ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1081

Consolidated with Nos. 22-1083, 22-1084, and 22-1085

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OHIO, *ET AL.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Respondents,

ADVANCED ENERGY ECONOMY, *ET AL.*,

Intervenors.

On Petitions for Review of Final Agency Action by the U.S. Environmental Protection Agency

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BRIEF OF *AMICI CURIAE* SENATOR TOM CARPER, CHAIRMAN OF THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, AND REPRESENTATIVE FRANK PALLONE, JR., RANKING MEMBER OF THE U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE, IN SUPPORT OF RESPONDENTS

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January 20, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici Curiae*

Except for the following, all parties, intervenors, and *amici curiae* appearing before this Court are listed or referenced in the Initial Brief for Respondents U.S. Environmental Protection Agency (ECF No. 1981480) (filed Jan. 13, 2023):

- *Amici* Senator Tom Carper and Representative Frank Pallone, Jr. ("*Amici*");
- *Amici curiae* climate scientists David Dickinson Ackerly, Maximilian Auffhammer, Marshall Burke, Allen Goldstein, John Harte, Michael Mastrandrea, and LeRoy Westerling;
- The American Thoracic Society, American Medical Association, American Association for Respiratory Care, American College of Occupational and Environmental Medicine, American College of Physicians, American College of Chest Physicians, National League for Nursing, American Public Health Association, American Academy of Pediatrics, and Academic Pediatric Association, who have filed a notice of intent to participate as *amici curiae*; and
- Administrative-law professors Todd Aagaard, William Boyd, Alejandro E. Camacho, Robin Craig, Robert Glicksman, Bruce Huber,

Sanne Knudsen, and David Owen, who have also filed a notice of intent to participate as *amici curiae*.

B. Rulings Under Review

References to the rulings at issue appear in the Initial Brief for Respondents.

C. Related Cases

Other than the cases consolidated in this case, earlier challenges to actions by the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration are pending before this Court, consolidated under *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230. Counsel for *Amici* are aware of no other related cases.

D. Corporate Disclosure Statement

Pursuant to Fed. Rs. App. P. 26.1 and 29(a)(4)(A), *Amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
January 20, 2023

RULE 29 STATEMENTS

All parties in the consolidated action have indicated their consent to the filing of this brief. *See* Letter Filed by Diamond Alternative Energy, LLC, Iowa Soybean Association, South Dakota Soybean Association, Minnesota Soybean Growers Association, American Fuel & Petrochemical Manufacturers, Domestic Energy Producers Alliance, Energy Marketers of America and National Association of Convenience Stores, Clean Fuels Development Coalition, ICM, Inc., Illinois Corn Growers Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, and Valero Renewable Fuels Company, LLC (together, the "Industry Petitioners"), ECF No. 1972549 (filed Nov. 7, 2022); Letter Filed by Center for Biological Diversity, Clean Air Council, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, National Parks Conservation Association, Sierra Club, and Union of Concerned Scientists, ECF No. 1972783 (filed Nov. 8, 2022). Petitioners the States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia (together, the "State Petitioners"), and all other parties, have provided their consent directly to counsel for *Amici*.

Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for *Amici* states that no party or party's counsel authored this brief in whole or in part, and no other person besides *Amici* or their counsel contributed money intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. R. 29(d), undersigned counsel for *Amici* states that a separate brief is necessary due to *Amici*'s distinct expertise and interests. *Amici* are members of Congress with personal experience and expertise regarding legislation and congressional powers that Petitioners have placed at issue in this case. *Amici* are therefore in a unique capacity to aid the Court in interpreting certain statutory provisions referenced in this case. *Amici* likewise have particular insight into the question of equal sovereignty and the authority of Congress to make laws. No other *amici curiae* appearing in this case share these perspectives or expertise, as far as *Amici* are aware. Accordingly, *Amici*, through counsel, certify that filing a joint brief would not be practicable.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
January 20, 2023

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GLOSSARY

§ 209(b) standards	Vehicle emission standards that have received a waiver pursuant to § 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b)
1975 Act	The Energy Policy and Conservation Act of 1975
2007 Amendments	The Energy Independence and Security Act of 2007
EPA	The U.S. Environmental Protection Agency
NHTSA	The National Highway Traffic Safety Administration

STATUTES AND REGULATIONS

Pertinent statutes and regulations not reproduced in the parties' briefs are reproduced in the addendum filed with this brief.

SUMMARY OF ARGUMENT AND IDENTITY, INTERESTS, AND SOURCE OF AUTHORITY TO FILE OF *AMICI CURIAE*

The Clean Air Act creates a dual system for regulating motor vehicle emissions. One set of regulations applies nationwide and is issued by the U.S. Environmental Protection Agency ("EPA"). 42 U.S.C. § 7521. States sometimes have the option to adopt an alternative set of regulations (here called "§ 209(b) standards" after the authorizing provision in the Clean Air Act). *Id.* §§ 7507, 7543(b). Congress gave the responsibility for crafting these alternative regulations to California—the state that had pioneered early vehicle-emissions regulations—and required EPA to approve these regulations except under narrow circumstances. *Id.* § 7543(a)-(b) (preempting state regulation of new-vehicle emissions, but allowing the "State which has adopted [such] standards (other than crankcase emission standards) . . . prior to March 30, 1966," i.e., California, to apply for a preemption waiver, which must be approved unless any of three limited exceptions is shown to apply).

