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July 6, 2021

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Re: Comments related to the notice reconsidering withdrawal of a waiver of preemption for California's zero emission vehicle (ZEV) mandate and greenhouse gas (GHG) emission standards, Docket No. 2021-08826

In 2019, the previous administration adopted The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program. The program, among other things, revoked a waiver that had previously been extended to California under Section 209 of the Clean Air Act. That section allows California, and no other State, to obtain a waiver relating to the Clean Air Act's emissions standards. The waiver allows California, and no other State, to regulate new car emissions standards.

You recently issued a notice of reconsideration, seeking comments on whether the SAFE Vehicles Rule, in particular EPA's decision to withdraw a waiver of preemption previously granted to California, was a valid and appropriate exercise of agency authority.[1] It was. Ohio and 15 other States are submitting this letter to make clear that any attempt to restore California's January 9, 2013, waiver would be unconstitutional: Section 209, by allowing California and only California to retain a portion of its sovereign authority that the Clean Air Act takes from other States, is unconstitutional and thus unenforceable. Any waiver granted to California is thus "repugnant to the constitution" and "void."[2] In our union of equally sovereign States, the Golden State is not a golden child.

Equal Sovereignty of the States

The United States of America "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not

[1] 86 Fed. Reg 22421 (April 28, 2021).
[2] *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

delegated to the United States by the Constitution itself."[3] This "'constitutional equality' among the States,"[4] derives from the Constitution's text and structure. Indeed, the principle is so deeply embedded in our constitutional order that the Supreme Court treats the States' sovereign equality as a "truism."[5] The equal-sovereignty of the States is one of those principles that, while "not spelled out in the Constitution," is "nevertheless implicit in its structure and supported by historical practice."[6]

To see why, begin at the beginning. When the States declared their independence from Britain, "they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all … Acts and Things which Independent States may of right do.'"[7] By then, one key aspect of the sovereignty possessed by the States consisted of their "equal sovereignty."[8] The "law of nations" clearly established that "'Free and Independent States' were entitled to the 'perfect equality and absolute independence of sovereigns.'"[9] "The notion of a 'State' with fewer sovereign rights than another 'State' was unknown to the law of nations."[10] And the States would have understood themselves to possess this fundamental aspect of sovereignty.

Years later, in 1789, the Framers famously "split the atom of sovereignty," dividing sovereign authority between the States and the federal government.[11] This division of authority "limited … the sovereign powers of the States."[12] For example, the Framers' sovereignty-splitting gave the federal government exclusive authority over some matters,[13] restricted state authority over others,[14] and made validly enacted federal laws and treaties "the supreme Law of the Land."[15] But these changes did not *abolish* the States' sovereignty; to the contrary, the States "retained 'a residuary and inviolable sovereignty.'"[16] The Tenth Amendment confirms as

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[3] *Coyle v. Smith*, 221 U.S. 559, 567 (1911).
[4] *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1283 (2016) (citation omitted).
[5] *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918).
[6] *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019); *accord see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2205 (2020).
[7] *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence ¶32).
[8] Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 Colum. L. Rev. 835, 935 (2020).
[9] *Id*. at 937 (quoting *Schooner Exch. v. McFaddon*, 7 Cranch 116, 137 (1812)).
[10] *Id*. at 937–38.
[11] *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)).
[12] *Murphy*, 138 S. Ct. at 1475.
[13] *See* U.S. Const. art. I, §8, cl.4.
[14] *Id.*, art. I, §10.
[15] *Id.*, art. VI, cl.2.
[16] *Murphy*, 138 S. Ct. at 1475 (quoting The Federalist No. 39, p.245 (C. Rossiter ed. 1961)).

much, stating that the States and the People retain all powers not expressly surrendered in the Constitution.

One key aspect of the States' retained sovereignty included the longstanding notion of "equal sovereignty."[17] Again, that had long been understood as an essential aspect of sovereignty.[18] While the Constitution limited the States' sovereignty in some ways, it nowhere took from the States' their sovereign equality. Thus, the States retained that sovereign equality.[19] The fact that the States called themselves "States" confirms the point. "By using the term 'States,' the Constitution recognized the traditional sovereign rights of the States minus only those rights that they expressly surrendered in the document."[20] And the right to sovereign equality is not among the rights surrendered.

