No. 24-13

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

REPLY IN SUPPORT OF 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?

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REPLY

The plan of the constitutional convention reinforces accountability to the people at every turn, whether through the horizontal separation of powers within the federal government, or the vertical division of authority among it and the States. But what happens when Congress thwarts such accountability by exempting one state—California—from its rules? California state officials, who answer only to California voters, end up wielding their bespoke power to impose environmental and transportation "policy preferences" on other states, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 406 (2023) (Kavanaugh, J., concurring in part and dissenting in part), all while externalizing the costs of those preferences at thermostats and car dealerships across the country. When voters want to grade these policies, they should "know who to credit or blame." *N.J. Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 473 (2018). Yet, the people of those other states cannot use their ballot box to change the policies that California adopts. For people outside California, their only remedy is to challenge the EPA's waiver applying an unconstitutional statute so that this Court may restore the equal sovereignty—and the lines of accountability it provides—that are intrinsic to the Constitution.

Rather than seriously dispute that this Question Presented is weighty and worthy of this Court's review, the EPA's opposition front-loads a merits argument and then spends two pages on supposed vehicle issues that Ohio largely addressed ahead of time.

The States' status either as equal sovereigns, as Ohio and 16 other States say—or as functional

instrumentalities of the federal government, as the EPA says—is a question of exceptional importance. Look no further than the litigation trailing this case over other EPA actions that many States challenge as violating the equal-sovereignty doctrine. One rule would empower California to nearly eliminate the sale of heavy-duty trucks with internal-combustion engines. *California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption*; *Notice of Decision*, 88 Fed. Reg. 20,688 (Apr. 6, 2023). Eighteen States challenged that rule in the D.C. Circuit, but that challenge is currently in abeyance. *See* Order 1208581944 in *Iowa v. EPA,* No. 23-1144 (D.C. Cir. Dec. 21, 2023). Another rule involves a package of California regulations related to truck fleets. *See California State Motor Vehicle Pollution Control Standards; Advanced Clean Fleets Regulation; Request for Waiver of Preemption and Authorization,* 89 Fed. Reg. 57,151 (July 12, 2024). Again, two dozen States objected to a proposal to give California a sovereign power denied to the other 49 States. *See* Comment of Nebraska, et al., No. EPA-HQ-OAR-2023-0589-0001 (Sept. 16, 2024).

Those challenges show that the issue warrants this Court's attention now. Nearly a third of States believe the EPA is consistently violating their equal sovereignty by applying a law that Congress had no power to enact. And if Ohio and the other States are right, then every day that they are denied their rightful status both irreparably injures them and thwarts accountability for the environmental policies that affect

their citizens. This Court should grant certiorari and reverse.

I. The EPA's merits arguments are wrong about Ohio's equal sovereignty, but reinforce why this case is certworthy anyway.

The EPA opens its merits-forward opposition by highlighting parts of the Constitution that mandate equality among the States in specific areas. EPA Br.11–12; St. Resp. Br.27. Ohio flagged and distinguished these provisions in is petition. Pet. 20–21. As Ohio explained, these parts of the Constitution enforce a greater equality mandate than the background equality that undergirds the entire relationship between the States and the federal government.

True, some parts of the Constitution authorize Congress to treat the States unequally. EPA Br.12 (citing clauses in art. I, §10). But the permission these clauses give Congress to treat the States unequally does not dent the deep structural equality of the States outside those limited spheres. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 594 (2022). At most, any permission given Congress to treat States unequally in Article I, §10 is an exception that proves the general rule—Congress has no roving power to enhance one State's sovereign power over all the others. In the Constitution, State uniformity is the norm, and State dis-uniformity the exception. *Cf. Trump v. Anderson*, 601 U.S. 100, 112 (2024); *id.* at 121 (Sotomayor, J., concurring in the judgment).

Turning to history, the EPA draws the wrong lesson from four early statutes. EPA Br.13. Those statutes are not—as the EPA would have it—evidence

that Congress has conferred unequal sovereignty from the start. Rather, these statutes align with Ohio's theory that the Constitution generally requires Congress to treat the States as equal sovereigns.

The first two statutes did no more than allow certain States to impose tonnage duties. *See* Act of Aug. 11, 1790, 1 Stat. 184–85; Act of Feb. 19, 1791, 1 Stat. 190. As just discussed, the Constitution explicitly allows Congress to authorize the States to impose tonnage duties without authorizing the States to do so equally. The statutes are therefore no evidence that the Constitution erases the States' equal sovereignty generally.

A third statute the EPA highlights authorized courts in only some States to hear certain revenue offenses. *See* Act of March 8, 1806, 2 Stat. 354–55. That statute holds no lesson for the States' equal sovereignty either. The Constitution restricts Congress's power as to state legislators and executives in a way it does not restrict Congress's power as to state judges. *See Printz v. United States*, 521 U.S. 898, 907 (1997). The Constitution, that is, prevents Congress from "harness[ing] a State's legislative or executive authority," *Haaland v. Brackeen*, 599 U.S. 255, 281 (2023), but not its judicial authority. What is more, opening some state courts to hear federal actions is not analogous to enabling a single state to legislate in a field closed to all other States.

