No. _____

In The
Supreme Court of the United States

RONALD CLARK FLESHMAN, JR.,
Petitioner,

v.

VOLKSWAGEN, AG, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Environmental Protection Agency revise clear statutory terms of the Clean Air Act to allow the importation, sale, and use of motor vehicles with "defeat devices" when Congress expressly prohibited the same in enacting section 203 of the Clean Air Act, 42 U.S.C. § 7522?

2. Can the Environmental Protection Agency revise clear statutory terms of the State Implementation Plans of seventeen States to allow the use of motor vehicles with "defeat devices?"

3. Can a citizen intervene under 42 U.S.C. § 7604 or Federal Rule of Civil Procedure 24 when the Environmental Protection Agency refuses to enforce the Clean Air Act and the emissions standards and limitations found in 42 U.S.C. § 7522?

4. Was it an abuse of discretion for the District Court, as affirmed by the Ninth Circuit Court of Appeals, to approve a class action settlement condoning illegal activity by allowing 487,500 clandestinely imported vehicles to remain in the United States in violation of 42 U.S.C. § 7522(a)(1) and (b)(2), 19 U.S.C. § 1595a (c)(1)(A), and to remain in use in violation of the Clean Air Act and the State Implementation Plans of 17 States?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In United States Court of Appeals for the Ninth Circuit Case No. 16-17060, In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, there is one named plaintiff, six named defendants, and one proposed intervenor.

The plaintiff is:

THE UNITED STATES OF AMERICA,

The defendants are:

VOLKSWAGEN AG; AUDI AG; VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC; DR. ING. H.C. F. PORSCHE AG; PORSCHE CARS NORTH AMERICA, INC,

The proposed intervenor is:

RONALD CLARK FLESHMAN, Jr.

In United States Court of Appeals for the Ninth Circuit Case No. 16-17183, In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, there are seventy-eight plaintiffs, one objector, and seven defendants.

The plaintiffs are:

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; ELIZABETH EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL

HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

The objector is:

RONALD CLARK FLESHMAN, Jr.,

The defendants are:

VOLKSWAGEN, AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Clark Fleshman respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

Pursuant to Rule 12.4 of the Rules of the United States Supreme Court, Petitioner Fleshman seeks simultaneous review of two judgments of the United States Court of Appeals for the Ninth Circuit which involve identical and closely related questions. The opinions of the Ninth Circuit are published at 895 F.3d 597 (9th Cir. 2018) and 894 F.3d 1030 (9th Cir. 2018).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision in Fleshman, Petitioner and Proposed Intervenor below v. United States, *et al.* on July 3, 2018, and that Court denied a timely petition for rehearing on October 24, 2018. This Court, by order of the Honorable Associate Justice Elena Kagan dated January 23, 2019, granted an extension of time to file the Petition for a Writ of Certiorari to and including March 28, 2019.

The United States Court of Appeals for the Ninth Circuit issued its decision in Fleshman,

Petitioner and Objector below v. Volkswagen AG, *et al.* on July 9, 2018, and that Court denied a timely petition for rehearing on October 24, 2018. This Court, by order of the Honorable Associate Justice Elena Kagan dated January 23, 2019, granted an extension of time to file the Petition for a Writ of Certiorari to and including March 28, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

The jurisdiction of the United States District Court for the Northern District of California in Fleshman, Petitioner and Proposed Intervenor below v. United States, *et al.* in the action brought by the U.S. Department of Justice on behalf of the Environmental Protection Agency was established pursuant to 28 U.S.C. §§1331, 1345, and 1355, and 42 U.S.C. §§7523 and 7524.

The jurisdiction of the United States District Court for the Northern District of California in the litigation of the class action against Volkswagen was established pursuant to 28 U.S.C. §§ 1331, 1332, 1357, 1361, 1367.

The jurisdiction of the United States Court of Appeals of the Ninth Circuit for review of these two cases was established pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The Constitutional provisions, statutes, and regulations involved in this case are lengthy. Pursuant to Rule 14.1 (f), the citation to these provisions are provided here and their pertinent text is set out in the Appendix.

1. U.S. Constitution, Article I, Section I

2. Clean Air Act of 1977, §203, 42 U.S.C. §7522,

3. Clean Air Act of 1977, §202, 42 U.S.C. §7521,

4. Clean Air Act of 1977, §304, 42 U.S.C. §7604,

5. 40 C.F.R. §88.1811-04, "Emission standards" for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles

6. Tariff Act of 1930, 19 U.S.C. §1595(c)(1)

State Implementation Plans

7. Alabama Administrative Code 335-3-9-04
   Original: 39 F.R. 14338
   Revision: 55 F.R. 10062

8. Arizona Administrative Code R 18-2-1029;
   68 FR 2912

9. Connecticut Agencies Register 14-164c-4a;
   73 FR 74019

10. 18 District of Columbia Municipal Regulations Chapter 7, §751; 64 FR 31498

11. Georgia Comp. Rules & Regulations, 391-3-20-.06
    Original: 62 FR 42916
    Revision: 67 FR 45909
    Revision: 68 FR 40786

12. Hawaii Code of Regulations 11-60.1-34; 77 FR 25084

13. Illinois Administrative Code Title 35, §240.103; 70 FR 47377

14. Code of Maryland Regulations 11.14.08.06; 68 FR 2208

15. Minnesota Regulations 7023.0120

16. Nevada Administrative Code 445B.575; 73 FR 38124

17. New Jersey Administrative Code §7:27-14.3; 24 FR 17781

18. North Dakota Administrative Code 33-15-08-02; 44 FR 63102

19. Rhode Island Code of Regulations 47-1-37:1.12

20. Virginia Administrative Code 9 VAC 5-40-5670; 65 FR 21315

21. Wisconsin Administrative Code Natural Resources §485.06; 78 FR 57501

22. Wyoming Administrative Code § Environment Air Quality Ch 13 §2

Virginia Statutes

23. Virginia Code § 46.2-1048

STATEMENT OF THE CASE

This is an unusual case where all the relevant facts have been admitted and stipulated by appellee-defendant, Volkswagen. As part of a Plea Agreement to criminal charges brought by the Justice Department, Volkswagen acknowledged the truth of a "*Statement of Facts,*" and agreed to its admissibility in any proceeding. Volkswagen is prohibited by the Plea Agreement from contesting anything in the "*Statement of Facts*." *See*, United States of America v. Volkswagen AG, United States District Court for the Eastern District of Michigan, 2:16-cr-20394-SFC-APP, Document 68]. The "*Statement of Facts*" is found in the Appendix at pp. A214-A242.

