ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230 and consolidated cases

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

UNION OF CONCERNED SCIENTISTS, et al.,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.
Respondents.

On Petitions for Review of Action by the National Highway Traffic Safety Administration and the U.S. Environmental Protection Agency

BRIEF OF INTERVENORS THE STATES OF OHIO, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, MISSOURI, NEBRASKA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

All parties, intervenors, and amici are listed in the brief of the State and Local Government Petitioners, the Public Interest Petitioners, and the Respondents.

B. Rulings Under Review. The agency action under review is:

The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

C. Related Cases.

The U.S. District Court for the District of Columbia has consolidated and stayed three cases that challenged the same agency action that is challenged here. *California v. Chao*, No. 19-cv-2826-KBJ (D.D.C.); *Envtl. Def. Fund v. Chao*, No. 1:19-cv-2907-KBJ (D.D.C.); *S. Coast Air Quality Mgmt. Dist. v. Chao*, No. 1:19-cv-3436-KBJ (D.D.C).

s/ *Benjamin M. Flowers*
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INTRODUCTION

Our Constitution creates a federalist framework in which all States are equal and none is more equal than others. The Clean Air Act disregards that design. It allows the EPA to give California, and *only* California, a waiver empowering it to set vehicle-emissions standards more stringent than those imposed by the federal government. *See, e.g.*, 42 U.S.C. §7545(c)(4). In other words, the Act leaves California with a slice of its sovereign authority that Congress withdraws from every other State.

The Constitution does not permit Congress to unequally raid state sovereignty in this manner. Our country "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." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Every State enters the Union with the same sovereign authority as all the others. *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Once admitted, States, as sovereigns, enjoy the "perfect equality and absolute independence of sovereigns," *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812), subject only to limits appearing in the Constitution itself. *See also Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) (citing *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013)). And even in the few contexts where the Constitution empowers Congress to pass laws restricting the

sovereign authority of some States but not others, *see, e.g.*, U.S. Const., Am. 15 §2, Congress may depart from the background principle of equal sovereignty only if doing so is reasonably necessary for the achievement of an otherwise-constitutional end, *see Shelby Cty.*, 570 U.S. at 544.

This case presents the question whether the EPA properly withdrew parts of a previously-issued waiver that allowed California to set emissions standards different from the federal standards. The answer is yes. In fact, the law *compelled* the EPA to withdraw the waiver, and any previously issued waivers were improper, because the law permitting the issuance of such waivers is unconstitutional: it permits California to exercise sovereign authority that the law takes from every other State.

JURISDICTION

This Court has jurisdiction to review the Environmental Protection Agency's withdrawal of California's waiver under 42 U.S.C. §7607(b)(1). The Intervenors take no position in the debate about jurisdiction over the National Highway Traffic and Safety Administration's actions.

STATEMENT OF THE ISSUES

Does Section 209(b)(1) of the Clean Air Act violate the Constitution by allowing California, and only California, to set new-vehicle emissions standards more stringent than the "applicable Federal standards"?

PRIMARY STATUTES AND REGULATIONS

42 U.S.C. §7543 (also known as Clean Air Act 209):

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,
(B) such State does not need such State standards to meet compelling and extraordinary conditions, or
(C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

> (3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title.

42 U.S.C. §7545(c)(4)(B):

> (B) Any State for which application of section 209(a) has at any time been waived under section 209(b) may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

BACKGROUND

Section 209 of the Clean Air Act, which is codified at 42 U.S.C. §7543, preempts the States from setting emissions standards for new cars and new engines. §7543(a); *see also id.* §7543(e)(2)(A). But the Act makes two exceptions to its preemptive scope. *First*, Section 209(b)(1) allows California—and only California—to set emissions standards that are more stringent than those adopted by the federal government. §7543(b)(1); S. Rep. No. 91-1196, 32 (June 30, 1970). *Second*, the Act allows States with air quality below federal standards to adopt an emissions standard "identical to the California standard." 42 U.S.C. §7507(1); *see also id.* §7543(e)(2)(B)(i) (similar exception for non-road engines). Thus, "the 49 other states" may depart from the federal standard if and only if they adopt "a standard identical to an existing California standard." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152

F.3d 196, 201 (2d Cir. 1998); *accord Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't Envtl. Prot.*, 208 F.3d 1, 8 (1st Cir. 2000).

