Nos. 24-7, 24-13

IN THE

Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*

OHIO, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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

BRIEF OF *AMICI CURIAE* ORGANIZATIONS COMMITTED TO CONSTITUTIONAL GOVERNMENT IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.

2. Whether EPA's preemption waiver for California's greenhouse-gas emission standards and zero-emission-vehicle mandate is unlawful.

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of 23 organizations committed to our constitutional system of government. The *amici* are:

- American Commitment
- American Energy Institute
- Americans for Limited Government
- Americans for Tax Reform
- Association of Mature American Citizens ("AMAC") Action
- C3 Solutions
- Caesar Rodney Institute
- California Policy Center
- Cardinal Institute for West Virginia Policy, Inc.
- Center for Individual Freedom
- Center of the American Experiment

1. *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

- Committee for a Constructive Tomorrow
- Competitive Enterprise Institute
- Eagle Forum
- Energy & Environment Legal ("E&E Legal") Institute
- Frontiers of Freedom
- Fueling California
- Independent Women's Law Center
- Institute for Energy Research
- John Locke Foundation
- Mackinac Center for Public Policy
- Maine Policy Institute
- Rio Grande Foundation

SUMMARY OF ARGUMENT

The U.S. Environmental Protection Agency ("EPA") rescinded The Safer Affordable Fuel Efficient Vehicles Rule Part One: One National Program ("SAFE I") rule and reinstated a waiver of Clean Air Act ("CAA") preemption for *California's* greenhouse gas ("GHG") standards and Zero Emission Vehicle ("ZEV") sales

mandate. California is being singled out, to the detriment of other States, for preferential treatment.

That preferment violates the Constitution's requirement that the federal government must treat states equally unless there is a sufficient justification to do otherwise. This Court's jurisprudence so ensconcing has a time-honored pedigree. It did not become particularly controversial until *Shelby County, Ala. v. Holder* was decided in 2013. 570 U.S. 529. Over two centuries, this Court's jurisprudence has evolved from equal footing to equal sovereignty. All the while, equality of the states was the lodestar guiding this Court's odyssey. This case gives the Court an occasion to reaffirm that lodestar.

ARGUMENT

I. This Court's Time-Honored Jurisprudence Ensconces the Equality of the States.[2]

Under our Constitution, the federal government must treat the states equally. *See Shelby County*, *supra*. Treating some States or their subdivisions better than others, for no good reason at that, is perfidious to the federalism that is at the heart of our Constitution. At the heart of this principle is the constitutionally-recognized "union of political equals." Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979) (quoting *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889)).

2. *Amici* leave it to others to discuss the issue of standing that Industry Petitioners raise. *See Diamond Alternative Energy, LLC, et al. v. EPA*, No. 24-7, O.T. 2024, I.

That is why the Court repeatedly has asserted that "the States in the Union are coequal sovereigns under the Constitution." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590–91 (2012).

In thus favoring California over her sister states, the EPA has violated the Constitution's equality principle without any plausible justification whatsoever, much less the sufficient justification that the Constitution demands. *See Shelby County*, 570 U.S. at 542. As Petitioners have articulated before the Court of Appeals, the EPA never has had a good factual reason for doing so and many legal reasons to refrain from doing so. *See generally* Pet. 26–37; Ohio Br. and Industry Pet'rs Br., *Ohio v. EPA*, No. 22-1081 (CADC). The EPA should not be allowed to disobey the Constitution's equality-of-the-states instruction; this Court's precedents; and the careful balance struck in favor of states' equality during the original Constitution's ratification. The parties' arguments should be evaluated in light of these background constitutional principles.

While *Shelby County* is the Court's latest decision supporting the equality-of-the-states principle, the Court began this journey long ago with the equal-footing cases. The Court then had to grapple with the equal-sovereignty cases. But the principle underlying all these cases is that the federal government had to treat the states as equals. This remarkable judicial odyssey is reminiscent of T.S. Eliot's bardic insight that "We shall not cease from exploration/And the end of all our exploring/Will be to arrive where we started/And know the place for the first time." *Little Gidding* (1942).

