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May 23, 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 1999403

Dear Mr. Langer,

The Supreme Court's fractured decision in *National Pork Producers Council v. Ross*, No. 21-468 (May 11, 2023), does not support Petitioners' novel constitutional claim.

In *Pork Producers*, the divided Court affirmed the dismissal of a claim that a California law forbidding the in-state sale of certain pork meat impermissibly burdened interstate commerce. Here, Petitioners do not advance any similar claim that California's regulation of motor vehicles poses impermissible commerce burdens. They instead attack the constitutionality of the preemption framework within a Federal statute.

The passing reference in Justice Gorsuch's lead opinion to "equal sovereignty," moreover, does not support Petitioners' argument. To start, the reference does not reflect the opinion of the Court. The pertinent portion of the opinion was joined by just two justices and is inconsistent with the stated views of the six other justices.

Further, the reference was about a fundamentally different question: whether the Dormant Commerce Clause itself “constitutionally entitle[s]” voters in certain states to “greater authority” than voters in other states. Slip op. at 26. Justice Gorsuch’s suggestion that equal-sovereignty principles counsel otherwise says little about how such principles constrain Congress.

Indeed, Justice Gorsuch elsewhere made clear he was addressing Dormant Commerce Clause considerations and not commenting on the scope of Congress’s own enumerated and expansive power to regulate interstate commerce. Justice Gorsuch emphasized that under the “(wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws.” Slip op. at 21. Congress can “identify and assess” “pertinent economic and political interests at play across the country,” and “claim democratic support for any policy choice it may make.” *Id.* As the government has explained, EPA Br. at 31-53, nothing in the Constitution requires that Congress’s exercise of its plenary commerce power adhere to geographic uniformity, and nothing in any portion of Justice Gorsuch’s opinion suggests otherwise.

Regardless, Petitioners’ equal-sovereignty claim is deeply flawed for numerous reasons. *See* EPA Br. at 31-53.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric G. Hostetler, hereby certify that on May 23, 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