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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below upends a half-century of uniform national regulation of automobile emissions. Under the Ninth Circuit's erroneous preemption analysis, all 50 states and thousands of localities can freely regulate, without limitation, *any* changes that manufacturers make to their vehicles' emissions systems after sale. Having injected substantial uncertainty and disarray into EPA's regulation of auto emissions, particularly in the most populous Circuit, the decision below warrants this Court's review.

First, respondents acknowledge the Ninth Circuit's square conflict with the Alabama Supreme Court and Tennessee and Minnesota appellate courts, but speculate

that this conflict will resolve itself when those state courts read the Ninth Circuit's decision. But there is no reason to expect those state courts will defer to the Ninth Circuit's flawed preemption analysis. Fourteen courts have now ruled on the precise question presented: 15 of the 26 judges on those courts have correctly found that the Clean Air Act ("CAA") preempts state and local tampering claims against manufacturers.

Second, respondents try to rewrite the Ninth Circuit's decision to minimize its breadth and importance. Respondents claim that the decision below permits states and localities to regulate *only* when a manufacturer "deceived" EPA. Opp. 19. But the decision contains no such limitation: the Ninth Circuit held categorically that the preemption provision in CAA § 209(a) "does not apply to post-sale vehicles," and that the savings clause in § 209(d) preserves states' and localities' "authority to prohibit tampering with emission control systems in post-sale vehicles." Pet. App. 25a, 30a. Its sweeping decision did not cite any CAA provision making EPA deception relevant to preemption.

Numerous *amici*—seven organizations representing U.S. and global automakers, part suppliers, dealers, and other manufacturers, as well as four former senior EPA, California Air Resources Board, and Department of Justice officials—urge this Court to grant review. Lower courts have stayed other cases brought by states and counties pending this Court's ruling.[1] Even respondent

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[1] See Order, *People* v. *Volkswagen Aktiengesellschaft*, Appeal No. 1-18-1382 (Ill. Cir. Ct. Mar. 16, 2021); *Env. Prot. Comm'n of Hillsborough Cty.* v. *Mercedes-Benz USA, LLC*, No. 20-cv-2238, Dkt. No. 81 (M.D. Fla. Feb. 24, 2021). Montana also moved to stay its case pending this Court's decision. Plaintiff's Motion to Stay, *Montana Dept. of Env. Quality* v. *Volkswagen Aktiengesellschaft*, Cause No. DDV-2016-1045 (Mont. Dist. Ct. Mar. 19, 2021).

Hillsborough sought to stay its action against Daimler, belying respondents' claim that this petition is unimportant or limited to Volkswagen's conduct.

The decision below has enormous implications for manufacturers, which perform emissions updates on millions of cars annually. Under the Ninth Circuit's reasoning, manufacturers can avoid potentially "staggering liability" (Pet. App. 45a) only by first ensuring that no state or locality deems such updates "tampering" under local law—far from a straightforward determination given the complexity of emissions controls. Alliance for Automotive Innovation *et al.* Br. 16-17. The cost of doing so (or threat of suit) will chill even beneficial updates. Respondents' mantra that manufacturers can avoid state regulation merely by following EPA standards is refuted by their argument below that "'[a] vehicle does not have to exceed emission standards for a tampering violation to occur.'" Pet. App. 29a. If it has any doubt, this Court should request the Solicitor General's views.

Third, like the Ninth Circuit, respondents ignore the text and structure of the CAA and this Court's instruction in *Engine Manufacturers Assn.* v. *South Coast Air Quality Management District*, 541 U.S. 246, 253 (2004), that courts look to EPA's "standard-enforcement efforts" to identify what is "proscribed by § 209." Whether viewed as express or implied preemption, multiple interrelated CAA provisions grant EPA alone the authority to regulate manufacturers' nationwide emissions-related conduct throughout their vehicles' "useful life," including federal emissions warranty obligations to vehicle owners. By allowing 50 states and thousands of localities to bring tampering lawsuits against automobile manufacturers, the Ninth Circuit's decision will prevent EPA from fulfilling its congressionally mandated role to develop and enforce

uniform national emissions standards, including by securing quick and comprehensive resolution of environmental harm.

A. The square conflict among lower courts warrants review.

Respondents admit that there is a square conflict but downplay it by belittling the state appellate court decisions and speculating that the split will "resolve itself." Opp. 23-24.

1. State courts are fully competent to decide whether federal law preempts their laws and routinely do so. The Alabama, Tennessee, and Minnesota appellate courts did so here, independently concluding that preemption applies.