For over fifty years, California has provided this alternative set of vehicle-emissions regulations. EPA has approved these § 209(b) standards nearly universally, denying California's application only once, and in that case reversing

itself almost immediately. *See* Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009) (reversing 2008 waiver denial).

The instant petition deals with another temporary—and unlawful—break in EPA's practice. In 2019, the agency ostensibly withdrew an approval that it had previously granted for § 209(b) standards regulating vehicle greenhouse-gas emissions (the "Low-Emission Vehicles" standards) and setting sales requirements for vehicles that emit no pollutants while operating (the "Zero-Emission Vehicles" standards). Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One, 84 Fed. Reg. 51,310 (Sept. 27, 2019). EPA rescinded its withdrawal in 2022, confirming that the Low- and Zero-Emission Vehicles regulations were properly approved as § 209(b) standards and restoring the status quo. California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption, 87 Fed. Reg. 14,332 (Mar. 14, 2022). Petitioners now challenge that rescission.

State Petitioners claim that the Low- and Zero-Emission Vehicles standards are preempted by the Energy Policy and Conservation Act of 1975 (the "1975 Act"). State Pet'rs' Br. 34-41, ECF No. 1971738 (filed Nov. 2, 2022). As an initial matter, preemption under the 1975 Act is not relevant to this case: EPA has no

authority to consider whether a § 209(b) standard is preempted when reviewing it and did not purport to do so here. *See* Resp'ts' Br. 94-97, ECF No. 1981480 (filed Jan. 13, 2023); 42 U.S.C. § 7543(b)(1) (limiting EPA's review of a § 209(b) standard to three enumerated criteria, none of which is preemption by another statute). Should the Court decide to reach the issue, however, *Amici*, as leaders of the House and Senate Committees with relevant expertise, offer their insight into the 1975 Act and related legislation as an aid to the Court.

Petitioners also propose a novel interpretation of the equal-sovereignty doctrine that would radically limit Congress's legislative power. *See* State Pet'rs' Br. 28-33; Industry Pet'rs' Br. 53-55. As members of Congress, *Amici* urge the Court to uphold Congress's longstanding power to shape preemptive regimes consistent with our federalist system.

Amici—Senator Tom Carper, Chairman of the U.S. Senate Committee on Environment and Public Works, and Representative Frank Pallone, Jr., Ranking Member of the U.S. House Committee on Energy and Commerce—therefore submit this brief pursuant to Fed. R. App. P. 29(a)(2), making the following arguments:

First, the 1975 Act does not preempt the § 209(b) standards at issue in this case. Nothing in the 1975 Act indicates an intent to invalidate elements of the Clean Air Act. Congress understood that the fuel-economy improvements it sought

through the 1975 Act could be affected by the vehicle-emissions standards created under the Clean Air Act, either because emissions-reducing technology might directly impact fuel economy or because some manufacturers might not be able to improve on both fronts simultaneously. But Congress struck the balance between these two aims in favor of public-health and air-quality goals: it made exceptions in the 1975 Act to prioritize Clean Air Act emissions reductions over fuel-economy improvements, not the other way around. In doing so, Congress explicitly required that § 209(b) standards be considered in setting fuel-economy requirements under the 1975 Act. Thus, reading the Act to preempt § 209(b) standards that affect fuel economy both contradicts Congressional intent and makes the Act nonsensical.

Nothing about the particular standards at issue here changes this analysis. Subsequent federal legislation has consistently reaffirmed Congress's intent to preserve § 209(b) standards, specifically including regulations such as the Low- and Zero-Emission Vehicles standards. The Clean Air Act Amendments of 1977 added flexibility to the § 209(b) standards and allowed other states to adopt them, a clear indication that Congress did not believe the 1975 Act had eliminated that program. Further, the Energy Independence and Security Act of 2007, which amended the 1975 Act (the "2007 Amendments"), the Clean Air Act Amendments of 1990, and the Inflation Reduction Act of 2022 all explicitly incorporate state

regulation of vehicle greenhouse-gas emissions—regulation that would be preempted if Petitioners' reading of the 1975 Act were correct.

Second, the principle of equal sovereignty does not prevent Congress from designing preemption regimes to fit its legislative aims, and Congress's use of that power to enact § 209(b) of the Clean Air Act promotes, rather than degrades, state autonomy. All states, when they entered the Union or ratified the Constitution, consented to the subordination of their sovereignty under the Supremacy and Commerce Clauses. When Congress acts within the bounds of those authorities, it may limit states' sovereignty as necessary to achieve its goals. The jurisprudence applying equal sovereignty to the Voting Rights Act does not say otherwise; in fact, *Shelby County v. Holder* explicitly distinguished Congress's broad preemption powers in applying the equal-sovereignty doctrine to limit the Voting Rights Act. *See* 570 U.S. 529, 542, 545 (2013). Additionally, § 209(b) standards benefit state sovereignty: they create an alternative, state-led set of emissions regulations that states may choose to adopt if the nationwide standards are insufficient for their needs, while preventing a proliferation of standards that would unduly burden the automobile industry.