This litigation started on September 18, 2015 when the Environmental Protection Agency issued a "*Notice of Violation*." The Notice of Violation ("NOV") is found in the Appendix at pp. A243-A254. The NOV carefully described the "*Law Governing Alleged Violations*." App. A244-A248. To summarize, a foreign manufacturer cannot import a new motor vehicle or engine unless it is "*covered*" by a valid Certificate of Conformity ("COC") 42 U.S.C. §7522(a)(1). To obtain a valid COC, a manufacturer must submit an application to the EPA in a manner that conforms with the applicable federal regulations. App. A246. The regulations require the manufacturer seeking to import a new motor vehicle or engine to disclose any "*defeat device*" in the application for a COC. 40 C.F.R. 86.1844-01(d)(11). A "*defeat device*" "*reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal*

vehicle operation on use." 40 C.F.R. §86.1803-01. "*Motor vehicles equipped with defeat devices, such as those at issue here, cannot be certified*" to receive a COC. *EPA Advisory Circular Number 24*: Prohibition on Use of Emission Control Defeat Device (Dec. 11, 1972. *See also*, 40 C.F.R. §§86-1809-01, 86-1809-10, 86-1809-12.

For purposes of importing a new motor vehicle or engine under 42 U.S.C. §7522(a)(1), a vehicle is "*covered by a Certificate of Conformity only if they are in all material respects as described in the manufacturer's application for certification…*" 40 C.F.R. §86.1848-10(c)(6). App. A247. "*Similarly, a COC issued by [the] EPA including those issued to Volkswagen, state expressly '[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications' described in the application for that COC*." App. A247. *See*, 40 C.F.R. §86.1848-01(b) (authorizing the EPA to issue COCs on any terms that are necessary or appropriate to assure that new motor vehicle satisfy the requirements of the Clean Air Act and its regulations.)

The EPA's NOV expressly states it is prohibited for any person to sell or offer to sell any vehicle which has a defeat device as a "*part of*" it "*where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use*." App. A248. *See*, CAA §203(a)(3)(B), 42 U.S.C. §7522(a)(3)(B); 40 C.F.R. §86.1854-12(a)(3)(ii). The NOV expressly stated manufacturers are prohibited from "*importing any new motor vehicle unless that vehicle is covered by an EPA-issued COC*." App. A247. CAA §203(a)(1), 42 U.S.C. §7522(a)(1), 40 C.F.R. §86.1854-12(a)(1).

The NOV described the secretly installed "*defeat device*" in over 487,500 Volkswagen diesel engines (also known as the "*Subject Vehicles,*") and how Volkswagen admitted the scheme after the EPA threatened not to issue future COCs for Volkswagen vehicles. App. A250. The defeat device sensed when a vehicle was undergoing emission testing and caused the emission system to produce compliant emission results. However, when the vehicle was not undergoing testing, and was in normal vehicle operation, the effectiveness of the emissions system was reduced, resulting in NOx emissions "*10-40 times above the EPA compliant levels.*" App. A249.

Volkswagen admits the applications to the EPA for Certificates of Conformity for over 487,500 diesel vehicles contained the following signed statement:

> The Volkswagen Group states that any element of design, system, or emission control devise installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed

> or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk of public safety.
>
> . . .
>
> All the vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

App. A222-A223.

Based on these applications, the EPA issued Certificates of Conformity for the diesel vehicles allowing them to be imported and sold into the United States. As admitted in the "*Statement of Facts*."

> [Volkswagen] represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter U.S. emissions standards . . . Further, [Volkswagen] designed a specific marketing campaign to market these vehicles to U.S. customers as '*clean diesel*' vehicles.

App. A223.

> From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A-F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the [Volkswagen diesel vehicles] complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the [Volkswagen diesel vehicles] in the United States, Supervisors A-F and other VW employees: (a) knew that the [Volkswagen diesel vehicles] did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the [Volkswagen diesel vehicles] met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.
>
> App. A224.

Volkswagen admitted that its supervisors and employees:

> designed a defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle's

> software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards.
>
> App. A225.

Volkswagen admits "*that if they had told the truth and disclosed the existence of the defeat device, [Volkswagen] would not have obtained the requisite certificates for the Subject Vehicles and could not have sold any of them in the United States*." App. A229. Further, Volkswagen admits their vehicles are not allowed entry into the United States:

> In order to import the Subject Vehicles into the United States, [Volkswagen] was required to disclose to [Customs and Border Patrol] whether the vehicles were covered by valid certificates for the United States. [Volkswagen] did so by affixing a label to the vehicles' engines. [Volkswagen] employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, [Volkswagen]

> would not have been able to import the vehicles into the United States.

App. A229.

Inexplicably, on the same date the Notice of Violation was issued, September 18, 2015, the EPA released a press release stating, in pertinent part, as follows:

> Car owners should know that although these vehicles have emissions exceeding standards, these violations do not present a safety hazard and **the cars remain legal to drive and resell**. Owners of cars of these models and years do not need to take any action at this time. (emphasis added).

App. A255-A260.

The EPA made this declaration that the vehicles are "*legal to drive and resell,*" in spite of 42 U.S.C. §7522(a)(1) and (3)(B), respectively, which prohibit the importation and sale of these vehicles. The State Implementation Plans of 17 States, approved by the EPA according to law, also prohibit the use of the diesel vehicles with cheat devices. See, App. A200-A213. Petitioner Fleshman's home State of Virginia has a statute stating, in pertinent part, as follows:

§46.2 – 1048 Pollution Control Systems or Devices

> It shall be unlawful for any person to operate a motor vehicle, as herein described, on the highways in the Commonwealth with

> its pollution control system or device removed or otherwise rendered inoperable.

