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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

During recalls and routine maintenance on cars driven in respondents' counties, petitioners (collectively, "Volkswagen") installed software that illegally tampered with the cars' emissions-control systems. Volkswagen did not disclose these defeat devices to the Environmental Protection Agency for the obvious reason that EPA never would have approved them. After Volkswagen got caught, respondents (the "Counties") sued them for tampering. Volkswagen moved to dismiss based on preemption under the Clean Air Act (the "Act").

The Act recognizes that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3). It carves out limited areas of exclusive federal control—like enforcing "any standard relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a)—but otherwise provides that "nothing in this chapter shall preclude or deny the right of any State or political subdivision" to enforce "any standard" or "requirement." 42 U.S.C. 7416; see also 42 U.S.C. 7543(d) (preserving local authority over "the use, operation, or movement of" cars).

The Ninth Circuit rejected Volkswagen's preemption defense. It expressly grounded its conclusion on Volkswagen's "unusual" and "aberrant" misconduct, namely, "intentionally tamper[ing] * * * to deceive the regulators." Pet. App. 3a-4a.

The question presented is:

Whether the Clean Air Act preempts states and local governments from penalizing car manufacturers for tampering with emissions systems on post-sale, in-use vehicles, where EPA did not approve the manufacturers' actions.

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INTRODUCTION

Volkswagen devotes most of its pitch for certiorari to a question the Ninth Circuit didn't decide. The thrust of its argument is that states and local governments cannot be allowed to penalize EPA-approved conduct or "impose conflicting regulation[s] on manufacturers." Pet. 4. Maybe so, but that has nothing to do with this case. The Counties do not seek to penalize anything EPA approved because Volkswagen "deceive[d]" EPA and evaded the very regulatory approval process it invokes. Pet. App. 3a-4a. There are no conflicting regulations because the Counties' anti-tampering rules prohibit "exactly what" the Act

forbids. *Id.* at 37a n.22. Those critical facts form the express foundation of the Ninth Circuit's analysis. Volkswagen's specter of regulatory anarchy therefore depends on a legal and factual scenario that the Ninth Circuit neither addressed nor resolved.

The Ninth Circuit's actual holding is unremarkable legally and practically. It represents a "straightforward application" of well-settled preemption principles to Volkswagen's "unexpected and aberrant conduct." Pet. App. 3a-4a, 45a-46a. In short: the Act expressly preserves state and local authority over post-sale cars, and the Counties' claims do not interfere with a regulatory process that Volkswagen deliberately bypassed.

That narrow decision does not warrant further review. It is so obviously uncertworthy—Volkswagen's own *amici* admit the facts are "not typical" (Product Liability Advisory Council Br. 6)—that Volkswagen tries to litigate a wholly distinct preemption case, one where EPA did approve the post-sale modification and a state or locality rejected that judgment. Volkswagen indeed flat-out mischaracterizes the court's decision, wrongly claiming that the court called post-sale recalls "rare." Pet. 5, 18. The Ninth Circuit called Volkswagen's *misconduct* rare, and that misconduct is what the Counties may penalize without interfering with the Act. Pet. App. 2a-4a, 45a.

Volkswagen resorts to speculating that other localities "could potentially penalize even modifications that EPA already *approved*." Pet. 31 (emphasis in original); see, *e.g.*, *id.* at 19. The best Volkswagen can find are one page in another state's brief (which it grossly misrepresents, *infra* pp. 19-20) and one county's lawsuit (which it misunderstands, *infra* pp. 20-21). Regardless, the fact that other, distinguishable cases could present harder preemption questions provides no reason to review this decision. Far from it, those other cases support denying certiorari to let

the issue percolate. Should a court somewhere sometime hold that states can forbid what EPA has permitted, this Court can review that decision. The Ninth Circuit, however, addressed an entirely different question that carries no consequences for a post-sale, EPA-approved change.

Any split on the issue the Ninth Circuit actually decided is similarly insignificant. All the decisions comprising the split involve Volkswagen, so those cases have no bearing on typical post-sale updates. Any divergence in outcome thus matters only to Volkswagen or another manufacturer who intends to evade EPA's approval process.

And Volkswagen overstates the conflict even on that limited question. Indeed, every appellate court Volkswagen cites rejected its primary argument of express preemption. And on obstacle preemption, the "split" is shallow and likely to resolve itself. Two of the three state-court cases are unpublished decisions from intermediate courts, and all three rested heavily on the district court's now-reversed analysis here. That sparse caselaw confirms the propriety of additional percolation.

In truth, the petition is little more than a veiled request for error correction, which is no basis for certiorari at all. Regardless, the Ninth Circuit correctly decided the narrow issue before it. On express preemption, like every other appellate court, the court properly refused to rewrite a clear statute to protect manufacturers in a way Congress did not contemplate. On obstacle preemption, it properly refused to "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.'" Pet. App. 4a (citation omitted). The petition should be denied.

STATUTORY PROVISIONS INVOLVED

In addition to provisions reproduced in the petition appendix, the Clean Air Act includes the following pertinent provisions.

42 U.S.C. 7401(a) provides, in relevant part:

(a) Findings

The Congress finds—

* * *

> (2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation; [and]
>
> (3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments * * * .

42 U.S.C. 7416 provides:

Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of

air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. 7541(a)(2) provides:

In the case of a motor vehicle part or motor vehicle engine part, the manufacturer or rebuilder of such part may certify that use of such part will not result in a failure of the vehicle or engine to comply with emission standards promulgated under section 7521 of this title. Such certification shall be made only under such regulations as may be promulgated by the Administrator to carry out the purposes of subsection (b). The Administrator shall promulgate such regulations no later than two years following August 7, 1977.

42 U.S.C. 7543(c) provides:

(c) Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b).

42 U.S.C. 7550(3) provides, in relevant part:

As used in this part—

* * *

Except with respect to vehicles or engines imported or offered for importation, the term "new motor vehicle" means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser * * *.

STATEMENT

A. Statutory Background

1. "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co.* v. *City of Detroit, Mich.*, 362 U.S. 440, 442 (1960). When Congress enacted the Clean Air Act "to protect and enhance the quality of the Nation's air resources" (42 U.S.C. 7401(b)(1)), it likewise recognized that controlling pollution remains "the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3); see, *e.g.*, 42 U.S.C. 7401(a)(2), (4), (b)(3), (c); *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 n.2 (2004) (Souter, J., dissenting) (explaining history of Section 7401).

