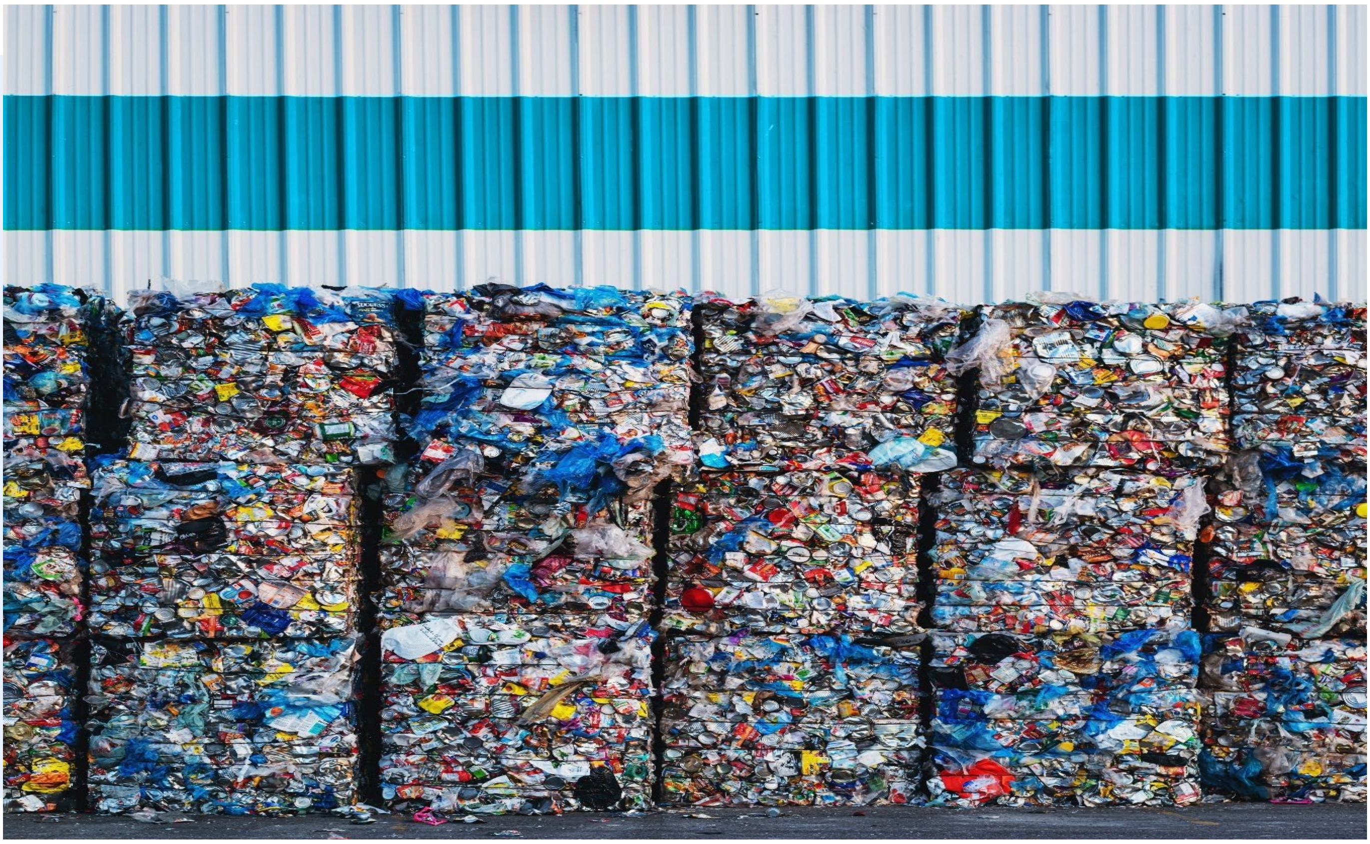
King & Spalding

All Wrapped Up
Extended Producer Responsibility for Packaging

Special Edition – August 17, 2026

In this special edition of *All Wrapped Up*, we discuss BREAKING NEWS in Oregon. All arguments are officially before the U.S. District Court for the District of Oregon after post-trial briefing closed last Wednesday in the first federal trial to test the constitutionality of a state packaging EPR law—*National Association of Wholesaler-Distributors v. Oregon Department of Environmental Quality*. No less than 16 parties filed *amicus curiae* briefs on behalf of industry trade associations, environmental non-profits, and the City of Portland, reflecting widespread national interest. Producers around the country now eagerly await a decision by Judge Michael H. Simon as to the constitutionality of Oregon's law. We read the trial transcripts, and we reviewed the briefs.



Simon Says!

There was never any question of whether the constitutionality of state packaging EPR laws would be challenged. The question was always when and how.

