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 of Action by the U.S. Environmental Protection Agency

PROOF REPLY BRIEF OF PETITIONERS THE STATES OF OHIO, ALABAMA, ARKANSAS, GEORGIA, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS
Ohio Solicitor General
MICHAEL HENDERSHOT
Chief Deputy Solicitor General
SYLVIA MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for State of Ohio

(Additional counsel listed after signature block)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
GLOSSARY v
INTRODUCTION AND SUMMARY OF ARGUMENT 1
ARGUMENT 1
I. The States have Article III standing. 1
A. Constitutional injury. 2
B. Economic injury. 3
II. The States satisfy the zone-of-interests test. 8
III. Section 209(b) violates the equal-sovereignty doctrine, facially and as applied. 10
IV. The waiver violates the Energy Policy and Conservation Act. 15
CERTIFICATE OF COMPLIANCE 23
CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Chemistry Council v. Dep't of Transp.,
468 F.3d 810 (D.C. Cir. 2006) 7

Bucklew v. Precythe,
139 S. Ct. 1112 (2019) 12

Carpenters Indus. Council v. Zinke,
854 F.3d 1 (D.C. Cir. 2017) 6

Clinton v. City of New York,
524 U.S. 417 (1998) 2

CSL Plasma Inc. v. U.S. CBP,
33 F.4th 584 (D.C. Cir. 2022) 8, 9

Cutler v. HHS,
797 F.3d 1173 (D.C. Cir. 2015) 2

Dep't of Com. v. New York,
139 S. Ct. 2551 (2019) 4

Energy Future Coal. v. EPA,
793 F.3d 141 (D.C. Cir. 2015) 8

Heckler v. Matthews,
465 U.S. 728 (1984) 2

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 8

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) 11

Mendoza v. Perez,
754 F.3d 1002 (D.C. Cir. 2014) 8

* Authorities chiefly relied upon are marked with an asterisk.

N.Y. Republican State Comm. v. SEC,
927 F.3d 499 (D.C. Cir. 2019) 4, 6

New Jersey v. EPA,
989 F.3d 1038 (D.C. Cir. 2021) 3

Oklahoma v. Castro-Huerta,
142 S. Ct. 2486 (2022) 16

Parker v. D.C.,
478 F.3d 370 (D.C. Cir. 2007) 2

Peters v. Aetna Inc.,
2 F.4th 199 (4th Cir. 2021) 7

**Shelby County v. Holder*,
570 U.S. 529 (2013) ..... *passim*

In re U.S. OPM Data Sec. Breach Litig.,
928 F.3d 42 (D.C. Cir. 2019) 2

Williams v. Lew,
819 F.3d 466 (D.C. Cir. 2016) 4

Statutes, Rules, and Constitutional Provisions

U.S. Const., am. 10 10

U.S. Const., am. 13 10

U.S. Const., am. 14 10

U.S. Const., am. 15 ..... 10, 12

U.S. Const., art. I, §8 11

U.S. Const., art. I, §9 11

83 Fed. Reg. 42986 (Aug. 24, 2018) 4, 16

84 Fed. Reg. 51310 (Sept. 27, 2019) 14

* Authorities chiefly relied upon are marked with an asterisk.

5 U.S.C. §706 15

42 U.S.C. §7507 14

*42 U.S.C. §7543 8

49 U.S.C. §32902 9

*49 U.S.C. §32919 ..... 1, 8, 15

Other Authorities

Bellia Jr. & Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835 (2020) 10

LaReau, *Chevy Bolt gets a price cut for 2023 and adds a sporty new package*, Detroit Free Press (June 1, 2022) 5

Wayland, *Ford cuts prices on electric Mustang Mach-E, following Tesla's lead*, CNBC (Jan. 30, 2023) 5

