ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1230

Consolidated with Nos. 19-1239, 19-1241, 19-1242, 19-1243, 19-1245, 19-1246, 19-1249, 20-1175, and 20-1178

UNION OF CONCERNED SCIENTISTS, ET AL.,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION, ET AL.,
Intervenors for Respondent.

On Petition for Review of Agency Action by the National Highway Traffic Safety Administration, No: NHTS-84FR51310

BRIEF FOR *AMICUS CURIAE* PROFESSOR LEAH M. LITMAN IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus* Professor Leah M. Litman certifies the following:

(A) Parties and Amici. All parties and intervenors appearing before this Court are listed in the opening briefs for Petitioners. No *amici* are listed in the opening briefs, including *amicus* Professor Leah M. Litman. On May 26, 2020, all parties consented to the filing of amicus briefs.

(B) Rulings Under Review. These consolidated petitions challenge actions of the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration jointly published as "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019).

(C) Related Cases. By Orders on November 19, 2019, November 20, 2019, November 25, 2019, November 27, 2019, December 2, 2019, and June 3, 2020, this Court consolidated the cases filed by the petitioners listed above in Nos. 19-1239, 19-1241, 19-1242, 19-1243, 19-1245, 19-1246, 19-1249, 20-1175, and 20-1178 into Lead No. 19-1230. The U.S. District Court for the District of Columbia has consolidated and stayed three cases in which petitioners here have challenged the same action of

the National Highway Traffic Safety Administration that is at issue here. *California v. Chao*, No. 19-cv-2826-KBJ (filed Sept. 20, 2019). *Amicus* is not aware of any other related cases.

Respectfully submitted,

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STATEMENT OF IDENTITY OF AMICUS CURIAE, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

In justifying the Rule under review, the federal respondents relied in part on the doctrine of equal sovereignty to justify eliminating California's exemption from preemption. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310, 51,322, 51,347, 51,349 n.281 (Sept. 27, 2019). The intervenor States of Ohio, Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Missouri, Nebraska, South Carolina, Texas, Utah, and West Virginia have indicated that they intend to rely on that rationale, arguing that "not only *may* the federal government block California's special status to regulate emissions, it *must* do so because that special status is unconstitutional under the 'fundamental principle of equal sovereignty' among the States." States' Mot. For Leave to Intervene as Resp'ts (Motion) 6, Nov. 26, 2019, ECF No. 1817763 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). That proposed argument fundamentally misunderstands the equal-sovereignty doctrine.

Amicus Professor Leah M. Litman is an Assistant Professor of Law at the University of Michigan Law School. Professor Litman has extensively studied and written about such topics as constitutional law, public

law, and regulatory policy. In particular, she has published a comprehensive analysis of the evolution and proper understanding of the equal-sovereignty doctrine. Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (May 2016). With this *amicus* brief, Professor Litman intends to illuminate for the Court the origins and nature of the equal-sovereignty doctrine invoked by the intervenor States, and to explain why that doctrine does not apply in this case.

All parties have consented to the filing of amicus briefs in this case.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No person other than *amicus* Professor Leah M. Litman and her counsel authored any part of this brief or contributed money intended to fund its preparation or submission.

STATEMENT OF ISSUE PRESENTED

In this brief, *amicus* Professor Leah M. Litman addresses the following argument, which the intervenor States have indicated they will make in their brief in support of respondents:

Whether the equal-sovereignty doctrine prohibits the federal government from exercising its Commerce Clause authority to grant an exception from preemption to only one State.

SUMMARY OF ARGUMENT

The intervenor States' invocation of the equal-sovereignty doctrine must be rejected because it is inconsistent with the origin and evolution of that doctrine and because it inhibits, rather than promotes, state sovereignty.

A. The Supreme Court has explained that all States are coequal sovereigns under the Constitution, entitled to the benefits of the doctrine of equal sovereignty. That doctrine first took root in a series of cases in which the Court examined whether conditions Congress had placed on the admission of new States were constitutional. The Court explained the equal-sovereignty doctrine in federalist terms, holding that the doctrine prevents Congress from enacting legislation that either exceeds its constitutionally enumerated powers or impinges on powers reserved to the States under the Tenth Amendment. The Court never suggested that the doctrine prevents Congress from treating States differently; indeed, from its earliest days, Congress has enacted legislation that imposes burdens on or bestows benefits to select States only.