The States' sovereign equality remained complete until the Civil War Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments all permit Congress to enforce their guarantees by "appropriate" legislation.[21] (A few later-adopted civil-rights amendments use identical language when empowering Congress to enforce their terms.[22]) Appropriate legislation might entail limiting the sovereign authority of only the States found to be acting in violation of these Amendments.[23] Therefore, "by adopting these Amendments, the States expressly … compromised their right to equal sovereignty with regard to enforcement of the prohibitions set forth in the Amendments."[24] But the States did not *otherwise* compromise their equal sovereignty—the Amendments do not speak to, and thus do not alter, the States' equal sovereignty in contexts unrelated to the prohibitions and guarantees of these amendments.

This background principle of equal sovereignty among the States accords with the "separation of powers," which the Framers viewed "as the absolutely central guarantee of a just Government."[25] The separation of powers depends as much on "preventing the diffusion" of power as it does on stopping the centralization of power.[26] After all, to avoid "a gradual concentration" of governmental authority in one level or branch of government,[27] we must ensure

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[17] Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 935.
[18] *Id*.
[19] *Id*. at 937–38.
[20] *Id*. at 938.
[21] U.S. Const. ams. 13 §2; 14 §5; 15 §2.
[22] *See id*., Ams. 19; 24 §2; 26 §2.
[23] *See United States v. Morrison*, 529 U.S. 598, 626–27 (2000).
[24] Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 938.
[25] *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
[26] *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991).
[27] The Federalist No. 51, p.349 (J. Madison) (Cooke, ed., 1961).

that each level and branch of government retains for itself the power the Constitution assigns to it.[28]

The equal-sovereignty doctrine performs this function. When Congress unequally limits the States' sovereignty—when it allows *some* States but not others to exercise some aspect of their sovereign authority—it reorders the constitutional division of power among the States. Imagine a law allowing some States, but not others, to boycott Israel.[29] Or a law permitting just one State to enact and enforce immigration laws.[30] It is one thing for Congress to enact preemptive laws, which necessarily limit state sovereignty; the federal government clearly has the power to do that, as the Supremacy Clause confirms. It is quite another thing for Congress to limit state sovereignty of disfavored States. When Congress picks favorites, it is not incidentally limiting state sovereignty in the exercise of its own power, but rather regulating the States *as States*. "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[31] And when the federal government exercises such authority anyway, it aggrandizes its own power and the power of the favored States while weakening the power of the disfavored States. Allowing Congress to reorder power that the Constitution gives equally to each State contradicts any sensible understanding of the separation of powers.

In addition to furthering the purposes of the separation-of-powers doctrine, the "constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[32] As one distinguished jurist recognized early in her legal career, equal sovereignty "rests on concepts of federalism."[33] "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[34] If the States' sovereignty could be reduced unequally, then the States would be in no relevant sense "indestructible"; a State is the sum of its sovereign authority, and a rule allowing the unequal reduction of sovereign authority would allow politically powerful States to win limits on sister States' authority. In addition to undermining "the integrity, dignity, and residual sovereignty of the States,"[35] political rent-seeking of that sort would undermine a key virtue of federalism. Our federalist structure "makes

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[28] *See Seila Law*, 140 S. Ct. at 2202–03; *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Morrison*, 487 U.S. at 710 (Scalia, J., dissenting); *INS* v. *Chadha*, 462 U.S. 919, 946 (1983).
[29] *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374–77 (2000).
[30] *Cf. Arizona v. United States*, 567 U.S. 387, 393–94 (2012).
[31] *New York v. United States*, 505 U.S. 144, 166 (1992); *see also Murphy*, 138 S. Ct. at 1476.
[32] *Coyle*, 221 U.S. at 580.
[33] Sonia Sotomayor de Noonan, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 835 (1979).
[34] *Texas v. White*, 1 Wall. 700, 725 (1869).
[35] *Bond v. United States*, 564 U.S. 211, 221 (2011).

government 'more responsive by putting the States in competition for a mobile citizenry.'"[36] Competition between the States gives all States incentive to make policy attractive to the People. The virtue of competition would be seriously hampered if the States could compete by harming their rivals rather than by improving themselves.