The Act's substantive provisions reflect that shared federal-state authority. They preserve state and local primacy in most areas, while vesting the federal government with exclusive authority over particular issues. For instance, in a provision titled "Retention of State authority," Congress instructed that, "[e]xcept as otherwise provided in" several express preemption provisions, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any

standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. 7416. And 42 U.S.C. 7604 reinforces that "States[] and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights." *Washington* v. *Gen. Motors Corp.*, 406 U.S. 109, 115 n.4 (1972) (citing 42 U.S.C. 1857h-2 (recodified as 42 U.S.C. 7604)).

2. The Act's treatment of motor vehicles hews to that line. The Act imposes emissions standards for new motor vehicles. See 42 U.S.C. 7521. A "new motor vehicle" is "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. 7550(3). To prevent "an anarchic patchwork of federal and state regulatory programs," Congress added an express preemption provision. *Motor & Equipment Mfrs. Ass'n, Inc.* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979). That provision prohibits states from regulating emissions from *new* motor vehicles: "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). And EPA has opined that a state could not apply an emissions standard "as soon as [the cars] are introduced into commerce," for that would "effectively" regulate "the design of new engines." 59 Fed. Reg. 36969, 36973, 36974 (July 20, 1994).

Other express preemption provisions explicitly excuse "manufacturers" from certain state and local regulation. See 42 U.S.C. 7541(h), 7543(c) (referencing 42 U.S.C. 7541(a)(2)). Volkswagen does not argue that those provisions expressly preempt state and local anti-tampering laws.

The Act also includes a non-preemption provision regarding in-use vehicles. Echoing Section 7416, Section 7543(d) 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."

As the Ninth Circuit discussed, EPA also wields some authority over in-use cars. The Act and EPA's regulations include provisions regarding the "useful life" of a vehicle and recall procedures to fix defects. See, *e.g.*, Pet. App. 25a-26a; 42 U.S.C. 7521(d), 7541; 40 C.F.R. 86.1845-04. The software defeat devices that Volkswagen installed here did not receive approval through those recall procedures. *E.g.*, Pet. App. 8a-9a; C.A. E.R. 51-53.

There is also undeniable overlap regarding anti-tampering laws. The Act forbids "any person to remove or render inoperative" any part of an emissions-control system, and forbids "any person * * * to bypass, defeat, or render inoperative" an emissions-control system. 42 U.S.C. 7522(a)(3)(A), (B). It imposes monetary penalties for violating those prohibitions. 42 U.S.C 7524(a).

Most states have also enacted anti-tampering laws. Pet. App. 33a & n.19. EPA has approved state anti-tampering laws with the same scope as the Counties', and it has disapproved state anti-tampering laws for being less stringent than the federal anti-tampering rule. See, *e.g.*, 50 Fed. Reg. 30960, 30961-30962 (July 31, 1985) (approving Indiana law that "prohibits any person" from tampering and imposes up to a $2,500 penalty); 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998) (disapproving anti-tampering law).

EPA has even encouraged states to adopt anti-tampering rules: "A State or local government is free to adopt and enforce an anti-tampering law on its own, if it feels

that such a law would contribute to reducing motor vehicle emissions." 51 Fed. Reg. 10198-01, 10206 (Mar. 25, 1986).

Accordingly, the basic division of authority under the Act is clear: "Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles." *Washington*, 406 U.S. at 115 n.4.

B. Facts And Procedural History

1. This case arises from Volkswagen's multi-year effort to avoid compliance with federal and state law and to deceive EPA to help its bottom line. Volkswagen tampered with new cars and post-sale, in-use cars. The Counties sued to impose penalties based on both types of tampering, but only the claims based on in-use cars are at issue here.

a. Volkswagen faced a dilemma. Effective 2007, it had to comply with new federal emissions standards. But satisfying those standards would hurt its cars' performance, making them less attractive to buyers. Rather than "mak[e] beneficial modifications to emission systems" (Pet. 4), Volkswagen decided to cheat the emissions tests. Pet. App. 6a.

Volkswagen installed software devices that could detect whether the vehicles were being tested or being driven on the road. *Id.* at 6a-7a. If they were undergoing testing ("dyno mode"), the devices caused the cars to operate in a way that would meet emissions limits. But if they were being driven ("street mode"), the software "reduced the effectiveness of the vehicle's emission control system" to produce emissions "up to 35 times higher than federal standards." *Id.* at 7a. Volkswagen did not disclose these devices to EPA.

Around 2012, drivers who had purchased these cars began reporting hardware failures. *Id.* at 8a. Volkswagen discovered that the software sometimes failed to detect

that the car was being driven on the road, so the car operated in compliance with emissions standards. That, in turn, "increase[d] stress on the exhaust system." *Ibid.*

Instead of either developing technology to maintain their vehicles' reliability while obeying the law or simply handling more warranty claims, Volkswagen decided it needed to cheat better. It developed two new software devices. One caused the car to start in dirty street mode. The other aimed to better detect when the car was undergoing an emissions test. *Ibid.* The software's fundamental purpose was to reduce the hardware failures caused by a compliant emissions system. See *ibid.*

Beginning in 2014, during voluntary recalls and routine maintenance, Volkswagen installed these new software defeat devices on cars that had already been sold and were being driven in the Counties. *Ibid.* Contrary to Volkswagen's assertion that EPA oversaw the software installations (Pet. 12), "Volkswagen deceptively told EPA regulators and American consumers that the software updates were intended to improve the operation of the" cars. Pet. App. 9a.[1]

EPA opened an investigation after an independent study showed that Volkswagen's vehicles were emitting pollutants above the federal limit. *Ibid.* Volkswagen continued to lie to EPA during this investigation, while also continuing to install the new software on in-use vehicles. C.A. E.R. 52-55.

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[1] Volkswagen asserts that the new software somehow *reduced* emissions. Pet. 12, 27. On the contrary, as the district court explained, "the post-sale software changes *increased* emissions." Pet. App. 65a. Volkswagen waived that determination by not challenging it before the Ninth Circuit. Cf. *id.* at 13a-14a. Regardless, Volkswagen's guilty plea confirms both courts' understanding of the facts. See *id.* at 8a-9a; C.A. E.R. 49-51.