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

Add.:	Addendum to Opening Brief of State Petitioners, Document #1971738
EPA:	Environmental Protection Agency
EPA Br.:	Brief of Respondents, Document #1981480
Intervenor-States Br.:	Brief of State and Local Government Respondent-Intervenors, Document #1985732
Intervenor-States Add.:	Addendum to Brief of State and Local Government Respondent-Intervenors, Document #1985732
Legislators Br.:	*Amicus* Brief of Senator Tom Carper and Representative Frank Pallone, Jr., Document #1982213
NHTSA:	National Highway Traffic Safety Administration
Roundtable Br.:	*Amicus* Brief of California Business Roundtable, Document #1971355
States Br.:	Opening Brief of State Petitioners, Document #1971738
Supp.Dec.:	Supplemental Declaration of Benjamin Zycher, attached as Exhibit A to the State Petitioners' Motion for Leave to Supplement the Record, Document#1989429 (March 10, 2023)

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Clean Air Act §209(b), the EPA may issue waivers empowering California to regulate new-vehicle emissions in ways no other State can. One such waiver permits California to combat climate change by adopting and enforcing stringent carbon-emission standards. That waiver and §209(b) are unconstitutional: both deny every State except California the right to equal sovereignty. The waiver also violates the Energy Policy and Conservation Act of 1975, which preempts state-law regulations "related to" fuel economy. 49 U.S.C. §32919(a). Because carbon-emission standards *are* fuel-economy standards, California's carbon-emission standards are "related to" fuel economy. The waiver is thus unlawful, as it empowers California to enforce preempted regulations.

The waiver impairs the States' constitutional and economic interests—it denies them equal sovereignty and forces them to spend more to purchase the many vehicles they need. Those injuries are fairly traceable to the waiver and redressable with a favorable ruling. Therefore, this Court has Article III jurisdiction. It must exercise that jurisdiction and set aside the EPA's unlawful waiver.

ARGUMENT

I. The States have Article III standing.

The States have standing to vindicate constitutional and economic injuries.

A. Constitutional injury.

The States contend the waiver and §209(b) violate their equal-sovereignty right. This Court must assume they are correct when assessing their standing. *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007). That proves dispositive. The "loss of a constitutionally protected … interest" constitutes an "actual injury in fact." *In re U.S. OPM Data Sec. Breach Litig.*, 928 F.3d 42, 55 (D.C. Cir. 2019) (*per curiam*). And those who are denied constitutionally guaranteed equality "because of their membership in a disfavored group" necessarily sustain an injury—an injury redressable through the "withdrawal of benefits from the favored class." *Heckler v. Matthews*, 465 U.S. 728, 740 (1984); *accord Cutler v. HHS*, 797 F.3d 1173, 1181 (D.C. Cir. 2015); *contra* EPA Br.29; Intervenor-States Br.10.

The denial of equal sovereignty has another, more-concrete effect that a favorable ruling would redress: the waiver, by giving California alone sovereign authority to regulate new-car emissions, enhances California's ability to extract concessions from manufacturers. States Br.29. Denying the petitioner States this bargaining chip injures them. *See Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998).

B. Economic injury.

1. California's Zero Emission Vehicle program requires that manufacturers' fleets include a minimum percentage of zero-emission vehicles. Market demand does not justify producing that percentage—if it did, the mandate would be unnecessary. Add.41–47. Therefore, to ensure compliance, manufacturers boost demand by lowering prices. They offset their losses through "cross subsidization"—that is, by raising the cost of conventional vehicles. Add.42; *Comments of the American Fuel & Petrochemical Manufacturers* at 17–18 n.65, Docket No. EPA-HQ-OAR-2018-0283 (Joint App'x ___). The price increase inflicts a pocketbook injury on buyers, including the States. The increased use of zero-emission vehicles will further injure States by depriving them of billions of dollars in lost gas-tax revenue. While States can *try* offsetting the lost revenue by imposing "zero-emission vehicle fees" on in-state electric vehicles, EPA Br.27, they cannot do the same for out-of-state electric vehicles that use their roads.

A favorable ruling will redress these injuries, which stem from the waiver.

2. The EPA wrongly dismisses these costs as "nonspecific, conclusory, and conjectural." EPA Br.24. The States' "arguments [are] firmly rooted in the basic laws of economics," *New Jersey v. EPA*, 989 F.3d 1038, 1048 (D.C. Cir. 2021) (quotation marks omitted), and supported by an expert economist's analysis. The expert,

after accounting for the "predictable ways" in which consumers and producers will respond to California's program, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019), concluded that manufacturers will charge more for conventional vehicles. Add.47. The EPA itself predicted that manufacturers would offset program-imposed costs by "increasing [the] prices of" conventional vehicles "throughout the country." 83 Fed. Reg. 42986, 42999 (Aug. 24, 2018). That is what manufacturers are doing. *See American Fuel & Petrochemical Manufacturers Comments* at 17–18 n.65 (Joint App'x ___).