In sum, the equal-sovereignty principle follows from the Constitution's history, text, and structure.

It follows from Supreme Court precedent, too. The Supreme Court long ago recognized that every State, as a matter of "the constitution" and "laws" of admission, is "admitted into the union on an equal footing with the original states."[37] "[N]o compact," the Supreme Court has explained, can "diminish or enlarge" the rights a State has, as a State, when it enters the Union.[38] Put differently, "a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations."[39] This principle precludes any arrangement in which one State is admitted on less-favorable terms than any other.[40] Conversely, it bars any State from being admitted on terms *more favorable* than those extended to its predecessors.[41] Each State has the right, "under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government."[42]

The States' equality upon admission would not matter much if Congress could vitiate it *after* admission. Therefore, it is perhaps unsurprising that the case law treats the right to equal sovereignty as surviving admission to the Union. The Court recently reaffirmed that the "fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States" after their admission.[43] These cases—*Shelby County* and *Northwest Austin*—both involved challenges to the Voting Rights Act, which required some States, but not others, to receive federal permission before amending their election laws.[44] In *Northwest Austin*, the Court signaled that the equal-sovereignty principle cast

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[36] *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).
[37] *Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845).
[38] *Id.* at 229.
[39] *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900); *see also Coyle*, 221 U.S. at 568.
[40] *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977).
[41] *United States v. Texas*, 339 U.S. 707, 717 (1950).
[42] *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889).
[43] *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).
[44] *Shelby County* 570 U.S. at 537–39, 544–45; *Nw. Austin*, 557 U.S. at 196.

doubt on the constitutionality of this differential treatment, though it decided the case on statutory grounds instead of reaching the constitutional issue.[45] A few years later, *Shelby County* squarely presented the constitutional issue. And *Shelby County* held unconstitutional Section 4 of the Voting Rights Act, which contained the formula used to decide which States needed federal preclearance before changing their election laws. The Court held that the law exceeded Congress's authority under the Fifteenth Amendment, which empowers Congress to pass "appropriate legislation" enforcing the Amendment's prohibition on denying or abridging the right to vote based on race.[46] The Court determined that, in deciding whether such legislation was "appropriate," courts must consult the background principle of equal sovereignty. When legislation departs from that principle—as Section 4 did, by unequally limiting the States' power to adopt and enforce election laws—it will be upheld as "appropriate legislation" only if the disparate treatment is reasonably justified.[47] Because the federal government had failed to make such a showing with respect to Section 4, Congress had no authority to enact that provision.[48]

Shelby County shows just how strong the equal-sovereignty principle is. Again, the Fifteenth Amendment *allows* Congress to single out some States for less-favorable treatment of their sovereign authority.[49] Still, the background rule that States retain equal sovereignty is so strong, even after admission to the Union, that Fifteenth Amendment legislation departing from that principle will be upheld as "appropriate" only if the need for such differential treatment is solidly grounded in evidence.[50] If the equal-sovereignty principle retains some strength post-admission even in contexts where the States have surrendered their entitlement to complete sovereign equality, it necessarily retains all its strength—which is to say, it is dispositive—in contexts where the States *have not* surrendered their entitlement to sovereign equality.

Before moving on to consider what the doctrine means for Section 209 of the Clean Air Act, it is critical to emphasize that the Constitution guarantees "equal *sovereignty*, not … equal treatment in all respects."[51] To demand that every law benefit everyone and everything equally "would make legislation impossible and would be as wise as to try to shut off the gentle rain from heaven because every

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[45] *Nw. Austin*, 557 U.S. at 203, 211.
[46] U.S. Const. am. 15, §2.
[47] *Shelby County*, 570 U.S. at 544–45, 552; *accord Nw. Austin*, 557 U.S. at 203.
[48] *Shelby County*, 570 U.S. at 551–55.
[49] *See South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966); *Shelby County*, 570 U.S. at 551–55.
[50] *Shelby County*, 570 U.S. at 554.
[51] Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1149 (2016) (emphasis added).