App. A210.

Virginia's EPA-approved State Implementation Plan contained 9 VAC 5-40-5670 (A), which declares:

9 VAC 5-40-5670 A. Emissions Control Systems

> I. No motor vehicle or engine shall be operated with the motor vehicle pollution control system or device removed or otherwise rendered inoperable.

App. A208.

Immediately after the September 18, 2015, "Notice of Violation," the Nation's class action bar cranked out hundreds of class action suits. Multidistrict Litigation #2672 "*In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*" was established in the United States District Court for the Northern District of California, the Honorable Charles R. Breyer, Senior District Judge, presiding. The District Court appointed a Plaintiffs' Steering Committee ("PSC") consisting of 21 class action attorneys from around the Nation to serve as counsel to the alleged class. The District Court appointed San Francisco attorney Elizabeth Cabraser as lead counsel.

On January 4, 2016, the United States brought a civil enforcement action against the Volkswagen defendants at the request of the Administrator of the

EPA pursuant to 42 U.S.C. §§ 7523 and 7524 "*for injunctive relief and the assessment of civil penalties*" for violations of the Clean Air Act. The suit the United States brought at the request of the Administrator is based solely on the scheme of implementing the defeat device described above. Id. At this point, it was impossible for the general public, including Mr. Fleshman, to know what form of "*injunctive relief*" the Administrator was seeking against VW. "*Injunctive relief*" could include mandatory rescission of the sale and exportation of all the Dirty Diesels which did not have valid certificates of conformity and which contained defeat devices, the sale, and use of which are expressly prohibited by Congress. *See*, 42 U.S.C. § 7522(a)(1), (3)(B). The District Court ordered the PSC, United States, and Volkswagen to work together in strict confidentiality to see if a settlement could be reached.

On June 28, 2016, the PSC filed a "*Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of the Class Action Agreement and Approval of Class Notice*." That same day, the United States filed a proposed Partial Consent Decree which was later amended. Together, these interrelated documents, submitted to the District Court as a package, proposed a global resolution to the 2.0 Liter diesel engine defeat device debacle. This was the first opportunity for Mr. Fleshman and the rest of the public to know the contents of the proposed resolution to Volkswagen's scheme.

Upon receiving the lengthy proposed Class Action Settlement and the proposed Partial Consent Degree, Mr. Fleshman learned the proposed settlements would allow ongoing illegal conduct.

Specifically, the proposed settlements did not require the 487,500 vehicles to be removed from the United States as mandated by 42 U.S.C. §7522(b)(2) and 19 U.S.C. 1595a(c)(1)(A)[1]. The proposed settlements allowed the sale and re-sale the vehicles in violation of 42 U.S.C. §7522(a)(3)(B). The proposed settlements allowed the continuing use of the vehicles in violation of 42 U.S.C. §7541 and 40 C.F.R. §86.1811-04 which prohibits the use of motor vehicles which exceed specified emission standards and limitations. Finally, the proposed settlements allow the continuing use of the vehicles in violation of the State Implementation Plans of 16 States. *See*, citation to State Implementation Plans at App. A200-A213. Under the proposed settlements owners and lessees of the Subject Vehicles had several options, including the option of doing nothing.

On August 5, 2016, during the public comment period, Mr. Fleshman, by counsel, alerted the

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[1] As of the submission of this Petition, hundreds of thousands of the Subject Vehicles are in "storage" at 37 locations around the Nation. Several thousands are "stored" on the bank of the James River in Mr. Fleshman's home district in Central Virginia. *See*, David Shepardson, VW Storing Around 300,000 Diesels at 37 Facilities Around U.S., Reuters (March 29, 2018), https://www.reuters.com/article/us-volkswagen-emissions-storage/vw-storing-around-300000-diesels-at-37-facilities-around-u-s-idUSKBN1H50GQ; Laurel Wamsley, Why 300,000 Volkswagens Are Being Stored In These Massive Auto Boneyards, The Two-Way: NPR (March 29, 2018), https://www.npr.org/sections/thetwo-way/2018/03/29/597991227/why-300-000-volkswagens-are-being-stored-in-these-massive-auto-boneyards; Nearly 300,000 VW Diesels are Sitting in Lots Across the U.S., Fox News (March 30, 2018), https://www.foxnews.com/auto/nearly-300000-vw-diesels-are-sitting-in-lots-across-the-u-s.

Department of Justice that the proposed settlement would allow ongoing illegal conduct. This was before the EPA's proposed settlement was submitted to the District Court for approval. On August 23, 2016 Mr. Fleshman filed a Motion to Intervene in United States v. Volkswagen AG, et al, asserting, as an owner of one of the Subject Vehicles, a resident of Virginia, and a citizen of the United States, he "*has an interest in seeing that the lawsuit filed by the…United States actually enforces the provisions of the Clean Air Act, including all applicable State Implementation Plans that have been incorporated therein*." Mr. Fleshman brought to the District Court's attention that the proposed settlements allowed the importation, sale, and use of the vehicles in violation of 42 U.S.C. §7522, in violation of 42 U.S.C. §7541 and 40 C.F.R. §86.1811-04, and in violation of the State Implementation Plans of 17 states, the citation to which was provided to the District Court. Mr. Fleshman demonstrated to the District Court that Volkswagen was actually republishing and re-broadcasting the EPA's incorrect statement that the vehicles are legal to drive and sell to improperly convince owners of these vehicles, and even Congress, that the vehicles did not need to be removed from use. *See*, testimony of Michael Horn, President and CEO of Volkswagen Group of America, Inc., before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives:

> *"Ms. DeGette: Okay, but the 430,000 cars that are already on the road, what are those customers supposed to do? Their cars cannot pass the emissions test.*

> *Mr. Horn: The EPA has said, and they have reported this also in their statement, that these cars are legal and safe to drive."*
>
> *See*, Volkswagen's Emissions Cheating Allegations: Initial Questions: Hearing before the Subcomm. On Oversight & Investigations of the H. Comm. On Energy & Commerce, 114th (2015) at [p. 23].