That these courts found the district court's analysis persuasive does not mean that they will "revisit" their rulings now that the Ninth Circuit has disagreed. The decision below is not binding in Alabama, Tennessee, or Minnesota, nor is its flawed reasoning likely to persuade those courts. These appellate courts did not blindly follow the district court's decision or treat it as binding. Rather, that 14 experienced judges and justices agreed with the district court's conclusion confirms why this Court should resolve the conflict.

Respondents wrongfully urge the Court to ignore the Tennessee and Minnesota decisions because they "do not satisfy Rule 10." Opp. 24-25. First, respondents misrepresent the Tennessee decision's "precedential effect," Opp. 24; only decisions designated "Not for Citation" (unlike the Tennessee decision[2]) have "no precedential

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[2] *State ex rel. Slatery* v. *Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. Mar. 13, 2019).

value," Tenn. Sup. Ct. R. 4. In any event, this Court routinely grants certiorari to resolve conflicts involving intermediate appellate court decisions and unpublished decisions. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 53 (2015) (conflict between one state intermediate appellate court and Ninth Circuit); *Riley* v. *California*, 573 U.S. 373, 378-381 (2014) (conflict involving unpublished state intermediate appellate decision); *Hillman* v. *Maretta*, 569 U.S. 483, 489-490 & n.2 (2013) (conflict involving state intermediate appellate decision).

Respondents cannot minimize the split by arguing "there is no conflict" on express preemption. Opp. 23. All forms of preemption "work in the same way," *Murphy* v. *Nat. Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018): whether labeled "express" or "implied," preemption "fundamentally is a question of congressional intent," *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). There is no dispute that whether Congress intended in the CAA to preempt respondents' claims has sharply divided courts.

2. Nor is further percolation warranted. Respondents suggest this Court should await rulings from, for instance, the Middle District of Florida, which *stayed* the case at *respondent Hillsborough's urging* pending this Court's decision. See *supra* n.1. Awaiting decisions from additional courts will only exacerbate the current uncertainty faced by one of this Nation's most important manufacturing sectors over the regulation of vehicles that readily cross state lines.[3]

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[3] Respondents' two-paragraph vehicle arguments (at 25) are meritless. Their assertion that the question presented is "overbroad" relies on their own recasting of the decision below. Nor is review "premature" because respondents have not yet obtained penalties; adjudication of a penalty in this case is not required to decide whether

B. The question presented is exceptionally important.

1. To try to avoid certiorari, respondents rewrite the Ninth Circuit's expansive holding as somehow limited to permitting state and local tampering claims against manufacturers that "deceive" EPA. Opp. 1-2, 16-17, 22. But nowhere in the Ninth Circuit's legal analysis did it mention deception of EPA or identify any CAA provision suggesting that preemption turns on whether EPA was deceived. Instead, the Ninth Circuit held, without limitation, that § 209(a) "does not apply to post-sale vehicles," and that § 209(d) expressly preserves states' and localities' "authority to prohibit tampering with emission control systems in post-sale vehicles." Pet. App. 25a, 30a.

The multiple *amici* briefs negate any suggestion that the decision below "is important only to manufacturers who cheat the EPA update process." Opp. 17. Manufacturers update six million cars annually. Pet. 5. Emissions controls are highly complex, and updates frequently involve tradeoffs: lowering emissions of one pollutant may require slightly increasing another, and protecting the engine from damage may require briefly reducing the effectiveness of emissions controls. Alliance for Automotive Innovation *et al.* Br. 16-17; Former Officials Br. 8. Thus, particular states and localities can view any post-sale updates that increase some pollutant as "intentional tampering" to "increase air pollution" under their own local laws.[4]

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allowing thousands of states and localities to seek such penalties conflicts with the CAA scheme.

[4] Respondents' *opposition* (at 10 n.1) incorrectly asserts that the updates here increased emissions, when EPA found the opposite. Pet. 12. Respondents wrongly imply that the district court made a factual finding that the updates increased emissions, when in fact the

See PLAC *et al.* Br. 17-19. Indeed, respondents' own tampering laws do not require showing that EPA was misled. Pet. App. 12a-13a. Respondents claim authority to prosecute "tampering" even when the "vehicle does not . . . exceed [federal] emission standards." *Id.* at 29a.

