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, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Clean Air Act, 42 U.S.C. 7401 *et seq.*, preempts local governments' claims for civil monetary penalties under state or local law based on an automobile manufacturer's tampering with the emission-control systems of in-use vehicles within those governments' jurisdictions, where that tampering was neither required by the Clean Air Act nor approved by the Environmental Protection Agency.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. The Clean Air Act

Congress enacted the Clean Air Act, 42 U.S.C. 7401 *et seq.*, to assist state efforts to control air pollution. See Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392.

The Act has been a paradigmatic example of cooperative federalism, under which "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990).

1. This litigation primarily concerns Title II of the Act, which governs control of pollution from mobile sources, including motor vehicles. See 42 U.S.C. 7521-7590 (§§ 202-250). Generally speaking, Congress gave the Environmental Protection Agency (EPA) exclusive authority to establish emissions standards for new motor vehicles, while encouraging federal, state, and local regulators to act in concert to address emissions from in-use vehicles.

a. Section 202(a)(1) of the Act directs EPA to establish "standards applicable to the emission of any air pollutant from * * * new motor vehicles." 42 U.S.C. 7521(a)(1); see 42 U.S.C. 7550(3) (defining "new motor vehicle" to mean, subject to an exception not pertinent here, "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser"). The Act establishes several mechanisms through which EPA can implement those standards.

Under Sections 203(a)(1) and 206, a manufacturer may not sell a new motor vehicle unless it obtains a "certificate of conformity" reflecting EPA's determination that the vehicle will comply with federal emissions standards throughout its "useful life" (generally 10 years or 120,000 miles for light-duty vehicles). 42 U.S.C. 7522(a)(1), 7525; see 40 C.F.R. 86.1805-04, 86.1848-01. In addition, manufacturers must warrant to consumers that (*inter alia*) the vehicle's emission-control system is "free from defects in materials and workman-

ship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life." 42 U.S.C. 7541(a)(1).

b. EPA also plays an active role in ensuring vehicles' continuing compliance with federal emissions standards throughout their useful lives. Under Section 207(b) of the Act, EPA has established procedures for testing the emission-control systems of vehicles in "actual use." 42 U.S.C. 7541(b). Manufacturers must perform such testing and report the results to EPA. See 42 U.S.C. 7542(a). If EPA determines that a substantial number of in-use vehicles of a particular model are exceeding federal emissions standards, EPA may order a mandatory recall. 42 U.S.C. 7541(c)(1). Under a mandatory recall, the manufacturer must implement an EPA-approved plan to remedy the nonconformity in all properly maintained and used vehicles. See 40 C.F.R. 85.1803-85.1804 and App. A to Subt. S of Pt. 85; see also 42 U.S.C. 7541(c)(1). Such mandatory recalls are rare; EPA has not issued one in more than two decades.

EPA regulations separately establish a process for a *voluntary* recall "initiated and conducted by a manufacturer to remedy any emission-related defect." 40 C.F.R. 85.1902(d). More than 800 voluntary recalls have occurred during the past decade. When initiating a voluntary recall, a manufacturer must notify EPA about identified defects and describe the steps the manufacturer will take to correct them. 40 C.F.R. 85.1904. The manufacturer also must report to EPA about the recall campaign's progress. 40 C.F.R. 85.1904(b). Unlike mandatory recall plans, however, "voluntary recall plans are not subject to EPA approval." 42 Fed. Reg. 28,123, 28,127 (June 2, 1977).

Manufacturers also undertake what are known as "field fixes," which are (with rare exceptions) not implemented through EPA's voluntary-recall program but serve a similar function. EPA regulations do not address field fixes, but in sub-regulatory guidance issued in 1975, EPA described an optional "field fix approval procedure" through which manufacturers could obtain EPA's views about planned modifications. Office of Air & Waste Management, EPA, Mobile Source Air Pollution Control Advisory Circular No. 2B, *Field Fixes Related to Emission Control-Related Components* 2 (Mar. 17, 1975) (Circular). Informal approval under that process "does not * * * carry the force of law." *Ibid.*

Finally, manufacturers may modify the emission-control system for a vehicle line through a "running change," which is implemented while vehicles are still in production. As with voluntary recalls and field fixes, EPA pre-approval is not required. See 40 C.F.R. Part 86.