Mr. Fleshman sought to intervene to command compliance of the CAA to require removal of the Subject Vehicles pursuant to 42 U.S.C. §7522(a)(1) and (b)(2), to prohibit sale of the Subject Vehicles pursuant to §7522(a)(3)(B), and to prohibit the use of the vehicles pursuant to 42 U.S.C. §86.1811-04, 40 C.F.R. §86.1811-04 and the State Implementation Plans of 17 States. Mr. Fleshman alerted the Court to 42 U.S.C. §7524(c)(3)(B) which states that even if a violator pays civil penalties for CAA infractions, they must still comply with the Act. Mr. Fleshman also alerted the District Court that pursuant to 42 U.S.C. §7413(a)(1) the Administrator of the EPA has a mandatory duty to notify any person in violation of any requirement or prohibition of a State Implementation Plan. This required the Administrator to inform the thousands of users of the Subject Vehicles in the applicable 17 States that they were in violation of their State Implementation Plan.

On August 26, 2016, the Plaintiffs Steering Committee filed a Motion and Memorandum in Support of Final Approval of the 2.0 Liter TDI Consumer and Reseller Dealer Class Action Settlement. On September 16, 2016, Mr. Fleshman

file an "*Objection to Approval of the Proposed Class Action Settlement*." Mr. Fleshman's objections described how all the operative facts of the case are admitted; how the EPA, and consequently the PSC and the Court, had proceeded under a fundamental error of law from the beginning of the case; how the Clean Air Act requires elimination of all nonconforming vehicles, and that since there is no repair, the only statutory remedy is elimination of the nonconforming vehicles; how the EPA has a mandatory, nondiscretionary duty to notify the owners and lessees to inform them that the dirty diesels are in violation of law; how the proposed settlement expressly leaves the nonconforming vehicles in use; how Volkswagen had a strong financial incentive to leave nonconforming vehicles in use; how Volkswagen has made a concerted national effort to republish the EPA's incorrect statement—"*the cars remain legal to drive*"; that despite the EPA's error, any person can utilize the CAA's "*independent enforcement authority*" to enforce the to Act; and that it is unconscionable to release the claims of 487,532 Dirty Diesel owners and lessees against Volkswagen, as the settlements do, when they have been told repeatedly by the EPA and Volkswagen that their vehicles are legal to drive, when in reality the vehicles are subject to mandatory elimination when the Clean Air Act and State Implementation Plans are enforced, as the Partial Consent Decree requires.

On September 30, 2016, the PSC responded to Mr. Fleshman's objections to the proposed Class Settlement. In support of the Class Settlement, the PSC expressly relied on the incorrect EPA statements that the Subject Vehicles are legal to

drive and sell and that the EPA "*will not confiscate your vehicle or require you to stop driving*". The PSC asserted Mr. Fleshman "*cites no persuasive authority for his arguments that State or Federal authority believe that the Class vehicles are illegal to drive*."

On October 4, 2016 the District Court denied Mr. Fleshman's motion to intervene to command compliance with the CAA. The District Court held that Mr. Fleshman was not seeking "*to enforce the same standard, limitation, or order as does the United States such that the CAA mandates his intervention*." The District Court made this ruling even though Mr. Fleshman incorporated by reference the government's Complaint into his own, thereby adopting by reference "*the same, standard, limitation, or order*" as asserted by the United States. The only difference was that the remedy sought by the government did not enforce the mandatory requirements of the CAA, while Mr. Fleshman's proposed remedy did enforce the mandatory requirements of the CAA.

Similarly, the District Court overruled Mr. Fleshman's objections to the Class Action Settlement. Again, the District Court rejected Mr. Fleshman's citation of 42 U.S.C. §7522, 42 U.S.C. §7541, 40 C.F.R. §86.1811-04, the State Implementation Plans of 17 States, and Va. Code §46.2-1048 by holding that "*No Federal or state authority has declared the eligible vehicles illegal to drive*." Clearly the District Court accepted the EPA's declaration that the vehicles are legal to drive and to sell. Mr. Fleshman alerted the District Court that in spite of what the EPA said, the "*independent enforcement authority*" given to any citizen by 42

U.S.C. §7604 will allow enforcement of the Clean Air Act, but when that happens, the District Court's approval of the Class Settlement will have released all the remedies against Volkswagen. The Class members will be caught in a bind with illegal vehicles they believed were legal to use and to sell based on the statements of the EPA which were repeated over and over by the PSC, Volkswagen, and the District Court. The District Court overruled all of Mr. Fleshman's objections.

Mr. Fleshman sought timely appeal to the United States Court of Appeals for the Ninth Circuit of the District Court's final Orders in the United States' enforcement action and the class action. Again, Mr. Fleshman demonstrated the settlements approved by the District Court allowed ongoing illegal activity by allowing the 487,500 vehicles illegally imported to stay in the United States, by allowing the sale of the vehicles with defeat devices even though Congress expressly prohibited such sale, and by allowing the continuing use of many thousands of the vehicles which emit 10-40 times more than the permissible limit of NOx in violation of Federal regulations and State Implementation Plans.

The Ninth Circuit Panel at oral argument seemed to understand the Settlements allowed continuing illegal activity. In questioning counsel for the United States the Panel stated:

> *"THE COURT:…at the time of the original press release, EPA said car owners should know that although these vehicles have emissions exceeding standards, these violations do not present a safety hazard and*

> *the cars remain legal to drive and resell. That seem to be…It's a statement that it's legal, and it's not true*."

See, Oral Argument, Case No. 16-17060 at: https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012786 21:05-21:27.

In questioning Volkswagen's counsel, the Panel asked:

> *"THE COURT: So what happens? So when somebody comes in for their annual smog check in California or Virginia and the vehicle doesn't pass because the defeat device, I assume, has not been disabled or doesn't pass because they say, well, you've got a defeat device and we know what happens when it turns on, so California just says you can drive it anyway?*
>
> *Ms. Nelles: That's correct, Your Honor."*

See, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012786 22:31-22:52.

