APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Case No. 18-15937

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA; SALT LAKE COUNTY, PLAINTIFFS-APPELLANTS,

v.

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

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Argued and Submitted August 6, 2019
Anchorage, Alaska
Filed June 1, 2020

Before: TALLMAN, IKUTA, and N.R. SMITH, *Circuit Judges*.

Opinion by *Judge* IKUTA.

IKUTA, *Circuit Judge*:

Volkswagen,[1] a car manufacturer, installed defeat devices in new cars for the purpose of evading compliance with federally mandated emission standards, and subsequently updated the software in those cars so the defeat devices would do a better job of avoiding and preventing compliance.[2] Volkswagen settled EPA's criminal and civil actions for over $20 billion dollars—but failed to obtain a release of liability from state and local governments at the same time. When two counties sought to impose additional penalties for violation of their laws prohibiting tampering with emission control systems, Volkswagen persuaded the district court that these claims were preempted by the Clean Air Act.

We agree with the district court only in part. We agree that the Clean Air Act expressly preempts state and local government efforts to apply anti-tampering laws to *pre-sale* vehicles.[3] But we disagree with the district court's ruling that the Clean Air Act impliedly

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[1] We use "Volkswagen" to refer to the parent company, Volkswagen Aktiengesellschaft ("Volkswagen AG") and its several subsidiaries, including Volkswagen Group of America, Inc. ("Volkswagen USA"), Audi of America, LLC ("Audi"), and Porsche Cars North America, Inc. ("Porsche").

[2] The following background facts are taken from the "Statement of Facts," to which Volkswagen stipulated pursuant to its plea agreement with the federal government. *See United States v. Volkswagen AG*, No. 16-cr-20394-SFC-APP-8, Dkt. 68 (E.D. Mich. Mar. 10, 2017).

[3] We likewise agree with the district court that the Clean Air Act does not expressly preempt the application of state and local anti-tampering laws to post-sale vehicles.

preempts state authority to enforce anti-tampering laws against *post-sale* vehicles. In other words, the Clean Air Act does not prevent the two counties here from enforcing their regulations against Volkswagen for tampering with post-sale vehicles.

We base this conclusion on Supreme Court precedent. A "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011) (citation omitted). Volkswagen has not met that high threshold here. The text and structure of the Clean Air Act do not indicate any congressional intent to prohibit states from enforcing anti-tampering laws in this context. Moreover, the regulation of air pollution for health and welfare purposes "falls within the exercise of even the most traditional concept of what is compendiously known as the police power," *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), so we must "assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress,'" *Arizona v. United States*, 567 U.S. 387, 400, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (citation omitted). No such purpose exists here.

We acknowledge that our conclusion—that the Clean Air Act does not prevent the two counties from enforcing their regulations against Volkswagen for tampering with post-sale vehicles—may result in the imposition of unexpected (and enormous) liability on Volkswagen. But that result is caused by the unusual and perhaps unprecedented situation before us. In drafting the Clean Air Act, Congress apparently did

not contemplate that a manufacturer would intentionally tamper with the emission control systems of its vehicles after sale in order to improve the functioning of a device intended to deceive the regulators. In other words, Volkswagen faces liability due to the straightforward application of the Clean Air Act and the preemption doctrine to its unexpected and aberrant conduct. We may not strain to give Volkswagen the equivalent of a release from state and local liability (which it did not secure for itself) by engaging in a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting*, 563 U.S. at 607, 131 S.Ct. 1968 (internal quotation marks and citation omitted).[4]

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[4] In view of the federal government's central role in bringing comprehensive civil and criminal enforcement actions against Volkswagen and ultimately obtaining a $20 billion settlement, and given that "the agency's own views should make a difference" on the question of federal preemption, *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 335, 131 S.Ct. 1131, 179 L.Ed.2d 75 (2011) (citation omitted), we asked the Solicitor General of the United States and the EPA for their views on whether the CAA preempts a state or its political subdivision from enforcing state or local anti-tampering laws with respect to post-sale vehicles and whether their agreements to settle their federal claims against Volkswagen were intended to foreclose subsequent state or local civil financial penalties. *Envtl. Prot. Comm'n of Hillsborough Cty. v. Volkswagen Grp. of Am., Inc.*, No. 18-15937, Dkt. 64 (9th Cir. Aug. 22, 2019). The federal government elected not to provide its opinion on these issues to aid us in addressing these significant questions. *Id.*, Dkt. 70 (Nov. 4, 2019).

I

Under Title II, Part A of the Clean Air Act of 1990 (CAA),[5] car manufacturers cannot sell new motor vehicles in the United States unless the vehicles comply with federal emission standards, including standards for the emission of nitrogen oxide (NOx). *See* 42 U.S.C. §§ 7521, 7525. The CAA gives the Environmental Protection Agency (EPA) the authority to establish emission standards for new motor vehicles, § 7521(a)(1), and administer a certification program to ensure compliance with those standards, § 7525. To obtain a certificate of conformity from the EPA, a manufacturer must submit an application to the EPA; the application must be submitted for each model year and it must include (among other things) test results from standardized federal emission tests that demonstrate compliance with the applicable emission standards. *See* 40 C.F.R. §§ 86.1843-01, 86.1844-01, 86.1848-01. The CAA also governs the use of emission control devices. 42 U.S.C. § 7521(a)(4)(A). A device "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use" is called a "defeat device," 40 C.F.R. § 86.1803-01,[6] and is prohibited, *see* 42 U.S.C. § 7522(a)(3)(B).

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[5] Title II of the CAA governs "Emission Standards for Moving Sources." 42 U.S.C. §§ 7521–7590. Part A of this title governs "Motor Vehicle Emission and Fuel Standards." §§ 7521–7554.

[6] 40 C.F.R. § 86.1803-01 provides:

Defeat device means an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be

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In 1998, the EPA established new federal emission standards for light duty vehicles, the type of vehicles at issue here,[7] including stricter NOx emission standards. Manufacturers were required to comply with the new standards beginning with model year 2007 vehicles. Volkswagen concluded that some of its diesel engine vehicles would not be able to meet the heightened NOx emission standards while still operating at a performance level that could attract customers. Therefore, beginning in 2006, Volkswagen employees developed and installed two defeat devices that would enable its diesel engine vehicles to pass federal emission tests, even though the vehicles could not actually meet the NOx emission standards while being driven on the street.

Volkswagen installed different defeat devices in vehicles with a 2.0 liter diesel engine (the "2.0 Liter Vehicles") and vehicles with a 3.0 liter diesel engine (the "3.0 Liter Vehicles"). The defeat device in the 2.0 Liter Vehicles comprised software designed to recognize whether the vehicle was undergoing federal emission testing on a dynamometer[8] or was being driven on the road. When the software detected that the vehicle was

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encountered in normal vehicle operation and use, unless: [listing exceptions].

[7] "Light-duty vehicle means a passenger car or passenger car derivative capable of seating 12 passengers or less." 40 C.F.R. § 86.082-2.

[8] A "dynamometer" is an instrument that measures the power output of an engine. *Dynamometer*, Webster's Third New International Dictionary 711 (2002) ("an apparatus for measuring mechanical power (as of an engine, an electric motor, or a draft animal)").

being tested, the vehicle performed in "dyno mode," i.e., in compliance with federal NOx emission standards. Otherwise, the vehicle would operate in "street mode," which substantially reduced the effectiveness of the vehicle's emission control system. When in street mode, the vehicle's NOx emissions were up to 35 times higher than federal standards.

The defeat device installed in the 3.0 Liter Vehicles was also designed to recognize when the vehicle was undergoing emission testing, but rather than cause the vehicle to switch between dyno mode and street mode, the defeat device injected varying amounts of a solution, AdBlue, into the exhaust system. When the vehicle was being tested, the defeat device would inject high amounts of AdBlue, reducing NOx emissions below federal standards. When the vehicle was being driven on the street, the defeat device would inject less AdBlue, causing NOx emissions to exceed federal standards.

Between 2009 and 2015, Volkswagen installed these defeat devices in approximately 585,000 new motor vehicles that were sold in the United States. During this period, Volkswagen deliberately misled the EPA by concealing the defeat devices and certifying that the vehicles complied with federal NOx emission standards. Unaware of Volkswagen's deception, the EPA issued certificates of conformity for these vehicles in each model year. Volkswagen also misled consumers by marketing the vehicles as "clean diesel" and "environmentally-friendly," despite knowing that the vehicles "were intentionally designed to detect, evade and defeat U.S. emissions standards."

Around 2012, consumers who purchased a 2.0 Liter Vehicle began reporting hardware failures. In investigating these failures, Volkswagen engineers theorized that the defeat device failed to switch into street mode when the vehicle was being driven on the street. Because the 2.0 Liter Vehicles were not designed to comply with NOx emission standards except during the short periods of testing, the Volkswagen engineers suspected that the hardware failures were caused by the increased stress on the exhaust system from being driven too long in compliance with NOx standards, i.e., in dyno mode.

To prevent such hardware failures, Volkswagen developed two software updates for the 2.0 Liter Vehicles. The first software update would decrease stress on the exhaust system by causing the vehicle to start in street mode rather than dyno mode; the second update would improve emission-testing detection by adding a "steering wheel angle recognition" feature. If a vehicle's steering wheel was stationary, the updated software would recognize that the vehicle was being tested and the engine would switch to dyno mode. But if the updated software detected that the steering wheel was turning, it would allow the engine to operate in street mode.

Volkswagen began installing the updated software in new 2.0 Liter Vehicles in 2014. The same year, Volkswagen took the following steps for its post-sale 2.0 Liter Vehicles. First, it issued voluntary recalls and installed the software fixes without revealing their purpose. Second, it updated the software when customers brought their cars in for normal maintenance, again without revealing the purpose of the software updates.

In each scenario, Volkswagen deceptively told EPA regulators and American consumers that the software updates were intended to improve the operation of the 2.0 Liter Vehicles.

An independent study soon revealed that certain Volkswagen vehicles emitted air pollutants at concentrations "of up to approximately 40 times the permissible limit." The EPA commenced an investigation. In August 2015, a Volkswagen whistleblower informed federal regulators about the defeat device in the 2.0 Liter Vehicles. Eventually, Volkswagen disclosed the entire scheme affecting both the 2.0 and 3.0 Liter Vehicles to federal regulators.

The EPA subsequently issued notices of violation and filed civil and criminal actions against Volkswagen for violating the CAA. In the civil action, the EPA charged Volkswagen with installing a defeat device on new motor vehicles, in violation of 42 U.S.C. § 7522(a)(3)(B), and tampering with emission control systems, in violation of § 7522(a)(3)(A), among other things. In the criminal action, the EPA charged Volkswagen with conspiracy, 18 U.S.C. § 371, obstruction of justice, § 1512(c), and introducing imported merchandise into the United States by means of false statements, § 542.

Volkswagen pleaded guilty to the criminal charges and agreed to pay a $2.8 billion fine to the United States. Pursuant to the plea agreement, Volkswagen stipulated to a detailed statement of facts regarding the defeat devices and agreed not to "contest the admissibility of, nor contradict" those stipulated facts "in any proceeding." The plea agreement did not give

Volkswagen "any protection against prosecution" from state or local governments.

Volkswagen also settled the civil CAA claims, entering into three consent decrees with the United States.[9] Other than California (which entered into the first and second consent decrees), no other state or local government released Volkswagen from liability. To the contrary, each state expressly reserved its ability to sue Volkswagen for damages.[10] In total, Volkswagen's liability exceeded $20 billion.

B

While the EPA was litigating its civil and criminal actions against Volkswagen, a number of states and

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[9] California was a party to both the first and second consent decrees. At the time, California was authorized to "adopt and enforce" its own "standards relating to control of emissions from new motor vehicles." 42 U.S.C. § 7507; *see also* § 7543(b). *But see* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) (withdrawing the waiver previously provided to California for certain emission standards, as applied to new motor vehicles). Under this grant of authority, California, like the United States, brought claims for injunctive relief against Volkswagen, alleging violations of California environmental and unfair competition laws.

[10] Specifically, each state expressly reserved its right "to seek fines or penalties" against Volkswagen in connection with being named a beneficiary of a trust created by Volkswagen to help reduce the NOx emissions caused by Volkswagen's noncompliant vehicles. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672, Dkt. 2103-1, App'x D-3 at 2 (N.D. Cal. Apr. 16, 2018).

counties brought separate lawsuits against the company for violating state and local laws that prohibit tampering with vehicle emission control systems.

In 2016, the Multidistrict Litigation (MDL) judicial panel transferred these actions to the district court for the Northern District of California.[11] In 2017, the district court granted Volkswagen's motion to dismiss a suit brought by Wyoming, holding that the state's claim that Volkswagen violated Wyoming law by installing the defeat device in new motor vehicles was preempted by the CAA. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1052–57 (N.D. Cal. 2017). In light of the district court's ruling, several local governments amended their respective complaints to allege facts relating not only to Volkswagen's installation of the defeat device in new motor vehicles (i.e., pre-sale conduct), but also to Volkswagen's modification to the defeat device in used vehicles (i.e., post-sale conduct).

Two of these complaints, one from Salt Lake County, Utah, and one from Hillsborough County,

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[11] On December 8, 2015, pursuant to 28 U.S.C. § 1407, the MDL judicial panel transferred 63 actions relating to Volkswagen's defeat device as MDL No. 2672 to the Northern District of California for coordinated pretrial proceedings. The MDL judicial panel noted that any other related actions were potential tag-along actions. *See* Rule 1.1(h), Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation ("'Tag-along action' refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407."). To date, the MDL judicial panel has transferred over 1,500 actions as tag-along actions.

Florida, (collectively, the "Counties") are before us on appeal.

Salt Lake County sued Volkswagen in Utah state court. In its third amended complaint, Salt Lake County alleged that Volkswagen's installation of and modification to the defeat devices violated Utah's anti-tampering regulation, which provides: "[n]o person shall remove or make inoperable the [emission control] system or device or any part thereof, except for the purpose of installing another [emission control] system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere." Utah Admin. Code R. 307-201-4.[12] The complaint alleged that Volkswagen violated this regulation by installing defeat devices in new vehicles to render the emission control systems inoperable, and by modifying the software in post-sale vehicles to enhance the defeat devices' capabilities. The penalty for violating Utah's anti-tampering regulation is up to $5,000 per violation, with each day of violation constituting a separate offense. Utah Code Ann. § 19-1-303(1)(a), (3). The complaint also brought common law claims for intentional misrepresentation and nuisance. Volkswagen removed the Salt Lake County action to federal court.

The Environmental Protection Commission of Hillsborough County (EPC), Florida, filed an action against Volkswagen in Florida district court. EPC's first amended complaint alleged that Volkswagen violated

[12] *See also* Utah Code Ann. § 26A-1-123(1)(a) ("It is unlawful for any person, association, or corporation, and the officers of the association or corporation to violate state laws or any lawful notice, order, standard, rule, or regulation issued under state laws or local ordinances regarding public health or sanitation.").

two of the county's anti-tampering and defeat device regulations, which provide that "[n]o person shall tamper, cause, or allow the tampering of the emission control system of any motor vehicle," and no person shall "manufacture, install, sell or advertise for sale, devices to defeat or render inoperable any component of a motor vehicle's emission control system." Rules of Envtl. Prot. Comm'n of Hillsborough Cty., Rule 1-8.05(1), (6).[13] The complaint alleged that Volkswagen violated these provisions by installing defeat devices in new vehicles, and by tampering with the emission control systems of used vehicles registered in the county through a program of field fixes and recall campaigns. The penalty for violating Hillsborough County's anti-tampering and defeat device regulation is up to $5,000 per violation, with each day of violation constituting a separate offense. *See* Hillsborough County Environmental Protection Act, Fla. Laws 84-446 § 17(2) (as amended by Fla. Laws 87-495 (2005)).

