ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1081 (and consolidated cases)

# In the United States Court of Appeals for the District of Columbia Circuit

STATE OF OHIO, ET AL.,

*Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

*Respondents.*

On Petition for Review by the United States Environmental Protection Agency (No. EPA-HQ-OAR-2021-0257)

## BRIEF OF *AMICI CURIAE* AMERICAN COMMITMENT, AMERICANS FOR TAX REFORM, CAESAR RODNEY INSTITUTE, CALIFORNIA POLICY CENTER, CENTER OF THE AMERICAN EXPERIMENT, ENERGY AND ENVIRONMENTAL LEGAL INSTITUTE, FREEDOM FOUNDATION OF MINNESOTA, INDEPENDENT WOMEN'S LAW CENTER, INSTITUTE FOR ENERGY RESEARCH, INSTITUTE FOR REGULATORY ANALYSIS AND ENGAGEMENT, RIO GRANDE FOUNDATION, and THOMAS JEFFERSON INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Amici certify as follows:

### A. Parties and Amici Curiae

All parties, intervenors, and Amici appearing before the district court and in this Court are listed in the Briefs for Petitioners.

### B. Rulings Under Review

References to the rulings at issue appear in the Briefs for Petitioners.

### C. Related Cases

References to related cases appear in the Briefs for Petitioners.

## STATEMENT REGARDING CONSENT TO FILE

Pursuant to Circuit Rule 29(b), Amici state that all parties have consented to the filing of this Amicus brief.

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## IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THE CASE AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

*Amicus curiae* American Commitment Foundation is a 501(c)(3) charitable foundation organized to educate the general public about concepts that advance economic freedom and constitutionally limited government.

*Amicus curiae* Americans for Tax Reform believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. This *amicus* also believes that the government's power to control one's life derives from its power to tax. Finally, Americans for Tax Reform believes that power should be minimized.

*Amicus curiae* Caesar Rodney Institute is a non-profit, non-partisan think tank that creates independent, fact-based analyses of public policies that would enable Delawareans to make more informed decisions.

*Amicus curiae* The California Policy Center is an educational non-profit organization working for the prosperity of all Californians by eliminating public-sector barriers to freedom.

*Amicus curiae* Center of the American Experiment is more than a think tank. It not only researches and produces papers on Minnesota's economy, education, health care, the family, employee freedom and state and local governance, it also crafts and proposes creative solutions that emphasize free enterprise, limited government, personal responsibility and government accountability.

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*Amicus curiae* The Rio Grande Foundation's mission is to increase liberty and prosperity for all of New Mexico by informing citizens of the importance of individual freedom, limited government, and economic opportunity. The Rio Grande Foundation is dedicated to assessing the impact of regulation on American society.

*Amicus curiae* The Thomas Jefferson Institute crafts and promotes public policy solutions that advance prosperity and opportunity for all Virginians, envisioning a thriving economy where Virginians have the opportunity to succeed because economic and regulatory barriers are low, and individuals and parents are empowered to make informed choices for themselves and their families.

## STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Environmental Protection Agency ("EPA") rescinded The Safer Affordable Fuel Efficient Vehicles Rule Part One: One National Program ("SAFE I") rule and reinstated a waiver of Clean Air Act ("CAA") preemption for California's greenhouse gas ("GHG") standards and Zero Emission Vehicle ("ZEV") sales mandate. These are some aspects of California's Advanced Clean Car Program ("ACCP").

Yet that waiver violates the Constitution's federalism principles, most notably equal sovereignty. In addition, Congress has not authorized the EPA to grant this waiver. In fact, it has precluded the issuance of such a waiver. The CAA does not authorize this waiver; and the preemption provision of the Energy Policy and Conservation Act of 1975 ("EPCA") prohibits it. In the absence of a clear statement from Congress, the EPA's reinstatement of this waiver—it unsettles an established federal-state balance and concerns a matter of vast economic and political significance—should be invalidated.