The Ninth Circuit affirmed the District Court's denial of Mr. Fleshman's Motion to Intervene and his objections to the approval of the Class Settlement. The Ninth Circuit held that there was no right to intervene under the CAA because the EPA's suit to enforce 42 U.S.C. §7522 was not a suit "*seeking to enforce any 'standard, limitation, or*

order' as those terms are used in the Clean Air Act." App. p. A74. The Court of Appeals held that Mr. Fleshman had no standing to seek enforcement of the CAA, so he could not intervene under FRCP 24(a)(2). *Id*.

In approving the Class Action Settlement, the Ninth Circuit acknowledged Mr. Fleshman's assertion that the Settlement allowed ongoing illegal activity because class members can decline to participate in the settlement and continue to drive their unmodified vehicles as long as they wish". App. p. A35. However, the Ninth Circuit held "*The EPA and the vast majority of states have stated unequivocally that they will permit unmodified vehicles to stay on the road, and none has specifically declared them illegal to drive*." App. p. A36.

The Ninth Circuit attached in support of its ruling an EPA document entitled "*Frequent Questions about Volkswagen Violations*." App. A255-A260. On the face of this documents the illegality of the Volkswagen diesel vehicles is again established:

> **How much more pollution is being emitted than should be?**
>
> NOx emission levels from the 2.0 liter vehicles with defeat devices were 10-40 times higher than emissions standards. NOx emissions levels from the 3.0 liter vehicles were up to nine times higher than the emissions standards.
>
> **How does NOx pollution affect people's health?**

> NOx pollution contributes to atmospheric levels of nitrogen dioxide, ground-level ozone, and fine particulate matter. Exposure to these pollutants has been linked with a range of serious health effects, including increased asthma attacks and other respiratory illnesses that can be serious enough to send people to the hospital. Exposure to ozone and particulate matter have also been associated with premature death due to respiratory-related or cardiovascular-related effects. Children, the elderly, and people with pre-existing respiratory disease are particularly at risk for health effects of these pollutants.
>
> **Will EPA take or confiscate my vehicle?**
>
> Absolutely not. EPA will not confiscate your vehicle or require you to stop driving. For more detail about choices and options for owners or lessees of diesel vehicles under the settlement visit VWCourtSettlement.com or Volkswagen Clean Air Act Partial Settlement.
>
> App. A255-A260.

The Ninth Circuit is aware of the tens of thousands of vehicles that emit 10-40 times the permissible level of NOx. The last filed report of the "*Report of Independent Claim Supervisor on Volkswagen's Progress and Compliance Related to 2.0 Liter Resolution Agreements Entered October 25, 2016*," dated November 26, 2018, demonstrates

32,138 non-compliant 2.0 Liter Volkswagen diesels remain in use and have not been modified. Using a hypothetical average of $20,000 for buying back these vehicles, it would cost Volkswagen $642,760,000 to remove these vehicles from use. The 21 members of the Plaintiffs' Steering Committee were paid $175,000,000 for their work in creating and supporting the settlement.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ to prevent the EPA, Volkswagen, and the Plaintiffs' Steering Committee, as affirmed by the Ninth Circuit, from rewriting clear statutory terms to suit their own sense of how the Clean Air Act should operate. As shown by its reference and incorporation into its opinion of the EPA's rewriting of the Clean Air Act and State Implementation Plans, the Ninth Circuit, in effect, overrules Utility Air Regulating Group v. EPA, 134 S.Ct. 2427, 2446, 189 L.Ed. 2d 372 (2014) in which this Court held "*We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate*."). Simply put, the EPA, the class action lawyers, and Volkswagen have made a highly profitable deal that allows 487,500 illegal vehicles to remain in the United States and the use and sale of tens of thousands of polluting vehicles when Congress expressly declared this is not allowed.

I. THE INTENT OF CONGRESS.

In enacting the Clean Air Act, Congress found, in part, that "*the increasing use of motor vehicles. . . has resulted in mounting dangers to the public health*

and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress' purpose in creating the Clean Air Act was "*to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population*." CAA § 101(b)(1), 42 U.S.C. § 7401(b)(2).

Congress knew "*that the automobile is responsible for 60 percent of all air pollution in the United States*" and stated that "*Our goal must be the attainment of pollution free vehicles as a complete substitute for our present types in the shortest period of time*." U.S. Cong. Senate, Committee on Public Works, Committee Prints "A Legislative History of the Clean Air Act Amendments of 1970," Vol. 2, p. 885 (statement of Congressman Gilbert Gude (Md. R)).

A. New Vehicles Imported Without a Valid Certificate of Conformity must be Seized and Forfeited.

Congress tackled the problem by regulating to ensure that before new vehicles are imported into the Country, or offered for sale by domestic manufacturers, they must meet emissions standards clearly defined by regulation. Congress made it clear that it is "*prohibited*" to import vehicles without a valid Certificate of Conformity. Such a vehicle "*shall be refused admission into the United States*." 42 U.S.C. § 7522(b)(2). If the vehicle is imported without a valid Certificate of Conformity "*the Secretary of the Treasury shall, if finally refused admission under this paragraph, cause disposition thereof in accordance with the customs laws. . .*" Here the subject vehicles were admitted on the

condition that the Certificates of Conformity were valid. Volkswagen has admitted that "*if they had disclosed that the subject vehicles did not meet U.S. emissions regulations and limitations, [Volkswagen] would not have been able to import the vehicles into the United States*." App. A229.

The prohibition on importing vehicles without a valid Certificate of Conformity is clear. The remedy is clear – the vehicles "*shall*" be disposed "*in accordance with the customs laws*." 42 U.S.C. § 7522(b)(2). The customs laws are clear and mandatory. 19 U.S.C. § 1595a(c) provides, in pertinent part:

> **(c) Merchandise introduced contrary to law**
>
> Merchandise which is introduced or attempted to be introduced into the United States contrary to law **shall** be treated as follows:
>
> (1) The merchandise **shall** be seized and forfeited if it –
>
> > (A) is stolen, smuggled, or clandestinely imported or introduced. (Emphasis added.)