The Counties' claims were transferred to the district court presiding over the MDL as tag-along actions. Volkswagen moved to dismiss the Counties' claims for failure to state a claim. The district court granted the motion. It first determined that, on their face, the Counties' anti-tampering rules applied to Volkswagen's conduct in installing and subsequently

[13] As used in the Hillsborough County regulations, "emission control system" means "the devices and mechanisms installed as original equipment at the time of manufacture ... for the purpose of reducing or aiding in the control of emissions," Rules of Envtl. Prot. Comm'n of Hillsborough Cty., Rule 1-8.03(2)(b), and "tampering" means "the intentional inactivation, disconnection, removal or other modification of a component or components of the emission control system resulting in it being inoperable," *id.*, Rule 1-8.03(2)(h).

enhancing the defeat devices. Volkswagen does not challenge this conclusion.

Nevertheless, the district court dismissed the Counties' actions with prejudice. It held that the Counties' claims, as applied to new vehicles, were preempted by § 209 of the CAA, which precludes state and local governments from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). As to post-sale vehicles, the district court concluded that the CAA preempts the Counties' anti-tampering rules because Volkswagen made post-sale software changes on a model-wide basis and Congress intended for model-wide tampering to be regulated exclusively by the EPA.

On appeal, the Counties argue that the CAA does not preempt their claims for either pre-sale or post-sale vehicles.

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's preemption analysis de novo. *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003).

II

The question on appeal is whether the Counties' regulations imposing penalties for tampering with emission control systems in motor vehicles are expressly or impliedly preempted by the CAA's motor vehicle emission standards. We begin with the framework for considering whether Congress has preempted (or displaced) state law. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "The Clause provides a 'rule of decision' for determining whether federal or state law applies in a particular situation." *Kansas v. Garcia*, ––– U.S. ––– –, 140 S. Ct. 791, 801, 206 L.Ed.2d 146 (2020) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015)). The basic principle is as follows: "If federal law imposes restrictions or confers rights on private actors and a state law confers rights or imposes restrictions that conflict with the federal law, the federal law takes precedence and the state law is preempted." *Id.* (internal quotation marks omitted) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, ––– U.S. ––––, 138 S. Ct. 1461, 1480, 200 L.Ed.2d 854 (2018)).

Congress may expressly preempt state law by enacting a clear statement to that effect. *Id.* "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

Congress may also preempt state law implicitly. In discerning whether there is implied preemption, our analysis "must be guided by two cornerstones of ... pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). We must find such a purpose "grounded 'in

the text and structure of the statute at issue.'" *Garcia*, 140 S. Ct. at 804 (quoting *CSX Transp., Inc.*, 507 U.S. at 664, 113 S.Ct. 1732). "Second, in all pre-emption cases ... we start with the assumption that the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565, 129 S.Ct. 1187 (alteration adopted and internal quotation marks omitted) (quoting *Lohr*, 518 U.S. at 485, 116 S.Ct. 2240). Both of these cornerstones support the same analytic approach: "a high threshold must be met" before a court will conclude that a federal law has impliedly preempted a state law. *Whiting*, 563 U.S. at 607, 131 S.Ct. 1968 (citation omitted).

The Supreme Court has articulated two circumstances—referred to as "field preemption" and "conflict preemption"—where Congress's implicit intent to preempt state law clears that high threshold. First, "when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation,'" *Murphy*, 138 S. Ct. at 1480 (quoting *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 140, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986)), a court may infer that Congress intended to preempt state law.

Second, when a state law "actually conflicts with federal law," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), either because "compliance with both state and federal law is impossible," or because "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S.Ct. 1591, 191 L.Ed.2d 511

(2015) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)), a court may again conclude that Congress implicitly intended to preempt state law. To evaluate a claim based on the second type of conflict preemption—referred to as "obstacle preemption"—a court must identify the "full purposes and objectives" of the federal law from "the text and structure of the statute at issue." *Garcia*, 140 S. Ct. at 804 (quoting *CSX Transp., Inc.*, 507 U.S. at 664, 113 S.Ct. 1732). "The Supremacy Clause gives priority to 'the Laws of the United States,'" not the priorities and preferences of federal officers, *id.* at 807, or the "unenacted approvals, beliefs, and desires" of Congress, *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988).

The Supreme Court has found obstacle preemption in only a small number of cases. First, where the federal legislation at issue involved a "uniquely federal area[ ] of regulation," the Court has inferred a congressional intent to preempt state laws "that directly interfered with the operation of the federal program." *Whiting*, 563 U.S. at 604, 131 S.Ct. 1968. Such unique federal areas include exercising foreign affairs powers, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), sanctioning fraud on a federal agency, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001), and regulating maritime vessels, *United States v. Locke*, 529 U.S. 89, 97, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). Second, the Court has inferred that Congress made "a considered judgment" or "a deliberate choice" to preclude state regu-

lation when a federal enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation. *Arizona*, 567 U.S. at 405, 132 S.Ct. 2492. Thus, a state law imposing criminal penalties on aliens who sought or engaged in unlawful employment "would interfere with the careful balance struck by Congress," because "Congress made a deliberate choice not to impose criminal penalties" for the same conduct. *Id.* at 405, 406, 132 S.Ct. 2492; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 879–81, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (holding that certain federal safety regulations "deliberately sought a *gradual* phase-in" of airbags to give manufacturers more time and increase public acceptance, and that state tort law requiring the *immediate* installation of airbags would have "stood as an obstacle" to the phase-in program "that the federal regulation deliberately imposed"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (holding that the federal statute's comprehensive regulation "carefully addressed" the "balance of public and private interests," giving rise to the inference that Congress did not intend to "tolerate common-law suits that have the potential to undermine this regulatory structure"). Where Congress has determined the appropriate balance, state regulation involving a different method of enforcement may upset that balance and be displaced by federal law even where the state "attempts to achieve one of the same goals as federal law." *Arizona*, 567 U.S. at 406, 132 S.Ct. 2492.

Absent such circumstances, the Supreme Court has frequently rejected claims of obstacle preemption. For instance, the Court does not infer Congress intended to preempt state enactments merely because they

overlap with a federal act. "Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap." *Garcia*, 140 S. Ct. at 806.

This analysis is equally applicable in the civil context, especially when the federal statute expressly or impliedly preserves state laws that might overlap with a federal statute. *See Whiting*, 563 U.S. at 607, 131 S.Ct. 1968. The Court gives great weight to Congress's inclusion of a provision preserving states' enforcement authority. In *Williamson*, for instance, the Court concluded that a federal statute giving manufacturers a choice to select a less effective car safety device did not preempt a state tort suit that could require the manufacturer to select a more effective device. 562 U.S. at 332–36, 131 S.Ct. 1131. The Court reasoned that because Congress included "a statutory saving clause" preserving state remedies, it foresaw "the likelihood of a continued meaningful role for state tort law." *Id.* at 335, 131 S.Ct. 1131. Similarly, in *Whiting*, the Court concluded that federal law preempting "any State or local law imposing civil or criminal sanctions" on employers who hire "unauthorized aliens," did not impliedly preempt an Arizona law that authorized (and sometimes required) the suspension or revocation of an employer's business license if the employer knowingly or intentionally employed unauthorized aliens. 563 U.S. at 587, 131 S.Ct. 1968. The Court held that there was no express preemption, because the state law fell "comfortably within the saving clause." *Id.* at 596, 131 S.Ct. 1968. The Court likewise concluded there was no implied preemption of the Arizona law, because where

"Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.* at 600–01, 131 S.Ct. 1968.

Although a saving clause raises the inference that Congress did not intend to preempt state law, the existence of a saving clause does not "foreclose or limit the operation of ordinary pre-emption principles" that are "grounded in longstanding precedent." *Geier*, 529 U.S. at 869, 874, 120 S.Ct. 1913; *see also Buckman*, 531 U.S. at 352, 121 S.Ct. 1012 (broadening *Geier*'s specific holding to apply to all saving clauses). We may not interpret a saving clause as preserving a state law that would so conflict and interfere with a federal enactment that it would defeat the federal law's purpose or essentially nullify it; rather, such a state law is preempted under ordinary preemption principles. Said otherwise, we infer that Congress did not intend the saving provisions in a federal law to be interpreted in a way that causes the federal law "to defeat its own objectives, or potentially, as the Court has put it before, to destroy itself." *Geier*, 529 U.S. at 872, 120 S.Ct. 1913 (internal quotation marks and citation omitted). But this unremarkable principle means only that a court must interpret a saving clause as it would any statutory language: giving effect to its plain language and meaning in a way that best comports with the statute as a whole. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (explaining that courts must interpret statutes "as a symmetrical and coherent regulatory scheme ... and fit, if possible, all parts into an harmonious whole" (citation and quotation marks omitted)); *see*

also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012) ("[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").

III

We apply these principles to the question whether the Counties' anti-tampering rules are preempted.

A

Some background is helpful to put our interpretation of the CAA and its relationship with states' laws and police powers into context. The CAA is a joint venture, one that makes "the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990). The basic division of responsibility in Title II of the CAA reflects the cooperative federalism principles that have long informed this nation's air pollution control laws. *See Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015) ("[T]he CAA has established a uniquely important system of cooperative federalism in the quest for clean air."); *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 516 (3d Cir. 2013) ("This 'cooperative federalism' structure is a defining feature of the [CAA]."). Prior to 1955, the regulation of air pollution was the sole responsibility of the states as a matter of public health, and the states enacted various regulations pursuant to their historic police powers. *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. Air Pollution Control Ass'n 44, 44, 47 (1982); *see also, e.g.*, 1947 Cal. Stat. 1640; 1911 Iowa

Acts 27; 1887 Minn. Special Laws 623. The federal government first partnered with the states in the fight against air pollution in 1955, enacting the Air Pollution Control Act and espousing a national policy "to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution." Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322, 322 (1955). In 1963, Congress enacted the first version of the CAA, Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963), which was "[b]uilt on a scheme of 'cooperative federalism,'" *MacClarence v. EPA*, 596 F.3d 1123, 1125 (9th Cir. 2010).

The current version of the CAA recognizes "that air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). In regard to air pollution from motor vehicles, Congress has taken a stronger lead in enforcing emission standards. Nevertheless, it has consistently preserved the legitimacy of state regulations. For instance, although Congress displaced state emission standards for new motor vehicles in 1967, *see* Air Quality Act of 1967, Pub. L. No. 90-148, § 208(a), 81 Stat. 485, 501 (1967); Clean Air Amendments of 1970, Pub. L. No. 91-604, § 8(a), 84 Stat. 1676, 1694 (1970), it has maintained a substantial role for states in post-sale implementation and enforcement ever since, *see* 42 U.S.C. §§ 7416, 7543(d); *see also Ashoff v. City of Ukiah*, 130 F.3d 409, 412–13 (9th Cir. 1997) (describing how the CAA's citizen suit provision enables citizens to "sue on the basis of more stringent state standards"). In sum, the regulation of air pollution falls within the historic police powers of the states, *see Huron Portland Cement Co.*, 362 U.S. at 442, 80

S.Ct. 813, and the modern CAA maintains a cooperative federalism approach, *see Gen. Motors Corp.*, 496 U.S. at 532, 110 S.Ct. 2528.

B

We now turn to the relevant text of the CAA. Under Title II, Part A of the CAA, the federal government has authority to establish "standards applicable to the emission of any air pollutant from ... new motor vehicles." 42 U.S.C. § 7521(a)(1). This includes the authority to set emission limits for air pollutants, § 7521(b), and to promulgate standards governing the use of emission control devices, § 7521(a)(4)(A). Failure to comply with the CAA and regulatory emission standards for new motor vehicles can result in civil penalties, criminal penalties, or both. *See* §§ 7413(c), 7524.

The CAA expressly preempts certain state and local laws regulating emissions from new motor vehicles. Under § 209(a) of the CAA:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a). A "new motor vehicle" is "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser," § 7550(3), in other words, a pre-sale vehicle. Although the CAA does not define a "standard relating to the control of emissions," the Supreme Court has provided a definition. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252–53, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) ("*South Coast*"). In *South Coast*, the Court first turned to the dictionary to define "standard" as "that which 'is established by authority, custom, or general consent, as a model or example; criterion; test.'" *Id.* (quoting Webster's Second New International Dictionary 2455 (1945)). The Court then stated that "[t]he criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine." *Id.* at 253, 124 S.Ct. 1756. A vehicle meets the criteria relating to emission characteristics in one of three ways: by not emitting "more than a certain amount of a given pollutant"; by being "equipped with a certain type of pollution-control device"; or by having "some other design feature related to the control of emissions." *Id.* Accordingly, even a requirement "that certain purchasers may buy only vehicles with particular emission characteristics" constitutes an "attempt to enforce" a "standard." *Id.* at 255, 124 S.Ct. 1756. In light of this definition, § 209(a) precludes state or local governments from imposing any restriction that has the purpose of enforcing emission characteristics for pre-sale, motor vehicles.

After a new motor vehicle is sold "to an ultimate purchaser," 42 U.S.C. § 7550(3), the express preemption clause no longer applies. Instead, the CAA preserves state and local governments' authority over

post-sale motor vehicles. Section 209(d) of the CAA provides: "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). A vehicle is registered or licensed after sale to a consumer, so the saving clause applies to post-sale vehicles.[14] The CAA does not define "operation," so taking *South Coast*'s lead, we look to the dictionary, which defines it as "the quality or state of being functional or operative" or the "method or manner of functioning." *Operation*, Webster's Third New International Dictionary 1518 (2002). Removing or making inoperable a vehicle's emission control system (i.e., tampering) affects the vehicle's "quality" and "method" of functioning (i.e., operation). Therefore, the plain language of § 209(d) preserves state and local governments' authority to prohibit tampering with emission control systems in post-sale vehicles.

Despite the saving clause, the EPA retains some authority over post-sale vehicles. The CAA requires manufacturers of new motor vehicles to warrant the emission control system of the vehicle for the "useful life" of the vehicle, with the useful life being 10 years or 100,000 miles. 42 U.S.C. §§ 7521(d), 7541(a)(1). Manufacturers must test post-sale vehicles for compliance with EPA emission standards by performing "in-use verification testing" on vehicles obtained from consumers at prescribed mileage intervals. *See* § 7541(b); 40 C.F.R. § 86.1845–04. If, pursuant to an EPA mandatory

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[14] *See, e.g.*, Nev. Rev. Stat. § 482.423 (2019) (indicating that the "certificate of registration and license plates for the vehicle" will be issued only after "the sale of a new vehicle").

reporting regulation, a manufacturer reports that a "specific emission-related defect exists in twenty-five or more vehicles or engines of the same model year," 40 C.F.R. § 85.1903(a)(2), then the EPA can require the manufacturer to conduct a recall and remedy the defect, all at the manufacturer's expense, 42 U.S.C. § 7541(c), (d). The EPA also has the authority to require manufacturers to make post-sale "[c]hanges to the configuration of vehicles covered by a Certificate of Conformity," including changes to vehicle software. *See* 40 C.F.R. § 86.1842–01(b). Failure to comply with any EPA post-sale regulation can result in civil enforcement actions and other penalties. 42 U.S.C. § 7524.