Famously, in *Coyle v. Smith*, this Court held that a federal statutory provision dictating to Oklahoma where

its capital should be, once it became a State, violated the State's right to exercise its own sovereign authority under the Federal Constitution. 221 U.S. 559 (1911). Since Congress could not similarly control the destiny of *existing* states, this Court held that the federal government could not arbitrarily single out Oklahoma for special burdens either. *Id.*

In so holding, this Court reasoned that "[t]his Union was and is a union of States, *equal in power, dignity and authority*." *Id.* at 567 (emphasis added and cleaned up). The historic office of equality among the states was a well-understood pillar of the Constitution, in cognizance of—and in exchange for—which the states had surrendered part of their sovereignty and entered the Union. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934). That was the bargained-for exchange, without which the States might well have declined to join the Union. Lest any of this be lost on the country, the *Coyle* Court remarked: "[T]he constitutional equality of the States is *essential* to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears[,] ... the Union will not be the Union of the Constitution." 221 U.S. at 580 (emphasis added).

This Court also observed that a contrary approach "would be" tantamount "to say[ing] that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power." *Id.* at 567. As a leading scholar in this field has noted, so radical a restructuring of the constitutional design "would violate the Constitution, which contemplates—indeed necessitates—a union of *equal* sovereigns." Thomas B.

Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1113 (2016) [Colby] (emphasis added). So, in the words of *Coyle*, Congress could not "by the imposition of conditions in an enabling act, deprive a new State of any of those attributes essential to its equality in dignity and power with other States." 221 U.S. at 568, 570. "Sovereign equality of the member states is presumptively an essential, inherent structural feature of federalism itself." Colby 1137.

Almost 70 years before *Coyle*, in *Pollard's Lessee v. Hagan* (1845), this Court vigorously had recognized the equality principle's constitutional status. 44 U.S. (3 How.) 212, 223. And in cases predating *Pollard's Lessee*, there was language in at least some Supreme Court literature confirming this position. *See*, *e.g.*, *Mayor of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 258–59 (1842) (Catron, J., concurring) (expressing view that new states have "equal capacities of self-government with the old states, and equal benefits under the constitution of the United States"). Just over a decade after *Pollard's Lessee*, the Court recognized that the "perfect equality" of the states regarding their "attributes as ... independent sovereign Government[s]" "follow[s] ... from the language of the Constitution." *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1857) (cleaned up). The cases described thus far pertain to equal sovereignty as far as entrance into statehood is concerned.

That said, it would be inaccurate to suppose that this Court's equality decisions up until this point in time were limited to the statehood-admittance context. An antebellum case proves the point. When confronted with a pre-Fourteenth Amendment situation where the

federal government was forcing a state to protect religious freedom, this Court refused to tolerate that federal coercion. *See Permoli v. Mun. No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845). Prior to the Fourteenth Amendment's ratification, "[t]he Constitution [had made] no provision for protecting the citizens of the respective states in their religious liberties." *Id.* at 609. But the federal statute that effectively was Louisiana's enabling legislation had conditioned Louisiana's statehood on its protecting religious liberty. *See id.*

This Court's opinion in *Permoli* commenced by determining that the enabling act no longer governed Louisiana once it became a State. *See id.* at 609–10. After Louisiana entered the Union as a State, the Court said, it became part of an union of equals. *See id.* Louisiana had the same rights that her sister states did. *See id.* Congress, this Court thus deduced, no longer had the authority to control, in the same pre-statehood sense, what Louisiana chose to enact and follow as its laws. *See id.* That meant that Louisiana now was free to modify and even outright alter its laws, including those very provisions that once upon a time were a condition of its statehood. *See id.* Consequently, this Court in *Permoli* left no doubt as to the fact that the federal government is required to respect the states' sovereignty equally *even* when the United States is exercising a legitimate federal power. And this principle is applicable beyond the entrance-into-statehood context.

The Court continued to stay this course. In 1883, the Court confronted *Escanaba & Lake Michigan Trans. Co. v. City of Chicago*, a case concerning the free navigation of waterways for commercial purposes. 107 U.S. 678. No one doubted the federal government's constitutional

authority over such maritime matters. The City of Chicago had been authorized by the State of Illinois to build several drawbridges over the Chicago River. But there was a hitch. The *federal* enabling act had conditioned Illinois' statehood on letting navigation of the Chicago River be "forever free." *Id.* at 688 (quoting the Northwest Ordinance, 1 Stat. 50 (1789)). Predictably, the shipping company wanted the drawbridges brought down because they were interfering with the riparian movement of goods. *See id.* at 678–88.