## ARGUMENT

### I. THIS EPA WAIVER VIOLATES THE CONSTITUTION'S EQUAL-SOVEREIGNTY PRINCIPLE.

The Constitution requires the federal government to treat the sovereign states equally. *See Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013). Treating some States or their subdivisions better than others, for no good reason at that, is perfidious

to the federalism that is at the heart of our Constitution, for this principle has at its core the "union of political equals." Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979) (quoting *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889)). As the Supreme Court repeatedly has acknowledged, "the States in the Union are coequal sovereigns under the Constitution." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590—91 (2012).

The EPA has violated the Constitution's equal-sovereignty principle without any plausible justification whatsoever. In attempting to give California this waiver, it has favored California over her sister states. As Petitioners have explained, the EPA never has had a good factual reason to do so and many legal reasons not to do so. *See generally* Ohio Br.; Industry Pet'rs Br., *Ohio v. EPA*, No. 22-1081 (CADC). This Court should not let the EPA flout the Constitution's equal-sovereignty command; a long line of Supreme Court cases culminating in *Shelby County*; and the balance struck in favor of states' equal sovereignty during the original Constitution's adoption and ratification.

**A. Supreme Court Precedents Support the Equal-Sovereignty Principle.**

Although *Shelby County* arguably is the Supreme Court's most famous decision extolling the equal-sovereignty principle, it is only the latest in the long line of cases. The Court started long ago with the equal-footing cases. Those cases asked when, and under what conditions, the federal government had to treat the states as equals. In *Coyle v. Smith*, more than a century ago, the Supreme Court held that a federal statutory provision dictating to Oklahoma where its capital should be, once it became a State, violated the State's right to control and exercise its own sovereign authority under the Federal Constitution. 221 U.S. 559 (1911). Because the federal government could not similarly control the fate of existing states, the Court held that Congress could not thus pick on Oklahoma either. *Id.*

The Court reasoned that "'[t]his Union' was and is a union of States, *equal in power, dignity and authority*." *Id*. at 567 (emphasis added). The historic concept of equal sovereignty was an understood pillar of the Constitution, in cognizance of—and in exchange for—which the states had surrendered part of their sovereignty and entered the Union. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 322—23 (1934). And for good measure, the Supreme Court added in *Coyle*: "[T]he constitutional equality of the States is *essential* to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears[,]

… the Union will not be the Union of the Constitution." 221 U.S. at 580 (emphasis added).

Building on these precepts, the *Coyle* Court added: "To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power." 221 U.S. at 567. Not only would that be anomalous with the constitutional design, it actually "would violate the Constitution, which contemplates—indeed necessitates—a union of *equal* sovereigns." Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1113 (2016) [Colby] (emphasis added). As a consequence, Congress could not "by the imposition of conditions in an enabling act, deprive a new State of any of those attributes essential to its equality in dignity and power with other States." 221 U.S. at 568, 570.

*Coyle*, in some respects, was traversing already-plowed earth. In *Pollard's Lessee v. Hagan* (1845), notably, the Supreme Court already had recognized the equal-sovereignty principle's constitutional status—and has never looked back. 44 U.S. (3 How.) 212, 223. And even before *Pollard's Lessee*, there was language in at least some Supreme Court literature supporting this view. *See, e.g.*, *Mayor of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 258—59 (1842) (Catron, J., concurring) (expressing view that new states have "equal capacities of self-government with the old states, and equal benefits under the constitution of the United States"). A dozen

years after *Pollard's Lessee*, the Court recognized that the "perfect equality" of all "members of the Confederacy" in respect of their "attributes as ... independent sovereign Government[s]" "follow[s] from the very nature and objects of the Confederacy, [and] from the language of the Constitution." *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1857) (cleaned up).

Similarly, in *Permoli v. Mun. No. 1 of New Orleans*—a pre-Fourteenth Amendment case—the Supreme Court declined to countenance let the federal government coerce a State into protecting religious freedom. 44 U.S. (3 How.) 589 (1845). That was because before the Fourteenth Amendment's ratification, "[t]he Constitution [made] no provision for protecting the citizens of the respective states in their religious liberties." *Id*. at 609. And the federal statute which served as Louisiana's enabling act had conditioned Louisiana's statehood on its protecting religious liberty. *See id*.