The EPA's final historical example betrays no evidence of unequal treatment of the States' sovereignty. The 1802 law the EPA cites authorized Virginia to improve navigation of the Appomattox River. Act of April 14, 1802, 2 Stat. 152. The six-line act involves no sovereign power. The act did not authorize

Virginia to regulate navigation while disbarring sister States from doing the same. Instead, the act granted Virginia permission to make improvements in a federal easement. The act bears no semblance to the law that gives California alone the power to regulate the auto industry. Nor does the short 1802 statute suggest that any other State would be denied similar permission should it desire it.

The EPA also cites some modern statutes, but these are not the kind of early "legislative exposition[s] of the Constitution," *Myers v. United States,* 272 U.S. 52, 175 (1926), that might shed light on original meaning. EPA Br.13–14. Some, maybe even all, of these laws are inconsistent with the States' equal sovereignty. But "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 591 U.S. 894, 934 (2020). If these laws raise equal-sovereignty issues, they are all the more reason to grant certiorari.

In contrast to these few statutes, Ohio's petition laid out some of the history that supports the Constitution's equal-sovereignty feature. Pet.12–14. And while there is more, the depth of the historical record is not a debate that matters for evaluating certiorari. But here is one more bit of historical background. "[T]he Framers did not write" the Constitution "on a blank slate—they instead borrowed from the Articles of Confederation." *Moore v. Harper*, 600 U.S. 1, 33 (2023). The Article of Confederation declared that each State retained "its sovereignty." Articles of Confederation, art. II. It then described the combination of these sovereign entities as a "union." *Id.* at arts. IV, XI, XIII. The Constitution picks up the same "union" language. U.S. Const., pream.; *id.* at art. IV, §3. The

Constitution's "union" is a union of equally sovereign States.

When the EPA turns to precedent, it either cites cases that did not involve disparate treatment of States or draws the wrong lesson from the caselaw. Some of the cases the EPA cites make the uncontroversial point (at the time) that the Commerce Clause "has no equal protection clause," *Currin v. Wallace*, 306 U.S. 1, 14 (1939), or any requirement of "geographic uniformity" of result, *Sec'y of Ag. v. Cent. Roig Refining Co.*, 338 U.S. 604, 616 (1950). Ohio has never claimed otherwise. Throughout this litigation, Ohio has distinguished between permissible disparate results and impermissible disparate treatment. *See* Pet.28–29.

Now consider *Shelby County v. Holder*, 570 U.S. 529 (2013). The EPA, like the D.C. Circuit, *see* Pet. App.43a–44a, makes the surprising claim that Congress has more power to treat the States unequally under the Commerce Clause as compared to the Fourteenth and Fifteenth Amendments. EPA Br.17–18; St. Resp. Br.29–30. That claim is hard to square with this Court's repeated holdings that "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 Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996); *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). As the Court said recently, these amendments "grant[] new power to Congress." *Trump*, 601 U.S. at 112. If anything, the EPA's doubling down on this point is a strong reason for the Court to grant review.

Finally, the EPA concludes the merits part of its brief by reading one of this Court's seminal equal-footing cases contrary to how this Court reads that decision. According to the EPA, *Coyle* observes that Congress *can* treat different States differently when "regulating commerce among the States in the normal course." EPA Br.18 (quotation marks omitted) (citing *Coyle v. Smith*, 221 U.S. 559 (1911)); St. Resp. Br.29. *Coyle* says nothing of the sort. Its holding, of course, rejected Congress's attempt to treat Oklahoma worse than the 45 States that preceded it. This Court later cited *Coyle* in the same paragraph reiterating that "the fundamental principle of equal sovereignty remains highly pertinent in assessing" post-admission "disparate treatment of States." *Shelby Cnty.*, 570 U.S. at 544. And *Coyle's* commentary about hypothetical laws passed when admitting a new State describes nothing more than the Commerce Clause's accepted "sphere" and the uncontroversial congressional power to regulate "public lands" (i.e. federal property) even if that regulation has disparate consequences in different States. *Coyle*, 221 U.S. at 574, *see* Const. art. IV, §3; *Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990).

EPA is also rightly spooked by Ohio's as-applied challenge. EPA Br.10 (calling the argument "forfeited"). As Ohio has consistently argued, even if Congress could authorize a single State to regulate a matter of unique concern to that State, the waiver at issue here exceeds any plausible limits on this principle. Pet. 31-32. The waiver reinstatement is not "sufficiently related to the problem that it targets" because no California-specific concerns can plausibly justify allowing California alone among the 50 States to

broadly fight *global* climate change. *Shelby Cnty.*, 570 U.S. at 542 (quotation omitted).