Although voluntary recalls, field fixes, and running changes do not require EPA pre-approval, the Act authorizes EPA to pursue relief if it determines that a manufacturer—or any other person—has made modifications that impede a vehicle's emission-control system. Section 203(a)(3)(A) makes it unlawful for "any person to remove or render inoperative any device or element of design" that has been installed in a vehicle to comply with federal emissions requirements. 42 U.S.C. 7522(a)(3)(A). That prohibition applies both before "sale and delivery to the ultimate purchaser" and—where a person acts "knowingly"—"after such sale and delivery." *Ibid.* In addition, Section 203(a)(3)(B) makes it unlawful knowingly to install a "part or component * * * a principal effect" of which "is to bypass, defeat,

or render inoperative" a vehicle's emission-control system. 42 U.S.C. 7522(a)(3)(B); see 42 U.S.C. 7523-7524 (authorizing injunctive and monetary relief for violations of Section 203(a)).

2. The Clean Air Act gives States and localities a substantial role in controlling air pollution. The Act reflects Congress's view that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3). Section 116 accordingly provides that, in general, "nothing in" the Act "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce * * * requirement[s] respecting control or abatement of air pollution." 42 U.S.C. 7416. That broad statement is made subject, however, to provisions in Sections 209, 211, and 233 that expressly "preempt[] certain State regulation of moving sources." *Ibid.* (citing, *inter alia,* 42 U.S.C. 7543, 7545(c)(4), and 7573).

Section 209 is the only one of those provisions that addresses motor-vehicle emissions. It provides:

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

42 U.S.C. 7543(a). Section 209(d) then specifies 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." 42 U.S.C. 7543(d).[1]

B. Petitioners' Conduct

Petitioners are involved in the manufacture and distribution of motor vehicles for sale and use in the United States. Beginning in 2006, petitioners developed, and subsequently installed in their diesel-engine vehicles, software that would substantially reduce the effectiveness of the vehicles' emission-control systems at times when the vehicles were not undergoing emissions testing. Pet. App. 6a-7a. That "defeat device[]" software allowed the vehicles to appear compliant with federal emissions standards when tested, but avoided the expense and engineering difficulty of designing engines that could actually comply with those standards during ordinary on-road conditions. *Ibid.* As a result, petitioners' diesel vehicles substantially exceeded federal emissions standards when driven—in some cases producing nitrogen oxide (NOx) emissions 35 times higher than the federal limit. *Id.* at 7a.

Around 2012, petitioners' diesel-engine vehicles began to experience hardware failures. Pet. App. 8a. Petitioners concluded that the failures likely were occurring because their defeat-device software was not activating as intended, so that emission-control systems were functioning in "testing" mode even during normal driving conditions. *Ibid.* Because the vehicles "were not designed to comply with NOx emissions standards

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[1] Under Section 209(b), EPA may permit California to enforce its own standards notwithstanding Section 209(a), and other States may then adopt California's standards. See 42 U.S.C. 7543(b), 7507. That provision is not implicated in this case, because neither Florida nor Utah has adopted California's standards.

except during the short periods of testing," petitioners suspected that the "increased stress on the exhaust system from being driven too long in compliance with NOx standards" was causing the failures. *Ibid.*

To address this problem, petitioners modified their defeat-device software in two ways. See Pet. App. 8a. The first caused a vehicle's emission-control system to start at reduced effectiveness, switching to its higher-effectiveness testing mode only if the system determined that it was undergoing an emissions test. *Ibid.*; C.A. E.R. 50. The second improved the vehicle's ability to differentiate between testing conditions and ordinary driving conditions. Pet. App. 8a.

Petitioners used the modified software when manufacturing new vehicles. Pet. App. 8a. They also installed it in existing in-use vehicles, including through a voluntary recall program in which they deceived both EPA and vehicle owners about the true purpose and effect of the update. *Ibid.*

Eventually, EPA learned of the defeat-device software through third-party road testing and an extensive investigation. See Pet. App. 9a. The federal government subsequently filed civil and criminal charges against a number of Volkswagen-related entities, including petitioners Volkswagen Group of America, Inc., and Porsche Cars North America, Inc., for installing defeat-device software in approximately 585,000 vehicles between 2009 and 2015, in violation of the Clean Air Act and other federal laws. *Id.* at 7a-9a. Those petitioners pleaded guilty to the criminal charges and settled the civil claims by entering into consent decrees with the United States. *Id.* at 9a-10a. The plea agreement

and consent decrees did not give petitioners "any protection against prosecution" by state or local governments. *Id.* at 10a.