Last, the CAA prohibits tampering with air pollution control devices in all motor vehicles, both pre-sale and post-sale. *See* § 7522(a)(3)(A), (B).[15] These sections make it a violation of the CAA "for any person to re-

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[15] 42 U.S.C. § 7522(a)(3) provides that it shall be unlawful:

(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and 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.

move or render inoperative" an air pollution control device both before and after "sale and delivery to the ultimate purchaser," or to install a defeat device on any motor vehicle at any time. *Id.* In the event of a tampering violation, the CAA provides for the imposition of a civil penalty not to exceed $25,000 per vehicle, with additional limitations on penalties for related offenses committed by specified persons. § 7524(a).[16] The EPA can give effect to the CAA's penalty provision through a civil or administrative action. § 7524(b), (c). When imposing a civil penalty through an administrative action, the EPA must "take into account" a range of factors, including "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the

[16] 42 U.S.C. § 7524(a) provides:

Any person who violates sections 7522(a)(1), 7522(a)(4), or 7522(a)(5) of this title or any manufacturer or dealer who violates section 7522(a)(3)(A) of this title shall be subject to a civil penalty of not more than $25,000. Any person other than a manufacturer or dealer who violates section 7522(a)(3)(A) of this title or any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3)(A), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component. Any person who violates section 7522(a)(2) of this title shall be subject to a civil penalty of not more than $25,000 per day of violation.

violator's ability to continue in business, and such other matters as justice may require." § 7524(c)(2).[17]

IV

We now consider the application of the preemption doctrine to the Counties' anti-tampering rules. We first ask whether the CAA's express preemption provision preempts the Counties' anti-tampering rules. To the extent the CAA's express preemption provision does not apply, we ask whether the Counties' rules conflict with the CAA, and therefore are impliedly preempted. *See Williamson*, 562 U.S. at 329–30, 131 S.Ct. 1131.

A

Volkswagen argues that § 209(a), the CAA's express preemption provision, preempts the Counties' imposition of anti-tampering rules on pre-sale vehicles. We agree. Section 209(a) precludes a local government from enforcing "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The Counties seek to enforce rules prohibiting persons from making changes to a motor vehicle's emission control system. *See* Rules of Envtl. Prot. Comm'n of Hillsborough Cty., Rule 1-8.05(1); Utah Admin. Code R. 307-201-4. The EPC additionally seeks to enforce a rule prohibiting the installation of any device designed "to defeat or render inoperable any component of a motor vehicle's emission control system." Rules of Envtl. Prot. Comm'n of Hillsborough Cty., Rule 1-8.05(6). Because these requirements relate to

[17] When the EPA initiates a civil action, the district court must "take into account" the same range of factors when assessing a penalty. 42 U.S.C. § 7524(b).

the emission control system of a vehicle, they constitute standards for purposes of § 209(a). Therefore, § 209(a) preempts the Counties' enforcement of these rules with respect to new motor vehicles. *See* 42 U.S.C. § 7543(a).

The Counties argue that their anti-tampering rules are not "emission standards" for purposes of § 209(a) because they do not attempt to enforce the limitations on emissions of pollutants from new motor vehicles that are set forth in § 202 of the CAA, 42 U.S.C. § 7521 (emission standards for new motor vehicles). In the same vein, the Counties argue that the anti-tampering rules are not "standard[s] relating to the control of emissions" because they merely prohibit tampering with emission control systems. According to the Counties, these anti-tampering rules do not relate to the control of emissions because "[a] vehicle does not have to exceed emission standards for a tampering violation to occur; a violation occurs whenever there is 'the act of removing or rendering inoperative any emission control device or element of design.'" These arguments fail, because *South Coast* defined "standard" as denoting not only "numerical emission levels with which vehicles or engines must comply, *e.g.*, 42 U.S.C. § 7521(a)(3)(B)(ii)," but also "emission-control technology with which they must be equipped, *e.g.*, § 7521(a)(6)." *South Coast*, 541 U.S. at 253, 124 S.Ct. 1756. Because the Counties' rules attempt to enforce the integrity of "the emission-control technology with which" the pre-sale vehicles must be equipped, *id.*, they attempt to enforce a "standard," and are therefore preempted by § 209(a).

B

We turn to Volkswagen's argument that § 209(a) also expressly preempts the Counties' anti-tampering rules as applied to post-sale vehicles. It clearly does not. By its terms, § 209(a) preempts state and local regulations "relating to the control of emissions from *new* motor vehicles." 42 U.S.C. § 7543(a) (emphasis added). The provision does not apply to post-sale vehicles.

Nevertheless, Volkswagen argues that the preemptive effect of § 209(a) does not end as soon as the "equitable or legal title" to a vehicle has "been transferred to an ultimate purchaser." § 7550(3). According to Volkswagen, a long line of federal authority recognizes that § 209(a) would be a dead letter if a state or local government could impose a different emission standard the moment after title is transferred to a purchaser. In the leading case of *Allway Taxi, Inc. v. City of New York*, a district court upheld a local ordinance requiring licensed taxicabs to use a certain type of gasoline and to be equipped with an emission control device, but stated that a state or locality is not necessarily "free to impose its own emission control standards the moment after a new car is bought and registered" because that "would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972). Volkswagen further notes that the EPA cited *Allway Taxi* with approval in the preamble to a regulation, stating that the "EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts." Control of Air Pollution, 59 Fed. Reg. 31306, 31330 (June 17, 1994).

Volkswagen's reliance on *Allway Taxi* is misplaced. The Counties' anti-tampering rules do not require Volkswagen to comply with a local emission standard that is different from the federal standard, nor do they impose a standard that would effectively require car manufacturers to alter their manufacture of new vehicles before sale. Rather, the anti-tampering rules prohibit post-sale tampering with federally mandated emission control systems. In this context, the Counties can regulate Volkswagen's post-sale tampering with vehicles' emission control systems to make them less effective just as it can penalize the local garage mechanic who disconnects vehicles' emission control devices to improve performance or gas mileage. Such an exertion of authority is not expressly preempted by § 209(a).

V

Because we reject Volkswagen's argument that § 209 of the CAA expressly preempts the Counties' anti-tampering rules as applied to post-sale vehicles, we turn to the more difficult question raised by the parties: whether the CAA impliedly preempts the Counties' anti-tampering rules as applied to post-sale vehicles.

Volkswagen's theory of implied preemption is based only on the doctrine of obstacle preemption.[18] Specifi-

[18] Volkswagen does not argue that Congress intended to occupy the field of emission regulations, nor could it, given that Congress contemplated that state and local governments would play a role in implementing the motor vehicle controls mandated

cally, Volkswagen claims that the Counties' anti-tampering rules stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of Title II, Part A of the CAA, and therefore they are impliedly preempted. *Oneok*, 575 U.S. at 377, 135 S.Ct. 1591 (quoting *ARC Am. Corp.*, 490 U.S. at 100–01, 109 S.Ct. 1661).

In considering Volkswagen's obstacle preemption arguments, we begin with the text and structure of the CAA. *See Garcia*, 140 S. Ct. at 804. As directed by the Supreme Court, we consider the impact of Congress's inclusion of a saving clause, *see Williamson*, 562 U.S. at 335, 131 S.Ct. 1131; *Whiting*, 563 U.S. at 600–01, 131 S.Ct. 1968, in light of the presumption "that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress,'" *Arizona*, 567 U.S. at 400, 132 S.Ct. 2492 (citation omitted).

The CAA's preemption clause (§ 209(a)) and saving clause (§ 209(d)) allocate authority between the federal government and state governments as follows: Section 209(a) gives the EPA exclusive authority to establish standards for new vehicles, 42 U.S.C. § 7543(a), while § 209(d) preserves the authority of state and local governments over post-sale vehicles, 42 U.S.C. § 7543(d). The plain language of § 209(d), providing that nothing in Title II "shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of

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by the CAA. *See* 42 U.S.C. § 7416. Nor does Volkswagen argue that it is impossible to comply with both state and federal regulations, given that § 7522(a)(3)(A) and the Counties' anti-tampering rules prohibit the same conduct.

registered or licensed motor vehicles," appears to give states substantial authority to enforce standards related to post-sale vehicles, including sanctioning tampering with emission control systems. *Id.*; *see also Whiting*, 563 U.S. at 611, 131 S.Ct. 1968 (holding that Congress's express reservation of state authority to impose certain civil sanctions means what it says). The language of § 209(d) also indicates that Congress foresaw "the likelihood of a continued meaningful role" for state enforcement. *Williamson*, 562 U.S. at 335, 131 S.Ct. 1131. Indeed, the vast majority of states have laws prohibiting tampering with air pollution control systems in motor vehicles.[19] We may presume that Con-

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[19] *See* Ala. Admin. Code r. 335-3-9.06; Alaska Admin. Code tit. 18, § 52.015; Ariz. Rev. Stat. Ann. § 28-1522; Ark. Admin. Code 014.01.5-7; Cal. Code Regs. tit. 16, § 3362.1; Colo. Rev. Stat. § 42-4-314; Conn. Gen. Stat. Ann. § 14-164c; Del. Code Ann. tit. 21, § 6701; D.C. Mun. Regs. tit. 18, § 750; Fla. Stat. Ann. § 316.2935; Ga. Code Ann. § 40-8-130; Haw. Code R. § 11-60.1-34; Idaho Code Ann. § 49-229; Ill. Admin. Code tit. 35, § 240.103; 326 Ind. Admin. Code 13-2.1-3; Iowa Code Ann. § 321.78; La. Admin. Code tit. 55,§ 817; Md. Code Ann. Transp. § 22-402.1; 310 Mass. Code Regs. 60.02; Mich. Comp. Laws Ann. §§ 324.6504, 324.6535; Minn. R. 7023.0120; Mo. Code Regs. Ann. tit. 10, § 10-5.381; Mont. Admin. R. 17.8.325; 129 Neb. Admin. Code Ch. 36, § 001; Nev. Admin. Code § 445B.575; N.H. Code Admin. R. Env-A 1102.01; N.J. Admin. Code § 7:27–15.7; N.Y. Comp. Codes R. & Regs. tit. 6, § 218-6.2; 19a N.C. Admin. Code 3D.0542; N.D. Admin. Code 33.1-15-08-02; Ohio Admin. Code 3745-80-02; Okla. Stat. Ann. tit. 47, § 12-423; Or. Rev. Stat. Ann. § 815.305; 75 Pa. Stat. and Cons. Stat. Ann. § 4531; 280-30 R.I. Code R. § 1.13.2; S.C. Code Ann. § 16-21-90; Tenn. Comp. R. & Regs. 1200-03-36-.03; 30 Tex. Admin. Code § 114.20; Utah Admin. Code r. R307-201-4; 16-5 Vt. Code R. § 702; 9 Va. Admin. Code § 5-40-5670; Wash. Admin. Code § 173-421-

gress was aware of these laws and did not intend to displace them, given that many of these state laws existed during the period in which Congress amended the CAA without making any changes to the preservation of state authority.[20] *See, e.g.*, Wis. Admin. Code NR § 154.17(2) (1972); Mont. Admin. R. 17.8.325 (effective Dec. 31, 1972); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988) ("[Courts] generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").[21] Congress's "certain awareness of the prevalence of state" law, coupled with its "silence on the issue," "is powerful evidence that Congress did

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100; W. Va. Code Ann. § 22-5-15; Wis. Admin. Code NR § 485.06; 20.0002-13 Wyo. Code R. § 2.

[20] Congress amended the CAA three times since enacting the saving clause in 1967, *see* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); Clean Air Act, Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990), but the language of the saving clause has never changed, *see* Air Quality Act of 1967, Pub. L. No. 90-148, § 208(c), 81 Stat. 485, 501 (1967), renumbered at 84 Stat. at 1694, and codified at 42 U.S.C. § 7543(d).

[21] To the extent we give weight to the EPA's interpretation of the CAA in this context, it is clear that the EPA did not read the CAA as preempting the states' enforcement efforts. *See* Approval and Promulgation of Air Quality State Implementation Plans (SIP), 63 Fed. Reg. 6651-01, 6652 (Feb. 10, 1998) ("Even though there is a federal [anti-tampering] law which provides for EPA enforcement, many states [have enacted anti-tampering laws] and use them successfully as enforcement tools for resolutions of consumer complaints involving tampered vehicles, deterrence of tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations."). We note, once again, that the EPA declined to provide its opinion on this issue. *See supra* at 1206 n.4.

not intend" to preempt local anti-tampering laws. *Wyeth*, 555 U.S. at 575, 129 S.Ct. 1187; *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) ("The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there is between them.'" (alteration adopted and citation omitted)); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 432, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (holding that a state law did not stand "as an obstacle to the full effectiveness of the federal statute" because the federal government "apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it"). Accordingly, the CAA's text and structure, particularly in light of the presumption that Congress does not impliedly preempt states' historic police powers, weigh against a conclusion that Congress intended to preempt the Counties' anti-tampering rules.

Nor are there other factors weighing in favor of obstacle preemption. The regulation of air pollution from post-sale vehicles does not involve a "uniquely federal" area of enforcement, *Whiting*, 563 U.S. at 604, 131 S.Ct. 1968, because the basic division of responsibility in Title II of the CAA reflects the cooperative federalism principles that have long informed this nation's air pollution control laws, *see supra* Part III.A. And even if the regulation of post-sale vehicles were an important area of federal concern, the EPA's ability to enforce the federal anti-tampering law, 42 U.S.C. § 7522(a)(3)(A), is not impeded by the Counties' parallel

rules, and so there is no basis to infer a congressional intent to preempt them. *See Whiting*, 563 U.S. at 605, 131 S.Ct. 1968 (holding that a state law regulating unauthorized alien employment did not interfere with federal immigration law where the federal program "operates unimpeded by the state law"). We also see no indication that Congress struck a balance in the enforcement of post-sale emission standards that would be upset by state anti-tampering rules. Unlike *Arizona* and *Geier*, where Congress "deliberately sought" a particular policy goal at the expense of others, *Geier*, 529 U.S. at 879, 120 S.Ct. 1913; *see also Arizona*, 567 U.S. at 405, 132 S.Ct. 2492, the text and structure of the CAA expresses a general policy to prohibit tampering by "any person" at any time. § 7522(a)(3)(A). Faced with such a generalized congressional objective, and the fact that Congress does not occupy the field of post-sale emission regulations, *see supra* at 1219 n.18, we cannot infer that Congress made a "deliberate choice" to preclude state regulations that overlap with federal law. *Arizona*, 567 U.S. at 405, 132 S.Ct. 2492.

Accordingly, we conclude that Congress intended to allow states to enforce anti-tampering rules related to post-sale vehicles, and that such rules are not impliedly preempted.