*Permoli* started out by determining that the enabling act ceased to govern Louisiana's conduct once it had already become a State. *See id*. at 609—10. Once Louisiana entered the Union as a State, the Court said, Louisiana became part of an union of equals. *See id.* Congress, the Supreme Court determined, no longer could control, in the same pre-statehood sense, the body of Louisiana law. *See id.* That meant Louisiana now was free to change its laws, including those provisions that once were a condition of statehood. *See id.* Thus, the *Permoli* Court made it clear

that the federal government is required to treat the states equally *even* when it is exercising a legitimate federal power.

The Supreme Court kept following through with this principle. Illustratively, *Escanaba & Lake Michigan Trans. Co. v. City of Chicago* was a 1883 case concerning the free navigation of waterways for commercial purposes, a subject within well-recognized federal constitutional authority. 107 U.S. 678. The City of Chicago, under its Illinois law-conferred authority, had built several drawbridges over the Chicago River. Yet the federal enabling act had conditioned Illinois' statehood on letting navigation of the Chicago River be "forever free." *Id*. at 688 (quoting the Northwest Ordinance, 1 Stat. 50 (1789)). The shipping company wanted the drawbridges brought down because they were interfering with the movement of shipped goods on the River. *See id*. at 678—88.

The Supreme Court rejected this argument. The "forever free" restriction contained in the enabling act, said the Court, "could not control the authority and powers of the State after her admission." *Id*. at 688—89. That was because "[o]n her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them." *Id*. It followed that Illinois retained the authority to regulate navigable waters that fell within its own maritime borders, as part of its own "inherent sovereignty." Brief for Appellee at 3,

10, *Escanaba*, 107 U.S. 678 (No. 1057) (quoting *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876)). As far as the *Escanaba* Court was concerned, while the federal government could regulate navigable rivers, it could not extend to Illinois *less* sovereign authority to control her own maritime borders than it extended to other states. 107 U.S. at 689.

*Escanaba*, it is fair to say, applied the equal-sovereignty principle to matters beyond just the traditional aspects of state sovereignty to equality of the states (as far as federal treatment was concerned) as the bedrock principle across the board. *Id*. at 688—89. "Equality of constitutional right and power is the condition of all the States of the Union, old and new." *Id*. As the Court would go on to say less than a decade later: "There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits." *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892).

Since it simply "is not the case that the states are sovereign only in the areas in which they possess exclusive sovereignty under the Tenth Amendment," in the "many areas in which the states and the federal government possess concurrent sovereignty" the states deserve equal treatment. Colby 1115. The settled and prevailing understanding is that "[e]ach State stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). No longer is there be any serious

dispute about the "standard federalism axiom that all states are equal in value as quasi-sovereigns." David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 512—13 (2008).

Thoughtful doctrinal and historical scholarship has deduced that the equal-footing doctrine merely "is a doctrinal reflection of a broader constitutional mandate." Colby 1124. The equal-sovereignty principle is "a specific manifestation of a deep, fundamental, and general principle that 'the Constitution guarantees sovereign equality to the states'—all of them." *Id*. at 1124. That principle "necessarily" is "implied and guarant[e]ed by the very nature of the Federal compact" that our Constitution crystallizes and recognizes. *Withers*, 61 U.S. (20 How.) at 93. This line of precedent, there is some suggestion, "stand[s] for the proposition that Congress, *regardless of the power that it seeks to exercise*, is constrained to respect the constitutionally mandated sovereign equality of all of the states." Colby 1114 (emphasis added).

These cases eventually culminated in *Shelby County*, which is the Supreme Court's latest word on the subject. But first, a brief background would be apt. Four Terms before *Shelby County*, the Supreme Court had before it another case, *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). There, a Texas municipality had sought the right to seek bailout from the Voting Rights Act's ("VRA") requirement, in Section 5 of that landmark statute, to have its

election law changes "precleared" by the United States Department of Justice ("DOJ"). *See id.* at 200—01. This "preclearance" requirement applied to just 9 states and several municipalities. *See id.*; DOJ: Jurisdictions previously covered by Section 5 at the time of the *Shelby County* decision, https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

