



Office of the Solicitor General  
Office 614-466-8980  
Fax 614-466-5087

May 16, 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:

On May 11, the Supreme Court issued its decision in *National Pork Producers Council v. Ross*, No. 21-468. Justice Gorsuch wrote the lead opinion. In a section joined by Justices Thomas and Barrett, his opinion embraces an argument relevant to this case. In particular, at page 26 of the slip opinion, Justice Gorsuch concluded that giving some States “greater authority to regulate in-state sales” than others would contradict “the Constitution’s ‘fundamental principle of *equal* sovereignty among the States.’” (quoting *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013)).

That insight supports the petitioner States’ position. The challenged waiver and §209(b)(1) of the Clean Air Act give California greater authority to regulate in-state sales of new motor vehicles because both allow California alone to set emission standards for new vehicles. *See* Petitioner States’ Opening Brief at 28–33. Therefore, both the challenged waiver and the statute pursuant to which it was issued violate “the Constitution’s ‘fundamental principle of *equal* sovereignty among the States.’” *Nat’l Pork Producers Council*, slip op. at 26 (quoting *Shelby Cnty.*, 570 U.S. at 544).

Finally, the application of this principle in *Pork Producers*—a case concerning the States’ authority to regulate in-state sales in ways that cause extraterritorial effects—refutes the EPA’s claim that equal-sovereignty principles limit only “Congress’s Fifteenth-Amendment authority to impose disparate restrictions on state election procedures.” EPA Br. at 35–36. Every State possesses equal sovereignty that Congress can limit only if expressly empowered to do so. As the States’ briefing explains, nothing in the Commerce Clause gives Congress the power to deny the States their equal sovereignty.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

/s/ Benjamin M. Flowers  
BENJAMIN M. FLOWERS\*  
Solicitor General

*\*Counsel of Record*

MICHAEL J. HENDERSHOT  
Chief Deputy Solicitor General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bflowers@ohioattorneygeneral.gov

*Counsel of Record for State Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 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