The EPA neither offers contrary evidence nor questions the expert's credibility. Instead, it speculates the States' injuries *might* be averted, perhaps by increased demand for zero-emission vehicles or by manufacturers' raising prices only on vehicles the States do not buy. EPA Br.25–26. But just as standing cannot rest on unsupported conjecture, *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016), standing cannot be defeated with unsupported conjecture, *see N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504–05 (D.C. Cir. 2019).

The Intervenor States and Local Governments make a few more unavailing arguments. The first rests on the declaration of an individual who is "responsible for" the regulations to which the waiver relates and appears to have a financial interest in the widespread use of electric vehicles. Intervenor-States Add.84–85. Citing

this declaration, the intervenors say "auto dealers in California (and elsewhere) are selling record numbers of zero-emission vehicles at profitable prices." Intervenor-States Br.11. This allegedly shows that manufacturers need not lower prices of zero-emission vehicles—and thus need not raise prices for conventional vehicles—to comply with California's rules.

But sales by *dealers* do not necessarily translate to profit for *manufacturers*, as the declaration recognizes. Intervenor-States Add.90–91. Moreover, the declaration's conclusion rests, at least in large part, on sales numbers from 2022. The waiver permitted California to enforce its rules for much of that year. And manufacturers had good reason to begin complying even earlier: it was clear the EPA would reissue the waiver when it began reconsidering the 2019 withdrawal. Thus, these large sales numbers comport with the States' prediction that manufacturers would lower prices on zero-emission vehicles to boost demand and assure compliance with California's rules. Ample evidence in the public domain indicates this is happening. *See e.g.*, Wayland, *Ford cuts prices on electric Mustang Mach-E, following Tesla's lead*, CNBC (Jan. 30, 2023), https://perma.cc/MW2U-E5ZH; LaReau, *Chevy Bolt gets a price cut for 2023 and adds a sporty new package*, Detroit Free Press (June 1, 2022), https://perma.cc/AH23-X6MW.

The intervenors posit that manufacturers might not offset their losses through cross-subsidization—they may instead "accept a short-run reduction in profits in order to invest in the innovation necessary to produce compliant vehicles consumers want to buy." Intervenor-States Br.12. Nothing suggests manufacturers have done this. The cited source speculates manufacturers could, while conceding they might simultaneously cross-subsidize. Intervenor-States Add.117–18. Regardless, the alternative theory presumes that manufacturers would accept "short-run" losses "to be a first-mover in developing compelling" zero-emission vehicles. *Id.* But with electric vehicles, any loss threatens to be long-term, since supply-chain constraints—including cobalt shortages for which there is no easy solution—prevent investments from realizing predictable returns. Roundtable Br.8–12; Supp.Dec. ¶¶6, 9–11. So the hypothesis that manufacturers will not cross-subsidize is perhaps theoretically possible, but fanciful. Supp.Dec. ¶¶4–12; *cf. N.Y. Republican*, 927 F.3d at 504–05. The manufacturers will cross-subsidize, increasing the cost of conventional vehicles of the sort the States buy. The States will thus experience *some* increased costs. Even a "dollar of economic harm is … an injury-in-fact for standing purposes." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

Finally, the intervenors chastise the States' expert for saying vehicle prices are always uniform nationwide. *See* Intervenor-States Br.12–13. The expert never

said that. He explained that a "given vehicle in one state must sell for the same price as an identical vehicle in another state, *with adjustments for* the cost of transporting vehicles from one state to another, differences in taxes and registration fees, and other second-order considerations." Add.43–44 (emphasis added); *see also* Supp.Dec. ¶¶13–16. And indeed, the intervenors' own evidence shows that cars thousands of miles apart sell at similar prices—prices sufficiently close that the differences can be attributed to just such second-order factors. Intervenor-States Add.92–93; *see also* Supp.Dec. ¶13. This shows there is a national market for cars, meaning price effects cannot be confined to California.

