No. 20-994

# In the Supreme Court of the United States

VOLKSWAGEN GROUP OF AMERICA, INC., ET AL.,

*Petitioners*,

v.

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA, AND SALT LAKE COUNTY, UTAH,

*Respondents.*

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

## BRIEF FOR PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the Clean Air Act, 42 U.S.C. 7401 *et seq.*, preempts state and local governments from regulating manufacturers' post-sale, nationwide updates to vehicle emission software systems.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES (continued)

**Cases – continued** **Page(s)**



**Statute**

## TABLE OF AUTHORITIES (continued)

**Regulations and rules** **Page(s)**



**Other authorities**

**TABLE OF AUTHORITIES**
**(continued)**

**Other authorities – continued** **Page(s)**

## BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF THE *AMICI CURIAE*

*Amici* are the Product Liability Advisory Council, Inc. (PLAC) and the Motor & Equipment Manufacturers Association (MEMA).[1]

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] Those companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, on behalf of

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for all parties received notice of *amici*'s intention to file this brief at least 10 days before its due date and consented to the filing of this brief. Sup. Ct. R. 37.2(a).

[2] See https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

MEMA represents vehicle suppliers that manufacture and remanufacture components and systems for use in passenger vehicles and heavy trucks. Those suppliers provide original equipment to new vehicles and aftermarket parts used to service, maintain, and repair the over 275 million vehicles on the road today. MEMA's supplier members are the largest manufacturers in the United States. Together, they employ 907,000 Americans. And because of the economic activity that those members generate, they contribute to 4.26 million American jobs. MEMA regularly files briefs as *amicus curiae* to address matters important to the automotive industry.

The issue in this case is whether States and localities may prescribe or enforce rules for auto manufacturers' nationwide post-sale updates to vehicle emissions control software. In *amici*'s view, the answer is no. The Clean Air Act gives the EPA the exclusive authority to regulate post-sale vehicle emission system updates, and its express preemption provision bars States and their political subdivisions from setting or enforcing their own regulatory standards. Even without the Act's express preemption provision, the Act impliedly preempts state and local regulation of post-sale updates because that regulation interferes with the Act's objective of creating a comprehensive, uniform scheme for regulating vehicle emissions.

The Ninth Circuit's decision will invite a patchwork of state and local regulations that will harm members of the auto industry and ultimately consumers. *Amici* urge this Court to grant review to confirm

that the federal government has the exclusive authority to regulate fleet-wide vehicle emissions.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Auto manufacturers regularly make updates to the software in their vehicles after the vehicles are sold to consumers. Those updates are needed to ensure that vehicles continue to perform as designed and to resolve issues that arise as the manufacturer produces more vehicles. Here, petitioner Volkswagen Group of America, Inc. (Volkswagen) installed in its vehicles, and then updated, software designed to reduce emissions controls outside of emissions testing. The use of that software to defeat federal emissions regulations violated federal law; Volkswagen acknowledged its wrongdoing and paid significant amounts to the federal government and to consumers in a nationwide class action.

But the Ninth Circuit took it a step further. It held that respondents – an environmental protection commission of a Florida county, and a Utah county – also can regulate auto manufacturers' post-sale updates to vehicle emissions control software. That was despite the express terms of the Clean Air Act, which give that authority exclusively to the federal Environmental Protection Agency (EPA). The court of appeals thus allowed respondents to proceed with a lawsuit against Volkswagen and its parts supplier, petitioner Robert Bosch LLC (Bosch). The Ninth Circuit's decision warrants this Court's review.

The question presented is important. The Ninth Circuit's decision invites state and local scrutiny of the millions of instances each year in which manufacturers provide post-sale updates to vehicle emission

control systems. Manufacturers do that to ensure that the software in their vehicles stays up to date even after the vehicles are sold, to keep the vehicles in optimal working condition. Under the court of appeals' decision, any one of those commonplace software updates potentially could be the basis for liability under state or local law. The potential liability from public and private lawsuits is enormous.

The Ninth Circuit's decision is wrong. Federal law preempts all state and local efforts to regulate nationwide post-sale updates to vehicle emission systems. The plain language of the Clean Air Act expressly precludes state and local governments from attempting to enforce against manufacturers any standard related to emission systems. The court of appeals failed to give effect to the Act's broad language, and it drew an unwarranted distinction between pre-sale and post-sale system updates. Even without the express preemption provision, state and local authorities' attempts to set or enforce standards for those software updates are impliedly preempted by federal law, because they interfere with the uniform federal regime for regulating fleet-wide emissions.

