulemaking file.<sup>102</sup>

Second, the petitioners argued that CARB violated California’s Environmental Quality Act by approving the standard before completing its environmental review; giving the executive officer of CARB the sole authority to approve the environmental review; and delaying its examination of how more biofuel use might cause more nitrogen oxide (NOx) emissions.<sup>103</sup> The court agreed with the petitioners on all issues and required CARB to readopt the standard with a process to cure the administrative process deficiencies.<sup>104</sup> However, the court found that the public interest did not favor vacatur thereby allowing the clean fuel standard to remain effective while CARB conducted a new regulatory process.<sup>105</sup>

In response to the *POET* decision, CARB undertook a second regulatory process and adopted the revised clean fuel regulations in 2015.<sup>106</sup> Litigation then continued with challenges to CARB’s updated process. In 2017, the California Court of Appeals found that CARB had not provided the public with documents on how the agency considered NOx emissions.<sup>107</sup> The court again directed CARB to conduct a review of the NOx emissions and again found that the public interest favored allowing the standards to remain in effect pending the new environmental review.<sup>108</sup>

**OREGON’S PROCEDURAL CHALLENGE: WESTERN STATES PETROLEUM ASSOCIATION V. ENVIRONMENTAL QUALITY COMMISSION**

Unlike the litigation in California state courts, an Oregon petroleum and agricultural association’s procedural challenges were unsuccessful. In this case, the petitioners argued that EQC failed to review safety, cost, public health, and the environmental impact as required by the statute that authorized the standard.<sup>109</sup> However, the Oregon Court rejected the associations’ claim and found that

EQC appropriately evaluated these required factors.<sup>110</sup> The court cited the documents that EQC had relied on in its rulemaking, finding that the administrative record adequately showed how EQC had evaluated the factors.<sup>111</sup>

**D. Constraints on how transportation revenues may be spent<sup>112</sup>**

Forty-nine states have constitutional or statutory restrictions that prohibit the use of transportation funds for non-transportation purposes.<sup>113</sup> These restrictions may shape how states fund the administrative costs of their clean fuel standards because they limit how money collected for transportation purposes may be spent. Both California and Oregon structure their programs so that the states never collect revenue from the programs. Credit generators sell directly to deficit generators, with the state acting only as a market facilitator that oversees certain registration and recording requirements.<sup>114</sup> Full time administrative staff who implement and administer the programs receive compensation from the states’ general funds.<sup>115</sup>

In Oregon, industry petitioners argued that the standard violated the state’s transportation funding restriction. Oregon’s Constitution restricts how the state may use funds it collects from fuel taxes and vehicle registration fees, requiring all such revenues to be spent on public roads and roadside rest areas.<sup>116</sup> While the petitioners argued that credits exchanged in the market were a tax on fuels, the Oregon Court of Appeals rejected this challenge concluding that the credit transaction is not a tax because taxes must be collected “for the use and service of the state.”<sup>117</sup> The court reasoned that because Oregon never collected money from the program, the clean fuel standard was not a tax, and the transfer of credits was not restricted.<sup>118</sup>

Funding restrictions also influence how both states structure provisions that equitably distribute the benefits of the program. Unclaimed credits fund these programs (detailed below), rather than the state directly.<sup>119</sup> These credits often remain if smaller-scale clean fuel producers elect not to undertake the administrative processes to sell their credits.<sup>120</sup> By funding equity programs with unclaimed credits, rather than state funds, states can



argue the design is consistent with transportation and fuel tax funding restrictions.

## E. Considerations for equity provisions in clean fuel programs

The clean fuel standards in Oregon, Washington, and California each commit to some investment in communities overburdened by pollution, but they differ in how they define these commitments and the recipient communities.<sup>121</sup> As states consider designing a clean fuel standard, policymakers and stakeholders may want to consider how the program can address some of the harms faced by communities living near high-emitting industries.<sup>122</sup> People of color across all income levels are more likely to live in highly polluted communities, and clean fuel standards may provide an opportunity for states to redress such harms.<sup>123</sup>

The programs take varying approaches to use the clean fuel standards to advance environmental justice goals. For example, California's standard allows electric utilities to generate credits by supplying energy for EV charging.<sup>124</sup> Under the program, utilities must use the associated revenue for defined purposes, including supporting electrification projects in "disadvantaged" or "low-income" communities.<sup>125</sup> Similarly, Washington's standard requires electric utilities to spend a percentage of revenues from credit sales on electrification projects, including electrification projects in low-income communities or communities with high air pollution.<sup>126</sup> Oregon's standard includes the "Incremental Aggregator" program, which requires revenue from sale of unclaimed credits to be used to "equitably distribute benefits and address the needs and interests of environmental justice communities."<sup>127</sup> Certain organizations can apply to claim credits where electric utilities or other parties generating credits do not designate an organization to claim credits on its behalf.<sup>128</sup>

Both California and Washington define the recipients of revenue from the clean fuel standard program as overburdened communities without reference to race. Rather, the programs prioritize investment in "environmental justice communities" and "low-income or vulnerable populations" respectively.<sup>129</sup> By contrast, Oregon's regulations explicitly mention race, defining "environmental justice communities," as "communities

of color, communities experiencing lower incomes, tribal communities, rural communities, coastal communities, communities with limited infrastructure and other communities traditionally underrepresented in public processes and adversely harmed by environmental and health hazards, including but not limited to seniors, youth and persons with disabilities."<sup>130</sup>

To date, the equity provisions in the California, Oregon, and Washington clean fuel standards have not been challenged under the federal or state anti-classification laws. However, it will be important for state policymakers to consider design options for clean fuel standards' equity provisions in light of the applicable case law and state constitutional restrictions.<sup>131</sup> Under current Supreme Court precedent interpreting the 14<sup>th</sup> Amendment's Equal Protection Clause, a court will only uphold a law that classifies based on race if neutral alternatives cannot meet the same compelling state interest.<sup>132</sup> The Supreme Court has not clearly defined what constitutes a racial classification,<sup>133</sup> but cases from lower courts suggest some ways that courts evaluate the question. In some cases, courts have found that laws do not classify based on race where they consider race at the community level, rather than the individual level.<sup>134</sup> Additionally, where a law does not use race to allocate benefits or burdens, the Supreme Court has sometimes, but not always, held that the law does not classify based on race.<sup>135</sup>

Moreover, it will be important for states to follow ongoing Equal Protection Clause litigation. In several cases filed in 2021, white farmers challenged a program that seeks to provide debt relief to farmers and ranchers who are members of "socially disadvantaged groups."<sup>136</sup> The statute defines such groups as those "whose members have been subjected to racial or ethnic prejudice...."<sup>137</sup> Halting the standard, one district court said this definition was a "rigid, categorical, race-based qualification," and held, along with two other district courts, that the white farmers would be likely to succeed in showing that the provision violated the Equal Protection Clause.<sup>138</sup> States may want to consider these cases as well as the ongoing cases related to universities' affirmative action policies in designing their own equity provisions.<sup>139</sup>



## III. Drafting Durable Standards: A Roadmap for Lawmakers

In upholding the clean fuel standards in California and Oregon, courts explained why they had found that the standards did not violate federal or state law. In their application of laws to facts, the cases illustrate how the planning, drafting, and messaging of clean fuel standards can affect legal risk. The sections below identify key lessons from these cases for policymakers considering clean fuel standards.