For years, the federal government granted waivers allowing California to set its own emissions standards. In 2013, for example, the EPA issued a preemption waiver for California's "Advanced Clean Car" program. 78 Fed. Reg. 2,112 (Jan. 9, 2013). That program contained multiple subprograms, two of which are relevant here. The first is the "Zero Emissions Vehicle" program, which (among other things) regulates the percentage of each manufacturer's new sales that must be zero-emissions vehicles, such as electric cars. *Id.* at 2,118–20. The second is the "Greenhouse Gas Emissions Standards" program, which (again, among other things) sets fleetwide standards for the emission of greenhouse gasses. *See id.* 2,112–14.

On September 27, 2019, the EPA partially withdrew the waiver for the Advanced Clean Car Program. More precisely, it withdrew the waiver for the Zero Emissions Vehicle and Greenhouse Gas Emissions Standards programs. 84 Fed. Reg. 51,310, 51,338, 51,350 (Sept. 27, 2019). California, joined by a number of co-petitioners, challenged the rule. And Ohio, along with a group of other States, intervened to defend the EPA's withdrawal decision on the ground that the Constitution compels it: Section 209(b) violates the Constitution by allowing California alone to

regulate new-car emissions standards, and so any waiver issued under that section is unconstitutional and thus unenforceable.

SUMMARY OF THE ARGUMENT

The EPA correctly withdrew California's waiver to regulate new-car emissions because the law under which the waiver was granted—Section 209(b) of the Clean Air Act—is unconstitutional. More precisely, the law violates the equal-sovereignty doctrine.

Although the equal-sovereignty doctrine is "not spelled out in the Constitution," it is "nevertheless implicit in its structure and supported by historical practice." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492–93 (2019). When the States declared their independence from England, each "claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all … Acts and Things which Independent States may of right do.'" *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence ¶32). One indispensable feature of sovereignty at that time included the concept of *equal* sovereignty. Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 935 (2020); *see also Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812). No one could have conceived of "a

'State' with fewer sovereign rights than another 'State.'" Bellia & Clark, *The International Law Origins of American* Federalism, 120 Colum. L. Rev. at 937–38.

When the People ratified the original Constitution, they limited the States' sovereignty in some respects. *Murphy*, 138 S. Ct. at 1475. But the States retained that sovereignty not surrendered in the Constitution itself. And because the original Constitution nowhere strips the States of their *equal* sovereignty, the States retained their equal sovereignty and Congress, when it acts pursuant to powers enumerated in the original Constitution (as opposed to later amendments), is bound to observe the States' equal sovereignty. Thus, laws passed pursuant to Congress's Article I powers violate the Constitution if they withdraw sovereign authority from some States but not others.

Supreme Court precedent is consistent with all this. The Court's cases recognize that every State enters the Union with the same sovereign authority as every other State. *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). And once admitted, the States *retain* that equal sovereignty. *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

Applying these principles here, Section 209(b) violates the Constitution. The law, which Congress passed using its Commerce Clause authority, allows California to set emissions standards for new vehicles. It does not permit any other State to do

the same. That violates the equal-sovereignty doctrine. The power to make law is no doubt a "sovereign power." *McCulloch v. Maryland*, 4 Wheat. 316, 409 (1819). By allowing California to retain that piece of its sovereign authority that the law elsewhere strips from every other State, Section 209(b) runs afoul of the Constitution.

STANDARD OF REVIEW

The Administrative Procedure Act directs this Court to set aside agency action that is "in excess of statutory … authority" or that is "arbitrary, capricious, … or otherwise not in accordance with law." 5 U.S.C. §706(2)(A), (C).

ARGUMENT

I. The EPA violates the equal-sovereignty doctrine every time it issues a waiver under Section 209(b)(1), which unconstitutionally allows California alone to exercise sovereign authority over emissions standards.