The Supreme Court granted the municipal plaintiff, and all political subdivisions, the right to file a bailout suit. *Northwest Austin*, 557 U.S. at 211. The Court interpreted §5 in light of "underlying constitutional concerns," which "compel[led] a broad[] reading of the bailout provision." *Id.* at 207. The Court further articulated that §5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy *equal sovereignty*." *Id.* at 202, 203 (cleaned up and emphasis added). The Court also maintained that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. Thus, *Northwest Austin*—resting on a long line of cases—vindicated the equal-sovereignty principle.[1]

[1] Even before *Northwest Austin*, this principle had pervaded our jurisprudence. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (observing that prevailing personal-jurisdiction jurisprudence relies on the states' "status as coequal sovereigns in a federal system"); *Wisconsin v. Michigan*, 295 U.S. 455, 462 (1935) (stating the "rule that the States stand on an equal level or plane under our constitutional system"); *Spooner v. McConnell*, 22 F. Cas. 939, 943 (C.C.D. Ohio 1838) (No. 13,245) ("[T]he states are equal. Equal in rank, equal in their powers of sovereignty ...."); *United States v. Williams*, 28 F. Cas. 647, 656 (C.C.D.C. 1833) (No. 16,711) (heeding "the principle of equality among sovereign states").

Then came *Shelby County*, in which an Alabama municipality asked the Supreme Court to declare unconstitutional under the Fifteenth Amendment the half-century old coverage formula for preclearance. 570 U.S. at 541—42. *Shelby County* was a straightforward application of earlier Supreme Court precedents. Explaining that "[t]he [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future," the Supreme Court in *Shelby County* recognized Congress' constitutional duty, if it wants to thus divvy up the Nation, to "identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id*. at 553. This reasoning hearkened back to *Northwest Austin's* observation that "we are now a very different Nation." 557 U.S. at 211.

Putting a finer point on this framework, the Supreme Court added that Congress "cannot rely simply on the past" in designing a way forward for the future. *Id*. at 553. Then, referring to *Coyle* and a host of its other precedents, the Supreme Court reaffirmed the "'fundamental principle of equal sovereignty' among the States." *Id*. at 544 (quoting *Northwest Austin*, 557 U.S. at 203). The original Constitution's longstanding equal-sovereignty principle, the Court's analysis implies, remained untouched by the Reconstruction Amendments to the Constitution. *See id.*; *see Lessee of Pollard v. Hagan*, 3 How. 212, 228—29 (1845); *Knight v. United States Land Assn.*, 142 U.S. 161, 183 (1891); *Shively v. Bowlby*, 152 U.S. 1, 26–31 (1894). The *Shelby County* Court noted that "'the [VRA] imposes

current burdens and must be justified by current needs.'" 570 U.S. at 536 (quoting *Northwest Austin*, 557 U.S. at 203). Based on these principles, *Shelby County* invalidated the VRA's coverage formula. *See id*. at 544—45, 556. And equal sovereignty was at the heart of it.

"[E]ven when Congress operates within its legitimate spheres of authority, it cannot limit or remove the sovereignty of some states, but not others." Colby 1121. This means that Congress may not "preclude only one state (or several states) from [pursuing some course of action] while allowing other states to do so." *Id*. at 1122. That would downgrade the rights, dignity, status, and sovereignty of the injured States "in an impermissibly discriminatory manner, depriving [them] of equal sovereignty with [their] peers." *Escanaba*, 107 U.S. at 688; *see also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 433, 435 (1855). What is more, that approach would run counter to the national constitutional commitment to "perfect equality" among the States in our Union. *Withers*, 61 U.S. at 92.

Equality of the states is existential for the States. It ensures their survival as distinct political entities as well as the protection of their dignity, authority, status, and sovereignty. "Sovereign equality of the member states is presumptively an essential, inherent structural feature of federalism itself." Colby 1137. Without equality, state sovereignty in our federalist structure would, sooner or later, cease to exist. *See id*. at 1138. If the federal government gets to treat some of the states better

than it treats others, then the "regional diversity" that federalism protects would be engulfed by antipathy and "animosity" among the states. *Id.* at 1136—37. As a result, "the central government, even when it operates only within its legitimate spheres, will be controlled by certain regional factions who will use its powers to discriminate against and minimize the authority of the other regional factions." *Id.* That fits this case to a tee.