More recently, the Supreme Court returned to the topic of equal sovereignty in reviewing the constitutionality of the 2006 reauthorization

of certain temporary provisions of the Voting Rights Act of 1965, 52 U.S.C. § 10101, *et seq.*, in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and again in *Shelby County v. Holder*, 570 U.S. 529 (2013). The Court reaffirmed *both* that the equal-sovereignty doctrine is rooted in federalism principles *and* that the doctrine is not a bar on Congress's treating States differently. The Court explained that the statutory provisions at issue in those cases intruded on an area of concern that the Framers intended to reserve to the States—and that the selective application of certain restrictions on the ability of covered States to enact voting-related laws expressed moral judgment about those covered States. In those circumstances, the Court held, Congress was required to meet a higher burden to justify its selective application of restrictions to certain States.

B. The doctrine of equal sovereignty does not apply in this case because in regulating vehicle emissions, Congress acted pursuant to its Commerce Clause authority to address an area of core federal concern in a manner that does not suggest wrongdoing by any State.

Unlike the provisions at issue in *Shelby County* and *Northwest Austin*, the statutory provisions at issue here were enacted pursuant to Congress's authority under the Commerce Clause. Congress's commerce authority is an affirmative grant of power to legislate on matters of national concern *without* a finding of wrongdoing by any State or other actor. Congress's commerce power is therefore not reactive in the same way that its power to enforce the Fifteenth Amendment is. Legislation regulating interstate commerce is inherently one of national concern and by definition is not among the powers reserved by the Constitution to the States. In addition, the Supreme Court has held that legislation to protect the environment falls squarely within Congress's core legislative powers, unlike the regulation of elections at issue in *Shelby County* and *Northwest Austin*. And nothing about the preemption exemption afforded to California suggests wrongdoing by any State. Indeed, Congress has enacted legislation singling out particular States for differential treatment from its earliest days. Neither intervenor States nor the federal respondent suggest any limiting principle that would distinguish those exercises of congressional authority.

In the end, intervenor States' arguments would result in *less* authority and flexibility for States and *more* coercive authority of the federal government. The States are not seeking a preemption exemption for all States or even just for themselves. Instead, they are asking for an expansion of the preemptive effect of federal law by eliminating California's exemption. But that result will offer States *fewer* choices, not more, a result that is antithetical to the flexibility and innovation that federalism is designed to promote. Rather than choosing between two emissions standards, States will be forced to adopt the federal standard. It is difficult to see how a forced expansion of federal power would promote any State's sovereign dignity. This Court should therefore reject the intervenor States' and federal respondent's reliance on the equal-sovereignty doctrine.

ARGUMENT

THE EQUAL-SOVEREIGNTY DOCTRINE DOES NOT PROHIBIT EPA FROM GRANTING A PREEMPTION WAIVER TO CALIFORNIA

This Court should reject the intervenor States' invocation of the equal-sovereignty doctrine. The States misunderstand the origins and evolution of that doctrine and seek a result that is hostile to—not respectful of—state sovereignty.

A. The Equal-Sovereignty Doctrine Does Not Require Congress to Treat All States the Same for All Purposes.

The intervenor States suggest (Motion 6) that the doctrine of equal sovereignty requires Congress and the federal government to treat all 50 States the same in legislation and regulations, regardless of the purpose of the legislation or regulation and regardless of relevant differences among States. That argument has no basis in the Constitution, let alone the history and evolution of the equal-sovereignty doctrine.

1. The United States Constitution does not mention the equal-sovereignty doctrine. Although some of Congress's enumerated powers include a command of "uniform[ity]," U.S. Const. art. I, § 8, cl. 1; *id.* cl. 4, even those provisions do not require strictly equal treatment of States by Congress. *See*, *e.g.*, *United States v. Ptasynski*, 462 U.S. 74, 80, 82, 84 (1983) (holding that the Constitution's command that "all Duties, Imposts and Excises shall be uniform throughout the United States" neither "require[s] Congress to devise a tax that falls equally or proportionately on each State" nor "prohibit[s] all geographically defined classifications"); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 156, 159 (1974) (holding that the Constitution's command that "Laws on the subject of Bankruptcies" be "uniform" "throughout the United States" "does not deny

Congress the power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems"). And the enumerated power at issue here—Congress's power "To regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3—includes no such command of uniformity.