Thus, petitioners did not "mischaracterize" the decision below (Opp. 2, 17)—the Ninth Circuit was wrong to "assume" that claims of "intentional tampering with post-sale vehicles to increase air pollution" will be "rare," Pet. App. 45a. Defeat device cases are far from "unprecedented." See Congressional Research Service, *Volkswagen, Defeat Devices, and the Clean Air Act: Frequently Asked Questions*, at 12-14 (Sept. 1, 2016), https://tinyurl.com/VWFAQs (identifying over a dozen examples involving millions of vehicles).

Beyond being unsupported in the decision below, respondents' attempt to make preemption turn on deception of EPA is no meaningful limitation at all. Any state or locality that dislikes an update—perhaps because it increases an emission problematic in its jurisdiction—could embroil the manufacturer in litigation over whether its disclosures to EPA were complete and accurate. For example, respondent Hillsborough has threatened claims against GM, Pet. 21-22, even though EPA has not claimed that GM violated the CAA or misled it. Requiring manufacturers to litigate against states and localities over the sufficiency of their disclosures to EPA would be incompatible with § 209(a)'s sweeping language preempting even "attempt[s]" to regulate by states.

Finally, respondents' argument that preemption turns on whether EPA was misled runs headlong into *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 346-352

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court was merely referring to one respondent's (ambiguous) allegations. Pet. App. 65a.

(2001), which held preempted state-law claims based upon misrepresentations to federal agencies.[5] *Buckman* recognized that federal agencies should address such conduct, and EPA comprehensively addressed Volkswagen's conduct here.

In short, to avoid "staggering" exposure, Pet. App. 45a, manufacturers seeking to implement any post-sale update (even to comply with their obligations under CAA-mandated warranties) would now need to seek pre-approval from 50 states and thousands of localities. The threat of such lawsuits will chill manufacturers from performing even beneficial updates and hamper EPA's ability to resolve enforcement actions and set penalties. See Pet. 19-20, 32-34.

2. Respondents' arguments that "'conflicting regulation[s]' . . . are not at issue here," and that "the Counties' anti-tampering rules prohibit 'exactly what' the Act forbids," underscore the need for this Court's review. Opp. 1-2, 18. Under respondents' reading, the Ninth Circuit's decision directly conflicts with the Eleventh Circuit's holding in *Sims* v. *Florida, Department of Highway Safety & Motor Vehicles* that "any standard" in § 209(a) means *any* standard, "federal or state," regardless of whether it conflicts with a federal standard. 862 F.2d 1449, 1455 (11th Cir. 1989). The CAA does not preempt only "different" standards, as Congress has done elsewhere.[6] Instead, Congress expansively preempted state

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[5] With their entire opposition claiming that their lawsuits are justified because Volkswagen "cheat[ed]" or "deceive[d]" EPA, Opp. *passim*, respondents' three-sentence disclaimer of reliance on fraud on EPA, *id.* at 35, rings hollow.

[6] See, *e.g.*, 49 U.S.C. § 30103(b)(1) ("[A] State may prescribe or continue in effect a standard . . . only if the standard is *identical to* the standard prescribed under this chapter." (emphasis added)).

enforcement of "any standard" because "identical Federal and State standards, separately administered" could "easily" lead to regulatory chaos resulting from "different answers to identical questions." H.R. Rep. No. 90-728, p. 22 (1967).

Respondent Hillsborough's own claims against Daimler illustrate Congress's concern. Hillsborough's strawman attack—claiming that the Daimler consent decree does not "express a judgment by EPA that it's fine for Daimler to keep polluting as long as it pays more money," Opp. 21—ignores that the relief that Hillsborough seeks from Daimler (removing all non-conforming vehicles from the road) directly conflicts with EPA's judgment that nonconforming vehicles may remain on the road and penalties be paid.

3. Respondents cannot credibly dispute that the decision below threatens EPA's ability to achieve efficient and beneficial settlements for emissions violations. Because emissions systems are controlled by software that, like any other software, frequently requires updates, states and localities will often be able to find a post-sale hook in any EPA defeat device case (which, as noted above, are not "rare"). Respondents' contention that overlapping regulators will make no difference because Volkswagen settled with EPA despite states and counties having sued Volkswagen, Opp. 21-22, ignores that at the time of that nationwide settlement, the *only* state or county claims filed against Volkswagen were based on *pre-sale* actions. Every court has agreed that the CAA preempts such original manufacturing claims. Now that the Ninth Circuit has provided a path to escape preemption for post-sale claims, "manufacturers will be far less willing to entertain settlements with EPA." Former Officials Br. 20.