VI

Despite the strong indications that Congress did not intend to preempt state efforts to prevent tampering in post-sale vehicles, Volkswagen argues that interpreting the CAA as allowing such state enforcement efforts would defeat the "purposes and objectives of Congress." *Oneok*, 575 U.S. at 377, 135 S.Ct. 1591 (citation omitted). Therefore, Volkswagen asserts, the Counties'

anti-tampering rules are preempted under ordinary preemption principles. Volkswagen relies on two distinct aspects of Title II to support its argument: (1) the provisions requiring manufacturers to ensure that post-sale vehicles comply with certain emission requirements on a model-wide basis, and (2) the provisions authorizing the EPA to impose civil penalties on persons who tamper with vehicles. We consider each of these arguments in turn.

A

Volkswagen first argues that Congress intended to give the EPA exclusive oversight over post-sale compliance with emission standards on a model-wide basis, and the Counties' anti-tampering rules pose an obstacle to this goal.[22] Volkswagen's argument proceeds in three steps. First, Volkswagen points to the sections of

[22] Volkswagen claims that the legislative history of the CAA supports this theory because it indicates that Congress wanted to avoid a patchwork of varying emission standards for vehicles nationwide, further supporting its argument that the Counties' anti-tampering rules are preempted. Even if we consider this legislative history, however, it is inapplicable here. The Counties' rules (just like every other state anti-tampering rule) do not impose unique emission standards; rather, they permit local governments to prohibit and penalize tampering with approved emission control systems, which is exactly what the federal anti-tampering law prohibits. The existence of identical federal and local laws would not, as the district court put it, "create nightmares for the manufacturers." Therefore, Volkswagen's concern about a patchwork of varying anti-tampering rules is unwarranted. And as the Supreme Court has instructed, a mere overlap in federal and state laws does not, without more, raise the inference that Congress intended to preempt the state laws. *Garcia*, 140 S. Ct. at 806.

the CAA imposing post-sale obligations on manufacturers and tasking the EPA with ensuring compliance with those obligations. For instance, the CAA requires manufacturers to ensure that their vehicles' emission control system remains functional for at least 10 years or 100,000 miles, *see* 42 U.S.C. §§ 7521(a)(1), (d), 7541(a)(1), (b), and to conduct a recall if certain model-wide defects are detected, *see* § 7541(c), (d). Second, Volkswagen acknowledges that the CAA's saving clause preserves some state enforcement authority over post-sale vehicles. Finally, Volkswagen argues that the only way to harmonize the saving clause with the EPA's post-sale enforcement responsibilities is to conclude that Congress intended the EPA to regulate post-sale emission standards on a model-wide basis at the manufacturer level without any interference from the states, and that Congress also intended the states to enforce the same standards only on an individual-vehicle basis at the end-user level. In other words, Volkswagen claims that Congress intended to prevent state and local governments from enforcing their anti-tampering rules against manufacturers that engage in post-sale tampering on a model-wide basis. The district court concluded that such a division of authority between the federal and state governments would be sensible because the EPA was in a better position to regulate tampering when such conduct "involves thousands of vehicles, and the changes are made through software updates instituted on a nationwide basis."

We disagree. Whether such a division of labor is reasonable from a policy perspective (or is merely a reading of the CAA tailored to fit Volkswagen's unique circumstances), this theory of partial preemption is not

"grounded in the text and structure" of the CAA. *Garcia*, 140 S. Ct. at 804 (citation and internal quotation marks omitted). Nothing in the CAA raises the inference that Congress intended to place manufacturers beyond the reach of state and local governments. Volkswagen itself concedes that the CAA does not afford "a wide-ranging grant of immunity [from state enforcement actions] based on the identity of the actor (auto manufacturers)." As the district court put it, if "a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders." Nor does anything in the text or structure of the CAA raise the inference that Congress intended to shield a person from state enforcement actions if that person tampered with a large number of vehicles or engaged in systematic rather than sporadic tampering. The CAA prohibits "any person" from tampering with an emission control device, manufacturers and dealers and local mechanics alike. 42 U.S.C. § 7522(a)(3)(A). And contrary to Volkswagen's assertion, the CAA does not classify tampering by reference to its scope. *See id.* Indeed, the CAA is entirely silent on this issue, probably because Congress did not contemplate that a manufacturer would systematically tamper with emission control devices on post-sale vehicles in order to ensure the devices were effectively (and illegally) disabled. Thus, there is little textual evidence from which we can infer that Congress made "a deliberate choice" to shield such a manufacturer from state enforcement actions. *Arizona*, 567 U.S. at 405, 132 S.Ct. 2492.

In short, we cannot discern a congressional intent, let alone a "clear and manifest purpose of Congress," to give the EPA exclusive authority over large-scale, post-sale tampering by manufacturers, while giving state and local governments concurrent authority only when the tampering is conducted on a more casual, individual basis. *Id.* at 400, 132 S.Ct. 2492. Because we see no indication that Congress intended to preempt state and local authority to enforce anti-tampering rules on a model-wide basis, we reject Volkswagen's argument that interpreting § 209(d) according to its terms would cause the CAA to "destroy itself." *Geier*, 529 U.S. at 872, 120 S.Ct. 1913 (citation omitted).

B

Volkswagen next argues that the CAA's penalty provision, 42 U.S.C. § 7524, shows that Congress struck a balance of interests with respect to the imposition of penalties, and this balance would be disturbed if states could impose their own penalties for tampering with post-sale vehicles. By including a penalty provision in Title II of the CAA, so the argument goes, Congress intended the EPA to have the exclusive authority to determine the appropriate penalty for every tampering violation. Therefore, the potential for any state penalties (large or small) "would seriously undermine the congressional calibration of force."

To support its claim that the CAA gives the EPA exclusive authority over the imposition of penalties, Volkswagen first relies on a line of cases interpreting the National Labor Relations Act as preventing states from imposing any remedies for activities potentially covered by the Act. *See San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S.

236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). Volkswagen's reliance is misplaced, because those cases involved a "special preemption rule" applicable to "state laws regulating matters that the National Relations Act 'protects, prohibits, or arguably protects.'" *Garcia*, 140 S. Ct. at 807 (quoting *Gould*, 475 U.S. at 286, 106 S.Ct. 1057). *Garmon* and its progeny are based on "a presumption of federal preemption," *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984), "designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration'" of the National Labor Relations Act, *Gould*, 475 U.S. at 286, 106 S.Ct. 1057 (quoting *Garmon*, 359 U.S. at 243, 79 S.Ct. 773). The Supreme Court has declined to extend this rule to other contexts. *See Garcia*, 140 S. Ct. at 807 (rejecting the argument that such a rule is "operative or appropriate" in a context not involving the National Labor Relations Act). And it is clearly not applicable here, where the federal law makes "the States and the Federal Government partners in the struggle against air pollution," *Gen. Motors Corp.*, 496 U.S. at 532, 110 S.Ct. 2528, and where we assume that Congress did not intend to displace the historic police powers of the states.

Volkswagen also offers textual arguments to support its claim. First, Volkswagen points to the list of factors the EPA "shall take into account" before assessing a civil administrative penalty. 42 U.S.C. §

7524(c)(2). According to Volkswagen, those factors evince "the clear and manifest purpose of Congress" to vest in the EPA the exclusive authority to penalize post-sale tampering, *Arizona*, 567 U.S. at 400, 132 S.Ct. 2492, because those factors indicate that the EPA has discretion to determine the appropriate punishment. Volkswagen also suggests that "it would be virtually impossible for the EPA to strike its preferred balance in quantifying a penalty" if states were allowed to enforce their own anti-tampering laws independently, because the EPA would have no control over the total amount of penalties actually imposed. Second, Volkswagen points to the CAA's penalty ceiling, which places a cap on federal penalties for tampering, as evidence that Congress intended to preclude states from enforcing their own anti-tampering rules, or at least the penalty components of those rules. *See* § 7524(a) (limiting the penalties for tampering to no more than $25,000 per vehicle, with additional limitations for related offenses committed by specified persons). If states could independently impose penalties, Volkswagen argues, the penalty cap would be meaningless.

These arguments fail. An exclusive federal regime (such as the regime created by the National Labor Relations Act, as explained in *Garmon* and its progeny) may preclude the imposition of state penalties. But the mere fact that a federal statute permits the imposition of federal penalties, without more, does not raise the inference that Congress created an exclusive federal regime. Because the CAA is, and always has been, a cooperative-federalism partnership, *see supra* Part III.A., there is no basis for Volkswagen's argument that Congress's authorization of federal penalties,

along with guidance on how those penalties should be imposed, expressly or impliedly forecloses state and local governments from enforcing their own rules or imposing sanctions of their choosing. To the contrary, the statutory provisions guiding the EPA in developing an appropriate penalty, including the non-exhaustive list of assessment factors and the penalty cap, are directed only at the EPA; there is no suggestion that Congress wanted to exclude state and local anti-tampering remedies. While this gives the EPA the authority to control only the amount of the federal penalty, we see nothing inherently problematic about the EPA's inability to control the total liability that may be imposed for a tampering violation. The potential for overlapping state and federal penalties has never, without more, raised the inference that Congress intended to preempt state law. *See Garcia*, 140 S. Ct. at 806; *California v. Zook*, 336 U.S. 725, 737, 69 S.Ct. 841, 93 L.Ed. 1005 (1949).[23]

In fact, the text and structure of the CAA provides greater support to the Counties. "Given that Congress specifically preserved" the states' authority to engage in post-sale enforcement, *see* § 7543(d), "it stands to reason that Congress did not intend to prevent the

[23] Volkswagen appears to argue that because Congress listed certain factors that the EPA "shall take into account" when determining the appropriate federal penalty, but did not require the EPA to consider the possibility that states might enforce their own anti-tampering rules, we must infer that Congress intended to give the EPA exclusive authority to penalize tampering. In other words, Volkswagen wants us to presume that Congress intends to displace state enforcement authority unless it expressly preserves it. This argument turns the presumption that Congress intends to preserve historic police powers on its head, and we reject it.

States from using appropriate tools to exercise that authority." *Whiting*, 563 U.S. at 600–01, 131 S.Ct. 1968. Indeed, a determination that the CAA did *not* preserve state enforcement of anti-tampering rules as applied to post-sale vehicles would be inconsistent with the congressional framework. For example, if the CAA's penalty provision preempted state and local governments from imposing *any* penalty for post-sale tampering, then the EPA would be the sole enforcement authority for *every* incident of tampering with air pollution control equipment, including illegal alterations by the local garage mechanic or do-it-yourself efforts to disable a catalytic converter.[24] But nothing in the CAA suggests that Congress intended the EPA to take over such local law enforcement issues, to the exclusion of state and local governments, which would have the effect of preempting anti-tampering rules in nearly every state. *See supra* at 1219-20 & n.19. The Supreme Court has warned against "setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of [judicial] imagination." *Zook*, 336 U.S. at 732–33, 69 S.Ct. 841. Given the prevalence of state anti-tampering rules, we are especially mindful of the Court's warning.

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[24] As the district court correctly explained, in 1990, Congress expanded the scope of its anti-tampering provision to include individuals, as well as manufacturers, dealers, service operators, and local mechanics. *Compare* Clean Air Act, Amendments, Pub. L. No. 101-549 § 228(b), 104 Stat. 2399 (1990), *with* Clean Air Act Amendments of 1977, Pub. L. 95-95 § 219(a), 91 Stat. 685 (1977). Notably, there is nothing in the 1990 amendments that would indicate a congressional intent to make the EPA the sole enforcer of tampering.

In sum, the CAA's cooperative federalism scheme, its express preservation of state and local police powers post sale, and the complete absence of a congressional intent to vest in the EPA the exclusive authority to regulate every incident of post-sale tampering, raises the strong inference that Congress did not intend to deprive the EPA "of effective aid from local officers experienced in the kind of enforcement necessary to combat" the evil of tampering with emission control systems. *Id.* at 737, 69 S.Ct. 841. Therefore, Volkswagen's penalty-provision arguments are not sufficient to pass over the "high threshold" which "must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 563 U.S. at 607, 131 S.Ct. 1968 (citation omitted).

* * *

We affirm the district court's dismissal of the Counties' complaints to the extent they sought to apply anti-tampering rules to new motor vehicles. However, we reverse the district court's dismissal of the Counties' complaints regarding post-sale tampering. We are mindful that our conclusion may result in staggering liability for Volkswagen. But this result is due to conduct that could not have been anticipated by Congress: Volkswagen's intentional tampering with post-sale vehicles to increase air pollution. We assume that this conduct will be as rare as it is unprecedented. In any event, we may not strain our application of the Supreme Court's preemption doctrine, or our interpretation of statutory language, to avoid this outcome. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that

authorized by federal law, and no clear purpose of Congress indicates that we should decide otherwise in this case." *ARC Am. Corp.*, 490 U.S. at 105, 109 S.Ct. 1661 (citation omitted).

AFFIRMED IN PART; REVERSED IN PART.[25]

[25] Each party shall bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

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IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

Case Nos. 16–cv–2210, 16–cv–5649

ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY v. VOLKSWAGEN;

&

SALT LAKE COUNTY v. VOLKSWAGEN.

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Signed: April 16, 2018

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ORDER RE: DEFENDANTS' MOTIONS TO DISMISS HILLSBOROUGH AND SALT LAKE COUNTIES' AMENDED COMPLAINTS

In approximately 585,000 new vehicles that it sold in the United States, Volkswagen installed software that caused the vehicles' emission controls to perform one way during emissions testing, and another (less effective) way during normal driving conditions. The software constituted a "defeat device," and Volkswagen vi-

olated the Clean Air Act and EPA regulations by installing it. *See* 42 U.S.C. § 7522(a)(3); 40 C.F.R. §§ 86.1803–01, 86.1809–01, 86.1809–10,–12.

Certain states and counties have asserted that Volkswagen's defeat device also violated state and local laws that prohibit tampering with vehicle emission controls. Last year, the Court considered Volkswagen's motion to dismiss one of these actions, which was a case filed by the State of Wyoming. The Court held that, because the only alleged conduct by Volkswagen that could have violated the State's tampering law took place during vehicle manufacturing, the State's tampering claim was preempted by the Clean Air Act. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.* ("*Wyoming*"), 264 F.Supp.3d 1040 (N.D. Cal. 2017).

Two counties—Hillsborough County, Florida and Salt Lake County, Utah—have filed tampering claims against Volkswagen that are similar to Wyoming's, except the Counties also allege that Volkswagen modified its defeat device to operate more effectively, and perhaps even added new defeat devices, through software updates during vehicle maintenance and post-sale recalls. The central question addressed in this Order is whether these new allegations save the Counties' tampering claims from preemption.

Hillsborough County has also named Robert Bosch LLC as a defendant, and Salt Lake County has also filed three additional state law claims against Volkswagen. The Court will also consider whether the tampering claim against Bosch and Salt Lake's additional claims are preempted.

I

Volkswagen's defeat device is able to detect whether the vehicles in which it is installed are undergoing emissions testing, or being driven normally on the road. During emissions testing, the device causes the vehicles' emission controls to perform in a mode that satisfies EPA's emission standards. When the vehicles are on the road, the device reduces the effectiveness of the emission controls, causing the vehicles to emit nitrogen oxides (NOx) at levels that are sometimes 40 times higher than EPA's standards. (Hillsborough Compl. ¶¶ 2–3; Salt Lake Compl. ¶¶ 4–5, 39–41.)