C. The Proceedings Below

1. While EPA was pursuing federal charges, respondents—municipal governments in Florida and Utah—filed their own suits alleging that petitioners' actions had violated state and local laws. Respondents' primary claims sought civil monetary penalties under anti-tampering laws that specifically address vehicle emissions. Utah's anti-tampering regulation states that "[n]o person shall remove or make inoperable the [emission control] system" of a motor vehicle except to install an "equally or more effective" control system. Utah Admin. Code R307-201-4 (2021). The Rules of the Environmental Protection Commission (EPC) of Hillsborough County, Florida, provide that "[n]o person shall tamper, cause, or allow the tampering of the emission control system of any motor vehicle," nor shall any person "defeat or render inoperable any component of a motor vehicle's emission control system." EPC Rules 1-8.05(1), (6) (Aug. 20, 2012). See Pet. App. 12a-13a.

In the operative amended complaints, respondents alleged that petitioners had violated those laws by (1) installing defeat-device software when manufacturing new vehicles that were subsequently registered in respondents' jurisdictions, and (2) installing modified defeat-device software in vehicles that were already in use in those jurisdictions. See Pet. App. 53a-54a. The Judicial Panel on Multidistrict Litigation transferred respondents' suits to the United States District Court for the Northern District of California, which granted petitioners' motions to dismiss. *Id.* at 11a, 47a-87a.

a. The district court held that Section 209(a) expressly preempts respondents' claims concerning *pre*-sale installation of defeat-device software, because those claims seek to enforce a "standard relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a). Pet. App. 61a-64a. Those claims are not at issue in this Court.

b. With respect to respondents' claims concerning petitioners' *post*-sale software updates, the district court held that Section 209(a)'s express-preemption rule is inapplicable because the vehicles involved "had already been sold to consumers and were in use within [respondents' jurisdictions], not 'new motor vehicles.'" Pet. App. 65a. The court recognized that, under "the relation-back concept discussed in" an influential district-court decision and later "cited favorably by EPA," Section 209(a) may preempt some state emission-control measures that apply immediately after a vehicle is purchased, since such measures could effectively compel manufacturers to "ensure that their new vehicles complied with [the state or local government's] in-use control measures." *Id.* at 66a (discussing *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), aff'd, 468 F.2d 624 (2d Cir. 1972)). The court concluded, however, that "the relation-back principle is not implicated here." *Id.* at 67a. The court explained that respondents "are not attempting to impose emission measures that would require manufacturers to change the way they construct new vehicles," but instead "are attempting to prevent manufacturers from tampering with their vehicles after the vehicles are sold." *Ibid.*; see *id.* at 64a-67a.

Although the district court held that Section 209(a) does not *expressly* preempt respondents' claims alleging post-sale tampering, it concluded that the Clean Air Act as a whole *impliedly* preempts those claims. The court acknowledged that States and localities can enforce emissions standards "on an individual vehicle basis at the end-user level." Pet. App. 73a. The court concluded, however, that the Act reflects Congress's intent that "only EPA" will regulate "post-sale software changes" made "on a model-wide basis." *Id.* at 82a-83a; see *id.* at 67a-87a.

2. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-46a.

Like the district court, the court of appeals held that Section 209(a) expressly preempts the claims related to new vehicles, but not those related to in-use vehicles. See Pet. App. 28a-31a. The court concluded that, because Section 209(a) addresses only "state and local regulations 'relating to the control of emissions from *new* motor vehicles,'" that provision "clearly does not" preempt all application of anti-tampering rules "as applied to post-sale vehicles." *Id.* at 30a (citation omitted). The court found *Allway Taxi*'s relation-back principle to be inapposite because respondents' claims of post-sale tampering would neither require "compl[iance] with a local emission standard that is different from the federal standard," nor "effectively require car manufacturers to alter their manufacture of new vehicles before sale." *Id.* at 31a.