None of the EPR programs in any of the seven states with packaging EPR were in effect until last July, when Oregon's EPR program came online. Sure enough—and as we reported in the July 2025 edition of All Wrapped Up—the first challenge was filed on July 30, 2025, by the National Association of Wholesaler-Distributors ("NAW") against the Oregon Department of Environmental Quality ("Oregon DEQ"). We projected at that time that litigation would likely take well over a year to run its course. Fast forward a year, and Judge Michael H. Simon held a five-day bench trial from July 13-17, 2026, hearing testimony from multiple witnesses about the law's fee-setting structure, the role of Circular Action Alliance ("CAA") as the sole producer responsibility organization ("PRO"), and the burdens of the program on interstate commerce.

The future of packaging EPR in Oregon now hangs in the balance as Judge Simon assesses whether Oregon's law violates the Dormant Commerce Clause and the Due Process Clause—the two primary constitutional challenges that remain in the litigation. Given the widespread national interest, we expect a decision within short order.

To recap:

NAW's First Amended Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction

NAW originally pursued five causes of action against Oregon DEQ:

> First, **Commerce Clause, Article I, Section 8, Clause 3:** "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." NAW argued, among other things, that the EPR program discriminates against out-of-state producers because (1) they have to disaggregate Oregon-bound shipments from shipments to other destinations; (2) they are more likely to be erroneously treated as the responsible producer or double-charged; and (3) the law compels them to make packaging changes outside of Oregon.
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> Second, **Unconstitutional Conditions Doctrine**. In an argument arising out of the Fourteenth Amendment's Due Process clause, NAW argued that the government cannot condition the receipt of a public benefit (like a contract) on the relinquishment of a constitutional right. NAW alleges that the program conditions access to the Oregon market on the Participant Producer "Agreement" that producers are required to execute, requiring producers to waive economic liberty and due process rights.
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> Third, **Due Process, 14th Amendment:** "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." NAW argued that the program subjects producers to binding fee assessments and compliance obligations without adequate procedural safeguards and that there was no meaningful opportunity to provide comment on, or to challenge, CAA's fee determinations and methodology.
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> Fourth, **Equal Protection, 14th Amendment:** "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." NAW argued that the program irrationally burdens mid-sized producers—they are too large to qualify for statutory exemptions yet too small to influence CAA governance and too small to absorb the costs of creating an independent program.

Fifth, **Nondelegation Doctrine, Article IV, Section 1 (Oregon Constitution):** “The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.” NAW argued that vesting authority over EPR program administration in a private entity without adequate legislative standards or procedural safeguards constitutes an unlawful delegation of authority in violation of the Oregon Constitution.

The Court’s Order Granting in Part Defendant’s Motion to Dismiss and Plaintiff’s Motion for Preliminary Injunction

In a ruling from the bench following a February 2026 hearing, Judge Simon dismissed NAW’s Unconstitutional Conditions, Equal Protection, and Nondelegation Doctrine claims, but granted their motion for preliminary injunction on Dormant Commerce Clause and Due Process grounds.

In response, both NAW and Oregon DEQ declared victory. NAW issued a press release hailing the decision as a “significant victory,” asserting that the Court agreed with NAW that the law’s implementation amounted to an “opaque regulatory scheme”[1] (with “opaque” being a word the Court never used). Oregon DEQ issued a press release underscoring the fact that multiple claims were dismissed and that the law “remain[ed] in effect,” characterizing the Court’s decision as a “narrow injunction that temporarily pauses DEQ enforcement of the act against producers who are members of the National Association of Wholesaler-Distributors.”[2]

Judge Simon, however, stopped short of finding a “substantial likelihood of success,” which is the standard for preliminary injunctions in most, if not all, federal circuits other than in the Ninth Circuit. Application of the “substantial likelihood of success” standard might have provided some indication of how he might ultimately adjudicate these claims. He instead pointedly noted: “I am just not there. The furthest I will go is that there are serious questions here.” And after finding that “serious questions” existed, he enjoined the Oregon DEQ from enforcing the law—but only against NAW and its members. He issued a second ruling soon thereafter to clarify that the injunction was further limited to NAW “and the members of that organization that were members as of February 6, 2026.”[3]

Trial and Post-Trial Briefing

Judge Simon likewise provided little indication of where he is leaning during the five-day trial, but he provided some insight into the issues that remain before him. As to the Dormant Commerce Clause, he indicated on the last day of trial that he was satisfied with the arguments presented and needed no post-trial briefing, which suggests that he may have indeed made up his mind on this issue. Or so he might have thought. The parties filed post-trial briefs on the Dormant Commerce Clause anyway, which prompted the Court to order supplemental briefing on whether the “small producer” exemption for Oregon public bodies violates the Dormant Commerce Clause, suggesting that he was still open to new argument. As to Due Process, he instructed the parties to file post-trial briefs on six specific topics, noting on one of the six (*i.e.*, the constitutionality of the Participant Producer Agreement (“PPA”)): “I truly have not made up my mind on what to do and how to analyze this problem and what conclusion to reach.”[4]

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[1] NAW, *NAW Wins Preliminary Injunction Against Oregon’s EPR Law* (Feb. 6, 2026), https://www.naw.org/naw-wins-preliminary-injunction-against-oregons-epr-law/.