4. The Ninth Circuit itself recognized the importance of these issues when it invited the government to file an

amicus brief "addressing the[] significant questions" presented here. Pet. App. 4a n.4. In declining to express its views "at this stage of the litigation," the government made clear that its decision was no "indication of [its] views about the proper resolution of this case," C.A. Dkt. 70, at 2, as respondents erroneously claim (at 17). In fact, the government's decision could just as easily indicate that it did not expect the Ninth Circuit to deviate from decades of exclusive EPA regulation and the well-reasoned earlier decisions.

C. The decision below is incorrect.

1. Respondents are wrong that post-sale tampering claims against manufacturers are an exercise of states' traditional police powers.[7] Because cars are mass-produced and readily cross state lines, Congress placed mobile-source emissions under EPA's control in Title II of the CAA more than 50 years ago. See *Engine Mfrs. Assn.* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (mobile emissions "a principally federal project"). Before the CAA, "only California ha[d] actively engaged in" such regulation. S. Rep. No. 90-403, p. 33 (1967). Respondents' tampering regulations post-date the CAA by years, and respondents tellingly do not identify a single tampering case—ever—by any state or county against a manufacturer before Volkswagen.

2. Respondents (like the Ninth Circuit) ignore this Court's instruction to examine how EPA enforces the CAA to identify the "standard-enforcement efforts that are proscribed by § 209." *South Coast*, 541 U.S. at 253.

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[7] Respondents rely on inapposite dicta from *Washington* v. *General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972). "[B]road residual power over used motor vehicles," *ibid.*, simply refers to states' authority to regulate how people drive their cars. Pet. 28-31.

The CAA's scheme confirms that Congress empowered EPA alone to enforce CAA standards against manufacturers, including by regulating post-sale updates to their vehicles. Pet. 8-10.

The Ninth Circuit's bright-line rule that § 209(a) "does not apply to post-sale vehicles," Pet. App. 30a, renders the expansive phrase "relating to" in § 209(a) a nullity. Pet. 24-25. As courts and EPA have long recognized, § 209(a) extends to manufacturers' *post-sale* conduct that relates back to the original design of vehicle emissions systems—such as a post-sale update changing how a factory-installed defeat device functions. *Id.* at 25-27. Like the Ninth Circuit, respondents' claim that § 209(a) preempts only post-sale regulations "that would effectively require new cars to be manufactured differently" (Opp. 28), finds no basis in the analysis, endorsed by EPA, originally announced in *Allway Taxi, Inc.* v. *City of New York*, which instead turned on whether state regulation impermissibly placed the "burden of compliance" on "manufacturers" instead of "individual owners." 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

Respondents are thus incorrect in claiming that *Allway Taxi*'s rule would preempt tampering claims against mechanics and owners. Opp. 14. Such local claims do not "relate to" new cars because they do not concern those who must make "new motor vehicles" in compliance with CAA useful-life standards. Pet. 27. Post-sale updates are necessary for manufacturers to satisfy a number of their CAA obligations, including mandatory new-car emissions warranties. Attempts to regulate such updates thus relate to "the control of emissions from new motor vehicles" under § 209(a); penalizing mechanics for removing a catalytic converter does not. Although EPA has encouraged

concurrent jurisdiction over tampering claims against mechanics, Opp. 30, respondents cite *no* similar EPA encouragement of state or local regulation of manufacturers.

3. Respondents' halfhearted defense of the Ninth Circuit's sweeping interpretation of "operation" in § 209(d)—which no party advanced below—is unpersuasive. Rather than try to justify the Ninth Circuit's misreading of that provision or address the petition's arguments, respondents insist that this misreading was not the "sole[]" basis for rejecting implied preemption. Opp. 32.

4. Nor can respondents rehabilitate the Ninth Circuit's implied preemption analysis. Multiple interrelated CAA provisions grant EPA alone authority to regulate manufacturers' emissions-related conduct both pre- *and* post-sale. Pet. 8-10, 31. The decision below authorizes every state and locality to decide for itself which manufacturer updates are "tampering." Such patchwork regulation would seriously impair Congress's "purposes and objectives" in giving EPA exclusive regulatory authority over manufacturers in this area. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

Finally, respondents claim that the size of their potential penalties ($11 billion annually) is no basis for preemption. Opp. 33-35. But the CAA's penalty regime reflects Congress's intent that EPA retain exclusive control over manufacturers' emissions-related conduct, including the penalties manufacturers face for tampering through nationwide emissions updates. Pet. 32-33.

Respectfully submitted.

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