The Supreme Court has nevertheless held, as the intervenor States correctly point out (Motion 6), that "the States in the Union are coequal sovereigns under the Constitution," *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012), entitled to the benefits of the "fundamental principle of equal sovereignty," *Nw. Austin*, 557 U.S. at 203. The Court has made clear, however, that the equal-sovereignty doctrine does not require Congress to treat all States equally in all circumstances. Rather, the doctrine is an expression of federalism, confirming that Congress may act only pursuant to its enumerated powers and not in contravention of the powers reserved to the States.

The Supreme Court initially developed the doctrine of equal sovereignty in examining the validity of requirements Congress placed on new States as a condition of admission to the Union. The most expansive

early discussion of the doctrine is found in *Coyle v. Smith*, where the Court struck down a federal requirement that Oklahoma retain its state capital in the City of Guthrie until 1913 as a condition of admission. 221 U.S. 559, 564-573 (1911). In examining Congress's power to admit a new State, the Court explained that "[i]t is not [a power] to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union." *Id.* at 566. It is, instead, "a 'power to admit states,'" which by definition possess "the powers possessed by the original states which adopted the Constitution." *Ibid.*

In *Coyle*, the Court anchored the equal-sovereignty doctrine in the federalist structure of the Constitution whereby Congress is limited to its enumerated powers and the balance of powers is reserved to the States and the people. The Court thus explained that "when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states"—and, critically, "that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which

would not be valid and effectual if the subject of congressional legislation after admission." *Coyle*, 221 U.S. at 573. In other words, the equality among States that the Constitution guarantees is the equal benefit of constitutional limits on federal authority. The Court noted that the notion that Congress could direct a State already admitted to the Union where to locate its capital "would not be for a moment entertained." *Id.* at 565. And because Congress could not impose such a requirement on an existing State, the doctrine of equal sovereignty prevented it from doing so on a new State as a condition of admission. *Id.* at 567 ("The power is to admit 'new states into *this* Union.' 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.").

That federalism-based understanding of the equal-sovereignty principle is reflected in other early decisions considering conditions on the admission of new States. And in each of those decisions, the Court similarly held that Congress could not impose a condition that was either outside of its enumerated powers or reserved to the States under the structure of the Constitution. *E.g.*, *Escanaba & Lake Mich. Transp. Co.*

v. City of Chi., 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new."); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 228-229 (1845) (holding that challenged provision "would be void if inconsistent with the Constitution of the United States").

Thus, the doctrine of equal sovereignty is *not*, as some have suggested, a rule that Congress must treat all States the same for all purposes. Nor is it a rule that Congress may not impose conditions on a State's admission to the Union that were not imposed on the original States. To the contrary, Congress has frequently imposed special conditions on admission, including on States readmitted after the Civil War and on States newly admitted in the Twentieth Century. *See*, *e.g.*, New Mexico-Arizona Enabling Act, ch. 310, § 2, 36 Stat. 557, 559 (1910) (requiring New Mexico and Arizona to maintain English-speaking schools); Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894) (requiring Utah to ban polygamy). *See* Litman, 114 Mich. L. Rev. at 1218-1219. Rather, the doctrine prohibits Congress from exceeding its enumerated powers under the Constitution and from otherwise intruding on the powers secured by the Constitution to the States.

2. As the intervenor States note (Motion 6), the Supreme Court recently returned to the topic of the equal-sovereignty doctrine in the context of examining the continuing validity of parts of the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10101, *et seq.* *See Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). Although the Court's discussion of the equal-sovereignty doctrine in those cases expanded the doctrine beyond the context of Congress's admitting new States to the Union, the Court neither held nor suggested, as the States posit, that the doctrine requires Congress to treat all States the same for all purposes. To the contrary, the Court reaffirmed that Congress may apply different rules to a subset of States, "reject[ing] the notion that the principle operate[s] as a *bar* on differential treatment outside th[e] context" of "the admission of new States." *Shelby Cty.*, 570 U.S. at 544 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328-329 (1966)). The Court held instead that differential treatment of States is permissible when it "makes sense in light of current conditions." *Id.* at 553. And the Court reaffirmed that determining *when* Congress may treat States differently must be guided by ordinary principles of federalism.