The EPA makes two final arguments. First, it faults the States for providing no evidence of *past* harm. But the States did not need to prove "an actual past injury" to prove an imminent future injury, and the latter suffices for standing. *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). Second, the EPA suggests that, on net, the waiver may benefit the States *if* it causes electric-vehicle and battery manufacturers to create more plants and jobs than they otherwise would. EPA Br.27–28; *see also* Intervenor-States Br.11 n.2. This, in addition to being speculative, is irrelevant. The injury-in-fact analysis does not account for offsetting benefits. *Peters v. Aetna Inc.*, 2 F.4th 199, 218 & n.10 (4th Cir. 2021) (collecting cases).

II. The States satisfy the zone-of-interests test.

1. The zone-of-interests test operates "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). But "the test is not especially demanding." *Id.* at 130 (quotation marks omitted). A plaintiff must show only that its "grievance … arguably falls within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) (alteration accepted, quotation marks omitted). The relevant question "is whether the challenger's interests are such that they in practice can be expected to police the interests that the statute protects." *CSL Plasma Inc. v. U.S. CBP*, 33 F.4th 584, 589 (D.C. Cir. 2022) (quotation marks omitted).

The States satisfy this "lenient" test. *Id.* at 593. First, they fall within the zone of interests protected by equal-sovereignty guarantee—the constitutional guarantee on which their suit primarily rests. Second, they fall within the zone of interests protected by the two statutory provisions they invoke—Section 209 of the Clean Air Act, 42 U.S.C. §7543, along with the Energy Policy and Conservation Act's preemption clause, 49 U.S.C. §32919(a). Both laws balance the goal of environmental protection with the need for "productive economic activity." *Energy Future Coal.*

v. EPA, 793 F.3d 141, 145 (D.C. Cir. 2015); *see also* 49 U.S.C. §32902(f). The States, as large-scale purchasers of vehicles, are injured when overly stringent emission standards drive up car prices. They can, therefore, "be expected to police the interests" the statutes protect. *CSL*, 33 F.4th at 589 (quotation marks omitted).

2. The EPA never contends, and thus forfeits any contention, that the States cannot satisfy the zone-of-interests test with respect to their constitutional argument or their argument pertaining to the Energy Policy and Conservation Act.

The EPA does argue, incorrectly, that the States fall outside the Clean Air Act's zone of interests because they "are not regulated by the challenged standards." EPA Br.19. But the zone-of-interests test "does not require that the statute directly regulate the plaintiff." *CSL*, 33 F.4th at 589. Regardless, the Clean Air Act (especially §209) directly regulates the States by limiting their sovereign authority to regulate new-car emissions.

The EPA also stresses that the States "do not seek to promote Congress's objective of ameliorating air quality." EPA Br.19, 31. But again, the Act aims to strike a balance between environmental and economic goals. The States can "be expected to police [that] interest[]," *CSL*, 33 F.4th at 589 (quotation marks omitted), as they are injured when the balance swings too far in one direction.

III. Section 209(b) violates the equal-sovereignty doctrine, facially and as applied.

At the founding, the law of nations "entitled" all sovereigns to "'perfect equality.'" Bellia Jr. & Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 937 (2020) (quoting *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812)). Except where the Constitution limits that right of equal sovereignty, the States retain it. U.S. Const., amend. 10.

Critically, some provisions in the Constitution permit Congress to abridge the States' equal sovereignty. Certain provisions in Article I, §10, including the Tonnage Clause, arguably do so. *See* EPA Br.46. The Civil War Amendments *certainly* do so. Each permits Congress to enforce its terms with "appropriate" legislation. U.S. Const., amends. 13, §2; 14, §5; 15, §2. That language, the Supreme Court has said, empowers Congress to unequally limit the States' sovereign authority—more precisely, to limit the sovereign authority of only those States that violate the amendments. *Shelby Cnty. v. Holder*, 570 U.S. 529, 544–46 (2013) (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

But unless some enumerated power permits Congress to deny the States their equal sovereignty, it cannot do so. That resolves this case. Section 209(b) strips the States of their sovereign equality by taking from every State but California the sovereign power to regulate new-vehicle emissions. Congress passed §209(b) using its

Commerce Clause authority. That clause gives Congress no power to strip the States' sovereign equality. Thus, §209(b), and the waiver issued under that statute, are unconstitutional.