### A. Legislative roadmap

#### **DESIGN THE PROGRAM TO HAVE NEUTRAL EFFECTS**

Courts reviewing a dormant Commerce Clause challenge have considered, among other factors, whether the standard creates a large competitive advantage for in-state businesses over out-of-state businesses. To address such concerns and ensure the program does not disproportionately affect out-of-state entities, it will be important for a state to assess and understand how a clean fuel standard might affect fuel importers.

To assess the specific implications of a clean fuel standard for a state, state lawmakers should evaluate:

- Who will generate credits and how large will their benefit be?
- Who will generate deficits and how large will their burden be?

While factors beyond a state's control, including the makeup of its fuel market, will determine the exact impact on each producer and importer, the legislature can undertake initial modeling to compare projections for the CI of in-state fuel and the CI of imported fuel. In both California and Oregon, some imported fuels were generating the largest credits, and the Ninth Circuit relied on this fact as evidence of non-discriminatory effect.<sup>140</sup>

#### **LEGISLATIVE PLANNING CONSIDERATION 1**

*Conduct a fact specific inquiry into how the clean fuel standard benefits and burdens fuel producers and importers.*

Where a state projects that importers will be generating many deficits, the state may wish to use extra caution in categorizing fuels. California illustrates two methods for conducting CI calculations. In the old version of its regulations, California categorized fuels into default pathways based on how much their production and transportation processes emitted on average.<sup>141</sup> Producers and importers could apply for individualized assessments if they could show that the pathway did not accurately represent their fuel's CI, but this required an additional application process.<sup>142</sup> Thus, because these default pathways were based on averages, not every process by every producer exactly matched the pathway to which it was assigned. Industry groups challenged the pathways on this basis, but the Ninth Circuit upheld the pathways because they were based on real emissions differences and did not discriminate based on geographic origin.

#### **LEGISLATIVE PLANNING CONSIDERATION 2**

*Research state funding restrictions and plan how to pay for the standard's administration.*

Nonetheless, California updated its standard to include a more precise measurement system. Under California's new tiered system, entities apply for an evaluation based on whether they are using innovative processes to reduce emissions and how well assumptions would apply to them.<sup>143</sup> This system puts regulated entities in control of their evaluations, incentivizes small efficiency updates along the production and delivery chain, and allows for more precise measurements in some cases.<sup>144</sup> The accuracy of this measurement system may therefore help establish an additional scientific basis for distinguishing among fuels in a dormant Commerce Clause challenge.



## DESIGN THE PROGRAM TO REFLECT FUNDING RESTRICTIONS

States designing a clean fuel standard should consider:

- Whether there are state requirements that certain revenues or taxes be put into the transportation fund
- Whether and how such restrictions limit the uses of transportation funds

It will be important for states to consider how to fund the administration of a clean fuel standard. As an initial step, legislators and planners may consider whether there are applicable restrictions on how transportation revenues or other revenues may be spent.<sup>145</sup> Policymakers can also estimate the number of full-time staff and resources needed to administer the program.

The petitioners in Oregon state court challenged the program under Oregon’s transportation fund restrictions. In some states, these transportation fund restrictions are known as “transportation lockboxes.”<sup>146</sup>

While not all states will have similar restrictions, some will require states to spend fuel revenues on specific enumerated projects.<sup>147</sup> Other, more permissive approaches may allow states to use funds on “transportation related purposes” or allow diversions of capital with the approval of a governor or the legislature.<sup>148</sup>

States also require specific revenue and tax sources for their transportation funds. For example, Iowa requires “[a]ll motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel” to be used for highway construction and maintenance but creates an exception for expenses related to the “cost of administration.”<sup>149</sup> Illinois, by comparison, creates no such exception, and extends restrictions to “taxes, fees, excises, or license taxes relating to any other transportation infrastructure or transportation operation.”<sup>150</sup> However, many of the strictest requirements only require “taxes,” or “revenues” to go into the transportation fund.<sup>151</sup> According to the Supreme Court, “the essential feature of any tax...” is that “[i]t produces at least some revenue for the government.”<sup>152</sup> If the state never collects clean fuel standard money, there are strong arguments that the program does not impose a tax.

Additionally, many states differentiate between taxes, which raise revenue, and fees, which cover the costs of

a specific service.<sup>153</sup> If state law distinguishes between taxes and fees and the transportation spending provision allows the state to spend such fees, the legislature can consider requiring producers and importers to pay fees to cover the minimal administrative costs of the programs. However, whether the legislature can do so will depend on the state’s differentiation of fees and taxes. Moreover, some states also restrict how transportation fees can be spent.<sup>154</sup>

## INCLUDE A CLEAR STATUTORY PURPOSE FOCUSED ON THE ENVIRONMENTAL OBJECTIVES OF THE PROGRAM

Clarifying the purpose of the clean fuel program can mitigate dormant Commerce Clause and preemption risks. A strong statement of purpose focusing on GHG emissions can establish the states’ non-protectionist motives. Moreover, because the Clean Air Act preserves local air quality as an issue for the states, a strong statement of purpose may also help minimize preemption risk.

### LEGISLATIVE DRAFTING CONSIDERATION 1

*Provide a greenhouse gas reduction benchmark based on the declining CI averages.*

Legislators can demonstrate a program’s purpose by expressing their state’s environmental concerns and the program’s goals in the text of the statute. Some courts will look to the statutory text as a primary source of purpose and using deliberate language in the statute can aid states in managing legal risk. In applying these considerations, state legislators should determine how state law and their local circuit’s dormant Commerce Clause and preemption case law apply.