ARGUMENT

I. The 1975 Act Does Not Preempt the § 209(b) Standards at Issue in This Case.

In designing the fuel-economy portions of the 1975 Act, Congress took care

not to interfere with public-health protections, including vehicle-emissions standards. Congress rejected several proposals to remove or delay emissions standards in favor of improved fuel economy, explicitly endorsed prioritizing environmental regulation in committee reports, and incorporated § 209(b) standards into the Act's regulatory structure. *See generally* Greg Dotson, *State Authority to Regulate Mobile Source Greenhouse Gas Emissions, Part 2: A Legislative and Statutory History Assessment*, 32 Geo. Env't L. Rev. 625, 631-42 (2020).

Given the manifest intent of the 1975 Act, it would be surprising to discover in the same Act a provision that *prevents* states from adopting the § 209(b) standards at issue in this case, as State Petitioners claim to have done. *See* State Pet'rs' Br. at 34-41. Indeed, the text and history of the 1975 Act, as well as that of relevant subsequent legislation, confirm that Petitioners' interpretation is incorrect: Congress did not preempt such standards when it passed the 1975 Act, and the Act cannot now be read to do so.

A. The 1975 Act Does Not Preempt Vehicle-Emissions Standards, It Prioritizes Them.

The text and legislative history of the 1975 Act indicate Congress's intent to prioritize vehicle-emissions standards, and particularly § 209(b) standards, over the new fuel-economy standards created by the 1975 Act. The 1975 Act's preemption provision does not affect vehicle-emissions standards; rather, it applies to state

"law[s] or regulation[s] related to fuel economy standards," 49 U.S.C. § 32919(a); *see also* 15 U.S.C. § 2009(a) (1976) (original language).[1] Further, Congress explicitly subordinated fuel economy requirements to "Federal standards," which include state regulations authorized by § 209(b) of the Clean Air Act. 15 U.S.C. § 2002(d)(1)(D) (1976). The history of the 1975 Act cements this reading: the enacting Congress was legislating to manage the nation's oil resources, but where conflict arose between achieving fuel economy and controlling vehicle emissions, it prioritized the latter. *See generally* Dotson, *supra*, at 631-42.

1. On a Plain Reading, the 1975 Act Shows No Intent to Preempt § 209(b) Standards.

On its face, the 1975 Act's preemption provision does not address vehicle-emissions standards. The 1975 Act preempts state regulations "related to fuel economy standards or average fuel economy standards," with no suggestion that it preempts vehicle-emissions regulations, such as § 209(b) standards. 15 U.S.C. § 2009(a) (1976). Indeed, it would be very strange if it did. The 1975 Act specifically incorporated § 209(b) standards as one of the "Federal standards" that the National Highway Traffic Safety Administration ("NHTSA") must consider in

[1] The fuel-economy provisions of the 1975 Act are all contained in a single, undifferentiated section. Pub. L. No. 94-163, § 301, 89 Stat. 871, 901-16 (1975). For readability and precision, *Amici* cite to these provisions as codified in the 1976 U.S. Code rather than the session law.

setting fuel-economy standards. *Id.* § 2002(d)(3)(D)(i) (listing "emissions standards applicable by reason of section 209(b) of [the Clean Air] Act" as "a category of Federal standards"). Reading the Act to preempt § 209(b) regulations would therefore lead to a "statutory contradiction" that Congress would not have intended. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 37 (D.C. Cir. 2019) ("[I]nterpretations needed to avert 'statutory contradiction' (really, self-contradiction) ipso facto have a leg up on reasonableness.").

State Petitioners acknowledge that the 1975 Act "treated California [§ 209(b)] standards as federal standards" when it was passed, but they argue it "no longer does." State Pet'rs' Br. 40. They note that the 1975 Act used the phrase "Federal standards" in modifying the fuel-economy standards that were set by statute for vehicles with model years from 1978 through 1980. 15 U.S.C. § 2002(d) (1976) (giving NHTSA the authority to relax fuel-economy requirements if manufacturers demonstrated that the applicable emissions regulations—the "Federal standards"—were impacting their fuel economy). Since the 1980 model year is long gone, Petitioners argue, § 209(b) standards are no longer used by the 1975 Act and the Act's preemption provision now eliminates them. State Pet'rs' Br. 39-40.

This argument is incorrect for two reasons. First, it does not answer the underlying issue: even if the § 209(b) standards were incorporated into the 1975

Act only for a limited purpose, interpreting that Act as both incorporating and eliminating them still creates a contradiction. For the Act to have made sense at the time it was passed, the Act's preemption provision must not have prohibited § 209(b) standards. And since Congress has not expanded that provision since, it should not now be read to prohibit those standards. *See, e.g.*, *Wisc. Ctrl. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (Since "Congress alone has the . . . authority to revise statutes," the "original meaning of the written law" remains in effect until that law is changed).

Second, it is not true that § 209(b) standards are no longer a part of the 1975 Act; they are still incorporated as a criterion for setting several types of fuel-economy standards. Specifically, the 1975 Act requires NHTSA to use "Federal motor vehicle standards"—together with "technological feasibility," "economic practicability," and "the need for the Nation to conserve energy"—in determining the "maximum feasible average fuel economy level" achievable for a given sector or manufacturer. 15 U.S.C. § 2002(e) (1976).[2] NHTSA must use the "maximum feasible" level in setting several fuel-economy standards, including for non-passenger vehicles such as light-duty trucks or recreational vehicles; manufacturers

[2] A 1994 recodification changed this language to "motor vehicle standards of the Government." Revision of Title 49, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1060 (codified at 49 U.S.C. § 32902(f)). The change is not substantive. *Id.* § 6(a), 108 Stat. at 1378.

producing fewer than 10,000 passenger vehicles a year; and passenger vehicles after model year 1980. *Id.* § 2002(a)(3)-(4), (b)-(c).