man does not get the same quantity of water."[52] Put a lot less poetically and a lot more bluntly: "Perfect uniformity and perfect equality" in law "is a baseless dream."[53] So it is when it comes to the States. Congress frequently treats States differently in unremarkable ways, such as when it locates naval bases in States with coastlines, or directs funding to projects in particular States. States located in areas prone to natural disasters gain more from federal laws empowering and enriching FEMA. States that sit atop oil fields bear the brunt and reap the benefit of federal energy policy. Spending Clause legislation will inevitably flow to the States whose populations or conditions disproportionately exhibit the problems at which the funding is aimed.[54]

Such laws create no equal-sovereignty issues. The equal-sovereignty doctrine demands "parity" *only* "as respects political standing and sovereignty."[55] Congress may not unequally limit or expand the States' "political and sovereign power,"[56] and must instead adhere to the principle that no State is "less or greater … in dignity or power" than another.[57] Disparate limitations on the States' sovereignty thus violate the equal-sovereignty doctrine. Disparate treatment *unrelated to sovereign authority*, however, does not. That means "Congress may devise … national policy with due regard for the varying and fluctuating interests of different regions."[58] Congress may, in other words, pass legislation that expressly or implicitly favors some States over others, as long as it does not give some States favorable treatment with respect to the amount of sovereign authority they are permitted to exercise. Only disparate treatment of sovereign authority implicates the equal-sovereignty principle.

Section 209(b)(1) of the Clean Air Act, because it violates the equal-sovereignty-of-the-States doctrine, is unconstitutional, and may not be enforced

Section 209 of the Clean Air Act, which is codified at 42 U.S.C. §7543, preempts the States from setting emissions standards for new cars and new engines.[59] But the Act makes two exceptions to its preemptive scope. *First*, Section 209(b)(1) allows California—and only California—to set emissions standards that are more stringent than those adopted by the federal government.[60] *Second*, the Act

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[52] *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 572 (1908).
[53] *Edye v. Robertson* (*The Head Money Cases*), 112 U.S. 580, 595 (1884).
[54] *See* 20 U.S.C. §1411 (special-education funding); 34 U.S.C. §10351 (rural drug enforcement).
[55] *Texas*, 339 U.S. at 716.
[56] *Id*. at 719–20.
[57] *Coyle*, 221 U.S. at 566.
[58] *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950).
[59] 42 U.S.C. §7543(a); *see also id*. §7543(e)(2)(A).
[60] §7543(b)(1); S. Rep. No. 91-1196, 32 (June 30, 1970).

allows States with air quality below federal standards to adopt an emissions standard "identical to the California standards."[61] Thus, "the 49 other states" may depart from the federal standard if and only if they adopt "a standard identical to an existing California standard."[62]

Section 209(a), by preempting state laws setting emissions standards for new cars, limits the States' sovereign authority. After all, the "power of giving the law on any subject whatever, is a sovereign power."[63] Since the States would have the power to regulate new-car emissions but for Section 209(a), that subsection of the Clean Air Act limits state sovereignty. The fact that Section 209(a) limits state sovereignty creates no *equal*-sovereignty problem. But the fact that Section 209(b)(1) limits state sovereignty *unequally*, does. Again, Section 209(b)(1) allows California, and *only* California, to obtain a federal waiver that permits it to set new-car emissions standards. While other States may adopt those same standards, California alone may set them. And so California alone retains some of its "sovereign power" to "giv[e] the law" in this area.[64]

Section 209(b) violates the equal-sovereignty doctrine by allowing California to exercise sovereign authority that Section 209(a) takes from every other State. The law effects an "extension of the sovereignty of [California] into a domain of political and sovereign power of the United States from which the other States have been excluded."[65] This unequal treatment is unconstitutional, full stop. Congress passed Section 209 under its Commerce Clause authority. And the States, in ratifying the Commerce Clause, did not "compromise[] their right to equal sovereignty,"[66] as they did with later amendments.[67] Thus, the Commerce Clause provides no basis for disrupting the States' retained right to equal sovereignty.