Volkswagen installed its defeat device in 2.0–liter and 3.0–liter TDI diesel engine vehicles, covering eight model years (model years 2009 through 2016) and a variety of model types—including Volkswagen's Jetta, Beetle, Golf and Passat models, Audi's A3, A6 and A8 models, and the Porsche Cayenne. (Audi and Porsche are subsidiaries of Volkswagen.) For each model year, Volkswagen misrepresented to EPA that these vehicles complied with the agency's emission standards. (Hillsborough Compl. ¶¶ 1–7, 36–37, 44; Salt Lake Compl. ¶¶ 2–5.)[1]

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[1] The Counties have also named Audi of America LLC and Porsche Cars North America, Inc. as defendants. (Hillsborough Compl. ¶¶ 16–17 & nn. 6–7; Salt Lake Compl. ¶¶ 28, 30.) Because the parties have not made Audi or Porsche specific arguments in their briefing on the motions to dismiss, and because Audi and Porsche are subsidiaries of the Volkswagen Group, the Court uses the umbrella term "Volkswagen" to refer to all defendants other than Bosch LLC.

After independent, on-road testing in 2014 called Volkswagen's representations into question, EPA began an investigation. Throughout 2014 and the first half of 2015, Volkswagen employees responded to EPA's inquiries by offering software and hardware fixes, without revealing the underlying reason for the discrepancies. (Hillsborough Compl. ¶¶ 82–86.) By the second half of 2015, however, it became clear that the fixes had not worked; and with EPA threatening not to certify model-year 2016 vehicles for sale in the United States, Volkswagen finally explained, in the fall of 2015, that certain of its vehicles used defeat device software. EPA subsequently issued Notices of Violation of the Clean Air Act, and Volkswagen admitted publicly that it had deliberately cheated on emissions tests. (*Id.* ¶¶ 90–94, 102.)

The United States, on behalf of EPA, responded by filing civil and criminal actions against Volkswagen for violations of the Clean Air Act. The criminal charges included conspiracy to defraud the United States by making false statements in submissions to EPA, in violation of 42 U.S.C. § 7413(c)(2)(A); and the civil charges included tampering with vehicle emission controls, and unlawfully installing a defeat device, in violation of 42 U.S.C. § 7522(a)(3). (*See United States v. Volkswagen AG*, No. 16–CR–20394, Dkt. No. 32 (E.D. Mich. Mar. 10, 2017); *United States v. Volkswagen AG*, No. 16–CV–00295, Dkt. No. 1 (N.D. Cal. Jan. 4, 2016).) Volkswagen pled guilty to the criminal charges and settled the civil claims. The resulting plea agreement and civil consent decrees require Volkswagen to remove from the road or fix at least 85 percent of the affected vehicles, to pay $4.3 billion in criminal and civil penal-

ties, to fund $2.0 billion in Zero Emission Vehicle investments, and to contribute $2.925 billion to a mitigation trust, the beneficiaries of which are the states and federal Indian tribes. (*See Volkswagen AG*, No. 16–CR–20394, Dkt. No. 68 (plea agreement); MDL Dkt. Nos. 2103, 3155, 3228 (civil consent decrees).) Volkswagen also settled related claims that were brought by classes of consumers. (*See* Dkt. Nos. 2102, 3229 (2.0–liter and 3.0–liter consumer class action settlement approval orders).) The 2.0–liter settlement requires Volkswagen to establish a $10.033 billion funding pool to buy back its 2.0–liter TDI vehicles and to pay the owners and lessees of those vehicles restitution. (Dkt. No. 2102 at 19.)

As part of Volkswagen's plea agreement, the company agreed to a Statement of Facts that it stipulated was "true and correct" and that it agreed to "neither contest the admissibility of, nor contradict, ... in any proceeding." (Plea Agreement § 1.E.) Therein Volkswagen admitted to, among other things, making certain modifications to its defeat device in or around April 2013. The Counties acknowledge in their joint opposition brief that their post-sale software change allegations are based on these admissions. The Counties have also attached a copy of the Statement of Facts to their joint opposition to Defendants' motions to dismiss. (*See* Dkt. No. 4640–1.) For simplicity, the Court cites to the Statement of Facts throughout this order

in discussing the software change allegations, and addresses any additional or conflicting allegations from the Counties' complaints where necessary.[2]

As relevant here, Volkswagen has admitted that it modified its defeat device in order to remedy hardware failures that developed in certain of its 2.0–liter TDI diesel engine vehicles in or around 2012. (SOF ¶ 47.) The company hypothesized that the failures were the result of a glitch with the defeat device, whereby the vehicles were staying in testing or "dyno" mode even when driven on the road, which was placing increased stress on the vehicles' exhaust systems. (*Id.*) To solve the problem, the company developed a "steering wheel angle recognition" feature, which "interacted with the [defeat device] by enabling the vehicles to detect whether [they] were being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road." (*Id.* ¶ 49.) After a Volkswagen supervisor authorized activation of this feature, in or around April 2013, Volkswagen employees "installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance." (*Id.* ¶ 50.) Volkswagen also modified these vehicles so that they would start in "street mode," and then shift to "dyno

[2] Volkswagen AG, a German corporation, is the entity that was charged and pled guilty in the federal criminal case, whereas Volkswagen Group of America, Inc., a Volkswagen AG subsidiary, is the defendant in this case. This distinction is not material for purposes of this Order, as the Counties allege that both Volkswagen entities engaged in the conduct at issue.

mode" when the defeat device recognized that the vehicles were undergoing emissions testing. (*Id.*)

Deviating from Volkswagen's plea agreement somewhat, Hillsborough alleges that Volkswagen not only modified its defeat device, but also installed "[a]t least two new defeat devices ... through post-sale recalls." (Hillsborough Compl. ¶ 88.) Yet Hillsborough describes these "new" defeat devices in a manner that mirrors the defeat device modifications described in Volkswagen's plea agreement. (*See id.* (describing one new defeat device as a "steering wheel angle function" device, and another new defeat device as a "start function" device that started the vehicles in one mode and switched them to the other mode during testing).) Hillsborough also alleges that Bosch LLC, as an engineering and electronics company, assisted with developing the defeat device and with implementing the post-sale software changes. (*Id.* ¶¶ 38–42, 89.)

The Hillsborough Environmental Protection Commission (EPC) and the State of Utah have both adopted vehicle tampering laws. These laws generally prohibit anyone from removing or rendering inoperable a vehicle's emission control system. *See* EPC Rule 1–8.05(1), (6); Utah Admin. Code R307–201–4. The Counties allege that Defendants violated these laws (1) by manufacturing the defeat device and installing it in vehicles that were ultimately registered in the Counties; and (2) by modifying the defeat device in vehicles that were in use within the Counties. (Hillsborough Compl. ¶¶ 143–44; Salt Lake Compl. ¶ 55.) A violation of either Hillsborough's or Salt Lake's tampering law is punishable by a civil penalty of up to $5,000 per offense, with each

day that a violation occurs constituting a separate offense. *See* Hillsborough EPC Enabling Act, Fla. Laws 84–446 § 17(2) (as amended by Fla. Laws 87–495 (2005));[3] Utah Code Ann. § 19–1–303. As alleged, at least 1,118 affected vehicles are registered in Hillsborough County, and at least 5,000 affected vehicles are registered in Salt Lake County. (Hillsborough Compl. ¶ 10; Salt Lake Compl. ¶ 47.)

Salt Lake's complaint also includes three claims in addition to its tampering claim. These additional claims are for common law fraud, violation of Utah's Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76–10–1601 to –1609, and common law nuisance. (Salt Lake Compl. ¶¶ 58–78.)

II

Before considering the preemption questions, the Court first addresses Defendants' statutory arguments—that their conduct does not come within the terms of the Counties' tampering rules. The parties have not cited to any judicial decision in which these rules have been interpreted, or any legislative history with respect to the rules. The Court therefore looks only to the text of the rules.

A

Salt Lake County alleges that Volkswagen violated the following rule in the Utah Administrative Code.

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[3] Hillsborough has attached a copy of the EPC Enabling Act and the EPC's tampering rules to its complaint. (See Dkt. Nos. 4457–1, –2.)

The Court has added italics to the terms and phrases at issue.

> Any person *owning or operating* any motor vehicle or motor vehicle engine registered or principally operated in the State of Utah *on which is installed or incorporated* a system or device for the control of crankcase emissions or exhaust emissions *in compliance with the Federal motor vehicle rules*, shall maintain the system or device in operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated. No person shall *remove or make inoperable the system or device* or any part thereof, except for the purpose of installing another system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere.

Utah Admin. Code R307–201–4 (emphasis added).

Volkswagen argues that its conduct, as alleged, does not come within the terms of this tampering rule for three reasons. First, Volkswagen contends that the rule prohibits tampering only by those "owning or operating" a motor vehicle, not manufacturers. This argument is based on the first sentence of the rule: "Any person *owning or operating* any motor vehicle ... on which is installed or incorporated a system or device for the control of ... emissions ... shall maintain the system or device in operable condition...." If Salt Lake's tampering claim was based on that portion of the rule, Volkswagen's argument would have merit, as the "own-

ing or operating" modifier of "any person" can reasonably be read to limit the rule's coverage to end users of motor vehicles, not vehicle manufacturers. Salt Lake's claim, though, is based on the second sentence of the rule, not the first. And unlike the first sentence, the second does not include the "owning or operating" modifier, but instead applies to any person that removes or makes inoperable an emission control system or device. *See id.* ("No person shall remove or make inoperable [an emission control system or device]...."). The broader scope of the second sentence is not surprising. While the conduct proscribed by the first sentence—failing to "maintain" a vehicle's emission controls—would most naturally apply only to those who use or are responsible for a vehicle that is in use, the conduct proscribed by the second sentence—tampering with vehicle emission controls—could be taken by mechanics, manufacturers, parts suppliers, or strangers in the parking lot. Volkswagen is accordingly within the universe of parties to which the second sentence of Salt Lake's rule may apply, and Volkswagen's focus on the "owning or operating" modifier in the first sentence is not persuasive.

Volkswagen next focuses on the language "remov[ing] or mak[ing] inoperative" in the second sentence of Salt Lake's tampering rule. It suggests that "the word 'remove' most naturally connotes extracting a pre-existing emission control device from a used car, and 'mak[ing] inoperative' contemplates a transformation from an operative emissions control system to an inoperative one." (Dkt. No. 4583 at 26.) It then contends that the allegations do not support that it performed either of these actions.

Salt Lake is relying on the "mak[ing] inoperative" prong, not the "remov[ing]" prong of the rule. For example, Salt Lake alleges that, due to post-sale software changes, "the affected vehicles' emission control systems were made inoperable most of the time the vehicles were being operated in Salt Lake County." (Salt Lake Compl. ¶ 42.) This conduct clearly comes within the reach of the "mak[ing] inoperative" prong: the allegations just quoted specifically refer to making the emission control systems inoperable. Salt Lake also alleges that, before the software changes, Volkswagen's defeat device could detect when emissions testing was complete, and "would respond by relaxing emissions controls to permit higher levels of emissions of NOx and other pollutants." (*Id.* ¶ 4.) Arguably, "relaxing" emission controls is not the same as making emission controls "inoperative," as inoperative suggests that the controls were not functioning, while "relaxing" suggests that the controls were functioning less effectively. Under the circumstances alleged here, however, this is a distinction without a difference. Salt Lake alleges that Volkswagen's defeat device reduced the effectiveness of emission controls in such a manner that the vehicles in which it was installed went from complying with EPA's emission standards to emitting as much as 40 times the level of NOx permitted by those standards. (*See id.* ¶ 43; *cf.* SOF ¶ 34 (referring to NOx levels that were sometimes 35 times higher than U.S. standards).) This was a drastic reduction in the effectiveness of the emission controls; so drastic that, for all practical purposes, the emission controls in the affected vehicles were indeed rendered "inoperable" when the defeat device began to operate. The Court therefore concludes that Volkswagen's initial installation of the defeat device in the affected vehicles, and

subsequent post-sale software changes, come within the scope of the "mak[ing] inoperative" prong of Salt Lake's tampering rule.

Finally, Volkswagen points to the following language in Salt Lake's rule: "on which is installed or incorporated a system or device for the control of ... exhaust emissions in compliance with the Federal motor vehicle rules." Volkswagen contends that this clause indicates that Salt Lake's tampering rule "does not apply to the original installation or updating of a *noncompliant* system, as Salt Lake alleges here." (Dkt. No. 4583 at 26 (emphasis added).) That is, Volkswagen suggests that because Salt Lake alleges that Volkswagen installed the defeat device in its vehicles during manufacturing, the vehicles never had compliant emission control systems, and therefore could not be tampered with under Salt Lake's rule.

The Court does not agree with this interpretation. Salt Lake alleges that Volkswagen installed emission controls in the affected vehicles that, during emissions testing, *were* able to satisfy EPA's standards. The defeat device then rendered the vehicles' otherwise compliant emission controls noncompliant when the vehicles were driven on the road. The defeat device, then, "ma[d]e inoperable [a] system or device" that was "installed or incorporated ... for the control of ... exhaust emissions in compliance with the Federal motor vehicle rules." Utah Admin. Code R307–201–4.

Volkswagen's alleged conduct comes within the terms of Salt Lake's tampering rule.

B

Volkswagen and Bosch also contend that their conduct does not come within the bounds of the tampering rules invoked by Hillsborough County. Hillsborough relies on two mobile source rules, which read as follows:

> No person shall tamper, cause, or allow the tampering of the emission control system of any motor vehicle.

EPC Rule 1–8.05(1).

> No person shall manufacture, install, sell or advertise for sale, devices to defeat or render inoperable any component of a motor vehicle's emission control system....

EPC Rule 1–8.05(6). As used in these rules, "tampering" is defined as "the intentional inactivation, disconnection, removal or other modification of a component or components of the emission control system." EPC Rule 1–8.03(2)(h). An "emission control system" in turn is defined in part as "the devices and mechanisms installed as original equipment at the time of manufacture ... for the purpose of reducing or aiding in the control of emissions." EPC Rule 1–8.03(2)(b).

Defendants contend that EPC Rule 1–8.05(1) applies only to the modification of "pre-existing emission control systems." (Dkt. Nos. 4583 at 27; 4584 at 7–8.) Similarly, Defendants contend that EPC 1–8.05(6) prohibits only the manufacture or installation of a device "to defeat or render inoperable" a part of an existing "emission control system," i.e., one that was already

"installed as original equipment at the time of manufacture." (Dkt. No. 4583 at 27.) Defendants then assert that their conduct, as alleged by Hillsborough, does not come within these provisions, because Hillsborough alleges that they installed a defeat device in the affected vehicles at the same time that they installed the emission control system. They therefore assert that they did not modify or render inoperable a pre-existing "emission control system" as required to violate Hillsborough's tampering rules.