The petitioners ask this Court to hold that the EPA acted unlawfully by withdrawing California's Section 209 waiver. They have it precisely backwards: the law *required* withdrawing the waiver. The Constitution "is superior to any ordinary act of the legislature." *Marbury v. Madison*, 1 Cranch 137, 178 (1803). And so "the constitution, and not such ordinary act, must govern the case to which they both apply." *Id.* Here, Section 209 of the Clean Air Act violates the Constitution by unequally stripping the States of their sovereign authority to regulate environmental concerns. More precisely, it violates the equal-sovereignty doctrine by allowing California, and

no other State, to obtain a waiver allowing it to regulate new-car emissions. Because Section 209(b) is unconstitutional, any waiver issued under that section is unconstitutional too. Thus, even assuming the Clean Air Act entitles California to keep its waiver, *but see* U.S. Br. 63–104, the Constitution does not. And the Constitution "must govern [this] case." *Marbury*, 1 Cranch at 178.

A. The Constitution, and Supreme Court precedent interpreting it, establish the principle that States have equal sovereignty.

The United States of America "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." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). This "'constitutional equality' among the States," *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1283 (2016) (citation omitted), derives from the Constitution's text and structure. Indeed, the principle is so deeply embedded in our constitutional order that the Supreme Court treats the States' sovereign equality as a "truism." *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918). Rightly so.

1. The equal-sovereignty of the States is one of those doctrines that, while "not spelled out in the Constitution," is "nevertheless implicit in its structure and supported by historical practice." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019).

To see why, begin at the beginning. When the States declared their independence from Britain, "they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all … Acts and Things which Independent States may of right do.'" *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence ¶32). By then, one key aspect of the sovereignty possessed by the States consisted of their "equal sovereignty." Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 935 (2020). The "law of nations" clearly established that "'Free and Independent States' were entitled to the 'perfect equality and absolute independence of sovereigns.'" *Id.* at 937 (quoting *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812)). "The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations." *Id.* at 937–38. And the States would have understood themselves to possess this fundamental aspect of sovereignty.

Years later, in 1789, the Framers famously "split the atom of sovereignty," dividing sovereign authority between the States and the federal government. *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). This division of authority "limited … the sovereign powers of the States." *Murphy*, 138 S. Ct. at 1475. For example, the Framers' sovereignty splitting

gave the federal government exclusive authority over some matters, *see* U.S. Const., art. I, §8, cl.4, restricted state authority over others, *id.*, art. I, §10, and made validly enacted federal laws and treaties "the Supreme Law of the Land," *id.*, art. VI, cl.2. But these changes did not *abolish* the States' sovereignty; to the contrary, the States "retained 'a residuary and inviolable sovereignty.'" *Murphy*, 138 S. Ct. at 1475 (quoting The Federalist No. 39, p.245 (C. Rossiter ed. 1961)). The Tenth Amendment confirms as much, stating that the States and the People retain all powers not expressly surrendered in the Constitution.

One key aspect of the States' retained sovereignty included the longstanding notion of "equal sovereignty." Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 935. Again, that had long been understood as an essential aspect of sovereignty. *Id.* While the Constitution limited the States' sovereignty in some ways, it nowhere took from the States' their sovereign equality. Thus, the States must be understood to have retained it. *Id.* at 937–38. The fact that the States called themselves "States" confirms the point. "By using the term 'States,' the Constitution recognized the traditional sovereign rights of the States minus only those rights that they expressly surrendered in the document.'" *Id.* at 938. And the right to sovereign equality is not among the rights surrendered.

The States' sovereign equality remained complete until the Civil War Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments all permit Congress to enforce their guarantees by "appropriate" legislation. U.S. Const., Am. 13 §2; Am. 14 §5; Am. 15 §2. (A few later-adopted civil-rights amendments use similar language when empowering Congress to enforce their terms. *See id.*, Ams. 19; 24 §2; 26 §2). Appropriate legislation might entail limiting the sovereign authority of only the States found to be acting in violation of these Amendments. *See United States v. Morrison*, 529 U.S. 598, 626–27 (2000). Therefore, "by adopting these Amendments, the States expressly … compromised their right to equal sovereignty with regard to enforcement of the prohibitions set forth in the Amendments." Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 938. But the States did not *otherwise* compromise their equal sovereignty—the Amendments do not speak to, and thus do not alter, the States' equal sovereignty in contexts unrelated to the prohibitions and guarantees of these amendments.