If left uncorrected, the Ninth Circuit's decision would result in an unworkable patchwork of regulations. One predictable consequence of the court of appeals' decision would be many additional lawsuits – public and private – that would increase costs with no corresponding benefit. Further, even the largest manufacturers and auto parts suppliers would struggle to comply with the patchwork of state and local regulations. Consumers ultimately would pay for this new regulatory regime – in the form of higher prices for their vehicles and in less industry innovation in post-sale updates.

## ARGUMENT

The Ninth Circuit's decision represents a significant departure from over 50 years of federal regulation of fleet-wide vehicle emissions. If left unchecked, it would provide a roadmap for any number of state and local governments to start adopting disparate rules for vehicle emissions, contrary to the comprehensive federal regime. That, in turn, would lead to more and more litigation, and would impose massive costs on the automotive industry and on consumers. This Court's intervention is sorely needed.

### I. The Question Presented Is Important

The court of appeals' decision implicates enormous potential liability because of the sheer number of updates that manufacturers make to vehicles after they are sold. Although the Ninth Circuit assumed that post-sale updates to vehicle emissions software are "rare," Pet. App. 45a, they in fact happen all the time.

Manufacturers apply post-sale software updates to millions of light-vehicle emission systems each year. *See* EPA, *2014-2017 Vehicle Engine Compliance Activities Progress Report*, at 7 (Apr. 2019), https://perma.cc/5HKD-JKG4. In the period from 2014 to 2017, manufacturers applied updates to a total of 24 million vehicle emission systems. *Ibid.* It is the norm, not the exception, for manufacturers to offer post-sale updates on their vehicles, including to vehicle emission systems.

Those millions of updates affect millions of vehicles in every part of the United States. In 2019, for instance, there were over 275 million vehicles registered in the United States. See Statista, *Number of Motor Vehicles Registered in the United States from*

*1990 to 2019* (Nov. 2020), https://perma.cc/N9YJ-VWU7. Over thirty States each have more than one million registered vehicles. Statista, *U.S. Automobile Registrations in 2018, by State* (Dec. 2019), https://perma.cc/6UFW-VE7L.

Post-sale updates generally benefit consumers. Manufacturers use post-sale updates to keep vehicles in top working condition and to ensure that vehicles continue to meet federal regulatory requirements. See, *e.g.*, John R. Quain, *With Benefits – and Risks – Software Updates Are Coming to the Car*, Digital Trends (Oct. 29, 2018) (Quain, *Benefits*), https://perma.cc/LVE6-VL5W; see also Pet. App. 38a ("The [Clean Air Act] requires manufacturers to ensure that their vehicles' emission control system remains functional for at least 10 years or 100,000 miles.") (discussing 42 U.S.C. 7521(a)(1), (d)). Those updates extend the life of vehicles by making sure that vehicles perform as designed and take advantage of technological advances. See, *e.g.*, Quain, *Benefits*. The factual circumstance in this case, where updates were used to attempt to evade federal emissions requirements, is not typical.

Under the Ninth Circuit's rule, routine vehicle emissions updates could be the basis for both public and private lawsuits. A state or local government easily could take a different view from the EPA of how emissions should be regulated and what tradeoffs should be made. Then when a manufacturer updates its emission system software to comply with the federal rules, the state or local government could file suit under its own regulations. Further, once the government has sued or taken enforcement action, private follow-on lawsuits (under products liability or other laws) inevitably would follow.

The potential liability is enormous. In this case, respondents brought suit under state and local anti-tampering laws authorizing penalties of up to $5,000 per offense – with each day after the update counting as its own separate offense, multiplied by all of the vehicles that received the update. Pet. App. 53a-54a. On that basis, respondents sought to impose penalties of $11.2 *billion* a year. And that is for one lawsuit, filed by just two counties, involving only 6,100 vehicles.

If additional government entities and private plaintiffs filed similar suits, the liability easily could grow to trillions of dollars. And there is no reason to believe that lawsuits would be limited to the atypical facts of this case. Although this case involved evasion of EPA emissions requirements, once state and local governments are able to regulate manufacturers' updates affecting vehicle emissions, they (or enterprising plaintiffs) could bring suit to enforce their own disparate requirements. The potential liability is enormous.