The federal government and the shipping company were unsuccessful before this Court. According to the Court, the "forever free" restriction in the enabling act "could not control the authority and powers of the State after her admission." *Id.* at 688–89. The reason was that "[o]n her admission [the state] at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. [Illinois] was admitted, and could be admitted, only on the same footing with them." *Id.* It followed that Illinois retained the authority to regulate navigable waters that fell within its own maritime borders, as part of its own "inherent sovereignty." Brief for Appellee at 3, 10, *Escanaba*, 107 U.S. 678 (No. 1057) (quoting *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876)).

Under *Escanaba*, although the federal government could regulate navigable rivers, it could not accord Illinois *less* sovereign authority to control her own maritime borders than it extended to other states. 107 U.S. at 689. The *Escanaba* line of jurisprudence "stand[s] for the proposition that Congress, *regardless of the power that it seeks to exercise*, is constrained to respect the

constitutionally mandated sovereign equality of all of the states." Colby 1114 (emphasis added). The echoes of *Permoli* are ubiquitous throughout the Court's opinion in *Escanaba*. A modern parallel would be that although the government may establish and run schools, hospitals, libraries, swimming pools, and other governmental institutions, it may not treat people's access to them—and post-admittance enjoyment of them—unequally on account of a constitutionally prohibited basis. Similarly, this Court's cases hold that treating states unequally is presumptively unconstitutional—no matter when in the course of a state's statehood odyssey that differential treatment is inflicted upon it.

Yet *Escanaba* did make a somewhat novel contribution to this Court's equality-of-the-states jurisprudence. That decision applied the equality principle to matters beyond just the traditional office of state sovereignty to (now) equality of the states *generally*. 107 U.S. at 688–89. Its scope and applicability were pervasive. In other words, the Court's equal-sovereignty jurisprudence now became simply its equality-among-the-states jurisprudence. In *Escanaba*, this Court therefore proclaimed: "Equality of constitutional right and power is the condition of all the States of the Union, old and new." *Id*. The Court would reaffirm this recognition within a few years, by saying: "There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits." *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892).

According to Professor Thomas Colby, as it just cannot be "the case that the states are sovereign *only* in the

areas in which they possess exclusive sovereignty under the Tenth Amendment," in the "many areas in which the states and the federal government possess concurrent sovereignty" the states deserve equal treatment. Colby 1115 (emphasis added). The dominant view in constitutional law is that "[e]ach State stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). It is beyond cavil that the "standard federalism axiom that all states are equal in value as quasi-sovereigns." David A. Dana, *Democratizing the Law of Federal Preemption*, 102 Nw. U. L. Rev. 507, 512–13 (2008). The party challenging this prevailing presupposition carries a heavy burden of demonstrating that federal treatment to the contrary has an exceedingly persuasive justification.

Indeed, the equal-footing doctrine merely "is a doctrinal reflection of a broader constitutional mandate" of treating states equally. Colby 1124. After all, equality of the states is the *fons et origo* of this jurisprudence. Another manifestation is the equal-sovereignty principle. It too is "a specific manifestation of a deep, fundamental, and general principle that 'the Constitution guarantees sovereign equality to the states'—all of them." *Id.* at 1124. For its part, the equal-sovereignty principle "necessarily" is "implied and guarant[e]ed by the very nature of the Federal compact" that our Constitution ensconces as a paramount principle of federalist governance. *Withers*, 61 U.S. (20 How.) at 93.

This line of cases culminated in *Shelby County*, which is this Court's most recent pronouncement on this issue. First, though, a quick recap is in order. Four Terms before *Shelby County*, this Court handed down its decision in *Northwest Austin Municipal Util. Dist.*

No. One v. Holder, 557 U.S. 193 (2009). There, a Texas municipality had wanted a bailout from the Voting Rights Act's ("VRA") Section 5 requirement to have its election law changes "precleared" by the federal Department of Justice ("DOJ"). *See id.* at 200–01. This "preclearance" requirement applied to only 9 states and several municipalities—following a 1960s coverage formula. *See id.*; DOJ: Jurisdictions previously covered by Section 5 at the time of the *Shelby County* decision, www.justice.gov/crt/jurisdictions-previously-covered-section-5.