This background principle of equal sovereignty among the States accords with the "separation of powers," which the Framers viewed "as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). The separation of powers depends as much on "preventing the diffusion" of power, as it does on stopping the centralization of power. *Freytag*

v. Comm'r, 501 U.S. 868, 878 (1991). After all, to avoid "a gradual concentration" of governmental authority in one level or branch of government, The Federalist No. 51, p.349 (J. Madison) (Cooke, ed., 1961), we must ensure that each level and branch of government retains for itself the power the Constitution assigns to it. *See Selia Law LLC v. CFPB*, 140 S. Ct. 2183, 2202–03 (2020); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Morrison*, 529 U.S. at 710; *INS* v. *Chadha*, 462 U. S. 919, 946 (1983).

The equal-sovereignty doctrine performs this function. When Congress unequally limits the States' sovereignty—when it allows *some* States but not others to exercise some aspect of their sovereign authority—it reorders the constitutional division of power among the States. Imagine a law allowing some States, but not others, to boycott Israel. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000). Or a law permitting just one State to enact and enforce immigration laws. *Cf. Arizona v. United States*, 567 U.S. 387, 394 (2012). It is one thing for Congress to enact preemptive laws, which necessarily limit state sovereignty; the federal government clearly has the power to do that, as the Supremacy Clause confirms. It is quite another thing for Congress to limit state sovereignty on a selective basis. When Congress picks favorites, it is not incidentally limiting state sovereignty in the exercise of its own power, but rather regulating the States *as States*. "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate

individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992); *see also Murphy*, 138 S. Ct. at 1476. And when the federal government exercises such authority anyway, it aggrandizes its own power and the power of the favored States while weakening the power of the disfavored States. Allowing Congress to reorder power that the Constitution gives equally to each State contradicts any sensible understanding of the separation of powers.

In addition to furthering the purposes of the separation-of-powers doctrine, the "constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle*, 221 U.S. at 580. As one distinguished commentator recognized early in her legal career, equal sovereignty "rests on concepts of federalism." Sonia Sotomayor de Noonan, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979). "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 1 Wall. 700, 725 (1869). If the States' sovereignty could be reduced unequally, then the States would be in no relevant sense "indestructible"; a State is the sum of its sovereign authority, and a rule allowing the unequal reduction of sovereign authority would allow politically powerful States to win limits on sister States' authority. In addition to undermining "the integrity, dignity, and residual sovereignty of the States," *Bond*

v. United States, 564 U.S. 211, 221 (2011), political rent-seeking of that sort would undermine a key virtue of federalism. Our federalist structure "makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Competition between the States gives all States incentive to make policy attractive to the People. The virtue of competition would be seriously hampered if the States could compete by harming their rivals rather than by improving themselves.

In sum, the equal-sovereignty principle follows from the Constitution's history, text, and structure, and also "concepts of federalism." Sotomayor, *Statehood and the Equal Footing Doctrine*, 88 Yale L.J. at 835.

2. Perhaps more relevant for present purposes, Supreme Court precedent holds that the equal-sovereignty principle limits Congress's power to unequally burden the States' sovereign authority.

The Supreme Court long ago recognized that every State, as a matter of "the constitution" and "laws" of admission is "admitted into the union on an equal footing with the original states." *Pollard v. Hagan*, 44 U.S. 212, 228-9 (1845). "[N]o compact," the Supreme Court has explained, can "diminish or enlarge" the rights a State has, as a State, when it enters the Union. *Id.* at 229. Put differently, "a State admitted into the Union enters therein in full equality with all the others, and such

equality may forbid any agreement or compact limiting or qualifying political rights and obligations." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900); *Coyle*, 221 U.S. at 568. This principle precludes any arrangement in which one State is admitted on less-favorable terms than any other. *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). Conversely, it bars any State from being admitted on terms *more favorable* than those extended to its predecessors. *United States v. Texas*, 339 U.S. 707, 717 (1950). Each State has the right, "under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government." *Case v. Toftus*, 39 F. 730, 731-32 (C.C.D. Or. 1889).