One way to show purpose is through a statement that sets a GHG reduction benchmark and a target date. The Ninth Circuit relied on California’s legislative goal to “to reduce its greenhouse gas (“GHG”) emissions to their 1990 level by the year 2020” and on Oregon’s goal to “reduce the amount of lifecycle greenhouse gas emissions per unit of energy by a minimum of 10 percent below 2010 levels by 2025” as evidence of neutral purpose.<sup>155</sup> While the



ambition level of the goal does not matter for dormant commerce clause purposes, the specification of the goal is one way to show that a statute’s purpose is to reduce GHGs.<sup>156</sup> Both states included a GHG reduction goal as part of findings that establish threats that the states face due to climate change.<sup>157</sup>

**LEGISLATIVE DRAFTING CONSIDERATION 2**

*Identify a legislative mechanism to expressly state the environmental harms that the program will address.*

The benchmark can also complement additional legislative findings that emphasize the objective of the program to address harms the state faces from local air pollution or climate change related to the transportation sector. Most recently, Washington’s legislature found that:

the health and welfare of the people...of Washington is threatened by the prospect of crumbling or swamped coastlines, rising water, and more intense forest fires caused by higher temperatures and related droughts, all of which are intensified and made more frequent by the volume of greenhouse gas emissions. As of 2017, the transportation sector contributes 45 percent of Washington’s greenhouse gas emissions, and the legislature’s interest in the life cycle of the fuels used in the state arises from a concern for the effects of the production and use of these fuels on Washington’s environment and public health, including its air quality, snowpack, and coastline...Therefore, it is the intent of the legislature to support the deployment of clean transportation fuel technologies...<sup>158</sup>

Some states have policies prohibiting separate purpose statements or legislative findings,<sup>159</sup> but these states may be able to establish their GHG reduction targets using other statutory language.

In addition to designing the program to ensure that it does not discriminate against out-of-state entities, legislators may also want to consider including an express dormant Commerce Clause disclaimer that denies economic motivations and attests the neutrality of their emissions calculations. For example, Washington’s statute declares

the state’s intention to “[n]eutrally consider the life-cycle emissions associated with transportation fuels with respect to the political jurisdiction in which the fuels originated and...not discriminate against fuels on the basis of having originated in another state or jurisdiction.”<sup>160</sup> Though the provision has not yet been tested in court, such a statement can demonstrate the intent of the statute.<sup>161</sup>

**B. Regulatory roadmap**

Regardless of whether the legislature has provided broad authority to manage GHG emissions or an express obligation to finalize a clean fuel standard, prior litigation provides important considerations for the regulatory process and the development of regulatory text.

**REGULATORY DRAFTING CONSIDERATION 1**

*Ensure the CI provisions of the program rely on science and require the use of tested, scientific models for lifecycle analysis.*

**DRAFT REGULATIONS BASED ON TRANSPARENT AND SOUND SCIENCE**

Courts reviewing dormant Commerce Clause challenges have looked at clean fuel standard regulations, including how inputs in CI calculators are valued and if and how default pathways are used. Ensuring that the regulations are based on the scientific understanding of lifecycle analysis supports a non-protectionist purpose for treating fuels differently and may help respond to claims that the regulations discriminate based on the geographic origin of the fuel.

To date, clean fuel standards statutes and rules have not facially discriminated by imposing geographic restrictions. Nonetheless, challengers argued facial discrimination against out-of-state interests under the theory that the lifecycle analysis is “inextricably intertwined with origin.”<sup>162</sup> The Ninth Circuit rejected these challenges, finding that



real, scientific differences in emissions underpinned these tests.<sup>163</sup>

**REGULATORY DRAFTING CONSIDERATION 2**

*If default pathways are used, base the CI on emissions averages for each production step.*

Policymakers should similarly ensure that regulations are based on scientific analysis and include analysis in the regulatory record to explain the reasoning and basis for the CI calculations. One way to integrate science into clean fuel standards is to use tested models, such as the GREET models adopted in California and Oregon. Moreover, in the fifteen years since California’s legislature first enacted the program, researchers have evaluated how different aspects of the clean fuel standard drive emissions reductions, and such research can provide additional scientific support.<sup>164</sup>

As explained in Section IA above, states are moving away from default pathways to incentivize small efficiency improvements in technology. However, regulators may still choose default pathways as a way to reduce the administrative costs of individual assessments.<sup>165</sup> Where states do use pathways, they should calculate the emissions averages associated with each step of production and transportation of the fuels.<sup>166</sup> Such considerations will ensure that actual averages are the basis for the program, not broad assumptions.

Moreover, individualized determinations helped California show neutrality because producers and importers who felt harmed by the assumptions made about their region could show that their sources were cleaner than the regions’ averages.<sup>167</sup>

**DESIGN REGULATIONS TO ONLY AFFECT THE STATE’S FUEL MARKET**

The doctrine of extraterritoriality prohibits states from

enacting laws that regulate conduct occurring fully outside of the state. By clearly defining parties that are regulated by the statute, a state can make clear it only regulates in-state transactions.

**REGULATORY DRAFTING CONSIDERATION 3**

*If default pathways are used, also include a regulatory option for individualized assessments.*

The clean fuel standards in California and Oregon only regulate fuel distributed for use in state.<sup>168</sup> Washington, California, and Oregon all exclude exporters.<sup>169</sup> States can define who is, and is not, required to comply so that fuel transporters merely travelling on interstate highways are aware that the standards do not regulate them.<sup>170</sup> States can also define what fuels are, and are not, included so that producers and importers understand their obligations.<sup>171</sup> By doing so, these states will show that only those wishing to gain access to their markets are regulated and that the standards do not regulate extraterritorially.

**REGULATORY DRAFTING CONSIDERATION 4**

*To the extent not defined in the legislation, ensure the regulation defines regulated parties.*

**FOLLOW APPLICABLE STATE PROCEDURAL REQUIREMENTS**

Similar to any program that relies heavily on agency action for administration, clean fuel standards can be vulnerable to procedural challenges. Though these threats do not endanger the long-term survival of the programs, administrative challenges can consume significant state resources and potentially result in lengthy pauses of



the standards. For these reasons, it will be important for regulators to follow their state’s procedural act and environmental review acts closely.

**REGULATORY PROCEDURAL CONSIDERATION**

*Follow applicable state procedural and environmental review requirements.*

## IV. Messaging and the Political Process

As in the drafting process, each state will have a unique tolerance for risk during the political process. Messaging best practices may depend not only on the states’ federal and internal preferences, but also on the states’ political makeup and public engagement on the statute and rulemaking. Rather than focusing on benefits to in-state industries, policymakers may want to highlight the program’s environmental and public health benefits. We discuss some potential messaging considerations in the sections below.