This argument is essentially the same as the third argument addressed above with respect to Salt Lake's tampering rule. For the same reasons, it is unpersuasive. As alleged, Defendants equipped the affected vehicles with emission controls that could—and did—meet EPA's emission standards during testing. Defendants also equipped the affected vehicles with a defeat device, which reduced the effectiveness of the vehicles' emission controls during normal on-road driving. Whether the defeat device was installed at the exact same time as the emission controls, or was installed sometime later during the manufacturing process, the defeat device reduced the effectiveness of the vehicles' emission controls during normal vehicle use and therefore "modified" and "render[ed] inoperable" certain "devices and mechanisms installed as original equipment at the time of manufacture ... for the purpose of reducing or aiding in the control of emissions." EPC Rules 1–8.03(2)(b), 1–8.05(1), (6). The same is true of the alleged post-sale software changes, which clearly took place after the original emission control systems were installed in the affected vehicles. (*See* SOF ¶¶ 47–51; *see also* Hillsborough Compl. ¶¶ 87–88; Salt Lake

Compl. ¶ 42.) The Court accordingly concludes that Defendants' alleged conduct comes within the bounds of Hillsborough's tampering rules.

III

Turning to the preemption analysis, the Court starts on familiar ground. Like the Counties, Wyoming previously asserted that Volkswagen violated a local tampering law by manufacturing and installing a defeat device in its vehicles. The Court held that Wyoming's tampering claim was expressly preempted by Section 209(a) of the Clean Air Act.

Section 209(a) provides that

> No State or any political subdivision thereof shall adopt or attempt to enforce any *standard relating to the control of emissions from new motor vehicles* or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a)(emphasis added).

The Act defines "new motor vehicle" as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." *Id.* § 7550(3).

The Act does not define a "standard relating to the control of emissions," but the Supreme Court offered two examples of such a standard in *South Coast Air Quality*. The first is a rule that a vehicle "not emit more than a certain amount of a given pollutant." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004). The second is a rule that a vehicle "be equipped with a certain type of pollution-control device." *Id.*

These "standards" are the same types of rules that Congress requires EPA to enact and enforce in Title II of the Clean Air Act. Specifically, Congress has tasked EPA with setting emission limits for new vehicles introduced into commerce, 42 U.S.C. § 7521(a); setting standards governing the use of emission-control devices in those vehicles, *e.g.*, *id.* § 7521(a)(4)(A), (m); running a certification and testing program to ensure that new vehicles meet these standards, *id.* § 7525; and enforcing these standards by refusing to certify vehicles that do not meet all regulatory requirements and by bringing civil enforcement actions against violators, *see id.* §§ 7522(a), 7524, 7525(a). Section 209(a) prohibits States and political subdivisions from doing the same.[4] Through this give and take, Congress has created a uniform regulatory regime governing emissions

[4] The exception is California: Congress has allowed California to set its own vehicle emission standards, and allows other states to adopt California's standards. See 42 U.S.C. §§ 7507; 7543(b); Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934, 938 n.3 (9th Cir. 2011). Because of this exception, the California Air Resources Board (CARB) also played an important role in investigating Volkswagen's conduct, as noted in Volkswagen's plea agreement.

from new vehicles, which it has done to avoid "the possibility of 50 different state regulatory regimes" governing vehicle emissions, which would "raise[ ] the spectre of an anarchic patchwork of federal and state regulatory programs" and would threaten "to create nightmares for the manufacturers." *Engine Mfrs. Ass'n v. EPA* ("*EMA*"), 88 F.3d 1075, 1079 (D.C. Cir. 1996) (citation omitted).

In *Wyoming*, this Court held that EPA's rule prohibiting the installation of defeat devices in new vehicles is a "standard relating to the control of emissions from new motor vehicles." *Wyoming*, 264 F.Supp.3d at 1052. In opposing Volkswagen's motion to dismiss, Wyoming argued that its tampering claim was nevertheless not an "attempt to enforce" EPA's rule, but rather was only an attempt to regulate the use of Volkswagen's defeat device within the State's borders. It was on the roads of Wyoming, the State argued, that the device reduced (and thereby tampered with) vehicle emission controls. Framed in this way, Wyoming asserted that its claim not only escaped the reach of Section 209(a)'s express preemption clause, but also was protected by the Clean Air Act's savings clause, Section 209(d), which provides that "Nothing in this part shall preclude or deny any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d).

The Court did not find Wyoming's in-use argument persuasive. Yes, the defeat device operated in vehicles within the State, but Volkswagen's conduct took place during manufacturing, when it installed the defeat de-

vice in its new vehicles. Wyoming, then, was attempting to regulate Volkswagen's conduct before its vehicles were sold to end users. And by doing so, the State was attempting to enforce a standard relating to the control of emissions from new motor vehicles. *See Wyoming*, 264 F.Supp.3d at 1056. The Court also noted that, by definition, all defeat devices work by reducing the effectiveness of emission controls during "normal vehicle operation and use." *Id.* (quoting 40 C.F.R. § 86.1803–01). Under Wyoming's reading, then, "every defeat device installed in a new vehicle that is later registered in the State will violate its tampering ... rule[ ], without any additional action by the manufacturer who installed the device." *Id.* Thus, by regulating the use of defeat devices, Wyoming would "effectively [be] regulating their installation." *Id.*

IV

To the extent the Counties' tampering claims are based on the manufacture and installation of a defeat device in new vehicles that were later registered in the Counties, their claims are expressly preempted by Section 209(a) for the same reasons identified in *Wyoming*. Although the defeat device may operate in vehicles within the Counties, Defendants are alleged to have manufactured the device and installed it in these vehicles before the vehicles were sold to end users. To the extent the Counties seek to regulate that conduct, they are "attempt[ing] to enforce [a] standard relating to the control of emissions from new motor vehicles," which states and local governments cannot do under Section 209(a).

The alleged post-sale software changes to the affected vehicles requires a different analysis. The Counties allege that Defendants modified the defeat device in the affected vehicles during vehicle maintenance, or installed new defeat devices during post-sale recalls. In either case, this conduct affected vehicles that had already been sold to consumers and were in use within the Counties, not "new motor vehicles." The Counties' attempts to regulate Defendants' post-sale software changes are therefore not expressly preempted by Section 209(a).

In arguing to the contrary, Defendants note that Wyoming also attempted to base its tampering claims in part on certain post-sale software changes, and the Court rejected that attempt. The Court did so on statutory grounds, however, not on the basis of preemption under Section 209(a). This was because Wyoming alleged that certain software changes by Volkswagen brought emissions *down* relative to the emissions allowed by the original defeat device. On that basis, the Court held that the changes "did not violate ... Wyoming's tampering provision ... because the updates did not 'render ineffective or inoperative' the emission control system." *Wyoming*, 264 F.Supp.3d at 1057 n.8. In contrast, the Counties' allegations support that the post-sale software changes *increased* emissions. (*See* Salt Lake Compl. ¶ 42; *see also* SOF ¶¶ 50–51) (admitting that the steering wheel angle recognition feature "improve[d] the defeat device's precision" and marked an "expansion of the defeat device," as this feature reduced the likelihood that the vehicles in which it was installed would inadvertently operate in testing or "dyno" mode during normal driving conditions). Unlike Wyoming's allegations, then, the Counties' are based

on conduct that could constitute tampering under their respective tampering rules. And because the software changes were made to vehicles that had already been sold to consumers, the Counties' attempts to regulate the changes are not expressly preempted by Section 209(a).

Defendants make one additional argument with respect to Section 209(a), asserting that the relation-back concept discussed in *Allway Taxi, Inc. v. City of New York*, 340 F.Supp. 1120 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972), and cited favorably by EPA in a regulation implementing non-road vehicle emission standards, *see* 59 Fed. Reg. 31306–01 (June 17, 1994), brings the Counties' tampering claims within the scope of Section 209(a). It does not. The idea behind that concept is that if a state were to adopt "in-use emission control measures that would apply immediately after a new vehicle or engine were purchased," this would amount to "an attempt to circumvent section 209 preemption and would obstruct interstate commerce," as manufacturers would feel pressure to ensure that their new vehicles complied with the state's in-use control measures. 59 Fed. Reg. at 31330. As a result, courts have reasoned that, even though such measures would be imposed on vehicles only after they were sold, the measures would relate back to the vehicle manufacturing process, and would therefore be preempted by Section 209(a). *See Allway Taxi*, 340 F.Supp. at 1123–24; *EMA*, 88 F.3d at 1086 ("The *Allway Taxi* interpretation, postponing state regulation so that the burden of compliance will not fall on the manufacturer, has prevented the definition of 'new motor vehicle' from 'nullifying' the motor vehicle preemption regime."). The Counties' attempt to regulate Defendants' post-sale

software changes does not raise the same concerns. The Counties are not attempting to impose emission measures that would require manufacturers to change the way they construct new vehicles. Rather, the Counties are attempting to prevent manufacturers from tampering with their vehicles after the vehicles are sold to end users. Because the relation-back concept is not implicated here, it does not bring the Counties' claims within the preemptive scope of Section 209(a).

That Section 209(a) does not expressly bar the Counties' attempts to regulate Defendants' post-sale software changes does not end the preemption analysis, however. This is because "neither an express pre-emption provision nor a saving clause 'bars the ordinary working of conflict pre-emption principles.'" *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 352, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000)). The Court must therefore also consider whether, "under the circumstances of [this] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)). Where a statute "regulates a field traditionally occupied by states, such as health, safety, and land use," courts "assume that a federal law does not preempt the states' police power absent a 'clear and manifest purpose of Congress.'" *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009)).

A

The Counties allege that Volkswagen and Bosch made the post-sale software changes at issue on a model-wide basis in thousands of vehicles nationwide. As a consequence, the congressional objective that the Court must identify is how Congress intended for model-wide tampering by vehicle manufacturers and parts suppliers to be regulated. The Counties view Section 209 of the Clean Air Act as answering that question: When vehicles are tampered with when they are new, they contend that Section 209(a) prohibits states and local governments from attempting to regulate that conduct; but when vehicles are tampered with when they are in use, they contend that Section 209(d) allows states and local governments to regulate that conduct, regardless of the magnitude of the tampering offense or the identity of the offender, without interfering with the federal regulatory scheme.

The Clean Air Act does not draw such a clear line. For one thing, the Act requires vehicles to meet EPA's emission standards during their "useful life." 42 U.S.C. § 7521(a)(1). The federal regulation of vehicle emissions therefore does not stop after vehicles are sold to end users. And although Congress has looked to both EPA and the states and local governments to enforce these useful life standards, the enforcement roles of these entities do not entirely overlap. Instead, it is evident from the statutory scheme and legislative history that Congress intended for EPA and the states and local governments to serve specific and separate functions in regulating emissions from in-use vehicles.

EPA's primary role after vehicles are put in use is to ensure that entire classes or models of vehicles remain in compliance with the agency's emission standards. Similar to during the new vehicle certification process, EPA works with vehicle manufacturers to accomplish this. For example, pursuant to 42 U.S.C. § 7541(b), EPA has established "[m]anufacturer in-use verification testing requirements." 40 C.F.R. § 86.1845–04. To comply, vehicle manufacturers must procure and test a specific number of vehicles in each test group (categorized by, among other things, engine type) that have been driven at least 10,000 miles (low-mileage testing) and 50,000 miles (high-mileage testing). *See id.* §§ 86.1827–01; 86.1845–04(b), (c). If a manufacturer's vehicles do not pass these in-use tests, or if EPA otherwise determines that "a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed," EPA has authority to recall those vehicles. 42 U.S.C. § 7541(c)(1). Either before or after vehicles are sold to end users, EPA may also inspect vehicle manufacturers' records related to emissions testing, and may observe activities at the manufacturers' plants. 42 U.S.C. § 7542. EPA also requires manufactures to report to the agency emission related defects discovered in used vehicles if the defects affect at least 25 vehicles of the same model year. 40 C.F.R. § 85.1903(a). Emission related defects include defective "software ... which must function properly to ensure continued compliance with emission standards." *Id.* § 85.1902(b)(2).

While Congress has tasked EPA with enforcing useful life emission standards on a model-wide basis, other

provisions in the Clean Air Act, and the Act's legislative history, reveal Congress' intent to have states and local governments enforce these standards by inspecting individual vehicles for compliance. Since Congress first adopted the modern vehicle emissions scheme, in 1967, it has intended that "States responsibility would be to assume responsibility for inspection of pollution control systems as an integral part of safety inspection programs...." S. Rep. 90–403, at 35 (1967). To encourage states to adopt such programs, Congress included a provision in the Air Quality Act of 1967 that authorizes EPA to "make grants to appropriate State air pollution control agencies in an amount up to two-thirds of the cost of developing meaningful uniform motor vehicle emission device inspection and emission testing programs." Pub. L. 90–148, § 209, 81 Stat. 502 (1967) (codified as amended at 42 U.S.C. § 7544). In commenting on minor amendments to this provision as part of the Clean Air Act Amendments of 1970, Congress also noted that "Effective State emission testing and inspection programs [are] essential ... to assur[e] that vehicles, once delivered to the ultimate and subsequent purchasers, continue to conform to the standards for which they were certified." S. Rep. 91–1196, at 31 (1970).

As Congress has made further amendments to the Clean Air Act, and in particular as it responded to increasing emissions from vehicles in the 1970s and '80s, which resulted from the increasing use of vehicles throughout the nation, it has made some of these state inspection programs mandatory, at least for states with particularly high levels of certain pollutants. *See* Clean Air Act Amendments of 1977, Pub. L. 95–95 §

172(b)(11)(B), 91 Stat. 685, 747; Clean Air Act Amendments of 1990, Pub. L. 101–549, § 182(b)(4), (c)(3), 104 Stat. 2399, 2426. Under the current Clean Air Act, then, certain states must adopt in-use vehicle inspection programs. *See* 42 U.S.C. § 7511a(b)(4), (c)(3). And these programs must comply with EPA-established minimum standards with respect to the frequency of inspection, the types of vehicles to be inspected, and the test methods and measures used. *See id.* § 7511a(a)(2)(B)(i); EPA Inspection/Maintenance Program Requirements Rule, 57 Fed. Reg. 52950 (Nov. 5, 1992). In states that are required to adopt "enhanced" inspection programs, enforcement through denial of vehicle registration is required. *See* 42 U.S.C. § 7511a(c)(3)(C)(iv). Many states and local governments, like the Counties in this case, have also adopted tampering laws to bolster state inspection programs, or as standalone provisions. These tampering laws generally "prohibit the operation of motor vehicles when air pollution devices have been removed, altered, or rendered inoperative." Arnold W. Reitze Jr., *Air Pollution Control Law: Compliance and Enforcement* § 10–5(d) (2001); *see also* 57 Fed. Reg. 24370–01 (June 9, 1992) (EPA's approval of Florida's anti-tampering program); 52 Fed. Reg. 4921–02 (Feb. 18, 1987) (EPA's approval of Utah's inspection and anti-tampering programs).

By their nature, state inspection programs operate on an individual vehicle basis. This is clear from, among other things, the use of vehicle registration denial as a means of enforcement—which is a penalty that affects the owners of specific non-compliant vehicles. It is also clear from Section 207(h)(2) of the Clean Air Act. There, Congress has provided that "Nothing in [Section 209(a)] shall be construed to prohibit a State from

testing or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser....” 42 U.S.C. § 7541(h)(2). But the same provision follows with this exception: “(except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).” Through this exception, Congress has manifested its intent that state inspection programs should not interfere with vehicle manufacturers.