[2] Oregon DEQ, *Court dismisses multiple claims against Oregon recycling law* (Feb. 10, 2026), https://apps.oregon.gov/oregon-newsroom/OR/DEQ/Posts/Post/Court-dismisses-claims-against-Oregon-recycling-law.

[3] The Court had previously denied motions to intervene filed by the American Forest and Paper Association, the Oregon Business and Industry Association, Northwest Grocery Association, and Food Northwest as untimely, mooting their requests for preliminary injunctions.

[4] A. Baumhardt, *Federal Judge Will Decide Future of Oregon’s New Packaging Labeling Law by End of August*, Oregon Capital Chronicle (July 17, 2026), https://oregoncapitalchronicle.com/2026/07/17/federal-judge-will-decide-future-of-oregons-new-package-recycling-law-by-end-of-august/.

The decision now before Judge Simon may have several outcomes relevant to producers in Oregon as well as other states with packaging EPR laws. The Court could find that Oregon's EPR law is wholesale constitutional or unconstitutional; that discrete provisions are unconstitutional yet severable; or that any unconstitutionalities are limited to the interests of NAW members only.

Set forth below are the key points of contention that remain in the case.

Dormant Commerce Clause

- ***Discrimination Against Interstate Commerce***. Oregon DEQ contends the statute is neutral on its face and in purpose and that the law is designed to modernize Oregon's recycling system—not to protect in-state businesses. NAW frames the law's exemptions (*e.g.*, Oregon public bodies, small businesses, restaurants, foodservice ware) as facially and practically discriminatory cost-shifting devices that give express preferential treatment to specified in-state economic interests. Oregon DEQ counters that NAW lacks Article III standing to challenge the exemption for public bodies and that NAW's characterization of it as discriminatory is an "attempt to invalidate" the entire law.

- ***Substantial Burden vs. Local Benefit***. The parties dispute both the magnitude of the burden on interstate commerce and whether Oregon's asserted environmental benefits are adequately substantiated or merely speculative, with each side attacking the credibility of the other's trial evidence and experts. Under the *Pike* balancing test, "plaintiffs must first show that the challenged laws impose a 'substantial burden on interstate commerce'; if so, we determine whether that burden is 'clearly excessive' in relation to the law's putative local benefits." *Flynt v. Bonta*, 131 F.4th 918, 931 (9th Cir. 2025) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)) (citations cleaned up).

  - ***Interstate Distribution Networks***. NAW argues that the law "severely disrupts the flow of interstate shipping" and that the law's fees function "much like a tariff." Oregon DEQ counters that the law does not attempt to regulate how products are moved and that it "requires only that producers take responsibility for the costs of managing that packaging waste."

  - ***Instrumentalities of Interstate Commerce***. The parties disagree on whether packaging qualifies as a regulated instrumentality of interstate commerce (*e.g.*, truck, train, ship, or pipeline) or is merely a transported good, which is a threshold characterization dispute that affects which line of U.S. Supreme Court precedent applies. The Court requested specific pre-trial briefing on this issue, which may reflect its import to Judge Simon.

  - ***Extraterritorial Effects***. NAW argues that the law has market-wide impacts "far 'beyond the borders'" of Oregon and that "such sweeping extraterritorial effects" are germane to the assessment of substantial burden on interstate commerce, citing *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 400 (2023). NAW further argues that these effects fall disproportionately on out-of-state interests. Oregon DEQ takes the position that the law "does not have *impermissible* extraterritorial effects" (emphasis added). They assert that the law does not "compel anyone to alter packaging or sourcing decisions," an argument that may wind up implicating California's EPR law, which requires source reduction.

  - ***Compounding Patchwork State Regulations***. NAW asserts that the burdens on interstate commerce are compounded by "disparate EPR regimes" in other states, perhaps forecasting future challenges by NAW to packaging EPR in other jurisdictions.

Oregon DEQ argues that EPR is a "tool for governments to respond to modern waste management challenges" and furthers the state's "legitimate interest in protecting the environment."

- ***Regulatory Fees***. A state may levy fees "designed to recoup the costs of a regulatory program from members of the industry regulated." *Union Pac. R.R. Co. v. Pub. Util. Comm'n*, 899 F.2d 854, 859 (9th Cir. 1990). NAW, however, argues that the Dormant Commerce Clause limits the extent to which such fees may burden interstate commerce, citing *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 367–73 (1994). NAW asserts that Oregon's fees are not based on a fair approximation of the producers' use of the Oregon markets and that they are "clearly excessive in relation to the costs of running the program overall." Oregon DEQ responds that the fees are "proportional" to the cost of managing the waste sold by the producer in or into Oregon, which is "wholly reasonable."