This Court has held that "*smuggling*" has a "*definite legal meaning*." "*It consists in bringing on shore, or carrying from the shore, goods, wares, or merchandise. . . of which the importation or exportation is prohibited, - an offense productive of various michiefs [sic] to society*." Keck v. U.S., 172 U.S. 434, 446, 19 S.Ct. 254, 258, 43 L.Ed. 505 (1899).

Contrary to the clear will of Congress, the EPA, Volkswagen, and the Plaintiffs' Steering Committee, as allowed by the Ninth Circuit, has determined the vehicles smuggled into the United States shall be free to stay. The EPA, Volkswagen, and the Plaintiffs' Steering Committee do not have "*the power to revise clear statutory terms that turn out not to work in practice*." Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427, 2446, 189 L.Ed. 2d 372 (2014) ("*We reaffirm the core administrative law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate*.") (Citing Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d. 908 (2002) holding "*agency lacked authority to develop new guidelines or to assign liability in a manner inconsistent with*" an "*unambiguous statute*.")

In allowing continuing illegal activities on a massive scale, the Ninth Circuit has decided an important Federal question in a way that departs from this Court's precedent and the Clean Air Act. Respectfully, this Court should exercise its supervisory power to correct this error of law vital to the public health and welfare of our Nation.

B. New or Used Vehicles with Defeat Devices Cannot be Sold – And the EPA Cannot Validly Determine Otherwise.

To allow a motor vehicle with a defeat device to be used and sold renders the whole exercise useless. Congress knew this and clearly stated in the "*Prohibited Acts*" of 42 U.S.C. § 7522(a)(3)(B) that it is prohibited for any person to sell any motor vehicle

or engine with a part where a principal effect of the part is to "*bypass, defeat, or render inoperative*" the emissions systems "*where the person knows or should know that such part or component is. . . installed for such use or put to such use*."

Volkswagen admitted in the Consent Decree settling the EPA's civil enforcement action in which Mr. Fleshman sought to intervene that:

> "**WHEREAS,** [Volkswagen] **admit** that software in the 2.0 Liter Subject Vehicles enables the vehicles' ECMs to detect when the vehicles are being driven on the road, rather than undergoing Federal Test Procedures, **and that this software renders certain emissions control systems in the vehicles inoperative** when the ECM detects the vehicles are not undergoing Federal Test Procedures, **resulting in emissions that exceed EPA – compliant and CARB – Compliant levels when the vehicles are driven on the road.**" (Emphasis added).

In spite of the admitted facts and the clear prohibition on the sale of any vehicle with a defeat device, the EPA declared the vehicles are legal to sell. Volkswagen and the Plaintiffs Steering Committee join in, in spite of clear statutory terms, and argue no "*authority has declared the vehicles illegal to sell."* The District Court and the Ninth Circuit made this "*finding*" as the lynchpin to their rulings affirming the settlements below. The Ninth Circuit, the District Court, the EPA, Volkswagen, and the Plaintiffs' Steering Committee do not consider the United States Congress as an

"*authority*" capable of declaring vehicles with defeat devices illegal to sell. The Ninth Circuit has departed so far from the accepted and usual course of judicial proceedings by ignoring the expressed will and intent of Congress as to call for an exercise of this Court's supervisory power. Again, the EPA, Volkswagen, and the Plaintiffs' Steering Committee lack authority to develop new guidelines or to assign liability in a manner inconsistent with an unambiguous statute. Respectfully, this Court should grant the Writ to resolve this important question of Federal law.

C. Vehicles that Exceed Emissions Standards and Limitations Cannot be Used.

Congress made it clear that motor vehicles must not only meet emissions standards before they are sold as new, but they must also conform to the emissions standards and limitations "*when in actual use throughout their useful life*." 42 U.S.C. § 7541(c)(1). The Administrator of the EPA has a nondiscretionary duty when he or she learns a "*substantial number of. . . vehicles or engines, although properly maintained and used, do not conform to the [emissions standards and limitations] when in actual use throughout their useful life*." The Administrator "*shall require the manufacturer*" to submit a plan which "*shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer*." 42 U.S.C. § 7541(c)(1). At oral argument, Volkswagen's counsel stated that instead of mandatory removal or repair, Volkswagen was paying "*to mitigate any damage to*

the environment as a result of" the hundreds of thousands of diesel engines polluting the air by emitting 10-40 times the allowable amount of nitrogen oxide into the atmosphere. *See*, Oral Argument, Case No. 16-17060 at: https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012786, 25:08-25:30.

The Plaintiffs' Steering Committee's lead counsel stated it was the "*consumers,*" or the owners, that would enforce the Clean Air Act: "*frankly, it's the economic incentives that have put the consumers themselves at work here to enforce the Clean Air Act and their own consciences by making sure these cars are bought back and off the road or fixed and operated legally*." *See*, Oral Argument, Case No. 16-16731 at: https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012787, 30:08-30:38.

Neither Volkswagen's mitigation nor the Plaintiffs' Steering Committee's voluntary participation comply with the CAA. In Center for Auto Safety v. Ruckelshaus, 747 F.2d 1 (D.C. Cir. 1984.) then Circuit Court Judge Antonin Scalia writing for the unanimous Court, held that both mitigation of environmental damage and voluntary participation are not a substitute for the remedy of mandatory elimination of the nonconforming vehicles. In 1979 General Motors vehicles were tested for nitrogen oxide. "*All ten test vehicles exceeded the NOx emission standard of 2.0 grams per mile for reasons which neither the EPA nor GM was able to determine*." 747 F.2d at 3. The EPA approved a plan which "*proposed not recalling and repairing the nonconforming*" vehicles, but to allow GM "*to meet a target lower than mandatory NOx standards*" in future vehicles which "*would offset the*

excessive emissions from the 1979 vehicles." Id. This plan was challenged "*as unlawful on the ground that the offset plan*" was not permissible under Section 207(c), 42 U.S.C. §7541(c) of the Clean Air Act. "*Nothing but recall and repair of the nonconforming vehicles themselves,*" said the Petitioners, "*is an acceptable remedy under the statute.*" Id.