In *Northwest Austin* and again in *Shelby County*, the Supreme Court considered the constitutionality of Congress's 2006 reauthorization of Section 5 of the VRA, 52 U.S.C. § 10304. Section 5 prohibited covered States from enacting any law or practice that would affect voting without first obtaining permission from the federal government or a federal court. *Shelby Cty.*, 570 U.S. at 544. Congress determined which States were subject to the requirements of Section 5 by relying on the so-called coverage formula in Section 4, which referenced voting-related data from the 1960s and early 1970s. *Id.* at 551. Although Section 4 on its face treated all States equally in the sense that it applied the coverage criteria to every State, its effect was to single out only some States for coverage under Section 5 and other provisions. When Congress reauthorized Section 5 in 2006, it maintained the same coverage formula in Section 4. The Court declined to decide the constitutionality of that reauthorization in *Northwest Austin*, 557 U.S. at 211, but ultimately held that Congress's continued reliance on the old data in the coverage formula violated the doctrine of equal sovereignty, *Shelby Cty.*, 570 U.S. at 557.

In so holding, the Court in *Shelby County* confirmed that the equal-sovereignty doctrine is rooted in principles of federalism, first examining

whether the conditions Congress placed on a subset of States were within Congress's enumerated powers. The Court explained that "the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens" and emphasized that "[t]his 'allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.'" *Shelby Cty.*, 570 U.S. at 543 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). Applying those principles to the VRA, the Court explained that Section 5's preclearance requirement applied to "any law related to voting," including those governing state and local elections. *Id.* at 535. Although the Constitution vests Congress with some authority over federal elections, *see id.* at 536, the Court emphasized that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections" more generally, *id.* at 543 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991)), including by exercising "'broad powers to determine the conditions under which the right of suffrage may be exercised,'" *ibid.* (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965)).

The Court's approach to the equal-sovereignty doctrine in *Shelby County* was, at least to that extent, consistent with its decision in *Coyle* (which the Court relied on in *Shelby County*, 570 U.S. at 544) because it first examined whether the challenged congressional action was squarely within Congress's enumerated powers. Critical to the Court's application of the equal-sovereignty doctrine was the fact that the VRA inverted the usual relationship between state and federal authorities with respect to regulation of elections. In the ordinary course, a state law governing elections would be presumptively valid—and subject to invalidation only if it were preempted by conflicting federal regulation of the same subject or if it were ultimately shown to violate a federal prohibition such as the Fifteenth Amendment's prohibition on race discrimination in voting. Under the VRA, in contrast, any election-related law enacted by a covered State or any of its subdivisions was presumptively *invalid* and could not be enforced unless or until the federal government (or a federal court) gave its permission. That inversion of the usual constitutional allocation of power, the Court held, required a particularly strong justification for subjecting only some States to the requirements of Section 5. *Id.* at 552-553.

In that respect, the Court's analysis in *Shelby County* added a new element not present in its early decisions discussing the equal-sovereignty doctrine. Unlike Congress's authority under its Article 1 powers (*e.g.*, under the Commerce Clause or the Spending Clause), Congress's authority to act under the Fifteenth Amendment is limited to addressing denials of the right to vote on the basis of race. That power is therefore predicated on a finding of morally culpable behavior—either in a particular application of legislation such as under the intent prong of Section 2 of the VRA or by a particular set of jurisdictions such as under Section 5. In the Supreme Court's view, Congress's decision in 2006 to reauthorize Section 5 under the existing coverage formula reflected a moral judgment by Congress about whether the covered States could be trusted *now* to follow federal and constitutional mandates based on their misconduct of decades earlier. That moral judgment, the Court held, was an affront to the covered States' dignity because it was based on what the Court viewed as stale data and could not be linked to "current conditions." *Shelby Cty.*, 570 U.S. at 553.