Due Process

We have, perhaps, an even more reliable indicator of the Due Process issues Judge Simon is exploring. As noted above, he instructed the parties to file post-trial briefs on six specific topics:

First, is there a protected interest? If not, then Due Process analysis may well end right here. The parties dispute whether a constitutionally protected property or liberty interest is at stake. NAW takes the position that delegation of regulatory authority to "self-interested private parties implicates protected liberty and property interests" and that the law's "imposition of compelled fees" on producers likewise implicates protected property interests. Oregon DEQ maintains that there is no property interest "in carrying out a particular business" and that, even if there was, it could be conditioned on "reasonable restrictions," *e.g.*, requiring a producer to pay fees proportional to the costs of managing the waste they sell in or into Oregon. Oregon DEQ agrees that the imposition of civil penalties involves a protected interest that requires due process, but points to agency enforcement procedures as exceeding what due process requires.

Second, what process is due? NAW invites the Court to consider the "greater transparency and accountability" associated with a fee-setting process run by Oregon DEQ as opposed to a PRO (or the "*theoretical* opportunity to form a competing PRO" (emphasis added)). Oregon DEQ reiterates the "well-established" procedures in Oregon for the imposition of civil penalties and provides a detailed recitation of that process.

Third, is the analysis informed by the existence of binding arbitration provision in the PPA? NAW says no, given that the law conditions a producer's ability to do business in the state on a "non-negotiable" contract (*i.e.*, the PPA) entered into by the producer and CAA that lacks due process. Interestingly, Oregon DEQ also says no, albeit for different reasons: (1) the law does not require producers to join CAA; (2) the PPA allows for judicial review notwithstanding the arbitration provision; and (3) the PPA arbitration provision does not override Oregon DEQ's enforcement authority.

Fourth, what is the remedy if the Court determines that the PPA raises due process concerns, but the law and its regulations are otherwise constitutional? NAW takes the position that the alleged constitutional deficiencies are "structural" and that the Court must grant permanent relief enjoining enforcement of the law in full given that the only alternative would be for the Court to "rewrite the statute." Oregon DEQ asserts that any remedy must be narrowly tailored to the constitutional infirmity and notes that the arbitration provision in a contact does not implicate the constitutionality of the statute or regulation. Oregon DEQ also, however, points to the "presumption of severability" in Oregon law, citing to *Lee v. Waters*, 433 F.3d 672, 676 (9th Cir. 2005), presumably to give the Court another reason not to enjoin enforcement of the law in full should it lose the severability argument on other grounds.

Fifth, what is the legal significance of the fact that the law uses a third-party PRO as opposed to a state agency to administer the program? NAW again invites the Court to consider packaging EPR without a PRO, citing to the "greater democratic and procedural safeguards" that would be available. NAW appears to imply that due process concerns would be mitigated, if not eliminated, if the law was restructured to avoid delegating program administration to the PRO. Oregon DEQ contends that the U.S. Constitution allows states to delegate regulatory authority to third parties, assuming there is due process and agency oversight.

Sixth, is the question of the fee methodology's confidentiality properly before the Court given the availability of due process in Oregon's public records law? NAW argues that the confidentiality of CAA's fee methodology is ripe for court adjudication, whereas Oregon DEQ takes the position that the Court should abstain from making a finding on confidentiality under the *Burford* abstention doctrine[5] (or alternatively the *Pullman* abstention doctrine[6]) because NAW failed to pursue Oregon public-records remedies and because federal intervention would disrupt state administrative law.

Whether or not NAW's challenge in Oregon is a bellwether of successful challenges in other states remains uncertain. Judge Simon's decision, however, will invariably reverberate throughout packaging EPR, wherever he lands. Building upon the prospect of a successful challenge in Oregon, NAW is opening new fronts in other states. NAW filed a legal challenge to California's EPR law in the U.S. District Court for the Eastern District of California on June 22, 2026, and to Colorado's EPR law in the U.S. District Court for the District of Colorado on July 30, 2026. King & Spalding continues to monitor this wave of packaging EPR litigation to remain at the forefront one of the most dynamic fields in environmental law today.

[5] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).
[6] *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

King & Spalding + Extended Producer Responsibility

King & Spalding has a cutting-edge extended producer responsibility practice. We have been at the forefront of these laws long before Maine became the first state to pass a comprehensive EPR packaging law in 2021. Our EPR practice extends beyond paper and plastics to batteries, electronics recycling, and other product stewardship, and our clients include producers as well as service providers. The firm also has one of the deepest environmental teams among the AmLaw top tier firms, providing full-service capability and a global reach.

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