While "Federal motor vehicle standards" were not defined in the 1975 Act, it is clear from the Act's structure that they must include § 209(b) standards. "Federal motor vehicle standards" were used in the same section as the "Federal standards" that explicitly incorporated § 209(b) standards. There is no semantic difference between "Federal standards" applied to motor vehicles and "Federal motor vehicle standards," and the two phrases are used for the same purpose: determining the fuel-economy level achievable given existing emissions (and other) standards. *Compare id.* § 2002(d), *with id.* § 2002(a)-(c), (e).

Furthermore, excluding § 209(b) standards from "Federal motor vehicle standards," despite their explicit inclusion in "Federal standards," would lead to incongruous results. As discussed, the 1975 Act allowed passenger-vehicle manufacturers to request individualized adjustments to the statutory fuel-economy standards applicable to the 1978 through 1980 model years, which would relax their statutory requirements to account for the effect of "Federal standards" on their fuel economy. 15 U.S.C. § 2002(d) (1976). By contrast, NHTSA set standards for those same model years for non-passenger vehicles and for small manufacturers, taking account of "Federal motor vehicle standards." *Id.* § 2002(e). Accordingly, excluding § 209(b) standards from the set of "Federal motor vehicle

standards" would have created an illogical discrepancy as to model years 1978-1980: one means of setting fuel-economy requirements—the one used for passenger vehicles—would account for the effects of § 209(b) standards, while those for small manufacturers and non-passenger vehicles would not.

Such a distinction would have made no sense. It is particularly perverse as to small manufacturers, which receive special consideration under the 1975 Act: if the national fuel-economy standard is too onerous, they can petition NHTSA for a separate "maximum feasible average fuel economy" standard designed to fit their particular circumstances, accounting for the impact of "Federal motor vehicle standards." *Id.* § 2002(c), (e)(3). If § 209(b) standards were excluded from "Federal motor vehicle standards" but included in "Federal standards," the small-manufacturer option could be *more stringent* than the adjustment generally available to passenger-vehicle manufacturers, because it would not account for the impact of § 209(b) standards.

Including § 209(b) standards in the category of "Federal standards" while excluding them from "Federal motor vehicle standards" would have created perverse and unintended results. The more natural reading of the statute—in which "Federal motor vehicle standards" includes § 209(b) standards—provides "'the most harmonious, comprehensive meaning possible' in light of the legislative

policy and purpose," and is therefore correct. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (citation omitted).

It is not surprising, therefore, that both NHTSA and federal courts have read the 1975 Act as incorporating § 209(b) standards into "Federal motor vehicle standards." In setting the first non-passenger fuel-economy standards under the 1975 Act, NHTSA explicitly considered the "[e]ffect of California emissions standards," Average Fuel Economy Standards for Nonpassenger Automobiles, 42 Fed. Reg. 13,807, 13,814-15 (Mar. 14, 1977), and NHTSA has continued to do so across the decades. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 347 n.54 (D. Vt. 2007) (collecting examples). The two federal courts that have issued opinions on this issue have agreed. *See id.* at 346-47 (finding "beyond serious dispute" that § 209(b) standards have "the same stature as a federal regulation with regard" to the 1975 Act); *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1173 (E.D. Cal. 2007) (once "a California regulation is granted waiver of preemption pursuant to section 209 of the Clean Air Act, . . . the Secretary of Transportation must consider [it] in formulating maximum feasible average fuel economy standards under" the 1975 Act). And Congress itself ratified these interpretations in amendments passed immediately after *Green Mountain* and *Central Valley*. *See infra*, Part I.B.3.

2. The History of the 1975 Act Demonstrates that Congress Had No Intent to Preempt Emissions Regulations.

Congress's manifest objectives in passing the 1975 Act confirm that it intended emissions standards, including § 209(b) standards, to survive preemption. In drafting the 1975 Act, Congress closely considered the question of whether it should limit vehicle-emissions regulation to maximize fuel-economy reductions. The two goals were feared to be incompatible, as new emissions-reduction technologies could reduce vehicle mileage, and manufacturers might not have the resources to advance in both fields simultaneously. Dotson, *supra*, at 631-33; *see also* S. Rep. No. 94-516, at 202-03 (1975) (Conf. Rep.). The White House and some members of Congress pushed to favor fuel economy: President Ford twice proposed language that would have weakened vehicle-emissions standards, and members of Congress raised concerns that California's emissions standards would prevent any gains in fuel economy. *See* Dotson, *supra*, at 636-41 (collecting sources); S. Rep. No. 94-179, at 65 (1975) (separate statement of Sens. Robert P. Griffin and James L. Buckley) (citing EPA report that California's emissions standards for the 1977 model year could reduce fuel economy by 8-24 percent).