The States' equality upon admission would not matter much if Congress could vitiate it *after* admission. Therefore, it is perhaps unsurprising that the case law treats the right to equal sovereignty as surviving admission to the Union. The Court recently reaffirmed that the "fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States" after their admission. *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). These cases—*Shelby County* and *Northwest Austin*—both involved challenges to the Voting Rights Act, which

required some States, but not others, to receive federal permission before amending their election laws. *Shelby County*, 570 U.S. at 537–39, 544–45; *Northwest Austin*, 557 U.S. at 196. In *Northwest Austin*, the Court signaled that the equal-sovereignty principle cast doubt on the constitutionality of this differential treatment, though it decided the case on statutory grounds instead of reaching the constitutional issue. 557 U.S. at 203, 211. A few years later, *Shelby County* squarely presented the constitutional issue. And *Shelby County* held unconstitutional Section 4 of the Voting Rights Act, which contained the formula used to decide which States needed federal preclearance before changing their election laws. The Court held that the law exceeded Congress's authority under the Fifteenth Amendment, which empowers Congress to pass "appropriate legislation" enforcing the Amendment's prohibition on denying or abridging the right to vote based on race. U.S. Const., Am. 15, §2. The Court determined that, in deciding whether such legislation was "appropriate," courts must consult the background principle of equal sovereignty. When legislation departs from that principle—as Section 4 did, by unequally limiting the States' power to adopt and enforce election laws—it will be upheld as "appropriate legislation" only if the disparate treatment is reasonably justified. *Shelby County*, 570 U.S. at 544–45, 552; *accord Nw. Austin*, 557 U.S. at 203. Because the federal government

had failed to make such a showing with respect to Section 4, Congress had no authority to enact that provision. *Shelby County*, 570 U.S. at 551–55.

Shelby County shows just how strong the equal-sovereignty principle is. Again, the Fifteenth Amendment *allows* Congress to single out some States for less-favorable treatment of their sovereign authority. *See South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966); *Shelby County*, 570 U.S. at 551–55. Still, the background rule that States retain equal sovereignty is so strong, even after admission to the Union, that Fifteenth Amendment legislation departing from that principle will be upheld as "appropriate" only if the need for such differential treatment is solidly grounded in evidence. *Shelby County*, 570 U.S. at 554. If the equal-sovereignty principle retains some strength post-admission even in contexts where the States have surrendered their entitlement to complete sovereign equality, it necessarily retains all its strength—which is to say, it is dispositive—in contexts where the States *have not* surrendered their entitlement to sovereign equality.

3. Before moving on to the doctrine's application in this case, it is critical to emphasize that the Constitution guarantees "equal *sovereignty*, not … equal treatment in all respects." Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L. J. 1087, 1149 (2016) (emphasis added). To demand that every law benefit everyone and everything equally "would make legislation impossible and would be

as wise as to try to shut off the gentle rain from heaven because every man does not get the same quantity of water." *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 572 (1908). Put a lot less poetically and a lot more bluntly: "Perfect uniformity and perfect equality" in law "is a baseless dream." *Edye v. Robertson* (*The Head Money Cases*), 112 U.S. 580, 595 (1884). So it is when it comes to the States. Congress frequently treats States differently in unremarkable ways, such as when it locates naval bases in States with coastlines, or directs funding to projects in particular States. States located in areas prone to natural disasters gain more from federal laws empowering and enriching FEMA. States that sit atop oil fields bear the brunt and reap the benefit of federal energy policy. Spending Clause legislation will inevitably flow to the States whose populations or conditions disproportionately exhibit the problems at which the funding is aimed. *See* 20 U.S.C. §1411 (special-education funding); 42 U.S.C. §10351 (rural drug enforcement).

Such laws create no equal-sovereignty issues. The equal-sovereignty doctrine demands "parity" *only* "as respects political standing and sovereignty." *Texas*, 339 U.S. at 716. Congress may not unequally limit or expand the States' "political and sovereign power," *id.* at 719-20, and must instead adhere to the principle that no State is "less or greater … in dignity or power" than another, *Coyle*, 221 U.S. at 566. Disparate limitations on the States' sovereignty thus violate the equal-sovereignty

doctrine. Disparate treatment *unrelated to sovereign authority*, however, does not. That means "Congress may devise … national policy with due regard for the varying and fluctuating interests of different regions." *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950). Congress may, in other words, pass legislation that expressly or implicitly favors some States over others, as long as it does not give some States favorable treatment with respect to the amount of sovereign authority they are permitted to exercise. Only disparate treatment of sovereign authority implicates the equal-sovereignty principle.