In *Northwest Austin*, this Court granted all political subdivisions the right to file a bailout suit. 557 U.S. at 211. The Court interpreted § 5 in light of "underlying constitutional concerns," which "compel[led] a broad[ ] reading of the bailout provision." *Id.* at 207. That is not all. The Court articulated that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy *equal sovereignty*." *Id.* at 202, 203 (cleaned up and emphasis added). The Court further remarked that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. As a result, *Northwest Austin* vindicated the time-honored equality principle.

Eventually, *Shelby County* came to the Court. There, an Alabama municipality contended that the VRA's half-century-old coverage formula for preclearance was unconstitutional in light of current conditions and needs. 570 U.S. at 536, 541–42, 553. This Court agreed. Indeed, the Court's opinion in *Shelby County* constituted a straightforward application of its precedents. Beginning

with the premise that "[t]he [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future," this Court recognized that the federal government must at the very least "identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id.* at 553. This reasoning hearkened back to *Northwest Austin's* observation that by 2013, "we [we]re ... a very different Nation" than we had been in the 1960s, at least as far as racially-inflected access to suffrage was concerned. 557 U.S. at 211; *see also id.* at 202, 203.

The Court in *Shelby County* observed that "'the [VRA] imposes current burdens and must be justified by current needs.'" 570 U.S. at 536 (quoting *Northwest Austin*, 557 U.S. at 203). In light of the constitutionally-mandated equality of the states, that differential treatment of some states and municipalities was unsupported by current conditions, the Court ascertained. *See id.* Therefore, the Court invalidated the VRA's coverage formula. *See id.* at 544–45, 556.

Congress, cautioned this Court, "cannot rely simply on the past" when it is striving to pave the way to the future. *Id.* at 553. Being ossified in aspic in the 1960s when devising a 21st century solution was inappropriate, said this Court, when that reflection no longer reflects current circumstances and triggers a clash with a state's constitutional prerogative. *See id.* Then, while invoking its precedents, this Court reaffirmed the "'fundamental principle of equal sovereignty' among the States." *Id.* at 544 (quoting *Northwest Austin*, 557 U.S. at 203). The Constitution's enduring equality-of-the-states principle guided the Court's constitutional calculus. *See id.*; *see*

also Knight v. United States Land Assn., 142 U.S. 161, 183 (1891); *Shively v. Bowlby*, 152 U.S. 1, 26–31 (1894).

As mentioned earlier, "even when Congress operates within its legitimate spheres of authority"—such as admitting new states—the federal government may "[ ]not limit or remove the sovereignty of some [existing or future] states, but not others." Colby 1121. Congress, therefore, may not "preclude only one state (or several states) from [pursuing some course of action] while allowing other states to do so." *Id.* at 1122. That would debase the rights, dignity, status, agency, and sovereignty of the injured states "in an impermissibly discriminatory manner, depriving [them] of equal sovereignty" and equality generally "with [their] peers." *Escanaba*, 107 U.S. at 688; *see also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 433, 435 (1855).

As this Court insightfully has observed, equality of the states is existential for them. *See Coyle*, 221 U.S. at 580. Sovereignty, as has been addressed, is an important stick within the bundle of a state's rights that the equality principle protects—but that principle reaches well beyond the core functions and duties of sovereignty. Rather, this equality is absolutely essential for the states' survival as distinct political entities as well as for the protection of their autonomy, agency, dignity, authority, status, and of course sovereignty. *See* Colby 1138. If the federal government gets to treat some of the states better than it treats others, then the "regional diversity" that federalism protects would be engulfed by antipathy and "animosity" among the states. *Id.* at 1136–37. As a result, "the central government, even when it operates only within its legitimate spheres, will be controlled by certain

regional factions who will use its powers to discriminate against and minimize the authority of the other regional factions." *Id.* The less powerful states would lose out in such a conflict.

That disfavored possibility is also why Justice Robert Jackson regarded the enforcement of equality as a most vital defense against tyranny:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to *pick and choose* only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (concurring opinion) (emphasis added).