1. The EPA responds that some of Congress's enumerated powers require Congress to regulate through nationally uniform rules. *See* U.S. Const., art. I, §8, cls. 1 & 4; §9, cl.6. "These specific guarantees of equal treatment," the EPA says, "reflect the *absence* of any more general principle that Congress's enactments must broadly provide for identical standards across the States." EPA Br.33.

The EPA confuses "equal treatment," *id.*, which these clauses address, with equal sovereignty, which they do not. The equal-sovereignty doctrine prevents the government *only* from unequally stripping States of sovereign authority, such as the sovereign power to make law on a particular topic; Congress remains free to subject States to disparate *treatment* without abridging their sovereignty. States Br.25–26. Because equal sovereignty and equal treatment are distinct, the inclusion of some equal-treatment guarantees does not imply the absence of an equal-sovereignty right.

2. The EPA says the equal-sovereignty doctrine would "void numerous longstanding federal laws." EPA Br.20. That would be irrelevant if it were true; "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*,

140 S. Ct. 2452, 2480 (2020). Anyway, the parties and *amici* identify relatively few laws that *might* present equal-sovereignty issues.

3. The EPA and intervenors claim the equal-sovereignty doctrine applies only when Congress exercises non-Article I authority, such as its power to enact "appropriate" Fifteenth Amendment legislation. EPA Br.35–39; Intervenor-States Br.16–19. That argument contradicts the "reasoning underlying" *Shelby County*, which is "just as binding" as the case's holding. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019).

Shelby County began by recognizing the "fundamental principle of equal sovereignty among the States." 570 U.S. at 544 (emphasis and quotation marks omitted). Section 4 of the Voting Rights Act violated this principle—it unequally limited the States' sovereign authority. The Court observed that the Fifteenth Amendment might permit this otherwise-forbidden departure from the equal-sovereignty principle. That amendment empowers Congress to enforce its guarantees with "appropriate" legislation, *see* amend. 15, §2, which can include legislation denying equal sovereignty to States that misuse their sovereign authority by violating the amendment, *Shelby Cnty.*, 570 U.S. at 546. Still, the Court said, the "fundamental principle of equal sovereignty remains highly pertinent" even under the Fifteenth

Amendment, *id.* at 544, as any abridgment of equal sovereignty must be specially justified to qualify as "appropriate." Section 4 did not qualify. *Id.* at 550–53.

Shelby County thus treated equal sovereignty as a right the States retained when they joined the Union—a right that "remains" relevant today. *Id.* at 544. The Court did not treat the right as a standalone, *ad hoc* limit on Congress's non-Article I authority.

4. Finally, the EPA and intervenors insist that §209(b)'s "differentiated geographic preemption coverage satisfies even a heightened standard of review." EPA Br.42. *Shelby County*, they say, allows Congress to unequally strip the States' sovereignty if the "disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 39 (quoting *Shelby Cnty.*, 570 U.S. at 542). They claim §209(b) satisfies this standard because California has poor air quality. *Id.* at 39–42; Intervenor-States Br.23–25.

This argument fails because the quoted language does not set forth a broadly applicable test. Instead, this language announces the test that governs whether abridging equal sovereignty is "appropriate" for Fifteenth Amendment purposes. *See Shelby Cnty.*, 570 U.S. at 542–45. *Shelby County* never suggested this test applies in other contexts.

The petitioner States acknowledged that the equal-sovereignty doctrine arguably permits Congress to pass laws allowing only some States to regulate concerns that *only* those States face. States Br.26–27. But that is not because of *Shelby County*'s "sufficiently related" test. It is because these laws do not deny sovereign authority to any State capable of exercising it. Laws that do not deny any State sovereign authority it could otherwise exercise do not deny (arguably) any State its equal sovereignty. By contrast, §209(b) unequally denies the States their power to address a problem—air pollution—that is hardly unique to California. Further, the challenged waiver permits California to regulate climate change. As the petitioners have explained and the EPA has acknowledged, 84 Fed. Reg. 51310, 51346–47 (Sept. 27, 2019), California's interests in combatting climate change are not even significantly heightened, let alone unique.