**IDENTIFY THE ENVIRONMENTAL BENEFITS THAT WILL RESULT FROM THE PROGRAM**

The chief goal in enacting a clean fuel standard is environmental protection, but it may also have economic benefits. The dormant Commerce Clause prohibits unlawful economic protectionism, but that prohibition does not prevent states from enacting a non-discriminatory clean fuel standard that economically benefits the state. To demonstrate the value for the state in implementing such a program, advocates and policymakers may want to focus on the low costs and strong benefits of the program. In addition, states can expressly identify how the economic benefits tie to the environmental worth of the program including the economic value of cleaner air.<sup>172</sup>

**MESSAGING CONSIDERATION 1**

*Identify the economic and public health benefits of cleaner air that will result from the program.*

In an example of connecting environmental protection with economic benefits, the Ninth Circuit in Rocky Mountain highlighted that California’s clean fuel standard “create[d] a market in which the monetary cost of ethanol better reflects the full costs of ethanol production, taking into account the harms from GHG emissions.”<sup>173</sup>

Oregon’s legislature also connected the environmental and economic benefits of the standard, noting that “a potential rise in sea levels threatens Oregon’s coastal communities. Reduced snowpack, changes in the timing of stream flows, extreme or unusual weather events, rising sea levels, increased occurrences of vector-borne diseases and impacts on forest health could significantly impact the economy, environment and quality of life in Oregon.”<sup>174</sup>

**MESSAGING CONSIDERATION 2**

*Identify the standard’s low operational costs.*

States can also consider focusing on the low costs of the program. Advocates can clarify that because the state is only acting as a facilitator in the market, it will incur minimal administrative costs, and the vast majority of the money will be exchanged among fuel producers. Advocates can also consider ongoing research on the minimal price impacts of clean fuel standards to consumers.<sup>175</sup>

**HIGHLIGHT THE BENEFIT TO HISTORICALLY POLLUTED COMMUNITIES**

As shown in the legal analysis above, a variety of state and local constitutional concerns may influence whether



policymakers consider communities' race in defining environmental justice issues. In addition to that decision, a state may have to choose whether to publicly address race as it relates to environmental equity issues in press releases about the standard.

### **MESSAGING CONSIDERATION 3**

*For equity provisions, identify the benefit to historically overburdened communities.*

During the political process, advocates may want to acknowledge historical harms to communities of color and express the state's desires to redress these harms. Statements detailing historical racial harms recognize an important goal of environmental justice work and courts have not typically invalidated laws under the Equal Protection Clause based on such statements.<sup>176</sup> However, policymakers will want to consider also emphasizing the underlying purpose of the equity provision to improve air quality for every community overburdened by pollution.

## Conclusion

Nearly half of the US states have concrete GHG emissions reductions targets and clean fuel standards may be an effective measure to help them meet their goals.<sup>177</sup> California and Oregon drafted statutes and rules they successfully defended against legal challenges. Their standards, and the court decisions upholding them, provide lessons that may help states design clean fuel standards that are effective and resilient to legal tests. Using this guide and other ongoing research, policymakers can think strategically about how to design a legally durable clean fuel standard that reduces emissions from the transportation sector and protects public health.

**We welcome feedback on this work. Send comments to [ahusselbee@law.harvard.edu](mailto:ahusselbee@law.harvard.edu)**



## Endnotes

- 1 CAL. CODE REGS. 17 §§ 95481–84.
- 2 CAL. CODE REGS. 17 § 95483 OR. ADMIN. R. 340-253-0310 use the terms “producers and importers,” but the courts referred to “in-state” and “out-of-state producers.” For this paper, we use the terms producer and importer.
- 3 CAL. CODE REGS. 17 § 95485.
- 4 *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013); *Am. Fuel & Petrochemical Manufacturers v. O’Keeffe*, 903 F.3d 903 (9th Cir. 2018); Wash. Reg. 21-15-095 (July 20, 2021). Washington already faces a legal challenge from state legislators looking for a declaratory judgment against partial vetoes that Governor Inslee made to the clean fuel legislation. *State Legislature v. Inslee*, No. 21-2-02111-34 (Wa. Super. Ct.). This challenge could delay Washington’s rulemaking process.
- 5 See OR. REV. STAT. § 468A.266(2)(a); WASH. REV. CODE § 70A.535.005(3); CAL. HEALTH & SAFETY CODE § 38501(c) (“AB 32”) (mentioning vehicle standards, among many other required emissions reductions).
- 6 CAL. HEALTH & SAFETY CODE § 38501.
- 7 CALIFORNIA AIR RESOURCES BOARD (CARB), *AB 32 Climate Change Scoping Plan*, <https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan/about> (last visited Apr. 11, 2022).
- 8 CAL. OFFICE OF THE GOVERNOR, Exec. Order S-01-07 (Jan. 18, 2007) (available at <https://climateactionnetwork.ca/wp-content/uploads/2011/06/eos0107.pdf>).
- 9 CALIFORNIA AIR RESOURCES BOARD (CARB), *Climate Change Scoping Plan* (Dec. 2008), [https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/document/adopted\\_scoping\\_plan.pdf](https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/document/adopted_scoping_plan.pdf).
- 10 CALIFORNIA AIR RESOURCES BOARD (CARB), *Low Carbon Fuel Standard: About* (<https://ww2.arb.ca.gov/our-work/programs/low-carbon-fuel-standard/about>) (last visited Feb. 9, 2022); CAL. CODE REGS. 17 §§ 95481, 84.
- 11 CAL. CODE REGS. 17 § 95480; 95482. Some entities that don’t produce or sell fuel may also choose to generate credits. For example, companies expanding zero-emissions vehicle charging or reducing greenhouse gas emissions from petroleum supply in California may generate credits.
- 12 See, e.g., CAL. CODE REGS. 17 AT § 95486, Table 6 (2009) (“Carbon Intensity Lookup Table for Gasoline and Fuels that Substitute for Gasoline”). Direct emissions are emissions from producing, transporting, and using the fuel.
- 13 CAL. CODE REGS. 17 § 95486(c). Argonne Laboratory’s Greenhouse gases, regulated emissions, and energy use in technology model (“GREET”) is used by both California and Oregon to calculate lifecycle analysis. See CARB, *LCFS Life Cycle Analysis Models and Documentation*, <https://ww2.arb.ca.gov/resources/documents/lcfs-life-cycle-analysis-models-and-documentation> (last visited Feb. 24, 2022).
- 14 See CARB, *Low Carbon Fuel Standard Basics Notes*, <https://ww2.arb.ca.gov/sites/default/files/2020-09/basics-notes.pdf> (last visited Jan. 21, 2022) (slide 22 on Fuel Pathway Based Crediting).
- 15 *Id.*
- 16 *Id.*
- 17 OR. REV. STAT. § 468A.266 et seq.
- 18 *Id.* at § 468A.266(1), (4).
- 19 *Id.* at § 468A.266 (5).
- 20 *Id.* at § 468A.266(2).
- 21 *Id.* at §§ 468A.271(d)–74.
- 22 Or. Admin. R. 340-253-0000.
- 23 *Id.* at 340-253-0500.