But Congress instead prioritized protecting air quality and public health. The 1975 Act excused manufacturers from full compliance with its fuel-economy requirements if emissions-reductions standards—explicitly including California's § 209(b) standards—impacted their fleets' mileage. 15 U.S.C. § 2002(d) (1976).

And the Act required NHTSA to incorporate any impact of emissions standards on fuel economy into future fuel-economy standards. *Id.* § 2002(e)(3).

Congress made this choice deliberately, as the legislative record demonstrates. *See, e.g.*, S. Rep. No. 94-179, at 6 (1975) (noting intent to create "the most fuel-efficient new car fleets compatible with safety, damageability, and emission standards"); H.R. Rep. No. 94-340, at 90 (1975) (noting the need for fuel economy standards to "take account of" possible future fuel-economy effects from emissions standards); S. Rep. No. 93-526, at 76-77 (1973) (acknowledging that Clean Air Act standards may have delayed fuel-economy improvements, but arguing that "this fact should certainly not be interpreted as an indictment of the standards"). Congress particularly favored § 209(b) standards, and even proposals to weaken other vehicle-emissions standards would have preserved § 209(b). *See, e.g.*, S. Rep. No. 93-793, at 98 (1974) (Conf. Rep.) (noting that under the Emergency Energy Act, an early bill which would have, *inter alia*, loosened vehicle-emissions standards, "California retains the right under section 209 of the Clean Air Act to seek a waiver for a more stringent standard"); Dotson, *supra*, at 638 (under President Ford's initial proposal, "authority would be retained allowing California to establish more stringent emission standards" (quoting letter from President Gerald Ford to Sen. Nelson Rockefeller, Jan. 30, 1975)).

Thus, the text of the 1975 Act and its legislative record demonstrate Congress's intent to preserve emissions-reduction regulations, and particularly the § 209(b) standards. This clear intent is further reason to favor a reading of the Act's preemption provisions that preserves § 209(b) standards. *Cf. Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016) (considering, in the context of an express preemption provision, "the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive").

B. Subsequent Legislation Demonstrates a Consistent Understanding that the 1975 Act Does Not Preempt the § 209(b) Standards at Issue.

Nearly fifty years of congressional action since the passage of the 1975 Act confirm that § 209(b) standards, including those requiring greenhouse-gas reductions and zero-emissions vehicles, are not preempted. Through amendments to the Clean Air Act in 1977 and 1990, the 2007 Amendments to the 1975 Act, and the Inflation Reduction Act of 2022, Congress has demonstrated its consistent understanding that these standards are not preempted. This understanding aligns with contemporary interpretations from NHTSA, *see Green Mountain*, 508 F. Supp. 2d at 347 n.54 (collecting examples of NHTSA regulations treating § 209(b) standards as incorporated into the Act), and federal courts. *See id.* at 346-47; *Cent. Valley*, 529 F. Supp. 2d at 1173. By repeatedly enacting legislation premised on this clear understanding, Congress has "effectively ratified" NHTSA's and the courts' interpretation that the § 209(b) program is in no way limited by the 1975

Act. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (finding Congressional ratification of an agency statutory interpretation where Congress had demonstrated an awareness of that interpretation, and enacted legislation premised on that understanding).

1. Soon after Passing the 1975 Act, Congress Expanded the § 209(b) Program.

Congress demonstrated its understanding that § 209(b) standards survived the 1975 Act almost immediately after passing the Act. The Clean Air Act Amendments of 1977 amended § 209 of the Clean Air Act, Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (1977), "confer[ring] broad discretion on the State of California" to develop them. H.R. Rep. No. 95-294, at 23 (1977). The act also allowed states other than California to adopt § 209(b) standards. Pub. L. 95-95, § 129(b), 91 Stat. at 750 (adding § 177 to the Clean Air Act). Indeed, Congress described the 1977 amendment as "ratify[ing] and strengthen[ing]" the waiver provision. H.R. Rep. No. 95-294, at 301-02. In other words, "Congress had an opportunity to restrict" the § 209(b) standards in light of the 1975 Act, but instead expanded and enhanced the program. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1096, 1110 (D.C. Cir. 1979).

2. The 1990 Amendments to the Clean Air Act Explicitly Incorporated § 209(b) Standards Similar to the Low- and Zero-Emission Standards.

In the comprehensive Clean Air Act Amendments of 1990, Congress went

even further, specifically relying on § 209(b) zero-emission standards to create a federal clean-fleet program. These amendments require operators of certain vehicle fleets to add more low-emission vehicles to their fleets, and award transferable credits to operators that add zero-emission vehicles. Pub. L. No. 101-549, § 229(a), 104 Stat. 2399, 2520-23 (1990) (adding § 246 to the Clean Air Act). In setting the standards for zero-emission vehicles, the amendments require EPA to "conform as closely as possible to standards which are established by the State of California for . . . ZEVs [i.e., zero-emission vehicles] in the same class." *Id.*, 103 Stat. at 2523 (adding § 246(f)(4)). By enacting amendments explicitly premised on the existence of § 209(b) standards—and specifically zero-emission standards—Congress endorsed these standards, showing that it did not consider them to be preempted.