Even if, outside the Civil Rights Amendments, a distinction between the States "can be justified in some cases," that distinction must be "sufficiently related to the problem that it targets."[68] The waiver at issue here, allowing only California to regulate carbon emissions, is not sufficiently related to the problem that Section 209(a) targets. Congress enacted that section to permit California to address *local* air pollution.[69] But California seeks special treatment for its proposed greenhouse

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[61] 42 U.S.C. §7507(1); *see also id*. §7543(e)(2)(B)(i) (similar exception for non-road engines).
[62] *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 201 (2d Cir. 1998); *accord Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 8 (1st Cir. 2000).
[63] *McCulloch v. Maryland*, 4 Wheat. 316, 409 (1819).
[64] *McCulloch*, 4 Wheat. at 409.
[65] *Texas*, 339 U.S. at 719–20.
[66] Bellia & Clark, *International Law Origins*, 120 Colum. L. Rev. at 938.
[67] *See Shelby County*, 570 U.S. at 551–55.
[68] *Nw. Austin*, 557 U.S. at 203.
[69] 84 Fed. Reg. 51310, 51330 (Sept. 27, 2019).

gas targets and zero emission vehicle mandate designed to mitigate climate change—an inherently global interest.[70] As the EPA previously recognized, "[p]arts of California have a real and significant local air pollution problem, but CO_2 is not part of that local problem."[71] Thus, *even if* Congress's differential treatment of California and the other States could be upheld as applied to a situation where the differential treatment is necessary, the differential treatment would remain impermissible as applied here.

To make matters worse, giving California special treatment will have concrete negative effects in other States. When California was merely allowed to "solve its air quality issues, there was a relatively-straightforward technology solution to the problems, implementation of which did not affect how consumers lived and drove."[72] But allowing California to set carbon-emission standards requires vehicle manufacturers to make "changes to the entire vehicle."[73] Car manufacturers, given the choice between creating two vehicle fleets versus one that complies with the stricter California standard, have no real choice at all. This means the vehicles available to Ohioans are not governed by Ohio's standards or the Federal government's standards, but rather by California's standards. That not only offends the Constitution, but it makes bad policy. The annual household income for a family in Ohio is almost $19,000 less than the annual income for a family in California.[74] Thus, Ohioans may not be able to afford drastic changes mandated by California, leading Ohioans to drive older vehicles for longer and exacerbating the problem California believes it is solving. Ohio and California have different key industries, different commuting patterns, and different access to alternative fuel stations. So it makes no sense to let California regulate Ohio's vehicles. While Ohio ceded some of its sovereignty to the Federal government in joining the Union, at no point has Ohio ceded its sovereignty to California, which is precisely what granting California a waiver would amount to.

Section 209's unconstitutionality is not some technicality. The unequal treatment undermines the federalist system by making California, in a very practical sense, "greater … in dignity or power" than the other States.[75] The law gives California a stick that it can use to win concessions and deals—even concessions and deals having nothing to do with emissions control—unavailable to any other State. For example, after the national government proposed new nationwide emissions standards, several car manufacturers met with California to

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[70] *Id*. at 51346.
[71] 83 Fed. Reg. 42986, 42999 (Aug. 24, 2018).
[72] *Id*.
[73] *Id*.
[74] *Compare* U.S. Census Bureau, QuickFacts: Ohio, https://perma.cc/N52Q-KKM3, *with* U.S. Census Bureau, QuickFacts: California, https://perma.cc/7SVJ-R9GG.
[75] *Coyle*, 221 U.S. at 566.

secure favorable treatment under California's regulations.[76] These manufacturers met with California because California had the ability to seriously help or hinder their businesses: the Golden State, and *only* that State, can adopt standards that manufacturers must either implement nationwide or find a way to implement in California alone, either way at potentially significant cost. A federal law giving one State special power to regulate a major national industry contradicts the notion of a union of sovereign States.

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Agencies are bound by the Constitution. For the foregoing reasons, Section 209(b) violates the Constitution by allowing California to obtain a preemption waiver unavailable to any other State. In reinstating such a waiver, especially the 2013 waiver that allows only California to regulate carbon emissions, the EPA would therefore act unconstitutionally.

Yours,

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[76] Coral Davenport and Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal With California*, New York Times (July 25, 2019), https://perma.cc/EZG4-47LA.

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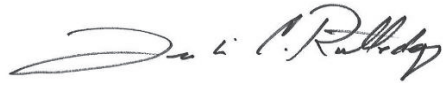

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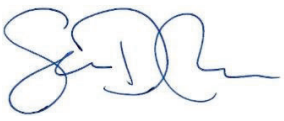

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