The District of Columbia Circuit held the Clean Air Act "*requires recall and repair as the only statutory remedy for nonconformity.*" Center for Auto Safety, 747 F.2d at 6. The Court explained that the Clean Air Act "*is addressed* ***to public needs*** *rather than private entitlements…Absent evidence of contrary intent, the words in the statute must be presumed to bear their normal meaning of* ***eliminating****, rather than merely providing compensation for the effects of, the condition that is to be 'remedied'. Here that means* ***eliminating*** *the nonconformity of the GM vehicles or engines.*" 747 F.2d at 4 (emphasis added).

That same year, the District of Columbia Circuit, with future Justices Ginsburg and Scalia in the majority, went further and held that "*To the degree that the members of a nonconforming class can be repaired to decrease their pollution potential even after their useful lives have expired, the public is benefitted. By the same token, to the degree that they elude correction both during and beyond their useful lives,* ***the public is cheated***." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1571, 1572 (D.C. Cir. 1989). (Emphasis added). Here, the Ninth Circuit has entered a decision in conflict with the decisions of the Court of Appeals for the District of Columbia, a Court with specialized knowledge and expertise in the Clean Air Act. This conflict in an

important area of Federal law vital to the health and welfare of the Nation should be corrected by the exercise of this Court's supervisory power.

II. THIS COURT SHOULD GRANT THE WRIT TO PREVENT THE APPROVAL OF A CLASS ACTION SETTLEMENT THAT CONDONES ILLEGAL ACTIVITY.

This Court should grant certiorari to protect what was, before now, an unquestioned principle of law: that no court can approve an agreement, in any context, that allows for the continuation of illegal activity. This principle has been maintained in several Courts throughout the country, throughout the centuries. *See*, Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 76 (1982) ("*There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law*."); *see also*, McMullen v. Hoffman, 174 U.S. 639, 654, 669 (1899) ("*The authorities from the earliest times to the present unanimously held that no court will lend its assistance in any way towards carrying out the terms of an illegal contract*."); Robertson v. NBA, 556 F.2d 682, 686 (2d Cir. 1977) *(". . . a settlement that authorizes the continuation of clearly illegal conduct cannot be approved. . .")*; Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975) (where, in antitrust law, an agreement cannot be approved if it constitutes a "*per se violation*" of antitrust law); U.S. v. Mardirosian, 602 F.3d 1, 7 (1st Cir. 2010) (declaring that in both federal law and State common law, *"[w]hen a contract is void ab initio, the contract 'may not be enforced,' and the*

court will treat the contract 'as if it had never been made.'") (quoting Mass. Wholesale Elec. Co. v. Town of Danvers, 577 N.E.2d 283, 292-93 (Mass. 1991).

This unquestioned precedent is relevant to this case not only because of the numerous illegalities detailed supra, but also because 42 U.S.C. § 7524(c)(3)(B) mandates that "[n]*o action by the Administrator under this subsection shall affect any person's obligation to comply with any section of this chapter*." In effect, no individual or company can purchase an exemption from the requirements of the Clean Air Act by paying a civil penalty. The Ninth Circuit disagreed with this statute. In spite of Mr. Fleshman's careful descriptions of the ongoing illegal activity, the Ninth Circuit ignored the illegality and held the District Court did not abuse its discretion in finding the settlements were fair and reasonable. 895 F.3d 617.

The Ninth Circuit expressly refused to consider the carefully documented continuing illegal activity. See, 895 F.3d 616 (where the Ninth Circuit stated "*leaving to the side whether his interpretation of the Clean Air Act is correct*," and then manufactured a "*central premise*" for Mr. Fleshman, which was not his central premise, and then defeated Mr. Fleshman's "*central premise*" approving the settlements that allow continuing illegal activity on a massive scale across the country. Respectfully, this Court should grant the writ to prevent the approval of a settlement which will violate the Clean Air Act.

III. THIS COURT SHOULD GRANT THE WRIT TO PREVENT THE NULLIFICATION OF SEVENTEEN STATE IMPLEMENTATION PLANS BY THE ENVIRONMENTAL PROTECTION AGENCY

The Clean Air Act requires each State to create State Implementation Plans (SIPs) to attain the national primary and secondary ambient air standards. After the EPA approves a SIP, the SIP gains the full force and effect of Federal law. *See*, Bayview Hunters Point Community Advocates v. Metropolitan Transp. Com'n, 366 F.3d 692, 695 (2004) (citing Friends of the Earth v. Carey, 535 F.2d 165, 169 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977). The Administrator of the EPA, under 42 U.S.C. § 7413, has a duty to "*notify the person and the State in which the plan applies of*" the owner's nonconformity with the applicable SIP. 42 U.S.C. § 7413(a)(1). The EPA, as discussed *supra*, has not notified owners of nonconforming Volkswagen vehicles in the 17 relevant States that those owners are in possession of nonconforming vehicles. Mr. Fleshman, when seeking to intervene in the Government's action against Volkswagen, also sought to enforce 42 U.S.C. § 7413(a)(1) by having the Administrator of the EPA notify the nonconforming vehicle owners of their noncompliance with the Clean Air Act. The Ninth Circuit denied Mr. Fleshman's request.

Furthermore, the EPA has no authority to change or revise a State Implementation Plan in this context. As asserted in the District Court and the Court of Appeals below, this Court has plainly held the EPA cannot change the 17 State Implementation

Plans that prohibit the use of motor vehicles with inoperable emission systems:

> *"The Agency [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source by-source emission limitations which are necessary if the national standards it has set are to be met. […] The Act gives the Agency no authority to question the wisdom of the State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a) (2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards."*
> *Train v. National Resources Defense Council, Inc., 421 U.S. 60, 79, 95 S.Ct. 1470, 1481, 43 L.Ed.2d 731 (1975).*

Here, the EPA, by assuming a primary role instead of a secondary role in the enforcement of the Clean Air Act, impairs Virginia's [and the 16 other States'] ability to enforce its implementation plan. Virginia has the primary role in this enforcement and the EPA "enforcement," or lack thereof, must not intervene, interfere, impair, or impede Virginia's enforcement of its own laws.