3. The 2007 Amendments to the 1975 Act Ratified the Federal Courts' Interpretation of § 209(b) Standards.

In the Energy Independence and Security Act of 2007, which amended the fuel-economy provisions of the 1975 Act, Congress again ratified an interpretation of the 1975 Act that protects § 209(b) standards. These amendments were passed in the wake of several important judicial decisions, including two holding that § 209(b) standards regulating greenhouse gases specifically were not preempted by the 1975 Act. *Green Mountain*, 508 F. Supp. 2d at 346-47; *Cent. Valley*, 529 F. Supp. 2d at 1173. Congress not only declined the opportunity to rework the 1975 Act to reverse the courts' actions, it incorporated § 209(b) greenhouse-gas

standards into the amendments, while favorably noting the "greenhouse gas emissions standards . . . adopted by California and other states." H.R. Rep. No. 110-297, at 17 (2007).

In the first of these judicial decisions, the Supreme Court's landmark opinion in *Massachusetts v. EPA* held that the 1975 Act's fuel-economy standards do not alter EPA's regulatory obligations under the Clean Air Act. 549 U.S. 497, 532 (2007) ("The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency"). Shortly afterward, two district courts published opinions specifically addressing the question of whether § 209(b) standards that regulate greenhouse-gas emissions or require sales of zero-emission vehicles were preempted by the 1975 Act. Both held that they were not. *Green Mountain*, 508 F. Supp. 2d at 353-54; *Cent. Valley*, 529 F. Supp. 2d at 1163.

The relevance of these court cases was not lost on Congress. Several proposals were introduced to eliminate federal greenhouse-gas emissions standards for vehicles, including those adopted through § 209(b). *See generally* Dotson, *supra*, at 652-58 (recounting proposals and collecting sources); Letter from Sens. Tom Carper, Dianne Feinstein & Edward J. Markey to Sec'y Elaine L. Chao & Acting Adm'r Andrew Wheeler (Oct. 25, 2018) (referencing lobbyists' proposals

to subordinate greenhouse-gas regulation under the Clean Air Act to the 1975 Act's fuel-economy standards).[3]

But Congress rejected these proposals and did the opposite: it explicitly incorporated California's greenhouse-gas motor vehicle regulations into the legislation, ratifying those regulations. The 2007 Amendments include a requirement that federal agencies purchase only "low greenhouse gas emitting vehicles." Pub. L. No. 110-140, § 141, 121 Stat. 1492, 1517 (2007) (codified at 42 U.S.C. § 13212(f)(2)(A)). The law tasked EPA with identifying "low greenhouse gas emitting vehicles," taking into account "the *most stringent standards* for vehicle greenhouse gas emissions applicable to and enforceable against motor vehicle manufacturers *for vehicles sold anywhere in the United States*." *Id.*, 121 Stat. at 1518 (codified at 42 U.S.C. § 13212(f)(2)(B)) (emphasis added).

Congress's reference to enforceable greenhouse-gas standards "for vehicles sold anywhere in the United States" could only have been a reference to § 209(b) standards. As explained in the committee report on H.R. 2635, the bill where the language originated, "[c]urrently, the only applicable greenhouse gas emissions standards are those adopted by California and other states. Those standards will be

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[3] *Available at* https://www.carper.senate.gov/wp-content/uploads/archives/GHG%20Tailpipe%20standards.pdf; https://www.carper.senate.gov/wp-content/uploads/archives/CAFEdocumentsFINAL.pdf.

enforceable if and when EPA grants the waiver requested by the state of California under the Clean Air Act." H.R. Rep. No. 110-297, at 17.

To avoid any doubt about its intent, Congress enacted a savings clause preserving, *inter alia*, existing state authority and showing Congress's approval of the *Green Mountain* and *Central Valley* decisions. Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (2007) (codified at 42 U.S.C. § 17002) ("Except to the extent expressly provided," nothing in the amendments to the 1975 Act "supersedes [or] limits the authority provided . . . by . . . any provision of law (including a regulation)"); *see also* 153 Cong. Rec. 35,833, 35,927-28 (statement of Rep. Markey, lead author of the legislation) ("It is the intent of Congress to fully preserve existing federal and State authority under the Clean Air Act," including "the authority affirmed . . . in *Green Mountain* . . . [and] *Central Valley*"); *see also id.* at 34,178 (statement of Sen. Dianne Feinstein, co-sponsor of the legislation) (explaining that the amendments "do[] not impact the authority to regulate tailpipe emissions of the EPA, California, or other States under the Clean Air Act," and citing *Central Valley*).

The 2007 Amendments to the 1975 Act thus provide the clearest possible example of Congressional ratification of state greenhouse-gas standards under § 209(b). Three major court decisions affirmed that § 209(b) greenhouse-gas standards were not preempted by the 1975 Act. Shortly after, Congress overhauled

the 1975 Act, rejecting several attempts to reverse those decisions and instead explicitly incorporating the § 209(b) greenhouse-gas standards into its amendments. The lead authors of the 2007 Amendments made clear that the amendments were intended to ratify the courts' interpretation that states can regulate greenhouse-gas emissions from vehicles.

4. The Inflation Reduction Act of 2022 Again Incorporated State Low- and Zero-Emission Vehicle Regulations.

In the Inflation Reduction Act of 2022, Congress again confirmed, through appropriation, that state regulation of vehicle greenhouse-gas emissions under § 209(b) is both legal and in the public interest. Where Congress appropriates funding for an agency to engage in a specific action, that appropriation acts as a ratification from Congress when it "plainly show[s] a purpose to bestow the precise authority which is claimed." *Ex parte Endo*, 323 U.S. 283, 303 n. 24 (1944).