- 24 Compare CAL. CODE REGS. 17 § § 95480 et seq., with Or. Admin. R. 340-253-0000 et seq.
- 25 OR. DEP'T ENV'T QUALITY, *Rulemaking at DEQ*, <https://www.oregon.gov/deq/rulemaking/Pages/cfp2022.aspx> (last visited Feb. 22, 2022).
- 26 WASH. REV. CODE § 70A.535.005.
- 27 See, e.g., WASH. REV. CODE § 70A.535.090 (mandating reporting requirements and deadlines); Or. Admin. R. 340-253-0650 (mandating annual compliance reports).
- 28 WASH. REV. CODE § 70A.535.090; Wash. Reg. 21-15-095 (July 20, 2021); Washington released draft rule language and is accepting comments on the draft until Apr. 25, 2022. See Wash. Admin. Code. § 173-424-100 Draft, <https://ecology.wa.gov/DOE/files/e4/e4b11436-8669-485d-8939-05f5524bfOff.pdf>.
- 29 WASH. REV. CODE § 70A.535.030(1)(b)(i).
- 30 See 903 F.3d 903, 911 (9th Cir. 2018); 730 F.3d 1070, 1082 (9th Cir. 2013).
- 31 See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) [hereinafter *Rocky Mountain I*]; *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018). In addition to these central cases, several dockets arose in the *Rocky Mountain* line. See, e.g., *Rocky Mountain Farmers Union v. Goldstene* ("Rocky Mountain Ethanol"), 843 F.Supp.2d 1071, 1090, 1093 (E.D.Cal.2011); *Rocky Mountain Farmers Union v. Goldstene* ("Rocky Mountain Preemption"), 843 F.Supp.2d 1042, 1070 (E.D.Cal.2011); *Rocky Mountain Farmers Union v. Goldstene* ("Rocky Mountain Crude"), Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2011 WL 6936368, at \*12-14 (E.D. Cal. 2011).
- 32 Ari Peskoe and Kate Konschnik, *Minimizing Constitutional Risk— Crafting State Energy Policies that Can Withstand Constitutional Scrutiny*, HARV. ENV'T & ENERGY L. PROGRAM (Oct. 18, 2017) (<https://statepowerproject.files.wordpress.com/2017/10/harvard-epi-minimizing-constitutional-risk-10-18-2017.pdf>).
- 33 *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008), citing *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 99 (1994).
- 34 *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).
- 35 See *KT.& G Corp v. Att'y Gen. of State of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008).
- 36 See, e.g., *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013)(Sutton, J., concurring).
- 37 *National Pork Producers Council v. Ross*, No. 21-468 (Mar. 28, 2022). In that upcoming case, agricultural trade associations are challenging California Proposition 12, which bans the sale of pork if the pig was not housed in a stall with sufficient space. However, the pork market is different than the fuel market, so a narrow holding based on that law would not necessarily change how the dormant Commerce Clause doctrine applies to clean fuel standards. However, the Supreme Court could change or clarify tests under the dormant Commerce Clause, which could impact the application of these tests. For this reason, states considering clean fuel standards should follow this litigation.
- 38 *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).
- 39 *Id.*
- 40 *Yamaha v. Jim's Motorcycle Inc.*, 401 F.3d 560, 568 (4th Cir. 2005), citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987).
- 41 *National Pork Producers Council v. Ross*, No. 21-468 (Mar. 28, 2022).
- 42 *Rocky Mountain I*, 730 F.3d at 1077-78 (9th Cir. 2013).
- 43 *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp.2d 1071, 1088-89 (E.D. Cal. 2011). The ethanol provisions that were at issue were the various pathways under which ethanol is produced.
- 44 *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp.2d 1071, 1091.
- 45 *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp.2d 1071, 1090-91.
- 46 *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp.2d 1071, 1105.
- 47 *Rocky Mountain Farmers Union v. Goldstene*, No. CV-F-09-2234 LJO DLB, 2011 WL 6936368, at \*7,13 (E.D. Cal. Dec. 29, 2011), rev'd sub nom. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). The crude oil provisions were designed to incentivize investment in cleaner fuels rather than more efficient crude oil. *Rocky Mountain I*, 730 F.3d. at 1085 (9th Cir. 2013).
- 48 A partial dissent would have found that the ethanol provisions did facially discriminate against interstate commerce. *Rocky Mountain I*, 730 F.3d. at 1108 (Murguia, J. dissenting-in-part).



- 49 *Rocky Mountain I*, 730 F.3d at 1088 (9th Cir. 2013).
- 50 *Rocky Mountain I*, 730 F.3d at 1093.
- 51 *Rocky Mountain I*, 730 F.3d at 1093.
- 52 *Rocky Mountain I*, 730 F.3d at 1093.
- 53 *Rocky Mountain I*, 730 F.3d at 1082.
- 54 *Rocky Mountain I*, 730 F.3d at 1097.
- 55 *Rocky Mountain I*, 730 F.3d at 1097–98.
- 56 *Rocky Mountain I*, 730 F.3d at 1100.
- 57 *Rocky Mountain I*, 730 F.3d at 1099.
- 58 *Rocky Mountain I*, 730 F.3d at 1099.
- 59 *Rocky Mountain I*, 730 F.3d at 1101.
- 60 *Rocky Mountain I*, 730 F.3d at 1105.
- 61 *Rocky Mountain I*, 730 F.3d at 1107.
- 62 *Rocky Mountain I*, 730 F.3d at 1107.
- 63 *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 948 (9th Cir. 2019) [hereinafter *Rocky Mountain II*].
- 64 *Rocky Mountain II*, 913 F.3d at 948.
- 65 *Rocky Mountain II*, 913 F.3d at 950.
- 66 *Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*, 134 F. Supp. 3d 1270, 1274 (D. Or. 2015), *aff’d sub nom. Am. Fuel & Petrochemical Manufacturers v. O’Keeffe*, 903 F.3d 903 (9th Cir. 2018).
- 67 *Id.* at 1278–88.
- 68 *Id.*
- 69 *Am. Fuel & Petrochemical Manufacturers v. O’Keeffe*, 903 F.3d 903, 911 (9th Cir. 2018).
- 70 *Id.* at 912.
- 71 *Id.*
- 72 *Id.* at 914, citing *Rocky Mountain I*, 730 F.3d 1088, at 1093.
- 73 *Id.* at 914.
- 74 903 F.3d at 912–914, 917 (Smith, J., dissenting). Because this was a hearing on a motion for summary judgment, the parties have not completed the records in discovery. On a summary judgment motion, the court takes all factual allegations and reasonable inferences in favor of the non-moving party. Here, the dissent believes the plaintiffs have made a plausible claim of discrimination.
- 75 *Id.* at 916, citing 397 U.S. at 142.
- 76 *Id.* at 916.
- 77 *Id.* at 917.
- 78 One example of such a difference is the evidentiary burden. The Tenth Circuit requires a higher evidentiary burden in dormant Commerce Clause challenges than the Ninth Circuit does, which makes it harder for petitioners to show discrimination. In the Tenth Circuit, a law will only be found to have a discriminatory effect if the challenger can meet the significant burden of showing that the law “alters the competitive balance between in-state and out-of-state firms. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1042 (10th Cir. 2009).
- 79 *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103 (2d Cir. 2017).
- 80 *Id.*
- 81 *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015).