Regardless, even under the EPA's interpretation of *Shelby County*, §209(b) is unconstitutional as applied. The challenged waiver allows California alone to impose fuel-economy standards in response to climate change—an international problem with global effects that can be meaningfully addressed only with multinational cooperation. *See* States Br.30–33. Given the size of the California market—not to mention the size of the other markets in which California's regulations apply, 42 U.S.C. §7507(1)—California's carbon-emission standards amount to national standards.

The waiver thus empowers California alone to act as a junior-varsity Congress on an issue of immense national significance. So the waiver's "disparate geographic coverage is" not "sufficiently related to the problem that it targets." *Shelby Cnty.*, 570 U.S. at 542 (quotation marks omitted).

IV. The waiver violates the Energy Policy and Conservation Act.

The Energy Policy and Conservation Act preempts state laws that are "related to" fuel-economy standards. 49 U.S.C. §32919(a). California's Low Emission and Zero Emission Vehicle programs qualify. They require manufacturers to reduce or eliminate carbon emissions. Carbon-emission and fuel-economy standards regulate the same thing by different names. States Br.35–38. Thus, the EPA's waiver, by permitting California to enforce carbon-emission rules, permits California to enforce regulations "related to" fuel-economy standards. Because federal law preempts such standards, the waiver is unlawful and must be set aside. 5 U.S.C. §706(2)(A)–(B).

The EPA responds that, in considering whether to grant a waiver, it had no duty to consider whether California law complied with the Energy Policy and Conservation Act. *See* EPA Br.93. But regardless of whether *the agency* may consider compliance with the Act, *courts* must consider the issue when deciding whether the waiver is lawful. §706(2)(A)–(B).

One *amicus* brief stresses the Act's legislative history, which allegedly shows that Congress (1) did not intend to preempt §209(b) standards when it passed the Act, and (2) assumed the validity of §209(b) standards in subsequent legislation. Legislators Br.13–14; *see also* Intervenor-States Br.48–51. But "assumptions are not laws" and intentions are not either. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2500 (2022). Regardless, the States' reading does not disrupt these assumptions and intentions; it simply bars all States, even California, from issuing regulations "related to" fuel economy. This has no effect on California's ability to obtain §209(b) waivers relating to regulations of "conventional pollutants"—pollutants other than greenhouse gases—that have an at-most-tangential connection to fuel economy. 83 Fed. Reg. at 43237. The *only* §209(b) standards the Act preempts are those that regulate fuel economy by another name.

The *amici* also point to §502(d)(3)(D)(i) of the Energy Policy and Conservation Act, which defined the phrase "Federal standards" for one narrow purpose relating to model years 1978–80. The definition encompasses standards for which California was given a waiver under §209(b) of the Clean Air Act. This, the *amici* say, shows that §209(b) standards, including those at issue here, are *federal* standards. And federal standards cannot be preempted. Legislators Br.8–9.

This argument fails because the relevant definition of "Federal standards" applies only "[f]or purposes of this subsection," meaning subsection (d) of §502 of the Energy Policy and Conservation Act. It does not transform §209(b) standards into federal standards for other purposes. *See* States Br.39–40.

Finally, the *amici* suggest that the Zero Emission Vehicle program does not "relate[] to … fuel economy *standards*" because NHTSA must disregard zero-emission vehicles in setting average-fuel-economy standards. Legislators Br.24 (citing 49 U.S.C. §32902(h)(1)); *accord* Intervenor-States Br.50–51. But the Zero Emission Vehicle program requires every manufacturer's fleet to include a minimum percentage of zero-emission vehicles. That is a carbon-emission standard (a percentage of cars must emit no carbon) and thus a fuel-economy standard. The program therefore "relates to" fuel-economy standards, regardless of whether NHTSA could lawfully set a similar standard.