The aforementioned factionalism would defeat the very purpose of having a "federation" like ours since "[i]t would contravene efforts to achieve unity, and it would fail to respect the integrity and the diverse cultures of the weaker regional states." Colby 1137. Thus, the Constitution "compel[s]" the United States "to respect and treat all member states—regardless of their differences—as legitimate equal sovereigns." *Id.* In fact, the Tenth Amendment and the Constitution's other

federalism provisions, not to mention the antecedent understanding with which the States entered the Union, would be rendered nugatory without an antidiscrimination safeguard. Equality of the states, therefore, is an essential predicate to our federalist Constitution.

II. Founding-Era History Supports the Equality Principle.

There is robust historical support for the principle of equality among the states. Even before our Constitution was adopted, Alexander Hamilton had assured the People of New York that the States will "clearly retain *all* the rights of sovereignty which they before had and which were not ... exclusively delegated to the United States." *The Federalist* No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

In that same Federalist number, Hamilton included that "[t]he necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power." *Id.* at 203. Breaking it down further, Hamilton explained: "[T]he rule that all authorities, of which the States are not explicitly divested in favour of the Union, remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the ... constitution." *Id.*; *see also* Amdt. X, U.S. Const. Equality of the states was a given in the constitutional constellation.

National harmony and unity could not survive without "this equality," our early leaders believed. 41 Annals of Cong. 547 (1824) (Representative John Holmes). "Equality of power is essential to the existence of a State. It cannot

have less than the rest, and when it has, it ceases to be a State." *Id*. When every state has an equal stake in the project of preserving the Union, the Nation itself is bolstered by its legion of defenders working cooperatively to fulfill its promise for all—on equal terms. The converse is also true: When inequality of the states pervades the *zeitgeist*, disunity and tension will reign.

Much of American history is fraught with this expectation. In the earliest years of our Republic, the pamphleteer Joel Barlow stated that "[t]he principle of equality [among the States] guaranteed harmonious union." Peter Onuf & Nicholas Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions 1776-1814, at 141 & n.48 (1993) [Onuf and Onuf]. Barlow observed that "[a]mong the several states, the governments are all equal in their force, and the people are all equal in their rights." *Advice to the Privileged Orders*, *in* The Political Writings of Joel Barlow 3, 67 (1796). He reasoned that "[j]ust as the state constitutions secured individual rights, the federal Constitution secured the rights of states; these states—as self-governing republics guaranteed against internal subversion and external assault—were much more comprehensively, substantially, and enduringly 'equal' than the states of Europe could ever hope to be." Onuf & Onuf 142.

Furthermore, the law of nations—derived from natural law—too supports this view. Specifically, when "drafting and interpreting the Constitution, both the Framers and Founding-era judges were heavily influenced by certain European scholars who believed the law of nations to be intimately intertwined with natural law." Michael Morley, Note: *The Law of Nations and the Offenses Clause of*

the Constitution: A Defense of Federalism, 112 Yale L.J. 109, 122 (2002). To that end, the equality precepts that influenced the Framers of our Constitution had an ancient pedigree rooted in the law of nations. *See id.* at 122–23; Mark W. Janis, An Introduction to International Law 50–51 (1988); A. Pearce Higgins, *Preface*, William Edward Hall, A Treatise on International Law, at xiv-xv (7th ed. 1917).

As this Court noted almost a century ago, "[w]hen independence was achieved, the precepts to be obeyed . . . were those of international law" (also known sometimes as the "law of nations"). *New Jersey v. Delaware*, 291 U.S. 361, 378 (1934). And, of course, an essential predicate of the law of nations was that all free nations were to be afforded "perfect equality and absolute independence of sovereigns." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1328 (1996). This makes sense because, as noted earlier, when surrendering part of their "absolute independence of sovereigns" in exchange for joining the Union, the states did not somehow relinquish their right to "perfect equality." *Id.*; *Withers*, 61 U.S. at 92.

That understanding continued into the 19th century. During Congress' servitude debates, Senator Charles Pinckney noted that "the Constitution recogni[z]es" the "natural equality of States, ... not only because it does not deny them, but presumes them to remain as they exist by the law of nature and nations." 35 Annals of Cong. 400 (1820). He added: "Inequality in the sovereignty of States is unnatural, and repugnant to all the principles of [natural] law." *Id.* Pinckney quoted Emmerich de Vattel's observation that "'[n]ature has established a perfect

equality of rights between independent nations.'" *Id.* (quoting THE LAW OF NATIONS bk. 2, ch. 111, § 36 (London ed. 1797) (1758) ["VATTEL"]).