To be clear, the Court in *Shelby County* reaffirmed that Congress *can* draw distinctions between and among States without running afoul

of the equal-sovereignty doctrine when Congress acts pursuant to its enumerated powers—including its power to enforce the Fifteenth Amendment, inherent moral judgments notwithstanding. 570 U.S. at 544 (citing *Katzenbach*, 383 U.S. at 328-329); *id.* at 553. But the Court added a new element in *Shelby County* to the equal-sovereignty mix: a heightened burden to justify differential treatment of States when enforcing the Fifteenth Amendment with reference to "current conditions" rather than "the past." *Id.* at 553.

B. The Doctrine of Equal Sovereignty Does Not Prohibit EPA From Granting a Preemption Exemption to California Alone.

With the origins and evolution of the equal-sovereignty doctrine set out, it is easy to understand why that doctrine does not prohibit Congress or any federal agency from granting a preemption exemption to California alone.

1. The exercise of congressional authority at issue here is distinct in every relevant sense from the exercise of congressional authority at issue in *Shelby County*. In regulating vehicle emissions, Congress

acted (1) pursuant to its authority under the Commerce Clause (2) to address an area of core federal concern (3) in a manner that does not even hint at wrongdoing by *any* State.

It is undisputed that Congress enacted the statutes at issue here pursuant to its authority under the Commerce Clause. Congress's authority under that power is materially different for purposes of the equal-sovereignty doctrine than it is under the Fifteenth Amendment. The subject of interstate commerce is squarely within the core of the federal government's—not the States'—authority. "Congress' exercises of Commerce Clause authority are aimed at matters of national concern" where "national solutions will necessarily affect states differently." *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 238 (3d Cir. 2013), *abrogated on other grounds by Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

To be sure, the Fifteenth Amendment gives Congress authority to enforce the antidiscrimination guarantees of that amendment—but that power is reactive in a way that Congress's commerce power is not. Legislation to enforce the Fifteenth Amendment must be predicated on (or

require a showing of) a constitutional violation. Congress's authority under other enumerated powers—including the Commerce Clause—is not restricted in the same way. The Constitution grants to Congress the affirmative authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. That enumerated power is affirmative in a way that Congress's authority under the Reconstruction Amendments has not been construed to be.

The difference between the two powers is reflected in the level of scrutiny courts apply to legislation enacted under each. Unlike the rational-basis review applicable to commerce legislation, courts apply a much more searching review to legislation enacted pursuant to one or more of the Reconstruction Amendments. The Supreme Court has held that legislation to enforce the guarantees of the Fourteenth Amendment "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). And, although the Court declined in *Northwest Austin* to decide what standard is applicable to legislation to enforce the Fifteenth Amendment, 557 U.S. at 204, it applied some form

of heightened review in *Shelby County*, requiring a showing that the "'statute's disparate geographic coverage is sufficiently related to the problem that it targets,'" 570 U.S. at 542 (quoting *Nw. Austin*, 557 U.S. at 203). Because Congress need have only a rational basis for its regulation of interstate commerce, heightened scrutiny is not appropriate for any aspect of commerce legislation, including any differential treatment of States.

Relatedly, the subject of the legislation at issue here—environmental protection—is quintessentially one of federal concern, *unlike* the subject of the legislation in *Shelby County* or in *Coyle*. The Supreme Court has held that "[e]nvironmental protection is undoubtedly an area 'within national legislative power,'" including regulation of the emission of air pollutants. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). Indeed, the Court suggested that federal regulation of air pollution is commanded by "the basic scheme of the Constitution." *Ibid.* (quoting Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964)). And nothing in the Constitution or in any Supreme Court decision even hints that environmental protec-

tion is a legislative sphere reserved to the States under the Tenth Amendment. The regulatory scheme at issue in this case thus falls squarely within Congress's core powers. In stark contrast, the Court explained that the ability to regulate elections at issue in *Shelby County* was an area "the Framers of the Constitution intended the States to keep for themselves." 570 U.S. at 543 (quoting *Gregory*, 501 U.S. at 461-462). The Court used similar language in *Coyle*, explaining that "[t]he power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers." 221 U.S. at 565. Courts that have considered equal-sovereignty challenges to federal laws in the wake of *Shelby County* agree that the doctrine does not apply at all when, as here, Congress does not "intru[de] into a sensitive area of state or local policymaking." *Mayhew v. Burwell*, 772 F.3d 80, 93 (1st Cir. 2014); *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 238. Because the federalism concerns that drove the decisions in *Shelby County* and *Coyle* do not apply here, this Court should reject the intervenor States' invocation of the equal-sovereignty doctrine.

