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May 1, 2023

VIA CM/ECF
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: *State of Ohio v. EPA*, No. 22-1081 & Consolidated Cases
Response to Petitioners' Federal Rule of Appellate Procedure 28(j) letter, Doc. ID 1996076

Dear Mr. Langer,

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) has no bearing on the merits of the challenged EPA Clean Air Act Section 209 waiver decision. First, as EPA has already explained, EPCA preemption was outside the scope of the challenged waiver action. *See* EPA Response Br., 91-97. Congress limited Section 209 waiver decisions to consideration of three specified statutory criteria, none of which includes assessment of EPCA preemption. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462-63 (D.C. Cir. 1998). Thus, a challenge to EPA's action under Section 209 is not the proper vehicle for Petitioners to raise an EPCA preemption claim, and nothing in *California Restaurant Association v. City of Berkeley*, No. 21-16278, — F.4th —, 2023 WL 2962921 (9th Cir., April 17, 2023) alters that fundamental deficiency.

Moreover, the EPCA preemption provision addressed in *California Restaurant Association,* which relates to energy efficiency standards for household appliances, is materially different than the EPCA preemption provision relied upon by Petitioners, which relates to fuel economy standards for vehicles. The scope of the former implicates a significantly different set of textual and contextual

considerations. And neither of these two EPCA preemption provisions implicates the "wholly independent" Clean Air Act mandates that are at issue in this case related to the protection of public health and welfare. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

In any event, the conclusion reached by the panel in *California Restaurant Association* was incorrect and should not be adhered to by this court. *See generally* U.S. Brief in Support of Appellee, Case No. 21-16278, Docket No. 33. As the United States explained in its brief in *California Restaurant Association*, statutory text, context, and longstanding administrative interpretation all support the conclusion that 42 U.S.C. § 6297(c) preempts state or local regulations imposing energy conservation standards (or equivalent performance standards) on certain appliances, without displacing regulations in areas traditionally subject to state authority that indirectly affect energy usage by covered appliances. *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric G. Hostetler, hereby certify that on May 1, 2023, I electronically filed the foregoing Response to Petitioners' FRAP 28(j) letter with the Clerk of the Court of the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF System. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Eric G. Hostetler
ERIC G. HOSTETLER