Finally, in August 2016, a Volkswagen whistleblower revealed, "for the first time to U.S. regulators and in direct contravention of instructions from supervisors," that Volkswagen "had evaded emissions tests." *Id.* at 55; see Pet. App. 9a. Then a supervisor, "while creating the false impression that he had been unaware of the defeat device previously, admitted that VW had installed a defeat device." C.A. E.R. 55. Volkswagen eventually "disclosed the entire scheme." Pet. App. 9a.[2]

The upshot is that the Counties seek to penalize only Volkswagen's actions—installation of software defeat devices on used vehicles being driven in their jurisdictions—that EPA never approved.

b. EPA brought civil claims against Volkswagen and criminal claims against Volkswagen AG.

In the criminal action, Volkswagen AG pleaded guilty to multiple crimes and paid the United States a $2.8 billion fine. Pet. App. 9a. "The plea agreement did not give Volkswagen 'any protection against prosecution' from state or local governments." *Id.* at 9a-10a.

In the civil action, Volkswagen entered into three consent decrees to settle, among other claims, tampering violations under 42 U.S.C. 7522(a)(3). It agreed to pay a $1.45 billion penalty to resolve EPA's various civil claims. See D. Ct. Doc. 2758-1, at 8-9 (Jan. 11, 2017), https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement. It also paid $2.925 billion into a mitigation trust. Pet. App. 51a. "[E]ach state expressly reserved its right 'to seek fines or penalties' against Volkswagen in connection with being named a beneficiary of [the mitigation] trust." *Id.* at 10a n.10.

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[2] Volkswagen thus "quickly acknowledged its wrongdoing" (Pet. 12) only after its years of deception had been irrefutably exposed.

2. The Counties sued Volkswagen for tampering with the emissions systems on cars in their counties. Salt Lake County sued under a state anti-tampering regulation providing that "[n]o person shall remove or make inoperable the [emissions-control] system" except to install an "equally or more effective" control system. Utah Admin. Code R307-201-4. Hillsborough County invoked two county rules, 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 * * * defeat or render inoperable any component of a motor vehicle's emission control system." EPC Rules 1-8.05(1), (6); see Pet. App. 12a-13a. These provisions prohibit "exactly what the federal anti-tampering law prohibits." Pet. App. 37a n.22.

The district court held that the Clean Air Act preempted the Counties' claims and dismissed them on the pleadings. The court held that 42 U.S.C. 7543(a) expressly preempted the claims based on the software installed when manufacturing new cars. Pet. App. 61a-64a. Section 7543(a), however, did not preempt tampering claims based on the software installed on post-sale vehicles. The cars were already "in use within the Counties," so they were not "new." Pet. App. 65a. The court also rejected Volkswagen's argument that the software related back to the original design under *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120 (S.D.N.Y. 1972). See Pet. App. 66a-67a.

The court next held that obstacle preemption did apply. But rather than analyze whether the Act shows "the clear and manifest purpose of Congress" to supersede the Counties' traditional police power to regulate pollution, the court asked whether "state and local governments [were] given authority to supplement EPA's enforcement

authority." *Id.* at 72a. After discussing the Act's provisions for "useful life" testing, the court determined it was "sensible" to give EPA exclusive authority over "model-wide" emissions "at the manufacturer level." *Id.* at 73a. That outcome "best utilizes the comparative advantages of EPA and the states and local governments." *Ibid.*; see *id.* at 76a. The court also wrote that the Counties' actions could "undermine the congressional calibration of force for tampering by vehicle manufacturers." *Id.* at 78a. The court did not explain why that reasoning wouldn't apply equally to tampering by non-manufacturers.

3. The Ninth Circuit affirmed the district court's dismissal of the claims for tampering with new cars, but reversed on the claims for post-sale tampering.

The court first rejected express preemption. It explained that the text of the clause "'contains the best evidence of Congress' pre-emptive intent.'" Pet. App. 15a (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). The plain "terms" of Section 7543(a) govern "regulations 'relating to the control of emissions from *new* motor vehicles,'" whereas the Counties seek to penalize tampering with "post-sale vehicles." *Id.* at 30a (quoting 42 U.S.C. 7543(a)).

The court also applied the test that Volkswagen requested regarding the reach of that provision. See *id.* at 30a-31a. It noted Volkswagen's argument, based on *Allway Taxi*, that states and localities cannot escape Section 7543(a) by "impos[ing] a different emission standard the moment after title is transferred to a purchaser." Pet. App. 30a. The Counties' rules, however, "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." *Id.* at 31a.

The court further noted that Volkswagen's understanding would extend Section 7543(a)'s express preemption to "the local garage mechanic who disconnects vehicles' emission control devices to improve performance or gas mileage." *Ibid.*

Turning to implied preemption, the court rejected Volkswagen's argument that the anti-tampering claims "stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the Act. *Id.* at 32a (quoting *Oneok, Inc.* v. *Learjet, Inc.*, 575 U.S. 373, 377 (2015)). Viewing Section 7543's preemption and saving clauses together, the court found that Congress did not intend to supersede states' historic police power to regulate tampering with post-sale vehicles. *Id.* at 32a-36a. That conclusion was supported by the fact that "many" state anti-tampering laws "existed during the period in which Congress amended the CAA without making any changes to the preservation of state authority." *Id.* at 33a-34a.

The court then addressed Volkswagen's two obstacle preemption theories. *Id.* at 36a-37a. First, the court rejected Volkswagen's reliance on provisions "tasking the EPA with ensuring compliance with" the Act's "post-sale obligations on manufacturers." *Id.* at 37a-38a. The court viewed Volkswagen's interpretation as "merely a reading of the CAA tailored to fit Volkswagen's unique circumstances." *Id.* at 38a. The text and structure did not indicate that manufacturers who engage in widespread tampering are shielded from regulation. "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." *Id.* at 39a.

Second, the court rejected Volkswagen's argument that state anti-tampering penalties would "'undermine

the congressional calibration of force.'" *Id.* at 40a. "The potential for overlapping state and federal penalties has never, without more, raised the inference that Congress intended to preempt state law." *Id.* at 43a (citing *Kansas* v. *Garcia*, 140 S. Ct. 791, 806 (2020); *California* v. *Zook*, 336 U.S. 725, 737 (1949)). Moreover, the Act's penalty provisions also cover non-manufacturers. Accepting Volkswagen's argument would thus make EPA "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." *Id.* at 44a (emphasis in original).

Finally, the Ninth Circuit easily brushed aside the assertion that the Counties' position will create a "patchwork of varying" laws that would "'create nightmares for the manufacturers.'" *Id.* at 37a n.22. Those concerns were "unwarranted" and "inapplicable" here because the Counties' anti-tampering rules prohibit "exactly what the federal anti-tampering law prohibits." *Ibid.*

The court concluded by reiterating that the potential for "staggering liability" for Volkswagen arises entirely from its own "rare" wrongdoing. *Id.* at 45a. That Volkswagen cheated on a breathtaking scale did not justify an exception from the normal operation of the preemption doctrine. Volkswagen thus "faces liability due to the straightforward application of the Clean Air Act and the preemption doctrine to its unexpected and aberrant conduct." *Ibid.*

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT THAT WARRANTS FURTHER REVIEW

A. The Ninth Circuit Did Not Address The Question Posed By The Petition

Volkswagen asserts that courts have split over "whether the CAA preempts state and local governments from regulating manufacturers' post-sale, nationwide updates to vehicle emission systems." Pet. i; see *id.* at 3, 15. That is inaccurate. No court has given states and localities wholesale freedom to regulate all "post-sale, nationwide" updates, regardless of circumstances. The Ninth Circuit did not answer that question any more than it answered "whether the Act preempts states from regulating cars."

The Ninth Circuit unambiguously rested its preemption analysis on the specifics of Volkswagen's post-sale modifications. It emphasized that its conclusion followed from Volkswagen's "unexpected and aberrant conduct," namely, "intentionally tamper[ing] with the emission control systems of its vehicles after sale in order to improve the functioning of a device *intended to deceive the regulators*." Pet. App. 4a (emphasis added). That distinguishes typical post-sale changes because Congress obviously contemplated post-sale updates that were approved through the recall process. See *id.* at 25a-26a.

The Ninth Circuit also made clear that it was not addressing "unique emission standards" imposed by states that would create "a patchwork of varying emission standards." *Id.* at 37a n.22. It perceived no conflict between the Counties' anti-tampering actions and EPA approval, precisely because the Counties acted in "parallel" to EPA. *Id.* at 35a-36a; see, *e.g.*, *id.* at 31a n.18 (noting that the "anti-tampering rules prohibit the same conduct" as the Act). Nothing in the Ninth Circuit's opinion suggests that it

would reach the same result outside of "Volkswagen's unique circumstances." *Id.* at 38a.

To be sure, the Ninth Circuit did not reach out to opine on hypothetical facts to speculate about the outcome of a different dispute. Like this Court, it decided the case before it, nothing more. And its analysis rests squarely on the fact that the Counties target conduct that EPA never approved, under anti-tampering rules prohibiting "exactly what the federal anti-tampering law prohibits." *Id.* at 37a n.22. The possibility that other, unidentified cases might present Volkswagen's hypothetical question is a reason to await further percolation, not to grant review here. Volkswagen cannot divorce its petition from the legal and factual scenario the court confronted.

B. The Question The Ninth Circuit Decided Is Important Only To Manufacturers Who Plan On Evading The Act's Regulatory Procedures

Volkswagen skews the question presented because the Ninth Circuit's actual ruling is a narrow application of settled preemption law to a decidedly unflattering and atypical set of facts. The question whether the Act prohibits states from penalizing tampering by manufacturers who cheat the EPA update process is important only to manufacturers who cheat the EPA update process. It thus will not recur with any frequency. Manufacturers have a simple step to avoid this predicament—tell EPA what they're doing and get approval like Congress intended, instead of bypassing this "well-understood process with EPA." Alliance for Automotive Innovation *Amicus* Br. 3. Volkswagen's claim that the Ninth Circuit's decision is so disastrous is belied by the fact that the United States declined the court's invitation to participate.

Volkswagen's description of its question presented as "critically important" (Pet. 16) therefore depends on its mischaracterization of the Ninth Circuit's ruling. Once

that decision is properly read as discussed *supra* Part I.A, the case for plenary review crumbles.[3]

1. The foundation of Volkswagen's pitch is that the decision will "throw" the motor-vehicle industry "into regulatory chaos." Pet. 18. That is so, Volkswagen says, because "the Ninth Circuit held that all 50 states and 3,000 counties may separately regulate these updates according to their own local policies, priorities, and preferences" and thereby "second-guess EPA's expert determinations." *Id.* at 19; see *ibid.* (imagining that the decision "would allow states and localities to penalize these EPA-approved modifications"); but cf. *supra* n.3.

The Ninth Circuit held no such thing, because "conflicting regulation[s]" (Pet. 4) are not at issue here. The Counties seek to penalize "*tampering* with approved emission control systems"; they do not seek to penalize the approved systems themselves. Pet. App. 37a n.22 (emphasis added). Concerns about states regulating EPA-approved devices are plainly "inapplicable." *Ibid.*

For the same reasons, Volkswagen is wrong to speculate that manufacturers now have to "seek[] the approval of all 50 states and thousands of localities before implementing post-sale, nationwide updates." Pet. 19. To avoid that "entirely impractical step" (*ibid.*), manufacturers

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[3] The Ninth Circuit's decision may have even less practical import because of the Clean Air Act's structure and California's waiver. Volkswagen conceded that "California and potentially the Section 177 States following California *can* impose penalties for tampering." Volkswagen Rule 28(j) Letter, C.A. ECF No. 62 (Aug. 14, 2019) (emphasis added). The status of California's waiver is unsettled pending litigation over President Trump's revocation of the waiver and President Biden's order reconsidering that revocation. See 86 Fed. Reg. 7037, 7037-7038 (Jan. 20, 2021); 84 Fed. Reg. 51310 (Sept. 27, 2019); *Union of Concerned Scientists* v. *Nat'l Highway Traffic Safety Admin.*, No. 19-1230 (D.C. Cir.).

need only follow the EPA approval process the petition so painstakingly details.

Volkswagen thus has no basis to insist that the court's holding affects "dozens of recalls" involving "six million cars every year, all coordinated with EPA." Pet. 18. To that end, Volkswagen falsely accuses the court of calling post-sale updates "rare." *Ibid.* (quoting Pet. App. 45a). The Ninth Circuit did not call "post-sale updates" "rare"; it called Volkswagen's deceitful misconduct rare. See Pet. App. 45a; *id.* at 3a-4a. Even Volkswagen's *amici* admit: "The factual circumstance in this case, where updates were used to attempt to evade federal emissions requirements, is not typical." Product Liability Advisory Council Br. 6.

Indeed, Volkswagen's own phrasing repudiates its sky-is-falling rhetoric. It notes that updating these millions of cars is "coordinated with EPA." Pet. 18. Volkswagen's updates, of course, were not coordinated; Volkswagen deliberately deceived EPA. Pet. App. 8a-9a; see *id.* at 1a. The Ninth Circuit's holding on that "rare" wrongdoing does not address updates that *are* coordinated with EPA. *Id.* at 45a.

Plenary review is not warranted for such an atypical situation. Should a court ever permit a state to penalize conduct that EPA has affirmatively approved, this Court can review that decision.

2. Because the Ninth Circuit plainly did not address the issues that trouble Volkswagen and its *amici*, Volkswagen hunts for other cases. These examples only prove the need for additional percolation, and Volkswagen mischaracterizes them regardless.

Volkswagen incorrectly asserts that in a pending appeal, Ohio "explicitly claimed that it has the authority to challenge EPA-approved updates." Pet. 5; see *id.* at 19 (quoting Merit Br. of Appellee 40, 2020 WL 4922377, *State*

of Ohio ex rel. *Yost* v. *Volkswagen Aktiengesellschaft*, Case No. 2020-0092 (Ohio Aug. 10, 2020)). Ohio's lawsuit addresses the same misconduct Volkswagen committed here, and nothing in Ohio's brief "explicitly" claims anything about regulating EPA-approved updates. Rather, Ohio "seek[s] penalties for Volkswagen's cheating." Ohio Br. 40; see *id.* at 44-45. Ohio's Attorney General confirmed at oral argument that it would be "a different case" if "the federal government gives the thumbs up to some kind of update, and a state tries to do the opposite." *Ohio*, Oral Arg. Recording 17:05-17:36 (Ohio Jan. 26, 2021), https://tinyurl.com/OhioOralArg. In any event, even if Ohio did assert such authority and even if the Supreme Court of Ohio accepts that argument, that's no reason to review *this* case—which does not present the question.

Volkswagen further notes that its deception isn't unique; another manufacturer, Daimler AG, also hid defeat devices from EPA, and Hillsborough County has been "emboldened" to sue Daimler for its illegal conduct. Pet. 21. In other words, another manufacturer also "did not disclose the existence of" software defeat devices, and a county had the audacity to sue it for breaking the law. EPA, Daimler AG and Mercedes-Benz USA, LLC Clean Air Act Civil Settlement (Sept. 14, 2020), https://tinyurl.com/EPADaimler ("Daimler Settlement"). Like the Ninth Circuit's decision, that claim has no bearing on whether states and counties can "impose conflicting regulation on manufacturers." Pet. 4.

Volkswagen tries to fabricate conflicting regulations in the Daimler lawsuit by arguing that the county also wants injunctive relief "to 'completely repair' the affected vehicles." Pet. 21 (quoting Hillsborough's Middle District of Florida complaint). According to Volkswagen, that relief would conflict with the Daimler consent decree, which

supposedly "permits those vehicles to remain in use, provided Daimler pays money into a mitigation trust." *Ibid.* That is a bizarre conception of the consent decree. EPA did order the cars repaired: "Daimler must recall the affected vehicles and update the software and certain hardware in order to remove all defeat devices and ensure the vehicles comply with all applicable emission standards." Daimler Settlement, *supra*. It then established "stipulated penalties in the unlikely event that one or more [approved modifications] do not meet the applicable emission standards." *Ibid.* Those provisions do not express a judgment by EPA that it's fine for Daimler to keep polluting as long as it pays more money, any more than speeding laws "permit" drivers to speed provided they pay their tickets.

Regardless, *if* "the unlikely event" occurs that Daimler does not repair the cars under the consent decree (*ibid.*), *and if* Hillsborough proves its entitlement to injunctive relief, *and if* that relief requires Daimler to fix something EPA approved, *and if* the Eleventh Circuit finds no preemption, *then* perhaps that case warrants review. But that speculative chain of events is worlds apart from the Ninth Circuit's decision, which considered only monetary penalties for conduct EPA never approved.

The fact that this unadjudicated request for injunctive relief is Volkswagen's leading real-world example of regulatory chaos exposes the weakness of its case for plenary review.

3. Finally, in a single sentence that cross-references its merits argument, Volkswagen suggests that the Ninth Circuit's decision will interfere with EPA's ability to resolve enforcement actions and "set appropriate penalties." Pet. 20. Volkswagen offers no evidence of such interference. In fact, states and counties sued Volkswagen while the federal enforcement actions were ongoing. Pet.

App. 10a-11a. The consent decrees were settled nonetheless, and Volkswagen knew the stakes when it did not obtain releases. *Id.* at 9a-10a. Moreover, Volkswagen admits that Congress endorsed concurrent enforcement of anti-tampering rules against non-manufacturers. *E.g.*, Pet. 27; cf. 42 U.S.C. 7522(a)(3), 7524(a); Pet. App. 34a n.21, 44a. Concurrent enforcement is indeed the norm under the longstanding dual-sovereignty doctrine, which makes clear that states aren't second-guessing EPA but rather vindicating their own interests "in punishing the same act." *Gamble* v. *United States*, 139 S. Ct. 1960, 1966 (2019). Volkswagen's argument boils down to an attack on that doctrine. But as this Court recently explained, "the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Garcia*, 140 S. Ct. at 807; see *infra* Part II.C. And, again, this situation will recur only where manufacturers take the rare step of bypassing EPA's approval process. This unusual scenario does not merit the Court's intervention.

* * *

In short, Volkswagen's assertion of "regulatory turmoil" (Pet. 20) constitutes pure conjecture that depends on misreading the Ninth Circuit's opinion to announce a holding it did not reach, based on hypothetical facts the court explicitly disclaimed. The decision provides no support for allowing states or local governments to penalize actions that EPA has approved. If some court somewhere does allow states to penalize EPA-approved conduct, the Court can take that case. But review is not warranted here to address Volkswagen's speculation.

C. The Actual Conflict Is Weak And Shallow

To the extent there is any actual conflict, it does not warrant review. Volkswagen's claim of a "split" boils down to this: Volkswagen escaped liability in Alabama because the Alabama Supreme Court adopted the now-reversed

decision of the district court in this case. See *State* v. *Volkswagen AG*, 279 So. 3d 1109, 1121-1129 (Ala. 2018) (quoting 8 pages of the district court's opinion); S. Ct. R. 10(a) (referencing conflict between a federal court of appeals and "state court of last resort"). That conflict is unlikely to persist now that the Ninth Circuit has corrected the district court's mistaken analysis.

Moreover, the split lacks practical significance. It involves only Volkswagen's past misconduct. It doesn't address any ongoing acts or business decisions—unless Volkswagen and other manufacturers intend to skirt EPA's approval process. A shallow, weak conflict over unusual factual circumstances does not deserve this Court's resources.

1. In the first place, there is no conflict at all on whether the Act expressly preempts anti-tampering lawsuits in these circumstances. The Alabama, Minnesota, and Tennessee courts all had little trouble rejecting Volkswagen's express preemption defense (as did the district court here). See *Alabama*, 279 So. 3d at 1119; *State* ex rel. *Slatery* v. *Volkswagen Aktiengesellschaft*, No. M2018-00791-COA-R9-CV, 2019 WL 1220836, at *10 (Tenn. Ct. App. Mar. 13, 2019); *State* ex rel. *Swanson* v. *Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *6 (Minn. Ct. App. Dec. 3, 2018); Pet. App. 65a-67a. That unanimity on express preemption does not warrant review.[4]

2. Although the Ninth Circuit's decision conflicts with the decision of the Alabama Supreme Court on obstacle

[4] The Missouri trial court found the claims expressly preempted, but its analysis consisted of two conclusory sentences. See *State* v. *Volkswagen Aktiengesellschaft*, No. 1622-CC10852-01, 2018 WL 3349094, at *3 (Mo. Cir. Ct. June 26, 2018). An unexplained conclusion by a state trial court does not satisfy Rule 10.

preemption, that is not enough to warrant this Court's intervention. The relevant portion of the Alabama decision consists primarily of an eight-page block quotation of the district court's opinion. *Alabama*, 279 So. 3d at 1121-1128. The court then wrote that it agreed, "[c]onsidering the unique factual situation involved in this case." *Id.* at 1128. That ruling does not signify a persistent or serious disagreement on the interpretation of federal law and would likely be revisited in a future decision based on the Ninth Circuit's subsequent decision.

The unpublished decisions from lower state courts add nothing to Volkswagen's argument. Those decisions do not satisfy Rule 10 and do not even have precedential effect in those states. See, *e.g.*, *Kingbird* v. *State*, 949 N.W.2d 744, 749 (Minn. Ct. App. 2020); *Watts* v. *Watts*, 519 S.W.3d 572, 579 n.5 (Tenn. Ct. App. 2016). And like the Alabama Supreme Court, they did little more than follow the district court's analysis here before the Ninth Circuit ruled. See *Minnesota*, 2018 WL 6273103, at *7; *Tennessee*, 2019 WL 1220836, at *10. It is likely that those courts also would revisit their decisions in light of the Ninth Circuit's analysis. Cf. *Minnesota*, 2018 WL 6273103, at *10-*13 (Smith, J., concurring in part and dissenting in part) (finding no implied preemption). This "split" will thus resolve itself.[5]

Ultimately, Volkswagen is left with a conflict between the Ninth Circuit and one state court of last resort, where

[5] Given that the decisions agreeing with Volkswagen all came before the Ninth Circuit's ruling but, as Volkswagen notes, two other cases are pending (one in the Ohio Supreme Court, the other in the Middle District of Florida), this is a particularly good candidate for percolation. Should the Ohio Supreme Court or Eleventh Circuit disagree with the Ninth Circuit, that decision might provide a conflict that actually satisfies Rule 10.

the state court merely parroted the district court's analysis here. That is thin gruel for this Court's review.

D. This Is A Poor Vehicle To Address The Petition's Question

The petition should also be denied because this is a poor vehicle to address the overbroad question it identifies. As discussed, this case does not involve a patchwork of obligations. Nobody would be here if Volkswagen had complied with *one* set of laws—those imposed by the Clean Air Act and EPA's regulations. To resolve this case, therefore, the Court wouldn't need to reach the distinct issue of whether the Act preempts state laws seeking to penalize updates that EPA approved.

Moreover, Volkswagen's heavy reliance on the amount of penalties at issue is premature. The Counties' claims were dismissed on the pleadings, and no penalties have been ordered. The federal consent decree imposed only a fraction of potential total liability. The outcome here would likely be similarly measured.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT

Without a meaningful split or sufficient practical or legal significance, Volkswagen's petition reduces to error correction. Cf. Pet. 22-34 (spending over half its argument on the merits). That is no basis for this Court's intervention, but there is no error in any event. The Ninth Circuit correctly decided that the Act does not expressly or impliedly preempt the Counties' anti-tampering claims. Every aspect of its analysis was firmly rooted in the Act's text and this Court's precedents.

A. The Ninth Circuit Correctly Understood The Preemption Framework And The Act's Structure

Volkswagen attacks the Ninth Circuit's articulation of the preemption doctrine and the Act's structure. *E.g.*, Pet. 22-24, 28. A faulty understanding of the framework, says Volkswagen, led the court to reach the wrong answer. But

it is Volkswagen who tries to twist the Act and the preemption doctrine to reach the outcome it desires.

1. As the Ninth Circuit correctly explained, the gist of the preemption doctrine is that "'[i]f 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.'" Pet. App. 15a (quoting *Garcia*, 140 S. Ct. at 801).

In the Clean Air Act, Congress gave careful attention to those state laws it wanted to preempt and those it wanted to leave unaffected, with a plain tilt against preemption. That deliberate structure matters because every theory of preemption must be grounded in the text rather than "a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Garcia*, 140 S. Ct. at 801 (citation omitted); see Pet. App. 4a, 15a-16a.

The Act recognizes that pollution control "is the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3). To that end, Section 7416 instructs that, except as provided in express preemption provisions, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" emissions standards. Section 7543(d) likewise provides that "[n]othing 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." And the Act's various express preemption provisions show that Congress carved out areas of exclusive federal control when it wanted to, including specific exemptions for "manufacturers." See, *e.g.*, 42 U.S.C. 7541(h)(2), 7543(a), (c), (e)(1).

The upshot for this case, as the Ninth Circuit correctly concluded (Pet. App. 22a-25a), is that "federal motor vehicle emission control standards apply only to new motor vehicles, [and] States also retain broad residual power over used motor vehicles." *Washington*, 406 U.S. at 115 n.4.

2. Volkswagen's request for error correction rests on its own misunderstanding of the preemption doctrine and the Act's framework. The telling passage is its assertion (at 28) that "state and local agencies have never had" authority to regulate car manufacturers. Before the Clean Air Act, the Counties undoubtedly could enforce anti-tampering laws against car manufacturers. That is because states' police powers do not come from Congress. The Counties thus need not show Congress authorized them to sue; Volkswagen must show Congress intended to *strip* them of that right. See *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009).

Volkswagen says Congress embedded that judgment in the Act's basic structure, preserving state law only regarding stationary sources, not mobile sources. Pet. 22-23. Both Congress and this Court declared otherwise. Volkswagen does not cite Section 7401(a)(3)—which expressly says that "air pollution control at its source is the primary responsibility of States and local governments"—and regardless Volkswagen's assertion is foreclosed by this Court's statement that "States also retain broad residual power over used motor vehicles." *Washington*, 406 U.S. at 115 n.4.

Volkswagen's criticisms of the Ninth Circuit's framework further reveal its confusion, wrongly conflating express and implied preemption principles. Volkswagen complains that the court "*six times*" invoked a "presumption against preemption," whereas "this Court has al-

ready declined to apply any such presumption in interpreting" Section 7543(a). Pet. 23 (emphasis in original). But the Ninth Circuit did not employ any presumption in interpreting Section 7543(a). See Pet. App. 15a, 28a-31a. The court reserved that presumption for its obstacle preemption analysis (*id.* at 15a-21a, 32a), exactly as this Court instructs: "In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we 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." *Wyeth*, 555 U.S. at 565 (cleaned up).

Once Volkswagen's distortions of the framework are set aside, its express and obstacle preemption arguments collapse.

B. The Act Does Not Expressly Preempt The Counties' Claims

Beginning with express preemption, Volkswagen argues that 42 U.S.C. 7543(a) preempts the anti-tampering claims because they seek "to enforce any standard relating to the control of emissions from new motor vehicles." See Pet. 24-28. Volkswagen is "clearly" wrong. Pet. App. 30a; see *Alabama*, 279 So. 3d at 1119; *Tennessee*, 2019 WL 1220836, at *10; *Minnesota*, 2018 WL 6273103, at *6; Pet. App. 65a-67a. Section 7543(a) precludes enforcing standards that relate to *new* cars; it therefore does not cover the "post-sale vehicles" at issue here. Pet. App. 30a.

The court agreed with Volkswagen that a state cannot circumvent Section 7543(a) by "'impos[ing] its own emission control standards the moment after a new car is bought and registered.'" Pet. App. 30a (quoting *Allway Taxi*, 340 F. Supp. at 1124). Its point was that states cannot impose standards that would effectively require new cars to be manufactured differently. See *id.* at 31a; *Allway*

Taxi, 340 F. Supp. at 1124. The Counties' anti-tampering claims do not offend that principle because they "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." Pet. App. 31a.

Volkswagen ignores that analysis when objecting that the court "eliminates 'relating to' from the statute" and ends preemption "at the point of initial sale." Pet. 24-25. The court acknowledged that some post-sale regulations could fall within Section 7543(a), and applied the very case—*Allway Taxi*—that Volkswagen invokes. Volkswagen counters that "relating to" should be interpreted broadly (Pet. 24), but "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 260 (2013). And Volkswagen does not propose a plausible interpretation that the Ninth Circuit missed. However broad "relating" might be, it does not transform "new" into "old."

Volkswagen asserts that "[t]he post-sale updates here necessarily relate back to the cars' original (noncompliant) software because the updates modified that factory-installed software." Pet. 6. But that proves too much. *Any* addition or modification will modify the original design. Volkswagen's interpretation of Section 7543(a) would encompass every repair shop or individual who changed the car from its point-of-sale condition. The only difference between a mechanic reducing hardware failures by tampering and Volkswagen reducing hardware failures by tampering is the identity of the tamperer—a subject on which Section 7543(a) is silent.

Volkswagen seeks not to interpret Section 7543(a) but to rewrite it to include a manufacturer release. But when Congress wanted to free "manufacturers" from state and

local regulation, it did so explicitly. Section 7541(h) provides that states may not require a "new motor vehicle manufacturer" to perform certain testing. And Section 7543(c) imposes preemption regarding "any motor vehicle part or motor vehicle engine part" subject to regulation under 42 U.S.C. 7541(a)(2), which in turn addresses certifications by a "manufacturer." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Salinas* v. *U.S. R.R. Retirement Bd.*, 141 S. Ct. 691, 698 (2021) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 327 (2008).

Contrary to Volkswagen's assertion (at 27-28), EPA's enforcement history confirms that the Act does not distinguish between manufacturers and non-manufacturers here. In practice, EPA enforces anti-tampering rules against non-manufacturers far more often than against manufacturers. *E.g.,* EPA, 2018 Clean Air Act Enforcement Case Resolutions, www.epa.gov/enforcement/2018-clean-air-act-vehicle-and-engine-enforcement-case-resolutions.[6] And EPA has in fact recognized that any state is "free to adopt and enforce an anti-tampering law on its own, if it feels that such a law would contribute to reducing motor vehicle emissions." 51 Fed. Reg. 10198-01, 10206 (Mar. 25, 1986).

At bottom, the best thing that can be said for Volkswagen's interpretation is that it "happens to fit this case precisely, but it needs more than that to recommend

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[6] In one case, a seller of aftermarket products sold 363,000 defeat devices nationwide. See EPA, Derive Systems Clean Air Act Settlement (Sept. 24, 2018), https://www.epa.gov/enforcement/derive-systems-clean-air-act-settlement.

it." *Dep't of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 394 (2015). The Ninth Circuit's decision is correct.

C. The Act Does Not Impliedly Preempt The Counties' Claims

To show implied preemption, Volkswagen must demonstrate that preempting the Counties' anti-tampering claims "'was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U.S. at 565. This test sets "'a high threshold.'" Pet. App. 16a (quoting *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 607 (2011)). And that manifest purpose must derive from the statutory text. Pet. App. 15a-16a (citing *Garcia*, 140 S. Ct. at 804; *CSX Transp.*, 507 U.S. at 664); see Pet. App. 4a.

1. Volkswagen's request for a "manufacturer," "nationwide" exemption from state and local regulation (Pet. 28) does nothing more than "'[i]nvok[e] some brooding federal interest.'" *Garcia*, 140 S. Ct. at 801. The Act is clear, however, that aside from express preemption, states and localities retain their traditional authority in this arena. Section 7416 says so expressly, providing that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to" enforce emissions standards. And Section 7543(d) further demonstrates that Congress did not intend to displace state and local regulation over tampering with in-use cars. The language of Sections 7416 and 7543(d) "might be described as a *non-preemption* clause." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1902 (2019) (lead op. of Gorsuch, J.) (emphasis in original). The import of these provisions is that when Congress wished to displace state law, it said so. Otherwise, it chose not to disturb states' police power.