March 10, 2023

Respectfully submitted,

STEVE MARSHALL
Attorney General of Alabama

/s/ Edmund G. LaCour Jr. (BMF per authority)
EDMUND G. LACOUR JR.
Solicitor General
Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
(334) 242-7300
(334) 353-8400 fax
Edmund.LaCour@AlabamaAG.gov

Counsel for State of Alabama

DAVE YOST
Attorney General of Ohio

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Ohio Solicitor General
MICHAEL HENDERSHOT
Chief Deputy Solicitor General
SYLVIA MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 fax
benjamin.flowers@ohioago.gov

Counsel for State of Ohio

TIM GRIFFIN
Attorney General of Arkansas

/s/Nicholas J. Bronni (BMF per authority)
NICHOLAS J. BRONNI
Solicitor General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
Nicholas.Bronni@arkansasag.gov

Counsel for the State of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

/s/ Stephen J. Petrany (BMF per authority)
STEPHEN J. PETRANY
Solicitor General
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

THEODORE E. ROKITA
Attorney General of Indiana

/s/ Thomas M. Fisher (BMF per authority)
THOMAS M. FISHER
Solicitor General
Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for State of Indiana

KRIS KOBACH
Attorney General of Kansas

/s/ Anthony J. Powell (BMF per authority)
ANTHONY J. POWELL (*application for admission pending*)
Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
(785) 368-8435
(785) 291-3767 fax
Anthony.Powell@ag.ks.gov

Counsel for State of Kansas

DANIEL CAMERON
Attorney General of Kentucky

/s/ Matthew F. Kuhn (BMF per authority)
MATTHEW F. KUHN
Solicitor General
Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5400
Matt.Kuhn@ky.gov

Counsel for State of Kentucky

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill (BMF per authority)
ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, Louisiana 70804
(225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Counsel for State of Louisiana

LYNN FITCH
Attorney General of Mississippi

/s/ Justin L. Matheny (BMF per authority)
JUSTIN L. MATHENY
Deputy Solicitor General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220
(601) 359-3825
justin.matheny@ago.ms.gov

Counsel for State of Mississippi

ANDREW BAILEY
Attorney General of Missouri

/s/ Jeff Johnson (BMF per authority)
JEFF P. JOHNSON
Deputy Solicitor General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-8870
(573) 751-0774 fax
jeff.johnson@ago.mo.gov

Counsel for State of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

/s/ Christian Brian Corrigan (BMF per authority)
CHRISTIAN BRIAN CORRIGAN
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
Montana Department of Justice
215 N Sanders St
Helena, MT 59601
(406) 444-2026
David.Dewhirst@mt.gov
Kathleen.Smithgall@mt.gov

Counsel for State of Montana

MICHAEL T. HILGERS
Attorney General of Nebraska

/s/ Eric Hamilton (BMF per authority)
ERIC HAMILTON
Solicitor General
JUSTIN D. LAVENE
Assistant Attorney General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
eric.hamilton@nebraska.gov
justin.lavene@nebraska.gov

Counsel for State of Nebraska

GENTNER DRUMMOND
Attorney General of Oklahoma

/s/ Bryan Cleveland (BMF per authority)
BRYAN CLEVELAND
Deputy Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
bryan.cleveland@oag.ok.gov

Counsel for State of Oklahoma

ALAN WILSON
Attorney General of South Carolina

/s/ James Emory Smith, Jr. (BMF per authority)
JAMES EMORY SMITH
Deputy Solicitor General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803)734-3680
esmith@scag.gov

Counsel for State of South Carolina

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II (BMF per authority)
JUDD E. STONE II
Solicitor General
RYAN S. BAASCH
Assistant Solicitor General
KATIE B. HOBSON
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
(512) 474-2697 fax
Ryan.Baasch@oag.texas.gov
Katie.Hobson@oag.texas.gov

Counsel for State of Texas

SEAN D. REYES
Attorney General of Utah

/s/ Melissa A. Holyoak (BMF per authority)
MELISSA A. HOLYOAK
Utah Solicitor General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
(801) 366-0260
melissaholyoak@agutah.gov

Counsel for State of Utah

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Lindsay S. See (BMF per authority)
LINDSAY S. SEE
Solicitor General
MICHAEL R. WILLIAMS
Senior Deputy Solicitor General
Office of the West Virginia Attorney General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
(682) 313-4550
Lindsay.S.See@wvago.gov

Counsel for State of West Virginia

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(f) and (g), I hereby certify that the foregoing complies with the Court's September 20, 2022 Order because it contains 3,490 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the brief 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.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2023, I caused the foregoing to be electronically 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.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio