No. _____

In the Supreme Court of the United States

STATE OF OHIO, ET AL.

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Over a century ago, this Court remarked that "the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900). It continued: "The idea that one state is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained even if Congress had power to make such discrimination." *Id.* Are those words just a *fin de siècle* sentiment, or do they endure today?

The Question Presented is: May Congress pass a law under the Commerce Clause that empowers one State to exercise sovereign power that the law denies to all other States?

LIST OF PARTIES

The petitioners are the States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

The respondents are the U.S. Environmental Protection Agency and Michael S. Regan, Administrator of the U.S. Environmental Protection Agency.

Additional respondents, and intervenors below, are Ford Motor Company, Volkswagen Group of America, Inc., American Honda Motor Co., Inc., BMW of North America, LLC, Volvo Car USA LLC, New York Power Authority, National Grid USA, Calpine Corporation, Advanced Energy Economy, Power Companies Climate Coalition, National Coalition for Advanced Transportation, District of Columbia, State of Washington, State of New Jersey, State of Maine, State of Hawaii, State of Illinois, State of Maryland, State of Colorado, State of Nevada, State of New York, State of Connecticut, State of Vermont, State of Rhode Island, State of North Carolina, State of California, State of New Mexico, State of Minnesota, State of Delaware, State of Oregon, Commonwealth of Pennsylvania, Commonwealth of Massachusetts, City of New York, City of Los Angeles, Clean Air Council, Natural Resources Defense Council, Public Citizen, Center for Biological Diversity, Environmental Defense Fund, Sierra Club, National Parks Conservation Association, Union of Concerned Scientists, Conservation Law Foundation, and Environmental Law and Policy Center.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. This case began as petitions for review in the D.C. Circuit. That case is *Ohio, et al. v. EPA*, *et al.*, Nos. 22-1081, 22-1083, 22-1084, 22-1085 (D.C. Cir. April 9, 2024).

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INTRODUCTION

The Golden State is not the golden child. Yet in the Clean Air Act, Congress elevated California above all the other States by giving to the Golden State alone the power to pass certain environmental laws. *See, e.g.*, 42 U.S.C. §7545(c)(4). This case asks whether, as part of the plan of the convention, the States surrendered their equal sovereignty as to each other even as they—quite explicitly—surrendered some of the sovereignty to the new national government. The answer is no, and this case presents an excellent vehicle in which to answer the question.

First and foremost, this case gives the Court a chance to correct the D.C. Circuit's grave error in concluding that Congress can play favorites among the States. That conclusion is hard to square with the plan of the convention and the most relevant statements in this Court's precedents. The Court should grant certiorari to consider the question in depth.

The States, of course, surrendered some of their sovereignty to the federal government as part of the plan of the convention. But the question posed in this case is whether the State's surrendered their *equal* sovereignty as to what they retained. That is, did the States agree that the federal government can—in those spheres in which it can override State sovereignty—override only some States' sovereignty and not others? To ask is to answer. Yet the D.C. Circuit saw no problem with a federal law that exempts California, and only California, from the Clean Air Act's preemptive sweep. It is one thing for a State's voters to pass a law that has effect elsewhere—*see, e.g.*, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023); *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023)—

but it is quite another for Congress to give one State's voters a power it denied to the voters in the other 49. The D.C. Circuit thus made a critical error as to a critically important federal question. *See* Rule 10(c).

The D.C. Circuit's judgment is incompatible with core constitutional principles because no State is more equal than the others. And Congress does not have the general power to elevate one State above the others. The Union "was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). The "'constitutional equality' among the States," *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 179 (2016), includes a mandate of equal treatment at admission to the Union, but also "remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013). The equal-treatment mandate prohibits treating one State less favorably than others. *See, e.g., Coyle*, 221 U.S. at 567. It also prohibits treating one State more favorably: it stops Congress, that is, from passing any "special limitation of any of the paramount powers of the United States in favor of a State." *United States v. Texas*, 339 U.S. 707, 717 (1950). The D.C. Circuit's holding destroys the Constitution's restraint on Congress's power to discriminate among the States as to their retained sovereign power.

Several other features of this case make it an ideal vehicle to resolve Congress's Article I power to confer more sovereign power on one State than all the rest.

First, many States have long wanted an answer to the Question Presented. This petition includes 17 petitioning States. And four States not in the current coalition have previously raised equal-sovereignty objections to other laws that distinguish among the States.

Second, the question arises in a highly consequential context as it asks whether any State other than California can regulate vehicle emissions. Other States have tried to regulate as California does, but federal law stands in the way. *See Am. Auto. Mfrs. Ass'n v. Cahill,* 152 F.3d 196, 201 (2d Cir. 1998) (New York); *Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't Env't Prot.*, 208 F.3d 1, 8 (1st Cir. 2000) (Massachusetts). And California's vast economy means that whatever regulations California imposes will likely set the market for the rest of the nation. *See, e.g.*, *Ross*, 598 U.S. at 405 (Kavanaugh, J., concurring in part and dissenting in part).

Third, this case gives the Court its best chance to address the equal-sovereignty doctrine outside the context of Reconstruction Amendment legislation. Perhaps the two most prominent violations of equal sovereignty outside that context are the Clean Air Act provision challenged here and Nevada's special status for sports betting. This Court has already—though on different grounds—eliminated the Silver State's special status. *See Murphy v. NCAA*, 584 U.S. 453, 462, 473–74 (2018). Another case to test the equal-sovereignty doctrine may be a long time coming. The time to evaluate the doctrine is now, and in this case.

Finally, this case gives the Court a chance to address the criticism that the doctrine reaffirmed in *Shelby County* lacks deep constitutional roots. *See,*

e.g., *Shelby Cnty.*, 570 U.S. at 588 (Ginsburg, J., dissenting); *see generally* Leah Littman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (2016); Zachary S. Price, NAMUDNO*'s Non-Existent Principle of State Equality*, 88 N.Y.U. L. Rev. Online 24 (2013). The petitioning States press only a single question here: do the States retain equal sovereignty with respect to each other? It therefore offers an ideal vehicle for the parties to debate the grounding and extent of that doctrine unburdened by any other questions.

OPINIONS BELOW

This case originated in the D.C. Circuit. That Court rejected Ohio's and sixteen other States' petition for review. The decision is reported at 98 F.4th 288 (D.C. Cir. 2024).

JURISDICTIONAL STATEMENT

The D.C. Circuit rejected the Ohio's petition for review of the EPA's *Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, on April 9, 2024. *See* 87 Fed. Reg. 14,332 (Mar. 14, 2022); Pet. App. 55a. This Petition timely invokes this Court's jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The California Waiver of Preemption Provision reads:

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State

> standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

42 U.S.C. §7543(b).

STATEMENT

1. The Clean Air Act requires the EPA's Administrator to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7521(a)(1). One provision of the Act preempts the States from setting emission standards for new cars and new engines. §7543(a); *see also id.* §7543(e)(1).

The Act makes two exceptions to its preemptive scope. *First*, the Waiver Provision allows the EPA to give California—and only California—a waiver allowing that State to set emission standards more stringent than the federal standards. §7543(b)(1); S. Rep. No. 91-1196, 32 (Sept. 17, 1970). *Second*, the Act allows States with air quality below federal standards to adopt emission standards "identical to the California standards." 42 U.S.C. §7507(1); *see also id.* §7543(e)(2)(B)(i) (similar exception for non-road vehicles or engines). Thus, "the 49 other states" may depart from the federal standard if and only if they adopt "a standard identical to an existing California standard." *Cahill*, 152 F.3d at 201.

2. California first adopted greenhouse-gas regulations pertaining to vehicles in 2005. Cal. Code Regs.,

tit. 13, §§1900–61, Register 2005, No. 37 (Sept. 15, 2005). Shortly thereafter, it asked for a preemption waiver under the Clean Air Act. *See California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver*, 73 Fed. Reg. 12,156 (Mar. 6, 2008). The EPA initially denied the waiver. *Id.* But it soon reconsidered and, for the first time ever, issued a waiver allowing California to set standards related to fuel economy. *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver*, 74 Fed. Reg. 32,744 (July 8, 2009).

In 2012, California adopted its Advanced Clean Car regulations. Those regulations comprise two programs relevant here: the Low Emission Vehicles program, and the Zero Emission Vehicles program. The first consists of regulations that, applied to model years 2017 through 2025, were designed to reduce carbon-dioxide emissions by approximately 34 percent. Advanced Clean Cars Summary, California Air Resources Board at 5, https://perma.cc/8282-HLBL. The second requires manufacturers to ensure that, by 2025, at least 15.4 percent of their California sales consisted of zero-emission vehicles and plug-in hybrids. *Id.* at 13.

Because both programs set emission standards more stringent than those set by federal law, California needed a Clean Air Act waiver. It sought a waiver in June 2012. And the EPA eventually issued a waiver for California's two programs. *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver*, 78 Fed. Reg. 2,112 (Jan. 9, 2013).

3. The agency withdrew that waiver in 2019. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule*

Part One: One National Program, 84 Fed. Reg. 51,310, 51,338, 51,350 (Sept. 27, 2019). California and others challenged the rule. Ohio, along with other States, intervened to defend the EPA's withdrawal decision on the ground that the Constitution compelled it. They argued that §209(b) violates the Constitution by allowing California alone to regulate new-car emission standards, making any waiver issued under that section unenforceable. *See generally* Br. of Intervenors, Doc. No. 1862459, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Sept. 21, 2020).

That case remains pending because the future of the 2019 withdrawal is now uncertain. After the EPA withdrew California's waiver, it received petitions for reconsideration. *See Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment*, 86 Fed. Reg. 22,421, 22,427–28 (April 28, 2021). Soon after President Biden took office, the EPA purported to accept those invitations and posted an opportunity to comment on its reconsideration of the 2019 action. *Id.* at 22,421. The EPA asked the D.C. Circuit to stay the litigation challenging the 2019 actions pending their reconsideration. The Court granted the request. Order, Doc. No. 1884115, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Feb. 8, 2021). (That case remains pending, although the D.C. Circuit has held the case in abeyance while Ohio and others petition this Court for review in this case. *See id.*, Order No. 2053775 (May 10, 2023.))

4. After receiving comments, the EPA rescinded the 2019 action. *See Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, 87 Fed. Reg. 14,332 (Mar. 14, 2022); *Corporate Average Fuel Economy (CAFE) Preemption*,

86 Fed. Reg. 74,236 (Dec. 29, 2021) (NHTSA). Most relevant here, the EPA fully reinstituted the 2013 waiver for California's Advanced Clean Car program.

During the comment period, the States submitted comments warning the EPA that reinstating the wavier would present equal-sovereignty issues. The EPA decided it should not consider those comments on the ground that "the constitutionality of section 209 is not one of the three statutory criteria for reviewing waiver requests." Pet. App. 279a.

5. Ohio and several other States challenged the Rule in the D.C. Circuit. Addressing the equal-sovereignty arguments, the court concluded that Ohio and its co-petitioning States had standing to challenge California's waiver because "vacating the waiver would redress the claimed constitutional injury." Pet. App. 40a. But on the merits, the court rejected both equal-sovereignty arguments. As to the argument that equal sovereignty categorically bars Congress from delegating differential sovereignty to the States under the Commerce Clause, the D.C. Circuit held that the Constitution contains no "bar against Congress leaving states with different levels of sovereign authority even in the traditionally state-dominated" fields. *Id.* 45a–46a. As to the argument that equal sovereignty means—at least—that the California Waiver Provision flunks *Shelby County's* sufficient-relationship test, the D.C. Circuit held that Ohio and its co-party States forfeited that argument. *Id.* 42a.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit gave the wrong answer to a question about the basic structure of our federal system. That alone merits certiorari review. What is more, the

States have long wanted this question answered, and this time the question arises in the critically important context of States' power to pass environmental regulations. Finally, the question is squarely presented for this Court's consideration.

I. The Court should review the D.C. Circuit's judgment because it clashes with the Constitution's structure and history, and with this Court's most relevant precedents.

This brief starts with the D.C. Circuit's error because the many ways that Court's judgment conflicts with the Constitution shows why certiorari is warranted here.

A. This case fits the mold of many recent cases that evaluate unanswered questions of constitutional structure, including the relationship of the federal government to the States and the States to each other.

Like many other recent cases on this Court's docket, this case involves a core question about the Constitution's basic structure. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 420–24 (2024); *United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 202–03 (2020); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 236 (2019).

Because the status of the States in relation to the federal government is both a foundational premise of the Republic and an enduring question with many facets, it is no surprise that this Court frequently hears cases about whether the States retained sovereignty

or surrendered it when ratifying the Constitution. *See, e.g.*, *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 499–500 (2021); *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 584 (2022); *Allen v. Cooper*, 589 U.S. 248, 255–59 (2020). This case is of a piece. Like those recent cases, this one asks whether the States surrendered one aspect of sovereignty in the plan of the convention. The twist here is that the question about surrender is a relative one; it is not, as in recent cases, whether all the States gave up sovereign immunity, but whether the States gave up the right to equal treatment vis-à-vis the other States.

Even if the D.C. Circuit reached the right answer, the Question Presented calls out for this Court's answer.

B. The D.C. Circuit's judgment conflicts with the Constitution's design.

The opinion below shows that review is warranted because the D.C. Circuit's judgment cannot be squared with the Constitution's basic design. The original plan of the Constitution requires equal State sovereignty for several reasons.

1. For starters, many parts of the Constitution treat the States as equals. The Full Faith and Credit Clause requires each States to give equal respect to other States' judgments. U.S. Const. art. IV §1. States are equally represented in the Senate. *Id.* art. I §3, cl. 1. And the States have an equal voice in amending the Constitution. *Id.* art. V. Collectively, these provisions signal that State equality is a bedrock premise of the Constitution. *Cf. Torres*, 597 U.S. at 590; *McCulloch v. Maryland,* 4 Wheat. 316, 414–15 (1819).

2. The same equality of States is evident in the Constitution's use of the word State to describe the sovereigns that retained power in the federal design. "By using the term 'States,' the Constitution recognized the traditional sovereign rights of the States minus only those rights that they expressly surrendered in the document.'" Anthony J. Bellia & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 938 (2020). That conclusion flows from the background to the Constitution's ratification.

When the States declared their independence from Britain, "they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all … Acts and Things which Independent States may of right do.'" *Murphy*, 584 U.S. at 470 (quoting Declaration of Independence ¶32). One key aspect of the sovereignty possessed by the States was their "equal sovereignty." Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 935. The "law of nations" established that "'Free and Independent States' were entitled to the 'perfect equality and absolute independence of sovereigns.'" *Id*. at 937 (quoting *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137 (1812)). "The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations." *Id.* at 937–38; *see also* C. Phillipson, Wheaton's Elements of International Law 261 (5th ed. 1916) (recognizing that sovereigns "enjoy equality before international law"). And the States would have understood themselves to possess this fundamental aspect of sovereignty.

When the new Constitution divided sovereign authority between the States and the federal government, some provisions "limited … the sovereign

powers of the States." *Murphy*, 584 U.S. at 470. For example, the Constitution gave the federal government exclusive authority over some matters, *see* U.S. Const., art. I, §8, cl.4, restricted state authority over others, *id.*, art. I, §10, and made validly enacted federal laws "the supreme Law of the Land," *id.*, art. VI, cl.2. But these changes did not *abolish* the States' sovereignty; to the contrary, the States "retained 'a residuary and inviolable sovereignty.'" *Murphy*, 584 U.S. at 470 (quoting The Federalist No. 39 (J. Madison)). It has always been "perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 325 (1816). As explained at the time of ratification, because "the plan of the convention aim[ed] only at a partial union or consolidation, the State governments … clearly retain[ed] all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States." Federalist No. 32 (A. Hamilton). The Tenth Amendment "unambiguously confirms this principle," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995), so the States and the People retained all powers not expressly surrendered in the Constitution.

The right to sovereign equality is not among the rights surrendered. While the Constitution limited the States' sovereignty in some ways, it nowhere took from the States their sovereign equality. Thus, the States retained that equality. Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 937–38. If anything, the discussion around the time of the convention included a push for new States added after the

original thirteen to be governed "as provinces" and allowed "no voice in our councils." 3 *The Life of Gouverneur Morris, with Selections from His Correspondence and Miscellaneous Papers* 192 (1832). In the face of such sentiment, the Constitution's bare use of "States" to describe the political sovereignty of the preexisting political units that formed the union is best read to incorporate the principle of equal sovereignty of those entities.

The States' sovereign equality remained complete until the Civil War Amendments. Those Amendments all permit Congress to enforce their guarantees by "appropriate" legislation. U.S. Const., amend. 13, §2; amend. 14, §5; amend. 15, §2; *see also* amends. 19; 24 §2; 26 §2. Appropriate legislation might entail limiting the sovereign authority of only the States found to be acting in violation of a particular amendment. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 626–27 (2000). "Thus, by adopting these Amendments, the States expressly … compromised their right to equal sovereignty with regard to enforcement of the prohibitions set forth in the Amendments." Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 938. But the States did not otherwise compromise their equal sovereignty—the Amendments do not address, and so do not alter, the States' equal sovereignty in contexts unrelated to the prohibitions and guarantees of these Amendments. Outside of that special context, if one State could authorize conduct preempted in the other 49, then the preempted States do not retain the "residual sovereignty," *Bond v. United States*, 564 U.S. 211, 221 (2011), contemplated by the Constitution that makes them States.

This history is why the Court has described the "union of States" as "equal in power, dignity, and

authority" with each State "competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle*, 221 U.S. at 567.

3. Beyond these explicit signals, the Constitution's overall design rests on State sovereign equality. This sovereign equality is one of the Constitution's implicit building blocks. The "plan of the Constitution" operates "[b]ehind the words" of the document's text. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934). Many restraints beneath the words are "implicit in the constitutional design" because the "bare text" is not an "exhaustive description" of the Constitution's limits on national power. *Alden v. Maine*, 527 U.S. 706, 730, 736 (1999); *McCulloch*, 4 Wheat. at 435–37. Those doctrines are "not spelled out in the Constitution but are nevertheless implicit" in its overarching design. *Franchise (2019)*, 587 U.S. at 247. Those implied doctrines include cornerstones of the constitutional structure, such as intergovernmental tax immunity, the States' sovereign immunity in their own courts, and the States' sovereign immunity in other States' courts. *Id.* at 247–48. Like these other doctrines, the equal sovereignty of the States is an "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." *Id.* at 237 (citation omitted).

Most basically, "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725 (1868), *overruled on other grounds*, *Morgan v. United States*, 113 U.S. 476 (1885). If the States' sovereign authority—the core of their statehood—could

be reduced unequally, then the States would be in no relevant sense "indestructible." Instead, they would be subject to diminution when more politically powerful States win limits on sister States' authority. Put another way, the "constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle*, 221 U.S. at 580. More specifically, federalism and nondelegation point to the States' sovereign equality.

Federalism. Start with perhaps the Constitution's most innovative structural feature—federalism. One of the Constitution's core structural principles is dual sovereignty. That is something "every schoolchild learns." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But perhaps one detail those grammar-school lessons do not confer is the true "genius" of that dual sovereignty. *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring). The genius of that structure is its ability to "check … abuses of government power." *Gregory*, 501 U.S. at 458. That check stems in part from a "diffusion of sovereign power" that fosters greater liberty than centralized power. *Bond*, 564 U.S. at 221 (quotation marks omitted). But that diffusion also secures liberty through "the tension" created "between federal and state power." *Gregory,* 501 U.S. at 459; *see Printz* v. *United States*, 521 U.S. 898, 921 (1997). The States, as sovereigns "create centers of political opposition that [can] control the excesses of the national government." Clarence Thomas, *Why Federalism Matters*, 48 Drake L. Rev. 231, 237 (2000); *cf.* Federalist No. 26 (A. Hamilton). All of this is why the Court said long ago that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union." *White,* 7 Wall. at 726.

The States' retained sovereignty under this dual-sovereign structure must be an *equal* sovereignty if the benefits of that structure are to retain any force. Dual sovereignty "enhance[s]" individual freedom. *Alden*, 527 U.S. at 758, 751. And that freedom-promoting feature is greatly diminished without equal state sovereignty. For one thing, unequal States cannot serve as "centers of political opposition" to the federal government, Thomas, *Federalism*, 48 Drake L. Rev. at 237, if the federal government can play favorites by diminishing the relative power of those States that oppose federal policies. For another, unequal sovereignty lessens citizen freedom by shifting State's attention from "competition for a mobile citizenry," *Gregory*, 501 U.S. at 458, to competition for Congress's favoritism. Political rent-seeking of that sort adds nothing to States' incentives to improve the lives of their citizens. Because unequal sovereignty neuters federalism, it is fair to say that equal sovereignty "ultimately rests on concepts of federalism." Sonia Sotomayor de Noonan (Note), *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979).

Non-delegation. The equal-sovereignty principle aligns with the Constitution's general concern with delegating vested power. "The power the Constitution grants it also restrains." *United States v. Windsor*, 570 U.S. 744, 774 (2013). And the Constitution's "structural integrity" depends as much on "preventing the diffusion" of power, as it does on stopping the centralization of power. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991); *cf. INS v. Chadha*, 462 U.S. 919, 954–55 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982). In many ways, the Constitution limits efforts to hand off vested power to

other actors. "Congress has plenary control over the salary, duties, and even existence of executive offices." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010). But Congress cannot assign the power to appoint those officers to actors not authorized in the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 127, 143 (1976) (per curiam); *see Lucia v. SEC*, 585 U.S. 237, 247–48, 251 (2018). Congress may, under certain powers in the Constitution, limit the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976). But Congress probably cannot "delegate[]" that power to others. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991). Congress may "strip[]" Article III courts of the power to hear cases. *Patchak v. Zinke*, 583 U.S. 244, 250–51 (2018). But Congress may not assign the judicial power to another branch. Instead, the "judicial power of the United States may be vested *only* in courts." *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (emphasis added); *see also Miller v. Johnson*, 515 U.S. 900, 922 (1995); *United States v. Nixon*, 418 U.S. 683, 704 (1974). In sum, if Congress cannot create a "sort of junior varsity Congress" (or judiciary), *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting), it cannot create a junior-varsity executive branch in one State.

All of these limits on handing off power promote "political accountability" by letting the "benefits and burdens" of the political action fall where they should. *Murphy*, 584 U.S. at 473. Without limits, accountability gets blurry, and the "sovereign people" no longer know "without ambiguity" whom to credit or blame. *Gundy v. United States*, 588 U.S. 128, 155 (2019) (Gorsuch, J., dissenting). In other words, merely "because Congress has been given explicit and plenary

authority to regulate a field of activity," it does not have carte blanche over the manner in which it regulates. *Buckley*, 424 U.S. at 132.

What is true about handing off power generally must be true, by analogy, about handing off power to only some States. Letting one State act like the federal executive clashes with the Constitution's design assigning that function to the Executive Branch. Imagine a law allowing some States, but not others, to boycott Israel. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374–75 (2000). Or a law permitting just one State to enact and enforce immigration laws. *Cf. Arizona v. United States*, 567 U.S. 387, 394–95 (2012). It is one thing for Congress to enact preemptive laws, which necessarily limit state sovereignty; the federal government has the power to do that (subject to various limits). It is quite another thing for Congress to empower one State, but no others, to exercise power like the federal executive. When the federal government empowers a single State, it aggrandizes its own power and the power of the favored State while weakening the power of the disfavored States. Allowing Congress to reorder power that the Constitution vests at the federal level contradicts the Constitution's basic concern against reassigning vested powers.

In the end, the Constitution's restraint on reassigning vested power reflects the Framers "explicit[]" choice of "a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U. S. 144, 166 (1992). Congress may no more delegate to one State alone the power to act like the federal executive than it may deputize the States to act as the national executive or command a State to exercise its legislative power in

lockstep with Congress. *Printz*, 521 U.S. at 919–20; *Murphy*, 584 U.S. at 473–74.

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Both federalism and non-delegation justify this Court's statement that the States' "status as coequal sovereigns" is "implicit in … the original scheme of the Constitution." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980). That equality is "implied by the [Constitution's] basic design." Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 Harv. J. Law & Pub. Pol'y 13, 16 (1998). Like other founding principles baked into the Constitution, the States' sovereign parity is something "the Constitution assumes," *Franchise (2019*), 587 U.S. at 237. And that is why the Court has treated the "'constitutional equality' among the States," *Franchise (2016)*, 578 U.S. at 179 (citation omitted), as a "truism" for more than 100 years. *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918). That truism has a consequence for courts evaluating equal-sovereignty claims: Much like a claim that a power falls outside the "executive power" must show that the Constitution "expressly" took it away, *Free Enter. Fund*, 561 U.S. at 492, a claim that States lack equal sovereignty must show that the Constitution deleted this "traditional," *id.*, State attribute.

4. To be sure, some language in the Constitution enforces an even *greater*, though more selective, equality mandate on Congress. Parts of Article I address State to State equality, such as the Bankruptcy Clause and the Ports Preference Clause. *See* U.S. Const. art. I, §8, cl. 4; §9 cl. 6. But those more-protective clauses do not signal that the Constitution abandons the deep structural premise of State equality.

Consider an analogy. The Speech and Debate Clause confers legislator immunity, but it does not signal that the Constitution's comparative silence about presidential immunity eliminates that immunity. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 706–07 (1995). In a similar way, the greater mandate for equality in these clauses does not eliminate the Constitution's deep structural commitment to the States' sovereign equality.

C. The D.C. Circuit's judgment conflicts with this Court's most analogous precedent.

This Court's precedents point in the opposite direction of the D.C. Circuit's judgment.

This Court first addressed the States' equal sovereignty in cases about admitting new States. The Court long ago recognized that every State, as a matter of "the constitution" and "laws" of admission is "admitted into the union on an equal footing with the original states." *Pollard v. Hagan*, 44 U.S. 212, 229 (1845). "[N]o compact" can "diminish or enlarge" the rights a State has, as a State, when it enters the Union. *Id.* Put differently, "a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900); *Coyle*, 221 U.S. at 568. This precludes any arrangement in which one State is admitted on less-favorable terms than any other. *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377–78 (1977). Conversely, it bars any State

from being admitted on terms *more* favorable than those extended to its predecessors. *United States v. Texas*, 339 U.S. at 717. Each State has the right, "under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government." *Case v. Toftus*, 39 F. 730, 732 (C.C. D. Or. 1889).

Perhaps the most significant case regarding State admission involved the Chicago River, a waterway "over which congress, under its commercial power, may exercise control." *Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 683 (1883). Absent any federal regulation, Illinois could "exercise the same power over rivers within her limits" as the original States. *Id.* at 689. A shipping company argued that Congress *had* limited Illinois through conditions in the Act granting Illinois statehood, but the Court concluded that those limitations "ceased to have any operative force … after she became a state of the Union. On her admission she at once became entitled to … all the rights of dominion and sovereignty which belonged to the original States." *Id.* at 688–89. Of course, Congress could have regulated Illinois's (and other States') rivers "under its commercial power," but it had not. *Id.* at 687. So the condition on Illinois's admission should have been valid on the theory that admissions conditions within Congress's enumerated powers survive admission. The reason the condition did not survive is that the equal-sovereignty principle blocked Congress's differential use of the commerce power over navigable waters. *See Coyle*, 221 U.S. at 573.

More recent cases align with these admission cases. The logic of these later cases flows from the reality that the States' equality upon admission would not matter much if Congress could vitiate it after admission. In the context of voting-rights laws, the Court recently reaffirmed that the "fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States" after their admission. *Shelby Cnty.*, 570 U.S. at 544. *Shelby County* involved challenges to the Voting Rights Act, which required some States, but not others, to receive federal permission before amending their election laws. *Id.* at 544–45. The Court determined that, in deciding whether such legislation was "appropriate," courts must consult the background principle of equal sovereignty. *See id.* When legislation departs from that principle—as the Voting Rights Act did, by unequally limiting the States' power to adopt and enforce election laws—it will be upheld as "appropriate legislation" only if the disparate treatment is justified. *Id.* at 544–45, 552; *accord Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Because the federal government failed to justify part of the Voting Rights Act, Congress had no authority to enact that provision. *Shelby Cnty.*, 570 U.S. at 551–55.

Shelby County shows just how strong the equal-sovereignty principle is. *Shelby County* reviewed a law passed under the Fifteenth Amendment, which *allows* Congress to single out some States for less-favorable treatment of their sovereign authority. *See South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966); *Shelby Cnty.*, 570 U.S. at 551–55. The Fifteenth Amendment, like the other amendments passed after the Civil War, was "specifically designed

to alter the federal-state balance." *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). When it comes to the States, Congress may sometimes act under Section 5 in ways it could not under the Commerce Clause. *Seminole Tribe v. Florida*, 517 U.S. 44, 65–66 (1996). Therefore, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome v. United States*, 446 U.S. 156, 179 (1980); *see also Gregory*, 501 U.S. at 468; *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983); *cf.* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1006 n.13 (1995); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 Harv. L. Rev. 2180, 2210–11 (1998). When Congress Acts under other provisions, such as its Article I powers that lack the same empowering language as the Reconstruction Amendments, it necessarily has less freedom to single out States.

Despite Congress's greater power to regulate the States under the Civil War Amendments, the background rule that States retain equal sovereignty requires that Fifteenth Amendment legislation departing from that principle will be upheld as "appropriate" only if the need for such differential treatment is solidly grounded in evidence. *Shelby Cnty.*, 570 U.S. at 554. If the equal-sovereignty principle retains some strength even in contexts where the States have surrendered their entitlement to complete sovereign equality, it necessarily retains all its strength in

contexts where the States *have not* surrendered their entitlement to sovereign equality.

* * *

If federal courts "must 'respect ... the place of the States in our federal system,'" *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022) (citation omitted), federal courts should expect no less from Congress. The Court should take up the Question Presented to say so. Granting certiorari will signal the "importance of showing respect for the sovereign States that comprise our Federal Union," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in judgment).

II. This case raises an important question of constitutional structure that many States have raised, and here occurs in the important context of environmental regulation.

As detailed above, the question whether the States retain equal sovereignty intersects with major structural features of the Constitution's federalist design. And while a decade ago, the Court addressed the States' equal sovereignty when Congress acts under a Reconstruction Amendment power, it has not directly addressed the States' equal sovereignty when Congress Acts under more general powers like the Commerce Clause or the Spending Clause. Those clauses are the basis for numerous federal laws. Congress uses the Commerce Clause, "in a wide variety of ways" to pass national laws. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J., Op.). And the Spending Clause opens the door to even more

legislative terrain, given "the vast financial resources of the Federal Government." *S. Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting). It is no surprise then, that the States have long sought an answer as to their sovereign equality under these frequently deployed bases for congressional lawmaking. This case is an ideal opportunity to answer that question.

Decades ago, Nevada cited the equal-sovereignty doctrine to challenge Congress's decision to site a nuclear-waste-disposal facility there. *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990). More recently, New Jersey objected that Congress illegally discriminated in favor of Nevada by allowing only Nevada to authorize sports betting. *See Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 237–38 (3d Cir. 2013), *abrogated by* 584 U.S. 453 (2018). Around the same time, Maine cited its equal sovereignty with other States when it objected to the Department of Health and Human Services disapproving its decision to change Medicaid eligibility for 19- and 20-year-olds. *Mayhew v. Burwell*, 772 F.3d 80, 94 (1st Cir. 2014). Most recently, New York launched an equal-sovereignty attack on Congress's decision to cap the deduction from federal taxes for state and local taxes. *New York v. Yellen*, 15 F.4th 569, 583–84 (2d Cir. 2021).

Ohio and its co-party States join the line formed by Nevada, New Jersey, Maine, and New York, but with a crucial difference. While New Jersey succeeded on other grounds, Nevada, Maine, and New York ultimately challenged laws that did not differentially suppress state sovereignty. The recurring pleas from the States to consider this question is one the court should take up now, as this case most squarely presents it.

Not only would granting certiorari answer a question long on many States' minds, but answering it in this case would resolve an exceptionally important question about how the States can regulate when their regulations have vast national consequences. In other words, *this* instance of Congress playing favorites intersects with one of the Constitution's key goals: to "create a national economic market." *Ross*, 598 U.S. at 404 (2023) (Kavanaugh, J., concurring in part and dissenting in part). That national "federal free trade unit" has brought Americans "material success" unrivaled "in the history of commerce." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949). Because the Constitution knits the States' economic fortunes together, any congressional favoritism that empowers one State but not others to regulate the market ineluctably forces every other States to follow the favored State's lead. Quadruple that when the favored State is California. With an economy the size of India's or the United Kingdom's, California has an outsized influence on the American economy such that no other State can avoid the economic consequences of whatever policy California and its voters choose. The net effect is that congressional favoritism that gives one State more sovereign power than the rest elevates the voters of one State over the voters of another. The concrete effect in this case: no Ohioan (or non-Californian) voted for the policies that California voters effectively impose on Ohio and all the other States because Congress granted California a sovereign prerogative that no other State enjoys. At bottom, the Constitution's "'fundamental principle of *equal* sovereignty among the States'" means that voters in one State are not "constitutionally entitled to greater authority to regulate" than voters in other States. *Ross*,

598 U.S. at 388 (2023) (Gorsuch, J., opinion) (*quoting Shelby Cnty*, 570 U.S. at 544).

The unequal treatment here gives California alone the power to act like the federal government. For example, after the federal government proposed new, more relaxed emission standards under the previous administration, several car manufacturers held "secret negotiations" with California regulators. Juliet Eilperin and Brandy Davis, *Major automakers strike climate deal with California, rebuffing Trump on proposed mileage freeze*, Washington Post (July 25, 2019), https://perma.cc/5FXC-FJPR. These manufacturers met with California because only California can adopt standards that manufacturers must either implement nationwide or find a way to implement in California alone. A federal law giving one State special power to regulate a major national industry contradicts the notion of a Union of sovereign States.

The States deserve to know if Congress can treat them unequally when passing Article I laws. And answering that question in this case will resolve an important question of State power to regulate air quality.

III. This is an ideal vehicle to address the Question Presented.

Several features of this petition make it an ideal vehicle to resolve the Question Presented.

A. This case is a good vehicle because the States claim only equal sovereignty, not equal results.

The States' position here is a more moderate form of the doctrine than advanced in some previous litigation. Ohio and the other States do not view equal

sovereignty as requiring equality of result, only political equality. Compare that with, for example, New York's position in *Yellen*, 15 F.4th at 583–84, which challenged the unequal *effects* of changes to certain federal tax deductions. Ohio and its co-petitioners argue here only that equal sovereignty prohibits Congress from giving states unequal power to regulate (or prohibits it without a compelling justification). Of course, equal treatment does not mean equal results. *See United States v. Texas*, 339 U.S. at 716; *cf. Washington v. Davis*, 426 U.S. 229, 240–41 (1976). Congress is free to pass laws that produce unequal results in the various States. Nor does equal treatment demand equal distribution of national spending or equal use of the federal government's property. The mandate is instead a requirement of equal "political rights and obligations." *Stearns*, 179 U.S. at 245. Ohio and its co-party States seek "equal sovereignty, not … equal treatment in all respects." Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L. J. 1087, 1149 (2016) (emphasis omitted); *see also* Valerie J.M. Brader, *Congress' Pet: Why the Clean Air Act's Favoritism of California is Unconstitutional Under the Equal Footing Doctrine*, 13 Hastings Env't L. J. 119, 155 (2007). It is an equality of the States as States.

The equal-sovereignty doctrine demands "parity" only "as respects political standing and sovereignty." *United States v. Texas*, 339 U.S. at 716. Congress may not unequally limit or expand the States' "political and sovereign power," *id.* at 719, and must instead adhere to the principle that no State is "less or greater … in dignity or power" than another, *Coyle*, 221 U.S. at 566. Disparate limitations on the States' sovereignty thus violate the equal-sovereignty doctrine.

Disparate treatment *unrelated to sovereign authority*, however, does not. That means "Congress may devise … national policy with due regard for the varying and fluctuating interests of different regions." *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950). Congress may, in other words, pass legislation that expressly or implicitly favors some States over others, as long as it does not give some States favorable treatment with respect to the amount of sovereign authority they are permitted to exercise. Only disparate treatment of sovereign authority implicates the equal-sovereignty principle.

Congress routinely creates unequal results among the States, and those are not challenged here. When Congress locates naval bases in States with coastlines or directs funding to projects in particular States, those disparate results are not distinctions about sovereignty like the law challenged here. States located in areas prone to natural disasters gain more from federal laws empowering and enriching FEMA. States that sit atop oil fields bear the brunt and reap the benefit of federal energy policies. Spending Clause legislation will inevitably flow money to the States whose populations or conditions disproportionately exhibit the problems at which the funding is aimed. None of that kind of inequality is challenged here.

Therefore, although some have criticized the equal-sovereignty doctrine as too extreme or "capable of much mischief," *Shelby Cnty.*, 570 U.S. at 588 (Ginsburg, J., dissenting), that is not the argument the Court would confront in this case.

B. This case is a good vehicle because the States press the alternative argument that the California Waiver is unconstitutional as applied here.

Another feature of the specific argument here makes this case a good vehicle for the Question Presented. Ohio and its co-party States contend that the California Waiver Provision is unconstitutional even under the *Shelby County* test. Even if Congress can empower a single State (or a single subset of States) to regulate a matter of unique concern to that State (or that subset of States), it may not do so as it has for California here. The California Waiver Provision is not "sufficiently related to the problem that it targets." *Shelby Cnty.*, 570 U.S. at 542 (quotation omitted).

For starters, the Provision accords special treatment to a category of States that enacted engine-emission regulations before March 30, 1966—a description designed to forever include only California, and to forever exclude all other States, without regard to whether other States face identical environmental concerns. If "Congress must ensure that the legislation it passes to remedy [a] problem speaks to current conditions," *id.* at 557, a law tied to the state of the world when the Beatles released *Revolver* is not it.

But even if the Waiver Provision could be justified as addressing a California-specific concern with respect to clean air, that justification will not work here. The challenged waiver allows California to regulate greenhouse gases in order to curb "climate change." Pet. App. 211a. But as a member of this Court recognized (in arguing that "the very concept" of climate change is "inconsistent" with particularized injury),

climate change would be a "phenomenon harmful to humanity at large." *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (quotation omitted). The "task of dealing with" it would thus require action "at the national and international level." *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

In sum, climate change does not present a risk uniquely, or even especially, to California. Whatever its effects, they would have to be assessed on a global, not local, level. And in 2019, the EPA agreed. The EPA explained that giving California a "waiver would result in an indistinguishable change in global temperatures," and "likely no change in temperatures or physical impacts resulting from anthropogenic climate change in California." 84 Fed. Reg. at 51,341.

The EPA now says, without evidence, that "California is particularly impacted by climate change." Pet. App. 211a. But home-insurance experts, to take one example, consider California to be middle-of-the-road compared to other States with respect to climate-change risk. Pat Howard, *Best & worst states for climate change*, Policygenius (Oct. 5, 2022), https://perma.cc/ZM7R-VG2R. While California may experience effects of climate change, there is no evidence it will suffer effects that are different in degree or kind than those experienced by all the other 49 States.

So, whatever one might make of the Waiver Provision in other applications, the equal sovereignty of the States forbids the EPA from giving California alone the power to regulate a global risk potentially faced by every State in the country and by every nation on Earth.

C. Several other features of the case advise a grant.

First, the D.C. Circuit agreed that the States have standing to advance an equal-sovereignty challenge. Pet. App. 40a. So the case involves no threshold jurisdictional question.

Second, the D.C. Circuit's belief that the States forfeited one version of an equal-sovereignty test is no vehicle flaw as it is plainly inconsistent with this Court's holdings about preserving arguments. As this Court has said, "separate *arguments* in support of a single claim" are not waived by raising only one argument below. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534–35 (1992). In this Court, a petitioner can bring "any argument they like[] in support of" a consistent claim. *Id.* at 535; *see also Egbert v. Boule*, 596 U.S. 482, 498 n.3 (2022); *Franchise (2019)*, 587 U.S. at 235 n.1 (argument not waived even though party's argument evolved to cite different constitutional basis in support). The D.C. Circuit's efforts to hamstring the States' arguments are more a reason to grant review than to deny it.

Third, the D.C. Circuit's opinion thoroughly (though wrongly) considered the State's arguments. Over several pages of the Federal Reporter, the D.C. Circuit addressed constitutional structure and history, as well as this Court's cases and sister-circuit cases. Pet. App. 41a–54a.

Fourth, this Petition is the plea of 17 sovereign States to resolve the equal-sovereignty question. *See* Pet App. 8a n.1. Unlike the single-State challenges from other States described above, this challenge is backed by a full third of the States of the Union.

Fifth, the D.C. Circuit may well be the only Court of Appeals that can address the law challenged here because Congress has designated the D.C. Circuit as the forum for such challenges. *See* 42 U.S.C. §7607(b)(1). At a more general level, while there is no circuit split over equal-sovereignty challenges to Article I legislation, uniform circuit error is no barrier to reviewing an important question of constitutional structure like the one raised here. This Court sometimes adopts positions that "[n]o Court of Appeals has ever" embraced. *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (2001) (Stevens, J., dissenting); *see also*, *e.g.*, *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting); *Massachusetts*, 549 U.S. at 505–06; *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) & *id.* at 192 (Stevens, J., dissenting).

Finally, the D.C. Circuit effectively invited review. The Circuit pointed to a perceived limit in *Shelby County* that waters down its force "outside the context of 'sensitive areas of state and local policymaking.'" Pet App. 45a (ultimately *quoting Shelby Cnty.*, 570 U.S. at 545). That approach, of course, inverts the relative power of Congress under the Reconstruction Amendments and the Commerce Clause. *See* above at 23–25. And it signals the need for review. Perhaps lower courts should not "read between the lines" in this Court's opinions. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.,* 980 F.2d 437, 448 (7th Cir.1992). But *inverting* the relative power of the States and the federal government for Reconstruction Amendment legislation and Commerce Clause legislation is not reading between the lines; it is smudging them.

* * * * *

Not one voter outside California voted for the California policies that now effectively bind the nation because Congress gave those voters a power it denied the voters in the other 49 States. The Constitution's core principles prohibit Congress from giving that power selectively to the voters of one of the States of the Union at the expense of voters in all the other States. This Court should say so and reverse.

CONCLUSION

The Court should grant the petition for certiorari.

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