The dangers of that factionalism are not merely theoretical. Those grave risks—indeed, certain perils—would defeat the whole point of having a "federation" like ours since "[i]t would contravene efforts to achieve unity, and it would fail to respect the integrity and the diverse cultures of the weaker regional states." *Id.* at 1137. Thus, the Constitution "compel[s]" the United States "to respect and treat all member states—regardless of their differences—as legitimate equal sovereigns." *Id.* Put simply, the Tenth Amendment and the other various constitutional provisions safeguarding federalism, not to mention the understanding with which the States entered the Union, would be rendered nugatory without an antidiscrimination safeguard. Equal sovereignty, or sovereign equality, is not just vital but an essential predicate to our federalist Constitution.

**B. Founding-Era History Supports the Equal-Sovereignty Principle.**

There is robust historical support for the equal-sovereignty principle and its corollaries. Even before our Constitution was adopted, Alexander Hamilton assured

the People of New York: "the State Governments" will "clearly retain all the rights of sovereignty which they before had and which were not . . . exclusively delegated to the United States." *The Federalist* No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton added that "[t]he necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power." *Id*. at 203. This meant: "[T]he rule that all authorities, of which the States are not explicitly divested in favour of the Union, remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the . . . constitution." *Id*.

A crucial *raison d'être* underlying the sovereign-equality principle, Representative John Holmes stated in 1824, is preserving national harmony and unity. *See* 41 ANNALS OF CONG. 547 (1824). "Equality of power is essential to the existence of a State. It cannot have less than the rest, and when it has, it ceases to be a State. Nothing is so essential to the harmony and perpetuity of the Union as this equality." *Id*. As already suggested, fragmentation, factionalism, and disunity would be rife *sans* the equality of the states.

That view courses through the veins of much of American history. In the earliest years of the Republic, the pamphleteer Joel Barlow articulated that "[t]he principle of equality [among the States] guaranteed harmonious union." PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS

IN AN AGE OF REVOLUTIONS 1776-1814, at 141 & n.48 (1993) [ONUF AND ONUF]. He said that "[a]mong the several states, the governments are all equal in their force, and the people are all equal in their rights." Joel Barlow, Advice to the Privileged Orders, in THE POLITICAL WRITINGS OF JOEL BARLOW 3, 67 (1796). Barlow reasoned that "[j]ust as the state constitutions secured individual rights, the federal Constitution secured the rights of states; these states—as self-governing republics guaranteed against internal subversion and external assault—were much more comprehensively, substantially, and enduringly 'equal' than the states of Europe could ever hope to be." ONUF AND ONUF 142.

What is more, "[i]n drafting and interpreting the Constitution, both the Framers and Founding-era judges were heavily influenced by certain European scholars who believed the law of nations to be intimately intertwined with natural law." Michael Morley, Note: *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 Yale L.J. 109, 122 (2002). And the concepts of equal sovereignty that influenced our Founders had an ancient pedigree in the law of nations, as derived from natural law. *See id*. at 122—23; Mark W. Janis, An Introduction to International Law 50—51 (1988); A. Pearce Higgins, Preface to the Seventh Edition of WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW, at xiv-xv (7th ed. 1917).

"When independence was achieved, the precepts to be obeyed ... were those of international law" (also known sometimes as the "law of nations"). *New Jersey v. Delaware*, 291 U.S. 361, 378 (1934). Under this view, all free nations were to be afforded "perfect equality and absolute independence of sovereigns." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1328 (1996). This makes sense because when surrendering part of their "absolute independence of sovereigns" in exchange for joining the Union, the states did not somehow abjure themselves of their "perfect equality" in relation to one another. *Id.*; *Withers*, 61 U.S. at 92.

That understanding continued into the early 19th century. During Congress' servitude debates in the antebellum era, Senator Charles Pinckney noted that "the Constitution recogni[z]es" the "natural equality of States, . . . not only because it does not deny them, but presumes them to remain as they exist by the law of nature and nations." 35 ANNALS OF CONG. 400 (1820). He added: "Inequality in the sovereignty of States is unnatural, and repugnant to all the principles of [natural] law." *Id.* Pinckney quoted Emmerich de Vattel's observation that "'[n]ature has established a perfect equality of rights between independent nations."' *Id.* (quoting EMER DE VATTEL, THE LAW OF NATIONS bk. 2, ch. 111, § 36 (London ed. 1797) (1758) [VATTEL]).