Furthermore, Pinckney remarked that our "Union" is "an equal Union between parties equally sovereign." 35 Annals of Cong. 397 (1820); *see also* 34 ANNALS OF CONG. 1230 (1819) (statement of Rep. Louis McLane) ("It is of the very essence of our Government, that all the States composing the Union should have equal sovereignty. It is the great principle on which the Union reposes—the germ of its duration."). Such "conceptualization of state sovereignty in Vattel's work" robustly influenced our own Constitution's federalist structure. Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1064–65 (2002).

For his part, Vattel had argued that "nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights." Prelim. § 18, VATTEL, *supra*. "[A] small republic is no less a sovereign state than the most powerful kingdom." *Id.* Senator Pinckney articulated that same principle: Our Constitution "takes the States as it finds them, free and sovereign alike by nature. ... It diminishes the individual sovereignty of each, and transfers, what it subtracts, to the Government which it creates: it takes from all alike, and leaves them relatively to each other equal in sovereign power." 35 ANNALS OF CONG. 400 (1820) (statement).

Nor should this precept be particularly surprising. Although "[t]he delegates to the Constitutional Convention

vehemently disagreed about which form of representation was more fair and appropriate, ... they did not disagree as to the antecedent assumption that the states were to possess equal sovereignty." Colby 1128. They were to be equals. For example, Delawarean Gunning Bedford declared: "That all the states at present are equally sovereign and independent, has been asserted from every quarter of this house." 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 471 (Jonathan Elliot ed., J.B. Lippincott & Co. 2d ed. 1891) ["Elliot's Debates"].

Of course, the small-state delegates fought for equal state representation in Congress. A prominent supporter of this view, William Patterson of New Jersey posited: "A confederacy supposes sovereignty in the members composing it, and sovereignty supposes equality." 5 *id.* at 176. He observed that "every State in the Union as a State possesses an equal Right to, and Share of, Sovereignty." 3 The Records of the Federal Convention of 1787, at 613 (Max Farrand ed., 1911). Similarly, Luther Martin of Maryland characterized "an equal vote in each state" as indispensable to the "right of sovereignty." 5 Elliot's Debates, at 176. Martin deduced "that the states, like individuals, were, in a state of nature; equally sovereign and free." *Id.* at 248.

Vigorous congressional debate ensued, with supporters of proportional representation all the way also expressing their views. *See* Colby 1130–32. In the end, the compromise "effectuated both visions of equal sovereignty, one for each congressional chamber." *Id.* at 1131. The Senate, according to James Madison, would "represent the States in their *political* capacity, the other House will represent the

people of the States in their *individual* capacity." 1 The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826, at 499 (James Morton Smith ed., 1st ed. 1995) ["Jefferson—Madison Correspondence"] (emphases added). But the winner all around was equality of the states because "just as the people were to have equal sovereignty in their individual capacity, the States in their political capacity were to be equally sovereign." Colby 1132 (cleaned up). Madison himself championed this configuration to the Virginia ratifying convention as "a government of a federal nature, consisting of many coequal sovereignties." 3 Elliot's Debates, at 381.

True, the House of Representatives does give the more populous states a greater say than to the less populous states in legislative proceedings but that treatment is reflective of the Constitution's concern for the *people*—not a derogation from the rights of states *qua* states. *See* Jefferson—Madison Correspondence, *supra*, at 499. A notable example of state equality comes from the rights of states to cast one ballot each in the House of Representatives whenever a contested Presidential election ends up there. In light of the Founding era history of state equality, this example supports the ubiquitous application of that principle. As a result, the Constitution contemplates no scenario in which a state, in its constitutional capacity as a state, may receive differential treatment.

As is evident, ubiquitous throughout the Founding era were references to equality that venture beyond the traditional tenets of sovereignty. Equality of the states was recognized as a broad principle not limited to the

traditional definition of sovereignty. Where, as here, the question involves the rights of the states in their political capacities, equality of the states is the governing rule. History, constitutional text and structure, and this Court's precedents, so require.