At times, the federal scheme reveals overlap between federal, state, and local enforcement authority of emission standards. As notable for present purposes, Congress has adopted a federal tampering provision, which prohibits “any person” from removing or rendering inoperative emission control devices either before or after the vehicles in which the devices are installed are sold to ultimate purchasers. *See* 42 U.S.C. § 7522(a)(3)(A). Until 1990, this provision applied only to manufacturers, dealers, fleet owners, service stations or garage operators, and those in the business of leasing vehicles. *See* Clean Air Act Amendments of 1977, Pub. L. 95–95 § 219(a), 91 Stat. 685, 761. But in the Clean Air Act Amendments of 1990, Congress expanded the reach of the federal tampering law to also cover individual owners and operators of vehicles. *See* Pub. L. 101–549, § 228(b), 104. Stat. 2399, 2507 (codified at 42 U.S.C. § 7522(a)(3)(A)). In this respect, EPA, similar to states and local governments, can regulate individual vehicle owners’ compliance with emission standards. Although no similar provisions in the Clean Air Act reveal a crossover going the other way, with states and local governments given authority to supplement EPA’s enforcement authority over vehicle manufacturers’ compliance with emission standards.

Further, the legislative history of the 1990 amendments reveals that Congress amended the federal tampering law only to supplement state efforts to regulate tampering by individual vehicle owners and operators, as tampering by individuals was proving to be problematic in states with and without inspection and tampering programs. *See* S. Rep. 101–228, at 123 (1989) (citing tampering statistics from a 1988 tampering survey). And while the amendments authorized EPA to regulate tampering by individuals, Congress "[did] not require sweeping new enforcement initiatives to be undertaken by EPA." (*Id.* at 124.)

The division of authority discussed above—with EPA enforcing useful life vehicle emission standards primarily on a model-wide basis, and at the manufacturer level, and states and local governments enforcing the same standards on an individual vehicle basis at the end-user level—is sensible, as it best utilizes the comparative advantages of EPA and the states and local governments. EPA, as a federal agency, is best positioned to enforce emission standards on a model-wide basis because model-wide emission problems will almost invariably affect vehicles in states and counties throughout the country. Further, when investigating model-wide emission issues, EPA can also rely on testing data it acquired from manufacturers during the new vehicle certification process, which it can utilize to understand how vehicle models are performing in use as compared to how they were performing during assembly-line testing. Likewise, because the new vehicle certification process requires EPA to work directly with vehicle manufacturers, the agency has preexisting relationships that it can rely on when addressing model-wide emission defects in used vehicles.

States and local governments, in contrast, are in a better position than EPA to enforce emission standards at the individual user level. Although Congress could theoretically task EPA with overseeing nationwide vehicle inspection programs—with the agency running testing centers and requiring vehicle owners to have their vehicles checked on a regular basis—states and local governments can more efficiently do so because they already oversee vehicle registration and drivers' licensing, and can use state police power to aid enforcement. Indeed, when Congress first sought to motivate states to create vehicle inspection programs, it did so based on the belief that states would adopt such programs "as an integral part of safety inspection programs." S. Rep. 90–403, at 35 (1967).

This is not to say that there is no conceivable scenario, consistent with the Clean Air Act, in which states and local governments could regulate a vehicle manufacturer's compliance with emission standards. If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders. In such a scenario, the manufacturer is not acting on a model-wide basis, and therefore the enforcement advantages that EPA has over the states and local governments are not implicated. But when a manufacturer's actions affect vehicles model wide, the Clean Air Act manifests Congress' intent that EPA, not the states or local governments, will regulate that conduct.

B

The model-wide nature of the post-sale software changes alleged here makes them the type of conduct that Congress intended EPA to regulate. And indeed, EPA has regulated this conduct. EPA was instrumental in bringing Volkswagen's emissions fraud to light, as it began an investigation in 2014 to determine why on-road emissions from the affected vehicles significantly exceeded emissions during testing. (*See* Hillsborough Compl. ¶¶ 82–86; SOF ¶¶ 52–63.) And it was only after EPA threatened not to certify certain model-year 2016 vehicles that Volkswagen finally admitted that it had equipped the affected vehicles with a defeat device. (*See* Hillsborough Compl. ¶ 90; SOF ¶ 59.) EPA has also brought civil and criminal actions against Volkswagen based not only on the company's initial installation of a defeat device in its vehicles, but also as a result of the company's post-sale software changes. (*See* SOF ¶¶ 47–51 (detailing Volkswagen's defeat device modifications as part of the factual basis for the company's guilty plea); *Volkswagen AG*, No. 3:16–CV–00295, Dkt. No. 32–3, EPA Am. Civil Compl. ¶¶ 114–16, 195–97 (detailing Volkswagen's defeat device modifications as conduct that violated the Clean Air Act and EPA regulations).) These criminal and civil actions have resulted in Volkswagen paying penalties and remediation payments totaling $9.23 billion, which is in addition to a $10.033 billion funding pool Volkswagen agreed to establish to buy back its 2.0–liter TDI vehicles and to pay the owners and lessees of those vehicles restitution.

The model-wide nature of the post-sale software changes also distinguishes them from the type of conduct that Congress intended for states and local governments to regulate. State and local tampering laws are meant to be used as a tool by states and counties to regulate vehicles within their borders. If a mechanic removes or alters a vehicle's emission control system during routine maintenance, for example, states and counties are in the best position to penalize that conduct. But when the tampering at issue involves thousands of vehicles, and the changes are made through software updates instituted on a nationwide basis, EPA is in a better position to regulate that conduct, as it can rely on the tools Congress has given it to police vehicle manufacturers' compliance with emission standards before and after vehicles are put in use.

Due to technological advances, manufacturers today also have the ability to impact their vehicles well after sale to end users. Vehicles are increasingly computerized, and similar to the types of a remote updates that consumers may receive on their phones or computers, manufacturers may be able to modify software installed in vehicles just as easily. This is not the type of conduct that states and local governments are in the best position to regulate. Although it may be characterized as conduct that takes place at least in part within their borders, it is conduct on a much broader, national scale. And it is not conduct involving an individual consumer's vehicle; rather, it involves entire vehicle lines, makes, and models. This is the type of conduct that Congress intended EPA to regulate.

Not only is EPA better positioned than the Counties to regulate Volkswagen's post-sale software changes,

but if the Counties were permitted to regulate this conduct, the size of the potential tampering penalties could significantly interfere with Congress' regulatory scheme. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)). This is because "[e]ven if [a] regulated entity can comply with both state and federal sanctions, the mere fact of ... inconsistent sanctions can undermine the federal choice of the degree of pressure to be employed, 'undermining the congressional calibration of force.'" *Compass Airlines LLC v. Mont. Dep't of Labor & Indus.*, No. CV 12-105-H-CCL, 2013 WL 4401045, at *13 (D. Mont. Aug. 12, 2013) (quoting *Crosby*, 530 U.S. at 379–80, 120 S.Ct. 2288).

As relevant here, Congress has set specific penalties for vehicle tampering by manufacturers. *See* 42 U.S.C. § 7524(a) (up to $25,000 per violation by manufacturers and dealers, and up to $2,500 per violation by any other person). And Volkswagen's tampering has triggered those penalties. The Counties now seek to impose additional, significant sanctions for the same conduct, with a violation of either Hillsborough's or Salt Lake's tampering rule punishable by a civil penalty of up to $5,000 per offense per day of noncompliance. *See* Hillsborough EPC Enabling Act § 17(2); Utah Code Ann. § 19–1–303. With at least 1,118 affected vehicles allegedly registered in Hillsborough County, and at least 5,000 allegedly registered in Salt Lake County, and with the tampering at issue occurring in or around April 2013, and continuing for over a year until

Volkswagen admitted to using a defeat device in the fall of 2015, the potential penalties could reach $30.6 million per day and $11.2 billion per year—and that is just for two counties. If other counties and states bring similar claims—and indeed some already have[5]—the potential penalties could dwarf those paid to EPA, which would seriously undermine the congressional calibration of force for tampering by vehicle manufacturers.[6]

Even if actual penalties are lower, if tampering claims like the Counties' are allowed to proceed, vehicle manufacturers could be subjected to up to 50 state and approximately 3,000 county regulatory actions based on uniform conduct that happened nationwide. The substantial nature of the potential penalties for the Counties' tampering claims, and the significant regulatory burden that would ensue if manufacturers were subject to tampering claims throughout the United States, further demonstrates the conflict that the Counties' claims create with federal policy. *See Crosby*,

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[5] Counsel for Volkswagen has represented that 28 counties in Texas, and at least 8 states have asserted tampering claims against the company that are based on its post-sale software modifications. (See Dkt. No. 4715 at 7 (Feb. 1, 2018 Hr'g Tr.); Dkt. No. 4887 (Notice of Recent Decisions).) The Counties have not contested these representations.

[6] The penalties sought by the Counties would also be above and beyond the remediation that consumers in the Counties have already received by way of the consumer class action settlements, and beyond the payments that the Counties' home states—Florida and Utah—have or are expected to receive as beneficiaries to Volkswagen's emissions mitigation trust. As beneficiaries, Florida is expected to receive approximately $166 million, and Utah is expected to receive approximately $35 million. (Dkt. Nos. 2103–1 at 207; 3228–1 at 164.)

530 U.S. at 380, 120 S.Ct. 2288 ("'Conflict is imminent' when 'two separate remedies are brought to bear on the same activity.'" (quoting *Wis. Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986))).[7]

The same analysis applies to Hillsborough's tampering claim against Bosch. Hillsborough alleges that Bosch assisted Volkswagen in developing the defeat device that was ultimately used in hundreds of thousands of vehicles in the United States, and in implementing the post-sale software changes to these vehicles. EPA, not the states and counties, is in the best position to regulate this conduct, as the conduct alleg-

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[7] The Counties' tampering claims also threaten to interfere with the injunctive relief obtained by EPA. At the time of the consent decrees, EPA and Volkswagen acknowledged that there were "no practical engineering solutions that would, without negative impact to vehicle functions and unacceptable delay," bring the majority of the affected vehicles into compliance with existing emission standards. (Dkt. Nos. 2103–1 at 5 ¶ 2; 3228–1 at 5 ¶ 2.) Yet to "avoid undue waste and potential environmental harm that would be associated with removing" the affected vehicles from service, EPA agreed to allow Volkswagen to offer emissions modifications to the owners and lessees of the affected vehicles if the modifications "would substantially reduce NOx emissions." (Dkt. Nos. 2103–1 at 6 ¶ 4; 3228–1 at 7 ¶ 4.) This approach reflected the type of careful balancing that is required in responding to a nationwide environmental problem like the one at issue here. But the Counties may jeopardize this balance by asserting that vehicles with EPA-approved modifications continue to violate their tampering rules because the modifications do not bring the vehicles into compliance with the originally certified emission standards. This threat of inconsistent sanctions further demonstrates the conflict between the Counties' tampering claims and federal policy.

edly affected vehicles on a model-wide basis. And although EPA has not filed an enforcement action against Bosch, it has the authority to do so under federal tampering laws. *See* 42 U.S.C. § 7522(a)(3)(A) (reaching "any person" that removes or renders inoperative vehicle emission control devices). State and local tampering actions against Bosch also threaten to create the same regulatory nightmare that would occur if the actions are allowed to proceed against Volkswagen. In either instance, the claims could subject companies that are responsible for developing motor vehicles to enforcement actions throughout the country based on uniform conduct that happened nationwide.

The Clean Air Act's savings clause, Section 209(d), does not alter any of the above analysis. That provision does not give states and local governments carte blanche to regulate any conduct that affects emissions from vehicles that are in use. Rather, the provision provides that "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right *otherwise* to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d) (emphasis added). The use of the term "otherwise" indicates that state and local government regulation of in-use vehicles is subject to the limitations otherwise imposed by federal law. And those limitations include the division of authority between EPA and the states and local governments discussed above.

Bolstering this conclusion, the legislative history of Section 209(d) reveals that Congress' intent in enacting this saving clause was to ensure that states and local governments had authority to adopt transportation

planning regulations, not to regulate vehicle manufacturers. In the Senate Report for the Air Quality Act of 1967, the Committee on Public Works noted the following with respect to Section 209(d):

> This language is of particular importance. While there has been a great deal of concern expressed regarding control of new vehicles little attention has been paid to control of used vehicles, either their emissions or their use. It may be that, in some areas, certain conditions at certain times will require control of movement of vehicles. Other areas may require alternative methods of transportation. Unfortunately some of these alternatives have been ignored and the onus of control has been placed solely on the automobile manufacturers.
>
> It is clear that, if a pollution-free (or at least minimized) rapid transit system reduced commuter traffic there would be a corresponding decrease in automobile-related air pollution. And any significant advance in control of used vehicles would result in a corresponding reduction in air pollution. These are areas in which the States and local government can be most effective.

S. Rep. No. 90–403, at 34 (1967).

Section 209(d), then, was viewed as providing states and local governments with the authority to "control [the] movement of vehicles" so that they could "reduce[ ] commuter traffic" and thereby "decrease ... automobile-related air pollution." *Id.*; *see also EMA*, 88 F.3d

at 1094 (recognizing that Section 209(d) "protect[s] the power of states to adopt ... in-use regulations," such as "carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles") (citation omitted). These are not the types of measures that affect vehicle manufacturers and parts suppliers. To the contrary, the legislative history reveals that the intent of Section 209(d) was to give states and local governments a tool to *lessen* the burden on vehicle manufacturers—as manufacturers are ultimately the ones that must develop and implement the technology capable of meeting federal vehicle emission standards.

Courts have "repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier*, 529 U.S. at 870, 120 S.Ct. 1913 (quoting *United States v. Locke*, 529 U.S. 89, 106–07, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)). Interpreting Section 209(d) in the manner suggested by the Counties would have just such a destabilizing effect. When the Clean Air Act is considered as a whole, it is clear that Congress intended for EPA to regulate vehicle emission standards on a model-wide basis, while states and local governments would regulate compliance with these standards at the individual vehicle level. Section 209(d) does not modify that framework.

* * *

The Counties' tampering claims, based on post-sale software changes to the affected vehicles by Volkswagen and Bosch, are an attempt to enforce vehicle emission standards on a model-wide basis. Because

Congress intended for only EPA to regulate such conduct, the Court concludes that these claims stand as an obstacle to Congress' purpose and are preempted by the Clean Air Act.

V

Salt Lake County's complaint includes three additional claims against Volkswagen. These claims are for common law fraud, violation of Utah's Pattern of Unlawful Activity Act, which is a state RICO statute, and common law nuisance. Volkswagen argues that each of these claims is preempted by the Clean Air Act. The Court agrees.

The decision in *In re Office of Attorney General of State of New York* ("*Detroit Diesel*"), 269 A.D.2d 1, 709 N.Y.S.2d 1 (2000), is instructive. Similar to here, that case involved vehicle manufacturers' use of a defeat device, and a state's attempt to bring common law claims against the manufacturers as a result. The dispute between the state and the manufacturers followed an EPA investigation, lawsuit, and settlement. *Id.* at 3–4, 709 N.Y.S.2d 1. After the settlement was formalized in a series of consent decrees, the New York Attorney General subpoenaed the manufacturers—seeking testing data and other documents that the manufacturers had provided to EPA. *Id.* at 4, 709 N.Y.S.2d 1. Although the Attorney General initially represented that he would use the requested material primarily to support New York's public comments on the consent decrees, he later noted that he sought to bring "State common-law actions for damages, such as fraud, breach of warranty, public nuisance and conspiracy to restrain trade," which he asserted were "not preempted by the Clean Air Act." *Id.* at 5, 709 N.Y.S.2d 1.