The "Union" under our Constitution, Senator Pinckney proclaimed, is a "confederation of States equal in sovereignty. . . . It is an equal Union between parties equally sovereign." 35 ANNALS OF CONG. 397 (1820); *see also* 34 ANNALS OF CONG. 1230 (1819) (statement of Rep. McLane) ("It is of the very essence of our Government, that all the States composing the Union should have equal sovereignty. It is the great principle on which the Union reposes—the germ of its duration."). "[T]he conceptualization of state sovereignty in Vattel's work" powerfully influenced the federalism that Americans adopted under our Constitution. Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1064—65 (2002).

Vattel had argued that "nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights." VATTEL, prelim. § 18. "[A] small republic is no less a sovereign state than the most powerful kingdom." *Id*. In Senator Pinckney's words: the Constitution "takes the States as it finds them, free and sovereign alike by nature. ... It diminishes the individual sovereignty of each, and transfers, what it subtracts, to the Government which it creates: it takes from all alike, and leaves them relatively to each other equal in sovereign power." 35 ANNALS OF CONG. 400 (1820) (statement of Sen. Pinkney).

A pervasive theme in the Constitutional Convention deliberations was the focus on equal sovereignty. Although "[t]he delegates to the Constitutional Convention vehemently disagreed about which form of representation was more fair and appropriate, … they did not disagree as to the antecedent assumption that the states were to possess equal sovereignty." Colby 1128. Observed Gunning Bedford of Delaware: "That all the states at present are equally sovereign and independent, has been asserted from every quarter of this house." 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 471 (Jonathan Elliot ed., J.B. Lippincott & Co. 2d ed. 1891) [ELLIOT'S DEBATES].

Unsurprisingly, the small-state delegates fought for equal state representation in Congress. William Patterson of New Jersey, championing this view, stated: "A confederacy supposes sovereignty in the members composing it, and sovereignty supposes equality." 5 *id*. at 176. He noted that "every State in the Union as a State possesses an equal Right to, and Share of, Sovereignty." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 613 (Max Farrand ed., 1911) [PHILADELPHIA RECORDS]. Maryland's Luther Martin characterized "an equal vote in each state" as indispensable to the "right of sovereignty." 5 ELLIOT'S DEBATES, at 176. Drawing upon the time-honored precepts laid down by several natural law philosophers, Martin spoke of the fact "that the states, like individuals, were, in a state of nature; equally sovereign and free." *Id*. at 248.

Much debate ensued, with supporters of exclusively proportional representation in Congress also weighing in hard for their side. *See* Colby 1130—32. In the end, the compromise "effectuated both visions of equal sovereignty, one for each congressional chamber." *Id.* at 1131. The Senate, according to James Madison, would "represent the States in their *political* capacity, the other House will represent the people of the States in their *individual* capacity." 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 499 (James Morton Smith ed., 1st ed. 1995) (emphases added). But the winner all around was equal sovereignty because "just as the people were to have equal sovereignty in their individual capacity, the States in their political capacity were to be equally sovereign." Colby 1132 (cleaned up). Madison himself championed this configuration to the Virginia ratifying convention as "a government of a federal nature, consisting of many coequal sovereignties." 3 ELLIOT'S DEBATES, at 381.

Because here the question involves the rights of the States in their political capacities, equal sovereignty is the applicable rule. Historical records, along with the constitutional text and structure as well as Supreme Court precedents, so establish.

**C. Equal Sovereignty is a Federalism Principle Rooted in the Constitution.**

Admittedly, some have raised the concern that equal sovereignty is not expressly spelled out in the Constitution. Leaving to one side for now that the Supreme Court repeatedly has recognized it as a constitutional rule, there are several problems with this argument. First, the quest for the Constitution's accurate meaning is the quest to honor all the rights, privileges, guarantees, obligations, and "'*public understanding*'" with which some entity was endowed under the Constitution's original public meaning. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2127—28 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)).