Unlike when Congress enforces the Fifteenth Amendment, moreover, the concept of wrongdoing by States has no place in evaluating whether an exercise of Congress's commerce power is constitutional. Allowing California to enact laws that are more protective of the environment than federal law does not cast aspersions on the equal dignity of other States and does not suggest any wrongdoing by any State. To the contrary—as discussed *infra* pp. 24-27—the challenged scheme gives States *more* flexibility than the Constitution requires and more flexibility than would be allowed without the exemption for California. Thus, nothing in the Supreme Court's equal-sovereignty cases suggests that that doctrine would apply at all in this case, let alone that it would prohibit Congress from granting a preemption exemption to California alone.

Because the equal-sovereignty doctrine is not implicated when Congress draws a rational distinction pursuant to an enumerated power that is subject to rational-basis review, this Court should reject the intervenor States' arguments to the contrary as well as the federal agencies' reliance on that doctrine in their rulemaking. Congress routinely enacts laws that treat States differently pursuant to its commerce powers and its authority to tax and spend. For example, Congress has afforded special

treatment to intervenor Texas's electric-grid operator in recognition of the operator's unique regulatory competency. 16 U.S.C. §§ 824k(k), 824p(k), 824q(h), 824t(f). Federal law also expressly establishes "[s]pecial rules for Wyoming, [intervenor] Ohio, [intervenor] Alaska, Iowa, [intervenor] Nebraska, Kansas, and Oregon," allowing those States to permit certain commercial vehicle combinations not permitted in other States. 49 U.S.C. § 31112(c). The Employee Retirement and Income Security Act preempts all state laws that "relate to any employee benefit plan," *except* "the Hawaii Prepaid Health Care Act." 29 U.S.C. § 1144(a), (b)(5)(A). Federal law governing the disposal of radioactive waste contains state-specific provisions for Washington, Nevada, and intervenor South Carolina, but not for any other State. 42 U.S.C. § 2021e(b)(1), (2), (3). And federal law requires only four States (intervenor Alaska, Idaho, Oregon, and Washington) to advise the federal government "of all pertinent laws or regulations pertaining to the harvest of Pacific salmon." 16 U.S.C. § 3635. *See also* Litman, 114 Mich. L. Rev. at 1243-1246 (listing other examples); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070-1071 (2016) (discussing various ways in which Congress has provided special statutory treatment to intervenor Alaska). And no doctrine of constitutional

law prevents Congress from exercising its Spending Clause authority to benefit particular regions or States, as it does routinely.

Congress's differential treatment of States is not a new legislative practice. The first and second Congresses regulated merchandise reports for ships, for example, by establishing different statutory reporting requirements based on which State a ship docked in. 1 *Laws of the United States of America*, ch. 35, § 20, pp. 199-200 (1796) (specifying that each shipmaster had "twenty-four hours after the arrival" of the ship to make the report "except in the state of [intervenor] Georgia, where such report shall be made within forty-eight hours"). *See also* Litman, 114 Mich. L. Rev. at 1242-1243 (listing other examples). Neither the intervenor States nor the federal respondent have offered any limiting principle that would distinguish the preemption exemption granted to California from any of those current or historical examples.

2. In their motion to intervene, the intervenor States do not play out the implications of their argument in this case. But understanding those implications clearly illustrates why their argument is wrong.

Under ordinary preemption principles, the intervenor States have *no* right to promulgate vehicle-emissions standards that are different

from or conflict with the standards promulgated by the federal government. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). By allowing California to promulgate alternative standards—and by allowing other States to choose between the federal standards and California's standards, Congress has offered those 49 States *more* options, not fewer. It is difficult to see how that could be an affront to state sovereignty.