The state trial court held that the common law claims were preempted, and the appellate court affirmed. *Id.* In the appellate decision, the court noted that common law claims "may be preempted if such claims would unavoidably result in serious interference with the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 10, 709 N.Y.S.2d 1 (internal quotation marks omitted). The court then concluded that the Attorney General's common law claims would create just such interference, because the Attorney General was "seeking to use [state] common law to penalize the manufacturers for producing engines which failed to comply with the Federal standards promulgated pursuant to the [Clean Air Act]." *Id.* at 11, 709 N.Y.S.2d 1. For example, the court reasoned that "the Attorney General's claim sounding in fraud has its genesis in the manufacturers' purported concealment or misrepresentation of their violations of the Federal emissions standards, and liability would necessarily be based on the scope of those standards." *Id.* at 11–12, 709 N.Y.S.2d 1. Similarly, the court reasoned that the Attorney General's nuisance claim, which was "based upon the notion that the manufacturers' alleged circumvention of federal emission control requirements ha[d] resulted in 1.3 million[ ] ... tons of excess NOx emissions annually," would require "a determination of whether the manufacturers complied with the Federal emissions standard." *Id.* at 12, 709 N.Y.S.2d 1 (internal quotation marks omitted). If the Attorney General were allowed to bring these claims, the court reasoned, the Attorney General would be indirectly attempting to enforce the federal emission standards. The court concluded that such a result would lead to "the chaotic situation which Congress sought to avoid" under the Clean Air Act, as all 50

states could bring similar actions against vehicle manufacturers to indirectly enforce EPA's emission standards. *Id.* at 11, 709 N.Y.S.2d 1.

The situation here is the same. Through its fraud, nuisance, and state RICO claims, Salt Lake County is attempting to penalize Volkswagen for its failure to comply with federal emission standards. Salt Lake's fraud claim, for instance, is based on the contention that Volkswagen misrepresented the amount of pollutants emitted by its vehicles, and concealed the use of a defeat device in its vehicles. (Salt Lake Compl. ¶¶ 58–65.) This is the same conduct underlying EPA's claims against Volkswagen for violations of the Clean Air Act. The same is true of Salt Lake's state RICO claim, which is based on a "pattern of unlawful activity" that includes alleged violations of Utah's tampering, fraud, deceptive business practices, and computer crime laws. (*See id.* ¶¶ 66–73.) Salt Lake does not offer any factual allegations to support this claim other than the allegations underlying Volkswagen's violations of the Clean Air Act. The state RICO claim accordingly "has its genesis in the manufacturers' ... violations of the Federal emissions standards, and liability would necessarily be based on the scope of those standards." *Detroit Diesel*, 269 A.D.2d at 11–12, 709 N.Y.S.2d 1. Finally, Salt Lake bases its nuisance claim on Volkswagen's "use of defeat devices on the vehicles [it] distributed and [its] modification of software on in-service vehicles," which the County alleges "created a public nuisance" that "rendered the air of Salt Lake County impure or unwholesome." (Compl. ¶ 75.) As the focus on Volkswagen's use of a defeat device demonstrates, this claim too is an attempt by the County to indirectly enforce EPA's emission standards.

With respect to the fraud claim, it is worth noting that the facts here are distinguishable from those in several cases in which courts have recently held that fraud claims based on a vehicle manufacturer's use of a defeat device are not preempted by the Clean Air Act. *See In re Chrysler–Dodge–Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F.Supp.3d 927, 990–1000 (N.D. Cal. 2018); *In re Duramax Diesel Litig.*, 298 F.Supp.3d 1037, 1056–66, 2018 WL 949856 TLL, at *10–17 (E.D. Mich. 2018); *Counts v. General Motors LLC*, 237 F.Supp.3d 572, 588–92 (E.D. Mich. 2017); *In re Volkswagen "Clean Diesel" Litig.* ("*VW Va.*"), CL–2016–9917, 2016 WL 10880209, at *2–6 (Va. Cir. Ct. Aug. 30, 2016). In each of those cases, the fraud claims at issue were filed by consumers who allegedly purchased vehicles that contained a defeat device, and who alleged that they were deceived by the manufacturers' representations about the vehicles' emissions, or by the manufacturers' concealment of the emissions cheating software. Under those circumstances, the courts concluded that the consumers' fraud claims were not preempted by the Clean Air Act because the claims were not an attempt to enforce EPA's emission standards, but rather were an attempt to hold the manufacturers liable for their false promises and deceit. *See VW Va.*, 2016 WL 10880209, at *5 ("Plaintiffs' fraud and VCPA claims do not rely on emissions violations.... Instead, Plaintiffs' claims rely upon allegedly false promises of compliance, efficiency, and new technology; or concealment of the fact that compliance testing was being circumvented."); *Counts*, 237 F.Supp.3d at 591 (reasoning that "the gravamen of Plaintiffs' claims ... focus on the deceit about compliance, rather than the need to enforce compliance") (internal quotation marks

omitted); *Chrysler*, 295 F.Supp.3d at 998 ("[T]he gravamen of Plaintiffs' complaint ... is Defendants' deceit, not the violation *per se* of federal emissions standards."); *Duramax*, 298 F.Supp.3d at 1062, 2018 WL 949856, at *14 ("The gravamen of their state law claims is that they purchased a vehicle which polluted at levels far greater than a reasonable consumer would expect."). Unlike the consumers in the cases cited, Salt Lake has not alleged that it purchased a vehicle affected by Volkswagen's defeat device scheme. The County therefore cannot contend that it was deceived into purchasing one of the affected vehicles. The impact of a manufacturer's deceit of consumers on the preemption analysis is therefore not relevant here.

Like the Attorney General in *Detroit Diesel*, Salt Lake seeks to use its common law and state statutory claims to penalize Volkswagen for its model-wide noncompliance with EPA's emission standards. Because Congress intended for EPA to regulate such conduct, Salt Lake's claims would "unavoidably result in serious interference with the accomplishment and execution of the full purposes and objectives of Congress." *Detroit Diesel*, 269 A.D.2d at 10, 709 N.Y.S.2d 1 (internal quotation marks omitted). Salt Lake's claims are therefore preempted.

VI

Having concluded that the Counties' claims are preempted, the Court GRANTS Defendants' motions to dismiss the Counties' complaints. Finding that an amendment of the complaints would be futile, the Court dismisses the complaints with prejudice.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

———————

Case No. 18-15937

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA; SALT LAKE COUNTY, PLAINTIFFS-APPELLANTS,

v.

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

———————

Filed: August 24, 2020

———————

Before: TALLMAN, IKUTA, and N.R. SMITH, *Circuit Judges*.

ORDER

The panel has unanimously voted to deny the Appellees' Petition for Panel Rehearing or Rehearing En Banc (ECF No. 78). Judges Tallman and N.R. Smith

recommended denying the Petition for Rehearing En Banc, and Judge Ikuta has voted to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Panel Rehearing or Rehearing En Banc is **DENIED**.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

* * * * *

1. 2 U.S.C. § 2163 provides:

Capitol Grounds shuttle service

Funds appropriated for any available account of the Architect of the Capitol after October 1, 1976, shall be available for the purchase or rental, maintenance and operation of passenger motor vehicles to provide shuttle service for Members and employees of Congress to and from the buildings in the Legislative group.

* * * * *

2. 7 U.S.C. § 2262 provides:

Employee liability insurance on motor vehicles in foreign countries

The Secretary of Agriculture is authorized to obtain insurance to cover the liability of any employee of the Department of Agriculture for damage to or loss of property or personal injury or death caused by the act or omission of any such employee while acting within the scope of his office or employment and while operating a motor vehicle belonging to the United States in a foreign country.

* * * * *

3. 42 U.S.C. § 7507 provides:

New motor vehicle emission standards in nonattainment areas

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

* * * * *

4. 42 U.S.C. § 7521(a) provides in pertinent part:

Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b)—

> (1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

* * * * *

5. 42 U.S.C. § 7521(d) provides in pertinent part:

Emission standards for new motor vehicles or new motor vehicle engines

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall—

> (1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

* * * * *

6. 42 U.S.C. § 7522(a) provides in pertinent part:

Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

> (3)(A) for any person to remove or render inoperative any device or element of design installed on

or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

* * * * *

7. 42 U.S.C. § 7523(b) provides:

Actions to restrain violations

(b) Actions brought by or in name of United States; subpenas

Actions to restrain such violations shall be brought by and in the name of the United States. In any such action, subpenas for witnesses who are required to attend a district court in any district may run into any other district.

* * * * *

8. 42 U.S.C. § 7524(a) provides:

Civil penalties

(a) Violations

Any person who violates sections 7522(a)(1), 7522(a)(4), or 7522(a)(5) of this title or any manufacturer or dealer who violates section 7522(a)(3)(A) of this title shall be subject to a civil penalty of not more than $25,000. Any

person other than a manufacturer or dealer who violates section 7522(a)(3)(A) of this title or any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3)(A), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component. Any person who violates section 7522(a)(2) of this title shall be subject to a civil penalty of not more than $25,000 per day of violation.

* * * * *

9. 42 U.S.C. § 7524(c) provides in pertinent part:

Civil penalties

(c) Administrative assessment of certain penalties

(2) Determining amount

In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.

* * * * *

10. 42 U.S.C. § 7541(a) provides in pertinent part:

Compliance by vehicles and engines in actual use

(a) Warranty; certification; payment of replacement costs of parts, devices, or components designed for emission control

(1) Effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after December 31, 1970, the manufacturer of each new motor vehicle and new motor vehicle engine shall warrant to the ultimate purchaser and each subsequent purchaser that such vehicle or engine is (A) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 7521 of this title, and (B) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under section 7521(d) of this title). In the case of vehicles and engines manufactured in the model year 1995 and thereafter such warranty shall require that the vehicle or engine is free from any such defects for the warranty period provided under subsection (i).

(3) The cost of any part, device, or component of any light-duty vehicle that is designed for emission control and which in the instructions issued pursuant to subsection (c)(3) of this section is scheduled for replacement during the useful life of the vehicle in order to maintain compliance with regulations under section 7521 of this title, the failure of which shall not interfere with the normal performance of

the vehicle, and the expected retail price of which, including installation costs, is greater than 2 percent of the suggested retail price of such vehicle, shall be borne or reimbursed at the time of replacement by the vehicle manufacturer and such replacement shall be provided without cost to the ultimate purchaser, subsequent purchaser, or dealer. The term "designed for emission control" as used in the preceding sentence means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions (not including those vehicle components which were in general use prior to model year 1968 and the primary function of which is not related to emission control).

* * * * *

11. 42 U.S.C. § 7541(b) provides:

Compliance by vehicles and engines in actual use

(b) Testing methods and procedures

If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its the warranty period (as determined under subsection (i)), each vehicle and engine to which regulations under section 7521 of this title apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) such methods and procedures are reasonably capable of being correlated with tests conducted under section 7525(a)(1) of this title, then—

(1) he shall establish such methods and procedures by regulation, and

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 7521 of this title applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph (2). The warranty under such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if—

(A) the vehicle or engine is maintained and operated in accordance with instructions under subsection (c)(3),

(B) it fails to conform at any time during its the warranty period (as determined under subsection (i)) to the regulations prescribed under section 7521 of this title, and

(C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. No such warranty shall be invalid on the basis of any part used in the maintenance or repair of a vehicle or engine if such part was certified as provided under subsection (a)(2).

* * * * *

12. 42 U.S.C. § 7541(c) provides in pertinent part:

Compliance by vehicles and engines in actual use

(c) Nonconforming vehicles; plan for remedying nonconformity; instructions for maintenance and use; label or tag

Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after December 31, 1970—

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan 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. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

* * * * *

13. 42 U.S.C. § 7541(h) provides in pertinent part:

Compliance by vehicles and engines in actual use

(h) Dealer certification

(2) Nothing in section 7543(a) of this title shall be construed to prohibit a State from testing, or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser (except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).

* * * * *

14. 42 U.S.C. § 7542 provides:

Information collection

(a) Manufacturer's responsibility

Every manufacturer of new motor vehicles or new motor vehicle engines, and every manufacturer of new motor vehicle or engine parts or components, and other persons subject to the requirements of this part or part C, shall establish and maintain records, perform tests where such testing is not otherwise reasonably available under this part and part C (including fees for testing), make reports and provide information the Administrator may reasonably require to determine whether the manufacturer or other person has acted or is acting in compliance with this part and part C and regulations thereunder, or to otherwise carry out the provision of this part and part C, and shall, upon request of an officer or employee duly designated by the Administrator, permit such officer or employee at reasonable times to have access to and copy such records.

(b) Enforcement authority

For the purposes of enforcement of this section, officers or employees duly designated by the Administrator upon presenting appropriate credentials are authorized—

> (1) to enter, at reasonable times, any establishment of the manufacturer, or of any person whom the manufacturer engages to perform any activity required by subsection (a), for the purposes of inspecting or observing any activity conducted pursuant to subsection (a), and

(2) to inspect records, files, papers, processes, controls, and facilities used in performing any activity required by subsection (a), by such manufacturer or by any person whom the manufacturer engages to perform any such activity.

(c) Availability to public; trade secrets

Any records, reports, or information obtained under this part or part C shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or a particular portion thereof (other than emission data), to which the Administrator has access under this section, if made public, would divulge methods or processes entitled to protection as trade secrets of that person, the Administrator shall consider the record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator shall be considered an employee of the United States for purposes of section 1905 of title 18. Nothing in this section shall prohibit the Administrator or authorized representative of the Administrator from disclosing records, reports or information to other officers, employees or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter. Nothing in this section shall authorize the withholding of information by the Administrator or any officer or employee under the Administrator's control from the duly authorized committees of the Congress.

* * * * *

15. 42 U.S.C. § 7543(a) provides:

State standards

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

* * * * *

16. 42 U.S.C. § 7543(b) provides:

State standards

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

* * * * *

17. 42 U.S.C. § 7543(d) provides:

State standards

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

* * * * *

18. 42 U.S.C. § 7543(e) provides in pertinent part:

State standards

(e) Nonroad engines or vehicles

(1) Prohibition on certain State standards

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter—

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives.

Subsection (b) shall not apply for purposes of this paragraph.

APPENDIX E

RELEVANT DICTIONARY DEFINITIONS

* * * * *

1. Webster's Third New International Dictionary 1581 (2002) provides, in pertinent part, the following definitions of "operation":

> **2**
>
> **b:** the quality or state of being functional or operative — usu. used with *in* or *into*
> < the plant has been in ~ for several weeks >
> < the new line will be put into ~ soon >
>
> **c:** method or manner of functioning
> < a machine of very simple ~ >
> < the ~ of circulation >
>
> **10:**
>
> the operating of or putting and maintaining in action of something (as a machine or an industry)
> < careful ~ of a motor car >
> < problems in the ~ of a railroad >

* * * * *

2. Black's Law Dictionary 1243 (4th ed. 1968) provides, in pertinent part, the following definition of "operate":

> This word, when used with relation to automobiles, signifies a personal act in working the mechanism of the automobile; that is, the driver operates the automobile for the owner, but the owner does not operate the automobile unless he drives it himself. Beard v. Clark, Tex.Civ.App. 83 S.W.2d 1023, 1025.