Thus, it is particularly telling that Congress adopted § 60105(g) of the Inflation Reduction Act, which allocates $5 million to EPA to help "States *to adopt and implement greenhouse gas and zero-emission standards for mobile sources* pursuant to section 177 of the Clean Air Act," which is the provision that allows states other than California to adopt § 209(b) standards. Pub. L. No. 117-169, 136 Stat. 1818, 2068-69 (emphasis added). Congress thus has again "ratified" the understanding that § 209(b) standards are not preempted by "affirmatively

act[ing]" to "create[] a distinct scheme . . . premised on th[at] belief." *Brown & Williamson*, 529 U.S. at 156; *see also* Greg Dotson & Dustin J. Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 Env't L. Rep. 10,017, 10,030-32 (2023) (noting Congressional ratification of the validity of greenhouse-gas and zero-emission § 209(b) standards via this provision of the Inflation Reduction Act).

Amici are in the best possible position to understand the origin and purpose of this provision. As the Chairs of the Senate and House Committees with jurisdiction over the Clean Air Act, *Amici* collaborated to conceive and draft the language of § 60105(g), which *Amici* included in the bill that was reported from the U.S. House Committee on Energy and Commerce, protected as they shepherded key provisions through the negotiation process, and, along with a majority of their colleagues, passed into law. *Amici* and the enacting Congress intended this provision to provide funding to support state adoption of § 209(b) greenhouse-gas and zero-emission standards; the provision allows for no other use of these funds. Congress understood, and its intent could only be fulfilled if: (1) EPA retained the authority to approve such standards; and (2) the standards were not preempted by the 1975 Act. By enacting § 60105(g) to fund activities that could only occur if NHTSA was correct in withdrawing its determination that § 209(b) standards are preempted, Congress knowingly and deliberately ratified

NHTSA's action and reaffirmed EPA's existing authority to approve state Low- and Zero-Emission Vehicle standards under § 209(b).

C. The Low- and Zero-Emission Vehicle Programs are Not Preempted by the 1975 Act.

The text and history of the 1975 Act, together with Congress's subsequent legislative enactments, all indicate an unwavering Congressional understanding that the Act does not preempt the § 209(b) standards at issue in this case. None of State Petitioners' arguments attempting to tie the 1975 Act's preemption provisions to specific elements of these standards succeeds in suggesting otherwise.

State Petitioners first argue that the Low-Emission Vehicles standards are preempted because they regulate carbon-dioxide emissions, and that "[t]he more gasoline a vehicle burns to travel a mile, the more carbon dioxide it emits." State Pet'rs' Br. 35. But this is the case for any pollutant emitted by gas-powered vehicles: burning more fuel in the same vehicle always produces more emissions. If this logic applies to preempt carbon-dioxide regulations, then it must, as a corollary, also preempt the hydrocarbon, carbon-monoxide, and nitrogen-oxides regulations in place when the 1975 Act was passed. *See, e.g.*, 13 Cal. Code Regs. § 1955.1(a). And while compliance with the Low-Emission Vehicles standards could affect fuel economy, that fact cannot be determinative here. The 1975 Act anticipates and accommodates effects on fuel economy from compliance with

emissions standards and is neutral about whether those effects might improve or hinder fuel economy. In any case, Congress's legislative enactments make clear that § 209(b) standards that regulate greenhouse gases are no more subject to preemption than other § 209(b) standards. *See supra* Part I.B.2-4.

Next, Petitioners make two arguments specific to the Zero-Emissions Vehicles standards. First, they argue that because producing vehicles that conform to those standards will affect the average fuel economy of a manufacturer's fleet, the standards "relate to" the fuel economy of that fleet and are therefore preempted. State Pet'rs' Br. 36-38. But even if the Zero-Emission Vehicle standards were "related to" fuel economy, they would not be "related to . . . fuel economy *standards*," 49 U.S.C. § 32919(a) (emphasis added), because zero-emission vehicles are specifically excluded from the process for setting fuel-economy standards. 49 U.S.C. § 32902(h)(1). In any case, State Petitioners' argument proves too much. As discussed in detail above, *supra* Part I.A.2, Congress assumed that § 209(b) standards would have a significant effect on fuel economy, yet preserved them. Thus, concluding that standards are preempted simply because they have a significant effect on fleetwide fuel economy leads to a contradiction in the statute, and that reading should be rejected.

State Petitioners also appear to craft a daisy-chained argument that zero-emission vehicle mandates must be preempted under the Act because the phrase

"fuel economy" includes the word "fuel," and because "alternative fuel" is elsewhere defined to include electricity—thus, a mandate requiring electric vehicles must relate to a "fuel economy" standard. State Pet'rs' Br. 37-38 (quoting 49 U.S.C. §§ 32901(a)(1), 32905(a)). This is incorrect. The 1975 Act's definition of "fuel economy" does not (and did not) refer to "alternative fuel," only "fuel," which is defined separately and includes only "gaseous" and "liquid" fuels, 49 U.S.C. § 32901(a)(10)-(11); 15 U.S.C. § 2001(5)-(6) (1976). In fact, the 1975 Act explicitly noted that electricity would *not* fall within its definition of "fuel." 15 U.S.C. § 2012(b) (1976) (including "electric vehicles" in the category of "vehicles not consuming fuel (as defined in [15 U.S.C. § 2001(5) (1976)])," and defining "electric vehicle" to include vehicles powered by fuel cells). Moreover, when the preemption provision was first enacted, no part of the 1975 Act used the phrase "alternative fuels." *See generally* Pub. L. No. 94-163, tit. III, pt. A, 89 Stat. 871, 901-16 (1975). Congress had no intent to incorporate "alternative fuels" into its preemption provision when it passed the Act; and, as Congress has not since expanded it, that provision cannot be read now to include "alternative fuels."