Second, this "ahistorical literalism" targeting the Constitution's structural principles "proves too much" because it flies in the face of well-established and entrenched constitutional doctrine. *Franchise Tax Board of Calif. v. Hyatt*, 139 S. Ct. 1485 (2019). Just a few Terms ago in *Hyatt*, the Supreme Court overturned a four-decade old precedent despite a similar counterargument. *See id.* (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)). In *Hyatt*, the Court held that "the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution." *Id*. at 1498—99. The *Hyatt* Court restored to the states their right to avoid being sued in the courts of a sister state without their consent. *See id*. at 1499.

The *Hyatt* Court was not quite done. Rejecting the contention that state sovereign immunity is not constitutionally protected just because it does not appear in black and white constitutional text, the Supreme Court noted that "[t]here are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review; intergovernmental tax immunity; executive privilege; executive immunity; and the President's removal power." *Id*. at 1498—99 (cleaned up). Equal sovereignty always has belonged in that pantheon of inviolable constitutional principles. And because the Constitution's structural bulwarks go to very heart of how our Republic is supposed to function, the Supreme Court generally has not let erroneous structural practices, even longstanding and commonplace ones, get in the way of restoring the correct constitutional principle. *See, e.g.*, *INS v. Chaddha*, 462 U.S. 919 (1983).

The equal-sovereignty principle requires that the reinstatement of this EPA waiver favoring California be invalidated. The dignity, authority, status, and sovereignty of California's sister states—including the State parties in this very litigation—grievously are offended by the federal government's bias in California's favor. It is "the federal sovereign['s]" constitutional duty to "govern impartially" that this EPA waiver irreparably has undermined. *Hampton v. Mow Sun Wong*, 426

U.S. 88, 100 (1976). Nor has the EPA advanced any credible, much less compelling, justification for that special treatment.

## II. CONGRESS HAS NOT AUTHORIZED THIS WAIVER.

Section 209(a) of the CAA states that "[n]o State ... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). At the same time, Section 209(b) empowers the EPA, *under limited circumstances*, to grant California a waiver to promulgate the State's own standards. Among the conditions, and pertinent to this case, is that California "need" those standards in order "to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B). California cannot overcome that demanding hurdle.

Under Section 209(b)'s plain text, California's conditions must be *both* "compelling" and "extraordinary" in order to justify a waiver. *See United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620—21 (2021) (analyzing conjunctives in statutes). And those terms should be deemed to have non-overlapping meanings since Congress is presumed to eschew textual superfluity when enacting statutes. *See Corley v. United States*, 556 U.S. 303, 314 (2009). In addition, because the CAA has not defined "compelling" or "extraordinary," the ordinary, contemporary meanings of those terms should be consulted. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). The most apt meaning of "compelling" refers to circumstances that are "force[ful]." WEBSTER'S NEW INTERNATIONAL DICTIONARY 463 (3d ed. 1961). Next,

"extraordinary" refers to conditions that are "most unusual" or "far from common." *Id*. at 807. With respect to "extraordinary," the comparators are other *states*—a forceful condition allegedly afflicting California must be *unique to California* in order for it to pass muster. And showing that California is worse off on a metric that also afflicts *other* parts of the country will not suffice.

This Court has observed that when addressing environmental issues, Congress wanted to avoid an "anarchic patchwork of federal and state regulatory programs." *Motor Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979). The Court has also noted that Section 209(b)'s waiver provision is "focus[ed] on local air quality problems" in California—conditions "that may differ substantially from those in other parts of the nation." *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979). Such observations are consistent with legislative history. *See* S. Rep. No. 90-403, at 33 (referring to California's "*peculiar* local conditions") (emphasis added); R-224 at 8 (noting that pertinent conditions might be "the acute susceptibility of the Los Angeles basin to concentrations of smog" and "frequent thermal inversions along the coast."); H.R. Rep. No. 90-728, at 22; 84 Fed. Reg. at 51,342.

California's GHG emissions do not qualify as an "extraordinary" condition under Section 209(b). When granting this waiver, the EPA said that "California is particularly impacted by climate change" because it tends to have "fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat." 87 Fed. Reg. at 14,363.