III. Equality of the States is a Constitutional Mandate that the Court Should Apply Here.

Some have raised the concern that equality of the states is not expressly spelled out in the Constitution. As an initial matter, such "ahistorical literalism" contradicts the Constitution's original meaning and long-established doctrine. *Franchise Tax Board of Calif. v. Hyatt*, 139 S. Ct. 1485 (2019) (cleaned up). Nor is this case that general argument's debut. Five Terms ago in *Hyatt*, this Court overturned a four-decade-old precedent despite being told that only "the structure of our Constitution" favored the Court's interpretation. *See id.* (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *id.* at 1502 (Breyer, J., dissenting). There, the Court held that "the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution." *Id.* at 1498–99. The *Hyatt* Court restored to the states their right to avoid being sued in the courts of a sister state without their consent. *See id.* at 1499. Second, here, unlike in *Hyatt*, the Court would not even have to overturn any of its decisions to vindicate the equality of the states—that principle *is* the *status quo*.

Third, *Hyatt* made short work of the objection, also floated here, about a principle's not appearing in black and white constitutional text. *Hyatt* answered that charge by pointing out that "[t]here are many ... constitutional

doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review; intergovernmental tax immunity; executive privilege; executive immunity; and the President's removal power." *Id.* at 1498–99 (cleaned up).

Another prominent example is a recent one. Just a few weeks ago, the Court drew support from the very nature and character of Article III in declaring *ultra vires Chevron's* deference to agency interpretations of ambiguous statutes. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Although the Court's ostensible basis for its decision in *Loper Bright* was the iconic administrative law super-statute, the Administrative Procedure Act ("APA"), the Court grounded its decision in the federal courts' duty, with respect to the original meaning of Article III, to say what the law is—without that candor's being refracted through the Executive's lens. *Id.* at 2257–60. The APA was read in a manner consistent with Article III. So the Court reasoned in *Loper Bright* : "To ensure the steady, upright and impartial administration of the laws, the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches." *Id.* at 2257 (cleaned up).

These promises inherent in the Constitution's structure are so important because without them, the Nation itself sooner or later would fall apart. It is for this reason that the Court generally has not let erroneous structural practices, even longstanding and commonplace

ones, prevent it from rectifying an egregious constitutional wrong. *See*, *e.g.*, *INS v. Chaddha*, 462 U.S. 919 (1983). Equality of the states always has been a similarly inviolable principle under our Constitution.

Concomitantly, the liberty secured by our Constitution lies in its sacrosanct structure, which preserves the channels and means of constitutional governance and the boundaries that each layer of government must respect. It prevents the accumulation of excessive governmental power in any one entity. While the individual rights guarantees of the Constitution involve *certain* rights, there are many other non-constitutional rights and liberties whose survival the structural Constitution ensures. That is why Justice Gorsuch has observed that, in the Framers' view, meticulous care for the Constitution's structure was "essential to the preservation of the people's liberty." *United States v. Nichols*, 784 F.3d 666, 670 (CA10 2015) (dissenting opinion). Without it, "the ability of an individual or group to exercise arbitrary or absolute power" would be difficult to "thwart." *Id.*

IV. The Equality Principle Requires that this EPA Waiver be Invalidated.

The agency, autonomy, dignity, authority, status, and of course sovereignty of California's sister states—the very nature of being a state—seriously are undermined by the federal government's unjustified bias in California's favor. This EPA waiver irreparably has undermined "the federal sovereign['s]" constitutional duty to "govern impartially." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Nor has the EPA advanced even a plausible justification for that special treatment. And the Court

would not have to micromanage federal-state interactions if it were to do what two centuries of its cases have always done.

This is not a case of California's unique conditions and needs warranting a special waiver. *See Shelby County*, 570 U.S. at 536, 541–42. California is getting this bonus not based on its own situation but rather because of federal favoritism unrelated to neutral or dispassionate considerations. That is the quintessence of an irrational governmental action and it invites the condemnation that the federal government is doling out special benefits to those it happens to favor at the expense of those who are out of favor. *Mow Sun Wong*, 426 U.S. at 100. And California is getting this favor through the EPA's unreasoned departure from its prior position, thus triggering the most searing scrutiny. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). Under no circumstances is it convincing, much less exceedingly persuasive, for the federal government to claim that its special waiver to California honors the "perfect equality" of the states. *Withers*, 61 U.S. at 92.

CONCLUSION

This Court should grant certiorari and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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