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April 24, 2023

Office of the Clerk
United States Court of Appeals for the D.C. Circuit
E. Barrett Prettyman U.S. Courthouse and
William B. Bryant Annex
333 Constitution Ave., NW
Washington, DC 20001

Re: 28(j) notice in *State of Ohio v. EPA*, No. 22-1081 & Consolidated Cases

Dear Mr. Langer:

I am writing about the Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*, No. 21-16278, — F.4th —, 2023 WL 2962921 (9th Cir., April 17, 2023).

That case presented the question whether the Energy Policy and Conservation Act of 1975 preempted a city ordinance “prohibiting the installation of natural gas piping within newly constructed buildings.” *Id.* at *2. The Ninth Circuit answered that question in the affirmative. *Id.* It held that the ordinance was preempted by 42 U.S.C. §6297(c). *Id.* That part of the Act, with some irrelevant exceptions, preempts state laws “concerning the energy efficiency, energy use, or water use of” any “covered product.” *Id.* at *4 (quoting 42 U.S.C. §6297(c)). (The covered products include consumer appliances.) The court reasoned that “concerning” is a broad phrase that “means ‘relating to.’” *Id.* at *6 (citation omitted). Berkeley’s ordinance banning “the delivery of natural gas to products that operate on natural gas ‘concerns’ the energy use of those products,” and is therefore preempted. *Id.* “States and localities,” the court held, “can’t skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can’t do *directly*.” *Id.* at *9.

The same logic applies here. This case concerns a different provision in the Act, which preempts state laws “related to fuel economy.” 49 U.S.C. §32919(a). This broad language preempts California’s low- and zero-emission-vehicle programs. Those programs regulate the number of low- and zero-emission vehicles in manufacturers’ fleets. *See* Br. of Petr. States 33–41. Emissions are inextricably linked to fuel economy; regulating one means regulating the other. *Id.* at 35–38. So the challenged programs necessarily “relate[] to” fuel economy. §32919(a). States, even California, “can’t skirt the text of” the Act’s “broad preemption provisions by doing *indirectly*” —regulating fuel economy—“what Congress says they can’t do *directly*.” *See California Restaurant Association*, 2023 WL 2962921 at *9.

Respectfully submitted,

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/s/ Benjamin M. Flowers

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2023, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Benjamin M. Flowers

Benjamin M. Flowers
Solicitor General