- 82 *Id.* at 1172–74.
- 83 *Id.* at 1173.
- 84 *North Dakota v. Heydinger*, 825 F.3d 912, 913 (8th Cir. 2016).
- 85 *Id.* at 917.
- 86 *Id.*
- 87 *Id.* In 2017, Minnesota adopted a new version of the statute that more clearly defines the electricity and utilities regulated by the program, which was not challenged in court. MINN. STAT. § 216H.03.
- 88 *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 125 (2016). Where the federal government has exclusive control, courts apply a doctrine called “field preemption,” which prohibits state regulations where Congress has legislated so comprehensively as to “occup[y] the entire field.” See, e.g., *Kurns v. Railroad Friction Products Corp.* 565 U.S. 625, 636 (2012). Field preemption was not at issue in the clean fuel standard cases.
- 89 *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).
- 90 Jay Sykes and Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer (2019).
- 91 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
- 92 *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1050. Under CAA § 211(o), the federal Renewable Fuel Standard requires minimum percentages of renewable fuels to be blended with petroleum-based fuels. Petitioners also raised preemption in an earlier 2010 case in which the Eastern District of California denied California’s motion to dismiss the claim of preemption under the CLEAN AIR ACT § 211(o). *Rocky Mountain Farmers Union v. Goldstene*, 719 F.Supp.2d 1170, 1195 (E.D. Ca. 2010).
- 93 *Rocky Mountain Farmers Union v. Corey*, 258 F. Supp. 3d 1134, 1153 (E.D. Cal. 2017), *aff’d in part, vacated in part, remanded*, 913 F.3d 940 (9th Cir. 2019). As part of this holding, the court found that its 2010 holding that the Renewable Fuel Standard preempted was clearly erroneous. *Id.* at 1148.
- 94 *Id.* at 1148–49, quoting *Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003).
- 95 *Id.* at 1151, citing *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254, 1255 (9th Cir. 2000).
- 96 42 U.S.C. § 7416.
- 97 *Rocky Mountain II*, 913 F.3d at 949, 958. The Ninth Circuit vacated the district court’s opinion as moot as to the 2011 version of the clean fuel standard, but affirmed the holding as to the 2015 version of California’s clean fuel standard. *Id.*
- 98 See 903 F.3d 903, 917 (9th Cir. 2018), citing 42 U.S.C. § 7545(c)(4)(A).
- 99 *Id.*
- 100 *Id.* The Ninth Circuit did not address whether a clean fuel standard is “a characteristic or component” of fuel that is already regulated in the same way by EPA, but a court would be unlikely to find that EPA regulates fuel in the same way. See Kirsten Nelsen, *An Analysis of Federal Preemption and a Clean Fuel Standard in Washington State*, 90 Wash. L. R. 57, 77-81 (2015).
- 101 *POET, LLC v. State Air Res. Bd.*, 218 Cal. App. 4th 681, 697 (Cal. Ct. App. 2013), as modified on denial of reh’g (Cal. Ct. App. Aug. 8, 2013).
- 102 *Id.*
- 103 *Id.* at 698.
- 104 *Id.* at 763.
- 105 *Id.* at 764.
- 106 See 2015 Ca. Reg. Text 38,0997 (Nov. 27, 2015).
- 107 See *POET, LLC v. State Air Res. Bd.*, 12 Cal. App. 5th 52, 185 (Cal. Ct. App. 2017) [hereinafter *Poet II*].
- 108 *Id.* at 101. California’s Alternative Diesel Fuel regulations were amended in response to the 2017 *Poet* challenge. Ca. Air Resources Bd., *Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Response* (Apr. 23, 2020), <https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2020/adf2020/fsor2.pdf>.
- 109 *W. States Petroleum Ass’n v. Env’t Quality Comm’n*, 296 Or. App. 298 (Or. Ct. App. 2019).
- 110 *Id.* at 303–313.



- 111 *Id.* at 312–314. Some other claims on this issue were found moot. *Id.*
- 112 Beyond restrictions specific to transportation revenues, some states have other funding restrictions. For example, several states require funds to be appropriated before they are expended from the general fund. See, e.g., Ronald K. Snell, *State Constitutional And Statutory Requirements For Balanced Budgets*, Appendix to *State Balanced Budget Requirements: Provisions and Practice*, Nat. Conf. of State Leg. (last visited Apr. 11, 2022), <https://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx>.
- 113 American ass’n of state highway and Transportation officials, *Transportation Governance and Finance: A 50-State Review of State Legislatures and Dep’ts of Transportation* (Nov. 2016), [http://www.financingtransportation.org/pdf/50\\_state\\_review\\_nov16.pdf](http://www.financingtransportation.org/pdf/50_state_review_nov16.pdf).
- 114 See CAL. CODE REGS. 17 § 95487, OR. ADMIN. R. 340-253-1005
- 115 See Or. Dep’t Env’t Quality, 2021-2023 Agency Budget Request, [https://www.oregon.gov/deq/FilterDocs/202123\\_DEQ\\_AgencyRequestBudget.pdf](https://www.oregon.gov/deq/FilterDocs/202123_DEQ_AgencyRequestBudget.pdf) (last visited March 2, 2022).
- 116 OR. CONST. ART. IX, §3(a).
- 117 *W. States Petroleum Ass’n v. Env’t Quality Comm’n*, 296 Or. App. at 316-19 (Or. Ct. App. 2019).
- 118 *Id.* at 316.
- 119 OR. ADMIN. R. 340-253-0330.
- 120 OR. DEP’T ENV’T QUALITY, *Incremental Aggregator Program*, <https://www.oregon.gov/deq/ghgp/cfp/Pages/iaEAC.aspx#:~:text=The%20Incremental%20Aggregator%20is%20new.of%20air%20pollution%20and%20climate> (last visited March 2, 2022).
- 121 OR. ADMIN. R. 340-253-0330 (incremental aggregator program distributes unclaimed credits to impacted communities), Wash. Rev. Code § 70A.535.080 (sets a percentage of revenues from credits that must go to electrification in communities with high air pollution), CAL. CODE REGS. 17 § 95483.
- 122 There is not yet a consensus on the most effective way to accomplish this goal. For example, the federal government and advocates have recently disagreed about this issue in the context of Justice40, and whether the definition of “disadvantaged communities” should include race. Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won’t Mention Race*, NY Times (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/climate/biden-environment-race-pollution.html>.
- 123 Christopher Tessum et al., *PM 2.5 polluters disproportionately and systemically affect people of color in the United States*, 7 Science Advances 18 (Apr. 28, 2021) <https://www.science.org/doi/10.1126/sciadv.abf4491>.
- 124 CAL. CODE REGS. 17 § 95483.
- 125 *Id.*
- 126 WASH. REV. CODE § 70A.535.080.
- 127 OR. ADMIN. R. 340-253-0330; Dep’t of Env. Qual., Incremental Aggregator and the Equity Advisory Committee, <https://www.oregon.gov/deq/ghgp/cfp/Pages/iaEAC.aspx#:~:text=The%20Incremental%20Aggregator%20is%20new.of%20air%20pollution%20and%20climate> (last visited Apr. 11, 2022).
- 128 OR. ADMIN. R. 340-253-0330.
- 129 CAL. CODE REGS. 17 § 95483; WASH. REV. CODE § 70A.535.080.
- 130 OR. ADMIN. R. 340-253-0040, 340-253-0330.
- 131 In addition to the federal Equal Protection Clause, California may have been motivated to avoid a racial classification that would violate its state constitution. California’s constitution does not allow the state to “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.” CA. CONST. ART. I, § 31. Going beyond the federal constitution, this amendment has been interpreted to directly prohibit affirmative action programs. *Coral Construction, Inc. v. City and County of San Francisco*, 235 P.3d 947 (Cal. 2010). To manage this additional barrier to using race, California uses a screening tool, called CalEnviroScreen 4.0, to define environmental justice communities in its state. Ca. Office of Environ. Health Hazard Assessment, CalEnviroScreen, <https://oehha.ca.gov/calenviroscreen> (last visited Mar. 21, 2022).
- 132 U.S. CONST. AMEND. XIV; See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).
- 133 Stephen Menendian, *What Constitutes a Racial Classification*, 24 Temp. Pol. & Civ. Rts. L. Rev. 81, 82 (2014). The case *Ricci v. DeStefano* could have provided an on-point precedent, but the Supreme Court decided that case on statutory grounds, avoiding the Constitutional question. *Id.* at 88–89, citing *Ricci v. DeStefano*, 555 U.S. 1091 (2009).
- 134 This issue has come up in the case of school redistricting. See *Student Doe 1 v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011)(upholding a school redistricting plan that considered race at the neighborhood rather than individual level); . The Supreme Court racial gerrymandering cases



make this principle a bit murkier and more inconsistent; however, the Court did hold that petitioners must show harm at the individual level to establish standing in those cases. *U.S. v. Hays*, 515 U.S. 737, 743–44 (1995). See also *Shaw v. Reno*, 569 U.S. 630, 649–50 (1993) (“At-large and multimember schemes, however, do not classify voters on the basis of race. Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis.”)

135 Compare *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (finding that the classification arises from the racial label alone), with *Parents Involved in Community Schools*, 551 U.S. 701, 783 (2007) (Kennedy, J. concurring) (“These plans...allocate benefits and burdens on [a racial] basis”).

136 *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275 (M.D. Fla. 2021).

137 *Id.*, quoting 7 U.S.C. §2279; *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tx.).

138 *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275 (M.D. Fla. 2021); *Faust v. Vilsack*, 519 F.Supp.3d 470 (E.D. Wi.)(granting a temporary restraining order pending the motion for preliminary injunction). Because the debt relief program was a federal program, the court analyzed the program under the Fifth Amendment, rather than the Fourteenth Amendment. That distinction does not change the racial classification analysis, as the two amendments generally track. *Bolling v. Sharpe*, 345 U.S. 972 (1953).

139 For information on the upcoming the affirmative action case, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 142 S. Ct. 895 (Jan. 24, 2022), consolidated with *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, No. 21-707, 142 S. Ct. 896 (Jan. 24, 2022).

140 *Rocky Mountain I*, 730 F.3d at 1110 App. 1–2 (9th Cir. 2013) (Appendix 1 showing various fuel pathways in California, the lowest CIs of which are achieved by Brazilian sugarcane fuel and Appendix 2 comparing California’s pathway calculation with the Midwest pathway calculation); 903 F.3d at 914 (9th Cir. 2018). This additional burden could result in some entities not seeking individual assessments.

141 CAL. CODE REGS. 17 at § 95486, Table 6 (2009)

142 See CAL. CODE REGS. 17 § 95486(c)-(d)(2012) (describing the application processes for Methods 2A and 2B).

143 See CARB, *Low Carbon Fuel Standard Basics Notes*, <https://ww2.arb.ca.gov/sites/default/files/2020-09/basics-notes.pdf> (last visited Jan. 21, 2022) (slide 22 on Fuel Pathway Based Crediting).

144 *Id.*

145 As an example of another type of restriction, many states have additional require funds to be appropriated before they can be expended from the general fund. See, e.g., Ronald K. Snell, *State Constitutional And Statutory Requirements For Balanced Budgets, Appendix to State Balanced Budget Requirements: Provisions and Practice*, NAT. CONF. OF STATE LEG. (last visited Apr. 11, 2022), <https://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx>.

146 For example, Connecticut’s funding restriction, which was passed in 2018, is regularly referred to as a “lockbox” by the local media and legislators. See Keith Phaneuf, *Voters overwhelmingly ratify transportation ‘lockbox’*, CONNECTICUT MIRROR (Nov. 6, 2018), <https://ctmirror.org/2018/11/06/voters-overwhelmingly-ratify-transportation-lockbox/>; see also State Rep. Michael Winkler, *Transportation Lockbox* (June 6, 2017), <https://www.housedems.ct.gov/winkler/article/transportation-lockbox>.