The court of appeals' opinion thus hangs a cloud of liability over the automotive industry. That industry is a major part of the U.S. economy. See Kim Hill et al., *Contribution of the Auto Industry to the Economies of All Fifty States and the United States* 3, Center for Automotive Research (Jan. 2015) (Hill, *Auto Industry*) ("[The auto industry] historically has contributed 3.0 – 3.5 percent to the overall Gross Domestic Product (GDP)."), https://perma.cc/TXT3-7NNU. Over 4 million Americans work directly for the industry. See U.S. Bureau of Labor Statistics, *Automotive Industry: Employment, Earnings, and Hours* (Feb. 11, 2021), https://perma.cc/37Q3-9HZU. And the auto industry as a whole indirectly supports over 7 million

private-sector jobs. See Hill, *Auto Industry*, at 1, 3. The Court's review is needed to ensure regulatory certainty for this vital industry.

## II. The Decision Below Is Wrong

The exclusive federal authority to impose standards on manufacturers related to vehicle emission systems is clear and longstanding. The Clean Air Act's broad preemptive scope is set out in its text, and state and local regulation of vehicle emissions software updates plainly interferes with the objectives of the Act.

### A. The Clean Air Act Expressly Preempts State And Local Regulation Of Post-Sale Emission System Updates

This is a classic case of express preemption. The Clean Air Act's preemption clause is broad and unambiguous: "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." 42 U.S.C. 7543(a).

That provision applies expansively to any state or local government that "adopt[s]" or "attempt[s] to enforce" *any* vehicle emissions standard, whether the standard is the same as the EPA's standard or different from the EPA's standard. 42 U.S.C. 7543(a); see, *e.g.*, *Sims* v. *Florida Dept. of Hwy. Safety & Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989) (holding that Section 7543(a) bars States' attempts to enforce any emissions standards against manufacturers, even federal standards). Further, the "relating to" language encompasses not only standards specifying permissible vehicle emissions, but also standards regarding software updates that are "related to" vehicle emissions. See, *e.g.*, *Morales* v. *Trans World Airlines,*

*Inc.*, 504 U.S. 374, 383 (1992) ("related to" "express[es] a broad pre-emptive purpose"). Accordingly, respondents' attempts to enforce state and local standards regarding vehicle emission system updates fall within the text of Section 7543(a).

In the face of that broad plain language, the court of appeals drew a line between software updates made before vehicles are sold and those made after vehicles are sold. See Pet. App. 24a-25a. The court focused on the language "new motor vehicle" in Section 7543(a), explaining that a "new motor vehicle" is a "pre-sale vehicle." *Id.* at 24a (citing 42 U.S.C. 7550(3)). The problem with that approach is that it ignores the broad "relating to" language. Standards about post-sale updates to new vehicles after they have been sold "*relate[] to* the control of emissions from new motor vehicles," because they update the emission control systems in those new vehicles. See *Morales*, 504 U.S. at 383 ("relate to" means "concern") (internal quotation marks omitted); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) ("relate to" means "has a connection with").

The statute does not limit federal preemption to standards "for" new vehicles; it applies to any standards "relating to" new vehicles. The court of appeals' rule would make no sense, because it would permit States and local governments to begin regulating federal emissions the moment the vehicle is sold, even though (as explained below) federal law gives the EPA exclusive authority over vehicle emission systems.

The "new motor vehicle" language was not intended to permit all States and localities to regulate manufacturers the moment their vehicles have been sold. Indeed, the EPA has long recognized that post-

sale state regulation of vehicle emission control systems is preempted if it "relat[es] back to the original design" by the manufacturer. 59 Fed. Reg. 31,306, 31,313 (Jun. 17, 1994) (discussing *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972)). Here, the state and local regulation at issue plainly relates to the original vehicle emission system, because it updates that system's software. Manufacturers apply updates to vehicle computer systems to ensure that vehicles continue to perform as designed and to keep the vehicles in sound working condition. The court of appeals' exceedingly narrow reading of the Act's express preemption provision cannot be squared with its language or with common sense.

In addition to narrowly reading the Clean Air Act's preemption clause, the court of appeals took a very broad reading of the Act's savings clause. Pet. App. 24a-25a, 32a-35a. According to the court, that clause "appears to give states substantial authority to enforce standards related to post-sale vehicles." *Id.* at 33a. But that clause says nothing about post-sale vehicles or enforcing emissions standards against manufacturers. Rather, it provides that States and their political subdivisions retain any *existing* rights "otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. 7543(d). That language was designed to permit state regulation at the individual-vehicle level, such as state licensing and registration requirements (including emissions inspections) and local traffic-control measures. It does not give States and localities some new power to set or enforce post-sale vehicle emissions requirements.

### B. The Clean Air Act Impliedly Preempts State And Local Regulation Of Post-Sale Emission System Updates

More broadly, state and local regulation of post-sale emission system updates is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted).

1. In its implied preemption analysis, the court of appeals erred at the outset by applying a presumption against preemption. The court took the view that it should presume that States and local governments have the authority to regulate fleet-wide vehicle emissions unless Congress very clearly specified otherwise. Pet. App. 33a-36a. To support that view, the court relied on "the presumption that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Id.* at 32a (citation omitted). The court had it exactly backward.

Regulation of fleet-wide vehicle emissions is not a part of the historic police powers of the States. To the contrary: Regulation of mobile source emissions has been entrusted exclusively to the federal EPA for over 50 years. See Pet. App. 62a. States had not historically exercised that authority for fleet-wide vehicle emissions; at the time Congress enacted the Clean Air Act, only one State (California) "had adopted [vehicle] emissions control standards." *Engine Mfrs. Ass'n* v.

*EPA,* 88 F.3d 1075, 1079 n.9 (D.C. Cir. 1996); see, *e.g.*, S. Rep. No. 403, 90th Cong., 1st Sess. 32-33 (1967).[3]

Then in the Clean Air Act, Congress made clear that regulation of mobile source emissions is exclusively the province of the federal government. As a result, it is now well-settled that the authority to regulate motor vehicle emissions is "lodged in the Federal Government." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). In light of the lack of state regulation and the longstanding federal regulation of vehicle emissions, no presumption against preemption applies. See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89, 90 (2000).[4]

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[3] The Clean Air Act accounts for that practice; it gives California a waiver to adopt and enforce its own "standards relating to control of emissions from new motor vehicles." 42 U.S.C. 7543(b). The Act does not include that language for any other State.

[4] There is a serious question whether the presumption against preemption ever applies in the conflict or obstacle preemption context. The Supreme Court set out the presumption against preemption in a *field* preemption decision. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (expressing for the first time the notion that in "a field which the States have traditionally occupied," courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). The presumption makes sense in the field preemption context, because Congress presumably is aware of the States' historic powers within certain fields, and courts should not lightly assume that Congress has precluded States from regulating in those fields. The presumption makes less sense in a conflict or obstacle preemption case, where the court should focus on the nature of the conflict or obstacle presented by the particular state or local law at issue. See, *e.g.*, *Mutual Pharm. Co.* v. *Bartlett*, 570 U.S. 472, 483-487 (2013); *Geier,* 529 U.S. at 881-882.

2. More broadly, the court of appeals failed to recognize that permitting state and local regulation of manufacturers regarding motor vehicle emissions would frustrate the purposes and objectives of the Clean Air Act.

Congress's primary purpose in enacting the Clean Air Act was to regulate emissions nationwide. Maintaining uniform federal control of vehicle emissions requirements is a key feature of the Act. That is because motor vehicles "readily move across state boundaries," and their emissions are not confined to one State. *Engine Mfrs. Ass'n*, 88 F.3d at 1079. An automobile manufactured in Michigan might be sold in Virginia, then be taken by its owner to Texas, and so on. If all States were allowed to set their own vehicle emissions standards, that would "defeat the congressional purpose" in the Clean Air Act of "preventing obstruction to interstate commerce." *Id.* at 1083 (quoting *Allway*, 340 F. Supp. at 1124).

Congress therefore authorized only the federal government to regulate "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines" that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). The EPA's authority under the Act extends to ensuring that manufacturers' vehicles remain in compliance with federal emissions standards for a vehicle's "useful life." 42 U.S.C. 7521(a)(1). For example, the agency requires manufacturers to satisfy "in-use verification testing requirements." 40 C.F.R. 86.1845-04. If the testing shows that a manufacturers' class of vehicles does not conform to federal emissions requirements, the EPA can order a recall. 42

U.S.C. 7541(c)(1). Similarly, manufacturers must report to the EPA any emissions-related defects that affect 25 or more vehicles in a model year. 40 C.F.R. 85.1903(a). In all events, the focus is on ensuring that manufacturers' fleets remain in compliance with federal emissions regulations.

The Act prescribes only a very limited role for state regulation that touches on vehicle emissions. As the district court explained, that regulation "operate[s] on an individual vehicle basis." Pet. App. 71a. For example, the Act permits States to have emissions inspection programs as part of their vehicle registration requirements. See 42 U.S.C. 7511, 7511a, 7541, 7543. But the Act prohibits States from requiring manufacturers to conduct those tests. See 42 U.S.C. 7541(h)(2). Further, the Act expressly bars States and localities from attempting to "adopt" or "enforce" any "standard" related to vehicle emissions. 42 U.S.C. 7543(a). Nowhere does the Act bestow upon States or localities a broad authority to impose emissions-related liability on manufacturers for their fleets. Instead, the Act specifies the opposite.

To be sure, the Clean Air Act gives States some authority to regulate *other* emissions. For example, States have "initial and primary" authority for addressing emissions from stationary sources, meaning buildings and other stationary structures that emit air pollution. *Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 470 (2001); see 42 U.S.C. 7411(a)(3) (defining stationary sources). But although Congress has permitted state regulation of stationary sources of emissions, "the regulation of mobile source emissions is a federal responsibility." *Jensen Family Farms, Inc.* v. *Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 938 (9th Cir. 2011).

The Act requires the EPA to make complicated decisions about when and how to regulate vehicle emissions. In that role, the EPA often must make decisions about the levels of emissions allowed, including making tradeoffs between different emissions, and balancing the effects on manufacturers and on the public. See, *e.g.*, 42 U.S.C. 7521(a)(1) (authorizing EPA to use its "judgment" in regulating emissions); 42 U.S.C. 7521(a)(4)(B) (charging the EPA to balance several factors when fashioning rules, including the extent to which a device or system "increases, reduces, or eliminates emissions," any "available methods for reducing or eliminating any risk to public health [or] welfare," and the availability of alternative devices that might better "conform to requirements"). The EPA considers all of the facts and draws upon its vast experience to put in place rules that it believes workable and beneficial to consumers and the public.

Congress entrusted those decisions to the EPA. Permitting state and local regulation of vehicle emissions would directly interfere with Congress's decision to give the EPA exclusive authority in this area. Some state and local regulators no doubt would strike a different balance than the EPA did, and that would eviscerate the uniform nationwide system of emissions regulation intended under the Act. The state and local regulation here thus is preempted because it obstructs Congress's purposes and objectives in the Clean Air Act.

## III. If Left Uncorrected, The Decision Below Would Create An Unworkable Patchwork Of Regulations And Ultimately Would Harm Consumers

### A. The Court Of Appeals' Decision Would Create A Patchwork of Emissions Regulations

The court of appeals' decision opens the door to state and local regulation of post-sale manufacturer updates to vehicle emission systems. For decades, the federal government has exclusively regulated vehicle emission systems. Congress gave the EPA that authority in the Clean Air Act in part because it understood that a different regime would be unworkable. Specifically, Congress "assert[ed] federal control in this area" because the "possibility of 50 different state regulatory regimes raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Engine Mfrs. Ass'n*, 88 F.3d at 1079 (internal quotation and citation omitted).

Even if state and local governments merely sought to enforce federal standards, as opposed to formulating their own standards, it "would be difficult for the industry" to comply because "different administration could easily lead to different answers to identical questions." H.R. Rep. No. 728, 90th Cong., 1st Sess. 2 (1967). So Congress vested authority over vehicle emissions in the EPA.

Under the Ninth Circuit's decision, state and local governments would be free to regulate post-sale vehicle emissions software updates. As a result, if the EPA puts in place a new emissions standard, and a manufacturer pushes a software update to all of its

vehicles to comply with that standard, it could be held liable under state and local laws. Any of the 50 States or thousands of counties in the United States could start regulating post-sale updates to emissions software. What might be perfectly acceptable under Nebraska law could be a violation under Kansas law. The prospect of so many different regulatory regimes, and the predictable chaos that would follow, is precisely why "[t]wo years after authorizing federal emissions regulations, * * * Congress preempted the states from adopting their own emissions standards." *Engine Mfrs. Ass'n*, 88 F.3d at 1079.

State and local governments may wish to adopt their own regulatory regimes for any number of reasons. Some may believe that federal emissions standards are too lax; some may believe those same standards are too tough. Some may view regulation as a potential source of revenue. Under the Ninth Circuit's decision, any state or local government potentially could adopt its own regulatory regime. See *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) ("To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations."). If even some state and local governments adopt their own regulations in this area, it will impose massive costs on the industry and ultimately will harm consumers.

### B. The Court Of Appeals' Decision Would Encourage Expensive And Needless Litigation

One predictable response to the court of appeals' decision will be a flood of lawsuits – from States and

localities as well as from private parties. Under the court of appeals' decision, States and local governments not only could adopt new rules for post-sale emissions software updates, but they also could enforce those rules through litigation. That is exactly what happened here: Even though the EPA addressed petitioners' conduct and negotiated a substantial financial settlement, respondents sued based on the same conduct under their own anti-tampering laws. They sought enormous amounts of money in penalties – billions of dollars. Pet. App. 78a. The Ninth Circuit recognized that this is "staggering liability." *Id.* at 45a.

Those lawsuits are just the starting point. Once the door has been opened, additional state and local litigation no doubt would follow. Indeed, one respondent already has filed another lawsuit based on post-sale software updates against Daimler and Bosch. See *Environmental Prot. Comm'n of Hillsborough Cty.* v. *Mercedes-Benz USA, LLC*, No. 20-cv-2238 (M.D. Fla. Sept. 25, 2020).

Further, once a state or local government sued or took enforcement action, private follow-on lawsuits inevitably would follow. That is because if each software update in each vehicle is a violation, the potential liability is enormous. And bringing a me-too suit would be easy to do if a state or local government already had taken some enforcement action against an auto manufacturer.

Those suits could be premised on any number of existing state or local laws. Options include anti-tampering laws, unfair or deceptive trade practices laws, products liability laws, and the common law of negligence. Most States have anti-tampering laws on the books that could be the basis for public lawsuits. See

Pet. App. 33a n.19. Respondent Salt Lake County's claims in this case show how easily that could be done. In addition to its anti-tampering claim, Salt Lake County sued petitioners for common law fraud, common law nuisance, and violation of Utah's Pattern of Unlawful Activity Act. See *id.* at 54a. There is no shortage of state statutes and common law causes of action that creative counsel could employ.

Given the number of vehicles on the road and the frequency of post-sale emission system updates, it would be only a matter of time before enterprising States, localities, and class action plaintiffs would target other manufacturers and auto part suppliers for suit. That incredibly expensive litigation would have little public benefit. Federal law already comprehensively regulates motor vehicle emissions. All the additional regulation would do is create confusion and increase costs for manufacturers that ultimately would be passed on to consumers.

### C. The Court Of Appeals' Decision Would Dramatically Raise Costs For Manufacturers

It would be difficult, if not impossible, for manufacturers to comply with a new patchwork regulatory regime for post-sale updates to vehicle emission systems. Manufacturers sell their vehicles nationwide, and vehicles often do not remain in the State of sale. If every State and county were free to establish its own rules for vehicle emissions software updates, manufacturers would have to comply with each of them before making any vehicle update. That might even require state-specific updates to a vehicle when the owner changes the place of registration, creating yet another new requirement for manufacturers. Given the millions of updates per year across the

country, that would be a tremendous burden. *E.g.*, EPA, *2014-2017 Vehicle Engine Compliance Activities Progress Report* 7. In fact, it may be an "insurmountable task" to comply with that "patchwork" of different requirements. *New Mexico* v. *Mescalero Apache Tr.*, 462 U.S. 324, 339-340 (1983).

Even if it were logistically feasible for large manufacturers and auto parts suppliers to navigate such a system, it would come at great cost. For example, suppose a manufacturer wanted to ensure compliance with state and local emissions regulations in advance of making a software update, so as to not risk massive liability. That would require significant work by both the company's in-house legal team and its technical team. It would take a great deal of coordination, not only for the company but also for the relevant government officials, to ensure regulatory compliance with a variety of different, potentially conflicting rules.

Further, if a manufacturer attempts to ensure compliance, it still could be risking significant liability with each software update. That uncertainty could lead the manufacturer to make only absolutely necessary updates, and to forego those that improve the vehicle's performance or employ new technologies. See, *e.g.*, *Caplinger* v. *Medtronic, Inc.*, 784 F.3d 1335, 1346 (10th Cir. 2015) (Gorsuch, J.) (observing that unpredictable liability might cause manufacturers to "delay or abandon at least some number of * * * innovations").

Some of the scarce resources that manufacturers could have spent on continuing to research and develop new post-sale updates instead would be spent on attempting to comply with state and local emissions regulations. Auto manufacturers do not have limitless resources; the auto industry is cyclical and has

high overhead costs. See, *e.g.*, Bill Vlasic and Nick Bunkley, *Obama Is Upbeat for GM's Future*, N.Y. Times (Jun. 1, 2009), https://perma.cc/8PB8-2SBF. The auto parts supply business, too, has long operated on "small profit margins." *Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874, 882 (7th Cir. 1965). Given finite resources, a substantial increase in the cost and complexity of regulatory compliance would come at the expense of research and development efforts.

### D. The Court Of Appeals' Decision Ultimately Would Harm Consumers

The end result would be that consumers lose out. First, some of the increased compliance costs on manufacturers and auto parts suppliers ultimately would fall on consumers. Just as manufacturer savings in the automotive industry lead to lower consumer prices, see, *e.g.*, *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1352 n.11 (D.C. Cir. 1985), additional manufacturer expenditures would lead to higher prices. Adding hundreds or thousands of new state and local regulations necessarily would increase those passed-on costs.

The court of appeals' decision would impose costs on consumers in other ways, too. A patchwork vehicle-emissions regulatory regime could, for example, negatively impact the value of customers' vehicles. Americans move from jurisdiction to jurisdiction, and take their vehicles with them. See *Engine Mfrs. Ass'n*, 88 F.3d at 1079 (Vehicles "readily move across state boundaries."). A vehicle might comply with the emissions regulations in one State and not in another. Consumers who move to States or localities with stricter emissions regulations might be surprised to learn that the value of their vehicles has decreased substantially. And if States and localities were free to

set their own emissions standards on entire fleets of vehicles, consumers who move to new jurisdictions may not be able to register their vehicles there at all.

More fundamentally, consumers could lose the benefit of receiving many post-sale emissions software updates. Remote software updates have become more frequent in recent years. See, *e.g.*, Quain, *Benefits*. That has "the potential to make software-based recall repairs more convenient, quick and comprehensive for car owners." Doug Newcomb, *The Upsides and Downside of Over-the-Air Software Updates for Automobile Dealers*, WardsAuto (Nov. 6, 2020), https://perma.cc/ZH8F-XASG. Indeed, necessary functions like "recalls and updates of critical safety systems" now often can be accomplished through remote updates – delivered wirelessly to vehicles through cellular or WiFi connections – without "requir[ing] customers to bring their vehicles to a dealership's service department." *Ibid.*

Auto manufacturers have begun rolling out new and innovative features through those post-sale software updates. Just last year, for example, BMW released a remote update that, among other things, added an emissions functionality to its hybrid vehicles that "automatically switches to pure electric drive mode" when in designated green areas. Press Release, BMW Group, *BMW Group Rolls Out Biggest Remote Software Upgrade In Company History* (Oct. 16, 2020), https://perma.cc/4J8B-78NN. That provides vehicle owners greater automated efficiency and provides the public the benefit of vehicles emitting fewer pollutants in dense urban areas. *Ibid.*

The threat of state and local regulation would jeopardize continued use of post-sale software updates and continued innovation in this field. Ultimately,

fewer post-sale software updates means fewer cars on the road maintained in optimal condition. The average vehicle on the road today is nearly 12 years old. See U.S. Dep't of Transportation, *Bureau of Transportation Statistics*, https://perma.cc/RVV9-QEWM. And many consumers do not bring their vehicles in for regular maintenance. As a result, only about two thirds of recalled cars ever get repaired – "even after owners have been sent multiple notices." Quain, *Benefits*; *accord* Congressional Research Service, *Motor Vehicle Safety: Issues for Congress* 16 (Jan. 26, 2021), https://perma.cc/GC8Q-PTBU.

Given those practical realities, post-sale software updates are vital for consumers to get the most out of their vehicles. Further industry innovation in remote updates "could eliminate many of these compliance problems" (and save consumers money) by allowing remote repair of vehicle electronic systems. Quain, *Benefits*. To continue to develop this field to its full potential, manufacturers need to know that they are not inviting lawsuits every time they send out a software update to vehicles.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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