But those are not "California-specific circumstances," 84 Fed. Reg. at 51,341, 51,343, within Section 209(b)'s contemplation. Some time ago, the EPA itself had conceded that "[m]any parts of the United States, especially western States, may have issues related to drinking water ... and wildfires, and effects on agriculture; these occurrences are by no means limited to California." 84 Fed. Reg. at 51,348.

Consequently, "California is not worse-positioned in relation to certain other areas of the U.S., and indeed is estimated to be *better*-positioned, particularly as regards the Southeast region of the country." *Id.* at 51,348 n.278 (emphasis added). So climatic or other conditions in California "are not sufficiently different from the conditions in the nation as a whole to justify separate State standards." *Id*. at 51,344. And certainly those California conditions are not sufficiently different from any *global* phenomena such as the greenhouse gases to justify a waiver. Once upon a time, the EPA too had acknowledged that "extraordinary" referred to California-specific conditions such as the State's "geographical and climatic conditions (like thermal inversions)." 87 Fed. Reg. at 14,365, 14,354 n.191. All this evidence shows that the waiver in question here is not authorized by the CAA.

This is not a close question; and there is no ambiguity in the pertinent statutory framework. Notably, EPCA's plain text, too, confirms this reading of CAA. EPCA preempts states from enacting or enforcing regulations "related to" fuel economy or average fuel economy. 49 U.S.C. § 32919(a). It does so because "[o]ne of Congress'

objectives in EPCA was to create a *national* fuel economy standard." 83 Fed. Reg. 42,986, 43,233 (Aug. 24, 2018) (emphasis added). Averting regulatory balkanization and the resultant confusion is an understandable legislative aim.

The plain, contemporary meaning of "related to," as used in EPCA, refers to: "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' ...—and the words thus express a broad pre-emptive purpose." *Morales v. Trans World Airlines*, 504 U.S. 374, 383—84 (1992). So much so that other federal courts have held EPCA to preempt local measures that encourage the use of hybrid taxis, thereby "relat[ing] to" fuel efficiency—a matter resting exclusively in the federal preserve. *See, e.g.*, *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157—58 (2nd Cir. 2010); *Ophir v. City of Bos.*, 647 F. Supp. 2d 86, 94 (D. Mass. 2009). And in this case, California's greenhouse-gas ("GHG") standards and zero-emission-vehicle ("ZEV") sales mandate, as part of the ACCP, undoubtedly are "related to fuel economy standards." Ohio Br. at 33—41. Accordingly, EPCA preempts the California standards in question.

A broader picture now emerges. The EPA is trying to reinstate a California-only waiver that: (1) upsets a delicate federal-state "balance" (as the equal-sovereignty discussion shows), *see Gregory v. Ashcroft*, 501 U.S. 452, 460—61 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), (2) on a question of "'vast economic and political significance'" (also known sometimes as the "major questions

doctrine"), *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2609—10 (2022). On *each* of these grounds, the EPA is powerless to act without a clear statement from Congress so authorizing it.

This waiver is a major policy question implicating federalism. Whereas in *West Virginia*, the EPA was trying to "substantially restructure the American energy market," *id.* at 2610, here that Agency—quite comparably—is "assert[ing] the authority to allow California to substantially restructure the American automobile market, petroleum industry, agricultural sectors, and the electric grid, at enormous cost and risk." Industry Pet'rs Br. at 23—25. And Congress never afforded the EPA any clear authorization. In fact, Congress has not even delegated the authority, on such a recurring issue, to federal agencies, much less to state regulators. *See id.* at 24—25. Consequently, there is no support in federal law for EPA's waiver favoring California—and plenty of prohibition on it.

## III. CONCLUSION

This Court should invalidate the waiver the EPA issued to California.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies the following:

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,498 words.

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. (a)(5) and (a)(6) because it was prepared in Microsoft Office Word, using a 14-point Times New Roman font, a proportionally spaced typeface.

Dated: October 31, 2022

*/s/ Riddhi Dasgupta*
RIDDHI DASGUPTA

## CERTIFICATE OF SERVICE

I certify that on October 31, 2022, the foregoing Brief was electronically filed with the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which will serve notice of this filing on all counsel for the parties.

*/s/ Riddhi Dasgupta*
RIDDHI DASGUPTA