147 KY. CONST. § 230 only allows spending for “cost of administration, statutory refunds and adjustments, payment of highway obligations, costs for construction, reconstruction, rights-of-way, maintenance and repair of public highways and bridges, and expense of enforcing state traffic and motor vehicle laws”; IOWA CONST. ART. VII, §8 only allows spending on “construction, maintenance, and supervision of the public highways.”

148 See, e.g., MASS. GEN. LAWS CH. 29, § 2ZZZ (which refers to “all monies received by the commonwealth”); MONT. CONST. ART. VIII, §6(2) (which allows for diversion from the lockbox with a three-fifths vote in both chambers), VA. CODE §2.2-1509.2 (which allows the Governor or the legislature to divert transportation funds in the budget bill as long as they provide for repayment of the money within three years).

149 IA. CONST. ART. VII, § 8.

150 ILL. CONST. ART. IX, § 9.

151 MASS. GEN. LAWS CH. 29, § 2ZZZ.

152 *Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 564 (2012). The United States Supreme Court is not a binding authority on state courts interpreting state law, but many state courts have adopted similar definitions. *Phone Recovery Servs., LLC on behalf of State v. Qwest Corp.*, 901 N.W.2d 185, 189 (Minn. Ct. App. 2017), *aff’d sub nom. Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315 (Minn. 2018).

153 See generally Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonzaga L. Rev. 336 (2010) (reviewing cases differentiating taxes from fees in Washington). In 2017, a California state court held that California’s cap-and-trade allowance auctions were not a tax. *California Chamber of Com. v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 639 (2017).

154 ILL. CONST. ART. IX, § 9.

155 *Rocky Mountain I*, 730 F.3d 1070, 1079 (9th Cir. 2013), CAL. HEALTH & SAFETY CODE § 38501; 903 F.3d 903, 912 (9th Cir. 2018). Though



the Court cited Oregon's regulatory provision OR. ADMIN. R. 340-253-0000, these goals originally come from the legislative directive in OR. REV. STAT. § 468A.266.

156 The Ninth Circuit in *American Fuel* looked to the stated goal of the Oregon legislature as evidence of Oregon's legitimate purpose, and a goal would likely be used by future courts as evidence of purpose. 903 F.3d at 912 (9th Cir. 2018).

157 Both states used numerical emissions targets, but the states also had several goals that they did not quantify, like increased public health. CAL. HEALTH & SAFETY CODE § 38501; Or. Rev. Stat. § 468A.266. Any plan that shows how the state is working to achieve its purpose could be useful to include.

158 WASH. REV. CODE § 70A.535.005.

159 *E.g.*, New Mexico Legislative Council Service *New Mexico Legislative Drafting Manual* (2015), [https://www.nmlegis.gov/publications/Legislative\\_Procedure/drafting\\_manual.pdf](https://www.nmlegis.gov/publications/Legislative_Procedure/drafting_manual.pdf).

160 WASH. REV. CODE § 70A.535.030(1)(b)(i).

161 Some states have similar provisions in other contexts. For example, California's Renewables Portfolio Standard "requires generating resources located outside of California that are able to supply that electricity to California end-use customers to be treated identically to generating resources located within the state, without discrimination." CAL. CAL. PUB. UTIL. CODE § 399.11

162 *Rocky Mountain I*, 730 F.3d at 1090 (9th Cir. 2013).

163 903 F.3d at 915 (9th Cir. 2018). These factors may nonetheless be considered because "the [dormant Commerce Clause] does not guarantee that...producers may compete on the terms they find most convenient." *Id.*

164 For example, U.C. Davis publishes updates and conducts studies on the impacts of California's program. See, e.g., Julie Witcover, *Status Review of California's Low Carbon Fuel Standard*, 2011–2018 Q1, UC Davis: Inst. Of Transportation Studies (Sep. 24 2018), <https://escholarship.org/uc/item/445815cd>.

165 See 730 F.3d at 1093 (9th Cir. 2013) (citing CARB's motivation to reduce administrative costs).

166 When California used fuel pathways, it assessed fuels on the same pathways when they had (1) the same feedstocks, (2) the same production technology, (3) the same production region, (4) the same modes of transport and transport distances, and (5) the same types and amounts of thermal and electric energy. CAL. CODE REGS. § 95486 (2012). Though geographic region often determines the electricity source, producers and importers using cleaner production methods were able to apply for individualized assessments. When the *Rocky Mountain* court reviewed California's pathways, it found that California's factors all "bear on the reality of GHG emissions." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d at 1090 (9th Cir. 2013).

167 *Rocky Mountain I*, 730 F.3d at 1094 (9th Cir 2013).

168 OR. ADMIN. R. 340-253-1010; CAL. CODE REGS. 17 § 94583. Washington's rule is not yet effective, but the statute authorizing the program sets the standard up to regulate in state.

169 CAL. CODE REGS. 17 § 94581; WASH. REV. CODE § 700A.535.020(9); OR. ADMIN. R. 340-253-1000.

170 Goods only being transported through a state provide a separate set of questions under the dormant Commerce Clause. Many district courts have considered, and rejected, claims that state highway funding and toll programs violate the dormant Commerce Clause doctrine. See, e.g., *Ullmo v. Ohio Turnpike and Infrastructure Com'n*, 126 F.Supp.3d 910 (N.D. Ohio 2015).

171 See, e.g., OR. ADMIN. R. 340-253-1010.

172 See OECD, *The Economic Costs of Air Pollution* (2016), [https://read.oecd-ilibrary.org/environment/the-economic-consequences-of-outdoor-air-pollution\\_9789264257474-en#page1](https://read.oecd-ilibrary.org/environment/the-economic-consequences-of-outdoor-air-pollution_9789264257474-en#page1).

173 *Rocky Mountain I*, 730 F.3d at 1092 (9th Cir. 2013).

174 OR. REV. STAT. § 468A.200, OR. ADMIN. R. 340-253-0000.

175 Aaron Smith et al., *Low Carbon Fuel Standard Credit Prices and Pass-Through at the Pump—A Preliminary Investigation*, U.C. Davis, <https://ncst.ucdavis.edu/project/low-carbon-fuel-standard-credit-prices-pass-through-pump-preliminary-investigation> (research ongoing).

176 See *Washington v. Davis*, 426 U.S. 229 (1976) (establishing that a person trying to show that a facially neutral law is discriminatory must show motive or intent); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (establishing list of factors needed to show motive or intent).

177 CENTER FOR CLIMATE AND ENERGY SOLUTION, *U.S. State Greenhouse Gas Emissions Targets* <https://www.c2es.org/document/greenhouse-gas-emissions-targets/#:~:text=Currently%2C%2024%20states%20and%20the.%E2%80%9Cnet%2Dzero%E2%80%9D%20targets>. (last visited Apr. 20, 2022).



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