B. The Clean Air Act violates the equal-sovereignty doctrine by allowing California to exercise sovereign authority that the Act withdraws from all the other States.

Section 209(a), by preempting state laws setting emissions standards for new cars, limits the States' sovereign authority. After all, the "power of giving the law on any subject whatever, is a sovereign power." *McCulloch v. Maryland*, 4 Wheat. 316, 409 (1819). Since the States would have the power to regulate new-car emissions but for Section 209(a), that subsection of the Clean Air Act limits state sovereignty.

The fact that Section 209(a) limits state sovereignty creates no *equal*-sovereignty problem. But the fact that Section 209(b)(1) limits state sovereignty unequally, does. Again, Section 209(b)(1) allows California, and *only* California, to

obtain a federal waiver that permits it to set new-car emissions standards. While other States may adopt those same standards, California alone may set them. And so California alone retains some of its "sovereign power" to "giv[e] the law" in this area. *McCulloch*, 4 Wheat. at 409.

209(b) violates the equal-sovereignty doctrine by allowing California to exercise sovereign authority that Section 209(a) takes from every other State. The law effects an "extension of the sovereignty of [California] into a domain of political and sovereign power of the United States from which the other States have been excluded." *United States v. Texas*, 339 U.S. at 719–20. This unequal treatment is unconstitutional, full stop. Congress passed Section 209 under its Commerce Clause authority. And the States, in ratifying the Commerce Clause, did not "compromise[] their right to equal sovereignty," Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 938, as they did with later amendments, *see Shelby County*, 570 U.S. at 551–55. Thus, the Commerce Clause provides no basis for disrupting the States' retained right to equal sovereignty.

Section 209's unconstitutionality is not some technicality. The unequal treatment undermines the federalist system by making California, in a very practical sense, "greater … in dignity or power" than the other States. *Coyle*, 221 U.S. at 566. The law gives California a stick that it can use to win concessions and deals—even

concessions and deals having nothing to do with emission control—that no other State may wield. For example, after the national government proposed new nationwide emissions standards, several car manufacturers met with California to secure favorable treatment under California's regulations. Coral Davenport and Hiroko Tabuchi, *Automakers Rejecting Trump Pollution Rule, Strike a Deal With California*, New York Times (July 25, 2019), online at https://nyti.ms/2y98T1F. These manufacturers met with California because California had the ability to seriously help or hinder their businesses: the Golden State, and *only* that State, can adopt standards that manufacturers must either implement nationwide or find a way to implement in California alone, either way at potentially significant cost. A federal law giving one State special power to regulate a major national industry contradicts the notion of a Union of sovereign States.

*

All told, Section 209(b) violates the Constitution, and so did the waiver that the agency withdrew. Because that waiver violated the Constitution, the EPA had no lawful choice except to withdraw it.

II. Neither the petitioners nor their *amici* provide a good reason to conclude that Section 209(b) is constitutional.

The petitioners and their *amici* insist that the equal-sovereignty doctrine does not apply to laws like Section 209(b). But their arguments all fail.

A. The State petitioners, for their part, argue that the doctrine forbids only unequal *burdens* on State sovereignty. And, they say, Section 209(b) "does not impose *any* burden on *any* State," but rather offers "California the *choice* to implement its own vehicular emissions program … for the benefit of the State and, ultimately, the Nation." State Petrs' Br.52. Therefore, the argument goes, the doctrine does not apply. *See id.* 52–53; *accord* Br. for *Amicus* Prof. Litman 26.

There are at least two problems with this argument.

First, this argument misconstrues the nature of the equal-sovereignty doctrine. Again, the doctrine reflects the ratification-era understanding that States, as sovereigns all their own, are "entitled to the 'perfect equality and absolute independence of sovereigns.'" Bellia & Clark, *International Law*, 120 Colum. L. Rev. at 935 (quoting *Schooner Exchange*, 7 Cranch at 137). The State petitioners are right that this principle prohibits Congress from imposing an unequal burden on state sovereignty by withdrawing sovereign authority from some States but not others. State Petrs' Br.52. But they are wrong that the principle allows Congress to *give* or *leave in place* sovereign authority to some States while withholding or stripping it from others. Indeed, the Supreme Court has already held that the equal-sovereignty doctrine "prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been

excluded, just as it prevents a contraction of sovereignty which would produce inequality among the States." *United States v. Texas*, 339 U.S. at 719–20 (internal citation omitted).