The Ninth Circuit invoked Section 7543(d) for this very point. Pet. App. 33a-35a ("The language of § [7543](d) also indicates that Congress foresaw 'the like-

lihood of a continued meaningful role' for state enforcement. * * * Congress's 'certain awareness of the prevalence of state' law, coupled with its 'silence on the issue,' 'is powerful evidence that Congress did not intend' to preempt local anti-tampering laws.") (citations omitted). Although the court correctly apprehended the broad scope of that clause vis-à-vis post-sale vehicles (*id.* at 24a-25a), it did not rest its holding solely on a finding that the Counties' claims were expressly saved. *Ibid.*; see also *id.* at 32a-35a (recognizing that "the existence of a saving clause does not 'foreclose or limit the operation of ordinary pre-emption principles'") (citation omitted); contra Pet. 28. Nor need it have done so. The Counties don't have to prove that their claims are saved. The burden is on Volkswagen to meet the high threshold of showing that the Act preempts those claims. And Section 7543(d) (alongside Section 7416) shows that Congress preempted state law only where it expressly chose to do so.

Volkswagen nonetheless (wrongly) criticizes the Ninth Circuit's interpretation of "operation" in Section 7543(d). Pet. 29-30. Volkswagen's effort to equate "operation" with "use" has at least two fatal flaws: it reads "use" out of the statute by making it redundant, and it means that states also could not penalize mechanics who tamper, for a mechanic isn't "driving" the car. *Id.* at 29. To the extent Volkswagen proposes a broader definition—"the operating of or putting and maintaining in action of something (as a machine or an industry)," *ibid.*—it would encompass the situation here. Volkswagen tampered with the cars to improve performance and reduce hardware failures. Making a car run better or not break down meets any reasonable definition of "operation."

2. There is simply no textual basis for Volkswagen's core position—that Congress intended to preempt state

anti-tampering laws relating to "manufacturer" or "nationwide" conduct. That limitation appears nowhere in the federal anti-tampering rule. And that omission is telling because, as noted *supra* pp. 29-30, other provisions of the Act show that Congress knew how to prevent states from regulating "manufacturer" conduct when it wanted to.

Volkswagen tries to import a manufacturer release by pointing to EPA's useful-life testing of vehicles and the process through which manufacturers obtain EPA's endorsement for post-sale changes. *E.g.*, Pet. 31. This argument is a red herring for the simple reason that Volkswagen admittedly evaded those regimes here. C.A. E.R. 51, 53. In a mine-run case, where a manufacturer worked with EPA to obtain approval for a post-sale update, the manufacturer would have strong preemption arguments—a state would likely impose an obstacle to Congress's objectives, if not an outright conflict, by suing a manufacturer for bringing its cars into compliance with the Act. But that's not what happened here. Volkswagen did not comply with Congress's statutory regime; it acted outside of that process. It cannot credibly argue that state law poses an obstacle to a statutory regime it evaded.

For the same reason, Volkswagen has no basis for arguing that "states and localities could potentially penalize even modifications that EPA already *approved*, thereby imposing conflicting regulatory guidance." Pet. 31. The Counties do not seek to do so, and the Ninth Circuit expressly distinguished that scenario. Pet. App. 37a n.22.

3. Volkswagen is also wrong that the Act's tampering penalties (42 U.S.C. 7524) demonstrate congressional intent to displace state and local anti-tampering rules. Pet. 32-33. This Court rejected a substantively identical argument last Term, holding that "the possibility that federal enforcement priorities might be upset is not enough to

provide a basis for preemption." *Garcia*, 140 S. Ct. at 806-807.

That conclusion carries equal force here, for Volkswagen's argument not only lacks textual grounding, but would mean that federal law preempts all state and local anti-tampering enforcement—whether against a nationwide emissions cheater or a local repair shop. The federal anti-tampering rule covers "any person," not just new vehicle manufacturers. 42 U.S.C. 7522(a)(3). And in practice, EPA regularly enforces anti-tampering rules against non-manufacturers. *Supra* p. 30. If Volkswagen is correct, then EPA's judgment about the appropriate remedy to seek would always represent the proper "congressional calibration of force." Pet. 33. So too would EPA's decision to forgo enforcement action in a given case—EPA would have decided the violation does not warrant a penalty.

The unavoidable result of Volkswagen's argument is that federal law would preempt all state and local enforcement of *any* standard (anti-tampering or otherwise) that EPA also could enforce. Yet Congress explicitly permitted states and localities to enforce such standards absent express preemption. 42 U.S.C. 7416.

4. The same analysis defeats Volkswagen's suggestion that practical concerns—such as facilitating federal settlements with wrongdoers who act on a nationwide scale—warrant obstacle preemption. Pet. 32-34. This argument merely repackages its incorrect belief that EPA alone may penalize tampering. Regardless, preemptive intent must derive from the statute. Where the text reveals no such intent, it cannot be manufactured for the convenience of stakeholders in a given case. See Pet. App. 42a-45a. And the text in fact points the opposite way. Congress made clear that absent express preemption, it intended to preserve state and local law. 42 U.S.C. 7416; see *Washington*, 406 U.S. at 115 n.4; 42 U.S.C. 7604(e).

To the extent Volkswagen violated laws in multiple jurisdictions, thereby complicating the enforcement process or creating massive exposure, that is only because its misconduct was so far-reaching. The extent of a manufacturer's wrongdoing provides no principled basis for applying preemption. And engaging in especially egregious misconduct is hardly a reason to immunize it.

In any event, Volkswagen's alarmism is unwarranted: it has incurred civil penalties of only approximately $2500 per car ($1.45 billion for 585,000 cars, see Pet. App. 7a), a fraction of its per-car revenue and the maximum per-car tampering penalty available under Section 7524. Indeed, Volkswagen faced at least tens of billions more in total federal liability. It offers no reason to think that states and localities would attempt to bankrupt Volkswagen rather than seek measured penalties as did the federal government.

This issue, moreover, is a question of the remedy, not a question of states' and localities' ability to sue in the first instance. Although Volkswagen's actions were aberrant, corporate misconduct that violates federal, state, and local law is not uncommon. Courts are equipped to temper inappropriately punitive liability (however remote that possibility may be) through due process and other protections against excessive fines.

5. Finally, Volkswagen's "fraud on EPA" theory is frivolous. Pet. 34. The Counties do not seek to penalize any statement to EPA; they seek to penalize Volkswagen's emissions tampering. Their claims would be identical even if Congress had never created EPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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