In sum, the 1975 Act's text, structure, and history, together with subsequent interpretations that Congress has ratified, demonstrate the impossibility of reading the 1975 Act to preempt the § 209(b) standards at issue here. Such a reading would not only be incompatible with the text, it would be contrary to Congress's manifest

intent in crafting and maintaining, for almost fifty years, a motor vehicle emissions regulatory structure that relies on the continued validity of § 209(b) standards, including regulations such as the Low- and Zero-Emission Vehicles standards.

II. The Equal-Sovereignty Principle Does Not Limit Congress's Authority to Create Programs Like the § 209(b) Standards.

State Petitioners assert a novel reading of the equal-sovereignty principle, claiming that "laws passed pursuant to Congress's Article I powers violate the Constitution if they withdraw sovereign authority from some States but not others." State Pet'rs' Br. at 12. *Amici* urge the Court to reject this artificial and unprecedented limitation on Congress's powers. Article I and the Supremacy Clause authorize Congress to shape preemption to fit the needs of the particular field in which it legislates—as it did in enacting § 209(b) of the Clean Air Act—and the equal-sovereignty principle has never been applied to limit this authority. *See* Resp'ts' Br. 34-35. The state-led regulatory program that § 209(b) creates does not undermine "a federalist system." *Contra* State Pet'rs' Br. at 29-30. Rather, it promotes state authority by giving states the flexibility to adopt an alternative set of regulations in lieu of the national standards if needed, while preventing an unduly burdensome proliferation of vehicle-emissions standards.

Each state, when it ratified the Constitution or when it joined the Union, agreed to subordinate its sovereignty to Congress's authority under Article I of the Constitution and the Supremacy Clause. Within the scope of those powers,

Congress is free to act as it chooses unless constrained by another provision of the Constitution. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801-02 (1995) ("As we have frequently noted, '[t]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government.'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985))). The recent Supreme Court jurisprudence regarding the Voting Rights Act, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013), does not change this analysis. Neither of these opinions addresses Congress's power under the Commerce Clause, and both make clear that the principle of equal sovereignty does not prevent Congress from creating differentiated statutory regimes. *Nw. Austin*, 557 U.S. at 203 ("Distinctions can be justified in some cases."); *Shelby Cnty*, 570 U.S. at 542 (noting that the Supreme Court has "rejected the notion that the principle [of equal sovereignty] operated as a *bar* on differential treatment").

Shelby County does address the Supremacy Clause, but only to disclaim any effect on Congress's preemption power. The opinion distinguishes preemption under the Supremacy Clause from the Voting Rights Act's requirement that certain state laws be reviewed by the Attorney General before they take effect. 570 U.S. at 542 ("The Constitution and laws of the United States are 'the supreme Law of the

Land.' U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments"). It goes on to discuss the state powers that remain "[o]utside the strictures of the Supremacy Clause," including the power to regulate elections, *id.* at 543, and closes by emphasizing the unique character of the Voting Rights Act, which was "extraordinary legislation otherwise unfamiliar to our federal system." *Id.* at 545 (quoting *Nw. Austin*, 557 U.S. at 211). Thus, *Shelby County* emphasizes the limitations of the equal-sovereignty doctrine, and specifically distinguishes Congress's exercise of its ordinary preemption powers—at issue here—from "extraordinary legislation" such as the Voting Rights Act.

Finally, contrary to State Petitioners' argument, the design of the § 209(b) standards promotes, rather than detracts from, state autonomy. State Pet'rs' Br. 29-30. Through this program, Congress has authorized California to "act as a . . . . laboratory for innovation" by creating alternatives to the nationwide vehicle-emissions regulations, which other states may then adopt. *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1111; *see also* 42 U.S.C. §§ 7543(b), 7507. This system showcases the best elements of federalism. By creating an alternative set of regulatory standards available to states, Congress has provided those states greater flexibility than they otherwise would have. By allowing a state, rather than EPA, to design these standards, Congress has ensured that they will reflect state

perspectives and needs. And, by limiting the system to two alternatives—one federally-led, one state-led—Congress has protected against a proliferation of standards that would be unworkable for the automotive industry.

CONCLUSION

Amici urge the Court to reject State Petitioners' interpretation of the 1975 Act and to decline to impose new, unfounded constraints on Congress's lawmaking power.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in D.C. Cir. R. 32(e)(3), Fed. R. App. P. 29(a)(5), and the Court's Scheduling Order, ECF No. 1965631 (filed Sept. 20, 2022), because this brief contains 6496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Cara A. Horowitz
CARA A. HOROWITZ
January 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of January, 2023, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which constitutes service on all parties and parties' counsel who are registered ECF filers.

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