The intervenor States complain that, because of populous California's market power, auto manufacturers as a practical matter conform to California's emissions standards rather than to the less-protective federal standards—resulting in higher prices for cars purchased in the intervenor States even though those States prefer the less-protective federal standards. Of course, if Congress treated all 50 States the same by allowing each one to promulgate its own emissions standards, the result would be the same—or possibly "worse" from the perspective of the intervenor States—because car manufacturers would presumably continue to adapt to the most protective standards, or at least to the most protective

standards in the State or States with a sufficiently large market share. Such a result would not address the injury the intervenor States allege. Instead, the States ask that the supposed violation of their sovereign dignity be remedied by a *greater* exercise of federal authority. That result would be a bizarre expression of respect for States' sovereignty, to say the least.

Ordinarily, a State asserting a claim under the equal-sovereignty doctrine seeks to be treated as favorably as the most favorably treated States—by eliminating a special burden placed on it or by obtaining the special favorable treatment afforded to another State. Not this time. In this case, the intervenor States argue that the federal government was required to exert *more* federal authority by preempting *more* state legislative and policy goals. The equal-sovereignty doctrine was developed and has always been applied as a limit on congressional power, not a mandatory boost. No case discussing the doctrine supports such a result.

It bears repeating that the intervenor States do not appear to be seeking the authority to promulgate their own emissions standards. They just do not want any other State—or at least any State with a large market share—to be able to promulgate its own standards. The States'

failure to seek any expansion of its own authority is difficult to square with its argument that the longstanding statutory and regulatory scheme somehow violated the intervenor States' sovereignty. In short, they are not arguing that the longstanding scheme prohibited them from doing anything they had a right—or even wanted—to do. Accepting the States' assertion that the equal-sovereignty doctrine applies in these circumstances would be unprecedented and a dangerous expansion of that limited doctrine.

Ironically, the intervenor States' argument would promote *unequal* treatment of States in some circumstances and would undercut one of the core purposes of federalism. The geographic, demographic, and economic diversity among States is immense. Under the intervenor States' view, Congress is prohibited from taking account of such differences and must instead adopt a one-size-fits-all approach to legislation, even when formally treating all States equally would visit very unequal consequences on some States. A law prohibiting taxation of all federal land, for example, would formally treat all States equally, but would have the effect of exempting from taxation much larger portions of western States than of other States. From the perspective of the western States, that treatment

would be unequal. That is undoubtedly why Congress does not do that, but instead adapts legislation to accommodate State-specific circumstances and concerns. *See supra* pp. 22-24. Indeed, the very legislative classification at issue here is designed in part to address geographic and environmental concerns that are specific to California—just as the tax provision upheld in *Ptasynski* that exempts certain Alaskan oil from taxation is designed to address geographic and environmental issues that are specific to intervenor Alaska. 462 U.S. at 85-86. *See* Br. for State and Local Gov't and Public Int. Pets. 5-8 (discussing history of California's regulation of vehicle emissions and its particular need for such regulations).

By the same token, intervenor States' view of the equal-sovereignty doctrine would have the effect of stifling the very "innovation and experimentation" that federalism is designed to promote. *Bond*, 564 U.S. at 221. Under the States' view, *no* State is entitled to innovate and experiment unless *all* States are entitled to do so. It is not difficult to imagine an industry—including in the agricultural, mining, or car-manufacturing sectors—that could not accommodate 50 different standards but can adapt to a smaller range of standards. Under the intervenor States' view,

Congress could not allow a subset of States with unique concerns related to such an industry to experiment with innovative solutions to local problems. Nothing in the Constitution supports the notion that when Congress legislates pursuant to the Commerce Clause, it must choose between imposing a single national standard or tolerating 50 different standards. That approach offers literally no federalism advantage and does nothing to advance the equal sovereignty or dignity of any State.

CONCLUSION

This Court should reject the federal respondent's and the intervenor States' argument that the equal-sovereignty doctrine prohibits Congress or federal agencies from providing a preemption exemption to California alone.

Respectfully submitted,

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July 6, 2020

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on July 6, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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