Moreover, the State petitioners' approach would turn the equal-sovereignty doctrine's application into a word game. Section 209 can be just as easily, and just as accurately, described as a benefit to California (which is given "the choice to implement its own vehicular emissions program," State Petr's Br.52 (emphasis omitted)) or a burden on the other forty-nine States (which are stripped of the power to make the same choice). And in *Shelby County*, one could just as easily, and just as accurately, have described Section 4 of the Voting Rights Act as a benefit to the unaffected States (which were allowed to retain their sovereign authority over election laws) or a burden on the affected States (which were stripped of their sovereign authority over election laws). Whether one labels these laws burdens or benefits is irrelevant, as the labels describe the exact same thing: unequal sovereignty. Trying to draw this distinction is rather like asking whether the man who "drowns by awaiting the incoming tide" commits an "act (coming upon the sea)" or an "omission (allowing the sea to come upon him)." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part). The equal-sovereignty doctrine cannot be made to turn on so metaphysical an inquiry.

Second, the Intervenor States do not agree that allowing California to set higher emissions standards necessarily works to "the benefit of the … Nation." Given the size of the California market, manufacturers have little choice but to design their cars to satisfy California's requirements. *See* 42 U.S.C. §7507 (prohibiting other States from taking action that would force manufacture of a "third vehicle", after a first, federal, and second, California, vehicle). And when California requires cleaner vehicles, the added technology imposes additional cost. That increased cost keeps "consumers in older, dirtier, and less safe vehicles." 83 Fed. Reg. 42,986, 42,993 (Aug. 24, 2018). Reasonable minds could debate whether the environmental benefits that result from such technologies justify the cost those technologies impose on users. *See, e.g.*, Julian Morris, Reason Found. Policy Study No. 445, *Assessing the Social Costs and Benefits of Regulating Carbon Emissions* (2015), available at https://tinyurl.com/y47npykw.

B. The one *amicus* to address equal sovereignty in any depth, Professor Leah Litman, fares no better. For starters, her brief addresses the straw-man argument that equal sovereignty means treating the States equally in "all circumstances." Litman Br.8, 11, 12. But equal sovereignty is about *political* equality only, not equality in all other respects. Thus, Congress's differential treatment of the States violates the equal-sovereignty doctrine *only* when Congress takes from some States sovereign

authority that it leaves to others. *See above* 18–20. In other words, disparate treatment with respect to the States' sovereign authority violates the equal-sovereignty doctrine, while disparate treatment of the States unrelated to their sovereign authority does not. That distinction may cast doubt on the validity of other statutes, perhaps even statutes that favor some of the Intervenor States. So be it; "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

The other problem with Professor Litman's brief is that it advocates for an understanding of the equal-sovereignty doctrine that would transform the doctrine into a superfluous restatement of the Tenth Amendment. She contends that "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." Litman Br.11. Neither the country nor the courts need an "equal-sovereignty doctrine" to establish that principle, which is implicit in the Constitution's design and explicit in the Tenth Amendment's reservation of all non-enumerated powers to the States and the People. And in Professor Litman's advocating for this understanding of the equal-sovereignty doctrine, one sees pretty clearly a desire to make the doctrine just go away. But like it or not, the equal-sovereignty doctrine exists, both in the Constitution, *see above* 9–15, and as a matter of binding Supreme

Court precedent, *see above* 15–18. Academic "aspirations for what the law ought to be" have no value in appellate courts bound to apply the law as it exists today. *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

CONCLUSION

The Court should hold Section 209(b) unconstitutional and affirm the EPA's decision to withdraw California's waiver.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(f) and (g), I hereby certify that the foregoing complies with the Court's May 20, 2020 Order because it contains 6,027 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I caused the foregoing to be electrically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system. I further certify that a copy of the foregoing has been served via United States First Class Mail upon the following:

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