In short, the EPA is incorrect that Congress may select California alone to retain its sovereign powers over important environmental policy choices, but the fact that the EPA devotes the bulk of its opposition to certiorari to the merits only proves the weightiness of the Question Presented.

II. The EPA gestures at vehicle issues, but Ohio already largely answered them in its opening brief.

The EPA devotes scant attention to vehicle issues, preferring to join Ohio on the merits of the Question Presented, and in so doing, showing the merits are worthy of this Court's attention. Even so, the concerns the EPA raises take no shine off the reasons to grant review.

The EPA reiterates that the decision below creates no split—a fact Ohio noted in its petition. EPA Br.19; Pet.34. But the EPA makes no effort to engage Ohio's argument that, because the D.C. Circuit is likely the only court that will confront the Question Presented as applied to the Clean Air Act, the Court should grant review now. Pet.34. In fact, the two equal-sovereignty challenges to more-recent approvals of California rules that post-date this one are either in or headed to the D.C. Circuit.

The EPA similarly fails to engage Ohio's point about the D.C. Circuit's hyper-aggressive view of forfeiture. EPA Br.19. The EPA retreads what the D.C. Circuit said. But as Ohio explained in the Petition, the D.C. Circuit's forfeiture analysis veers quite wide of this Court's holdings in that area. The rule is that

a petitioner can bring "any argument they like[] in support of" a consistent claim. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534–35 (1992); *see also Egbert v. Boule*, 596 U.S. 482, 497 n.3 (2022). To illustrate, only a few terms ago, this Court "reject[ed]" a claimed forfeiture even though the petitioner "initially" pegged its constitutional argument to a different clause in the Constitution and switched clauses later on. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 235 n.1 (2019). Applying that lesson here, it is no knock on Ohio's efforts to vindicate its equal sovereignty that it has refined its arguments as the case progressed. Any sharpening of that argument has always advanced the same claim: Congress's choice in the Clean Air Act to confer greater sovereignty on California than all the other States violates the foundational principle that the States are equal sovereigns. And that sharpening makes sense because facial and as-applied challenges are joined at the hip. As the Court recently reiterated, a court evaluating a facial challenge must "decide which of the laws' applications violate" the Constitution and then "measure" those against the laws' other "applications." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024).

State Respondents push a slightly varied form of this argument, but it falls short as well. St. Resp. Br.32. As those States see things, Ohio and its sister States originally brought a facial challenge to the statute and now add an as-applied challenge to the particular federal regulation authorizing a California rule. But this case has always been an APA challenge to specific agency action. It is not a facial or as-applied challenge to a statute. From the start, this case has challenged the EPA's agency action permitting California to regulate as no other State can. In service of

that challenge, Ohio has advanced both broader and narrower arguments about why that agency action violated the APA. 5 U.S.C. §§706(A), (B). None of those theories are forfeited.

The EPA makes two new points in the Opposition's last two paragraphs, but neither forecasts any headwind for review.

The EPA seems to fault Ohio for bringing this challenge because any success will not enhance Ohio's own sovereign power, but only bring California back in line with the other 49 States. EPA Br.20. Ohio believes that the Clean Air Act's favoring California lets California enforce its voters' preferences about balancing environmental and economic values—not Ohioan's. Ohio believes that its citizens' interests are at stake in Congress's illegal act, even if Ohio as a sovereign actor will not gain legislative power by winning this lawsuit. So Ohio believes it has quite concrete interests in winning back its sovereign equality. But if the EPA's judgment about Ohio's best interest is relevant at all, it enhances Ohio's sincerity here and favors granting review. *Cf.* Fed. R. Ev. 804(b)(3).

Finally, the EPA floats—but does not develop—the idea that Ohio and the other 16 States may lack standing under the "novel" view that returning the states to equal sovereign status does not satisfy Article III jurisdiction. EPA Br.20; St. Resp. Br.31. Ohio's position that equal treatment is its own reward draws on this Court's consistent holdings in cases where the remedy demands equality, but that remedy can follow from curing up or curing down. *See, e.g.*, *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 51 (1990) (dormant Commerce Clause); *Davis v. Mich. Dep't of Treasury*,

489 U.S. 803, 817 (1989) (intergovernmental tax immunity); *Stanton v. Stanton*, 421 U.S. 7, 17–18 (1975) (Equal Protection Clause). In such cases, a challenger has standing even if the only relief is vindicating the promise of equal treatment. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 76 (2017). If the States enjoy "equal dignity," *Franchise Tax Bd. of Cal.*, 587 U.S. at 245, in our federalist Republic, vindicating that dignity and restoring the long-established lines of political accountability satisfies Article III.

* * *

Seventeen States and a major industry seek review of agency action that lets California regulate the environment in a way prohibited to all other States. More EPA rules resting on the same unconstitutional statute follow on its heels, further depriving the States the equal sovereignty guaranteed them by the Constitution. The time and place to address the States' equal sovereignty is here and now.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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