The EPA itself has found it has no power or authority to exempt that which is prohibited by a State Implementation Plan. See, 78 FR 12486:

> *"Where there is little or no public process concerning such ad hoc exemptions… enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999 SSM Guidance, the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations. Thus, SIP provisions that allow discretionary exemptions from applicable SIP emission limitations through the exercise of director's discretion are substantially inadequate to comply with CAA requirements, as contemplated in CAA section 110(k)(5)". Id.,* at p. 12460, 12486.

Here the EPA has refused to comply with its non-discretionary duty to notify violators, while exercising authority it does not have to in effect revise the State Implementation Plans of 17 states

to allow the use of vehicles that do not have operable emission systems. The Ninth Circuit has allowed the EPA to decide important questions of Federal law in a way that conflicts with the decisions of this Court. Respectfully, this Court should grant the writ to correct this issue which is important to the administration of the Clean Air Act and the Nation's health and welfare.

IV. THE NINTH CIRCUIT HAS INTERPRETED 42 U.S.C. §7604—THE CITIZEN'S SUIT PROVISION—TO INSURE NO CITIZEN EVER INTERVENES IN A GOVERNMENT ENFORCEMENT ACTION WHICH IS DIRECTLY CONTRARY TO INTENT OF CONGRESS

The Ninth Circuit has interpreted the intervention provision of 42 U.S.C. §7604(b)(1)(B) to mean a citizen can only intervene in a government enforcement action if the citizen desires to assert the same standard and to enforce it in the same way with the same remedy as sought by the government. App. p. 56-62. This begs the question: Why would a citizen seek to intervene if only to assert the same standard and the same remedy in the same fashion as the government? Such an effort would be for vanity purposes only.

In enacting 42 U.S.C. §7604 "C*ongress made clear that citizens groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interest*." *See*, Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d. Cir. 1976):

"Fearing that administrative enforcement might falter or stall 'the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.' Natural Resources Defense Council, Inc. v. Train, *166 U.S. App. D.C. 312, 510, F.2d 692, 700 (1975). The Senate Committee responsible for fashioning the citizen suit provision emphasized the positive role reserved for interested citizens:*

'The House bill contained no provision for citizen suits. The Senate version prevailed in Conference Committee. See, Committee of Conference. H.R.Rep.No. 91-1783, 91st Cong. 2d Sess. (1970), reprinted in U.S.E.P.A., Legal Compilation (Air), Vol. III, at 1386 (1973).'

'Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate government and abatement proceedings.' Senate Committee on Public Works, S.Rep.No. 91-1196, 91st Cong., 2d Sess., at 35-36 (1970). See also Committee of Conference, H.R.Rep.No. 91-1783, 91st Cong., 2d. Sess. (1970) U.S. Code Cong. & Admin. News 1970, p. 5356, reprinted in U.S.E.P.A., Legal Compilation (Air), Vol. III at 1386-87 (1973)…Thus the Act seeks to encourage

> *citizen participation rather than to treat it as a curiosity or a theoretical remedy. Possible jurisdictional barriers to citizens actions, such as amount in controversy and standing requirements, are expressly discarded by the Act."*
>
> 535 F.2d 172-173.

Contrary to the intent of Congress, the Ninth Circuit has parsed the intervention provision to insure no citizen ever intervenes in a government action, to enforce standards, limitations, and orders of the CAA. Furthermore, the Ninth Circuit held 42 U.S.C. §7522 is not "*an emission standard or limitation*" within the meaning of §7604. §7522 is the primary "*timetable of compliance*" for the process of importing and selling new motor vehicles. §7604(f) defines "*emission standard or limitation*" to include a "*timetable of compliance*". The term "*timetable of compliance means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard*." See, 42 U.S.C. §7602 "*Definitions*" at "*p*." The Ninth Circuit holding that 42 U.S.C. §7522 is not an "*emission standard or limitation*" under the meaning of 42 U.S.C. §7604 ensures that no citizen will be able to bring a citizen's suit, or intervene in a governmental enforcement action, related to the importation, sale, and use of new and used motor vehicles. Motor vehicles contribute 60% of the Nation's air pollution. This was not the intent of Congress, it is wrong as matter of law, and, respectfully, this Court should grant the writ to

correct this important issue vital to the health and welfare of the Nation.

The Ninth Circuit also erred by holding that Mr. Fleshman did not have standing to intervene in the government's action. In addition to his personal exposure to the pollutants caused by the nonconforming vehicles, Mr. Fleshman has standing to pursue intervention under Friends of the Earth v. Carey, 535 F.2d at 172 ("*Possible jurisdictional barriers to citizens' actions, such as amount in controversy and standing requirements, are expressly discarded by the Act.*"). The Ninth Circuit's denial based on alleged lack of standing has created a Circuit split that only this Court can resolve by granting the writ of certiorari.

V. CONCLUSION

This Petition demonstrates the diligent and earnest effort of an ordinary citizen to seek enforcement of the Clean Air Act. The admitted facts and unambiguous law found here illustrates that Title II of the Clean Air Act has not been enforced in the largest case involving new and used motor vehicles ever to be litigated in our Federal Courts. News reports indicate many other manufacturers have vehicles with similar issues to those apparent here. *See*, https://amp.theguardian.com/environment/2015/oct/09/mercedes-honda-mazda-mitsubishi-diesel-emissions-row. This Court should grant the Petition because of the importance of these issues here and in other cases.

Our citizens have the right, given to them by Congress, to "*command compliance*" with the Clean Air Act. Gwaltney v. Smithfield, Ltd. V. Chesapeake

Bay Foundation, Inc. 484 U.S. 49, 62, 108 S.Ct. 376, 384, 98 L.Fd.2d 306 (1987). This right has been ignored and effectively destroyed by the Court of Appeals and the District Court. In place of the Clean Air Act enacted by Congress, we are governed by an agreement made by the EPA, Volkswagen, and the Plaintiffs' Steering Committee. None of them have the right to revise clear statutory terms and substitute their own idea for how we should be governed. Only this Court can stop this. Mr. Fleshman prays this Honorable Court grant a Writ of Certiorari on the grounds stated herein.

Respectfully Submitted,

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