The court of appeals reversed the district court's implied-preemption holding, however, concluding that respondents' claims alleging post-sale tampering can go forward. See Pet. App. 31a-46a. The court emphasized that Section 209(d) explicitly preserves certain state

and local authority over post-sale vehicles, and it found no evidence in the Act that Congress intended to displace the anti-tampering laws in effect in numerous States and municipalities. See *id.* at 32a-35a.

The court of appeals denied rehearing and rehearing en banc without recorded dissent. Pet. App. 88a-89a.

DISCUSSION

The court of appeals correctly held that the Clean Air Act does not preempt respondents' civil-monetary-penalty claims alleging post-sale tampering with the emission-control systems of in-use vehicles. That holding does not warrant further review.

No appellate court has accepted petitioners' primary argument (Pet. 24-31) that Section 209(a) expressly preempts claims like those at issue here. Although petitioners accurately identify a conflict with respect to their claim of implied preemption, that shallow conflict is unlikely to deepen—and may even resolve itself—in light of the court of appeals' persuasive opinion in this case. Petitioners speculate that States or municipalities might seek to hold manufacturers liable for software updates that EPA has ordered or approved. But because EPA never directed or approved the updates at issue here, this case would be an unsuitable vehicle for clarifying the preemption rules that would apply in the circumstances that petitioners posit. The petition for a writ of certiorari should be denied.

I. THE CLEAN AIR ACT DOES NOT PREEMPT RESPONDENTS' CLAIMS ALLEGING POST-SALE TAMPERING

A. Section 209(a) Does Not Expressly Preempt Respondents' Claims

1. Section 209(a) of the Clean Air Act expressly preempts state and local adoption or enforcement of "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a); see 42 U.S.C. 7543(b) (describing exception for standards established by California); p. 6 n. 1, *supra*. That provision ensures that newly manufactured vehicles that comply with federal emissions standards may be sold throughout the United States without the need for State-by-State or locality-by-locality customization. But as every appellate court to address the question has correctly held, Section 209(a) does not bar States and localities from imposing civil penalties for post-sale changes that reduce the effectiveness of emission-control systems in vehicles that are already in use.

By preempting "standard[s] relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a), Section 209(a) prevents interference with the federal government's responsibility for setting emissions standards applicable to motor vehicles that have not yet been "transferred to an ultimate purchaser." 42 U.S.C. 7550(3) (defining "new motor vehicle"). Because Section 209(a) refers to standards "*relating to* the control of emissions from new motor vehicles," 42 U.S.C. 7543(a) (emphasis added), its preemptive effect also extends beyond explicit regulation of conduct that precedes a vehicle's initial sale.

For example, EPA and the courts have long recognized that Section 209(a) prevents a State from "impos[ing] its own emission control standards the moment after a new car is bought and registered." *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); see 59 Fed. Reg. 31,306, 31,330 (June 17, 1994) ("EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts to any State adoption of in-use controls."); *Engine Manufacturers Ass'n* v. *EPA*, 88 F.3d 1075, 1086 & n. 39 (D.C. Cir. 1996) (endorsing *Allway Taxi* rationale). Although such state regulation would formally govern post-sale conduct, it would have an evident practical tendency to alter manufacturers' choices regarding the emission-control systems they install in new motor vehicles. Cf. *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 254 (2004) (holding that Section 209(a) preempts certain state rules that would pressure manufacturers to change the design of new engines even when "not enforced through manufacturer-directed regulation").

Section 209(a) likewise prohibits States and municipalities from implementing "recall programs" that require manufacturers to modify the "original manufacture of the engine" of an in-use vehicle. 59 Fed. Reg. at 31,330 n.28. Although such regulations "may be characterized as 'in-use' regulations," they are preempted because "they are effectively regulations on the design of new engines rather than on the use of 'in-use' engines." *Id.* at 31,331.

Section 209(a) generally does not, however, preempt state or local laws that prohibit tampering with the existing emission-control systems of in-use vehicles. Respondents' claims for monetary penalties based on

petitioners' post-sale tampering do not "relat[e] to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a), because they do not require petitioners—either expressly or practically—to modify the design or emission-control features of new vehicles. See Pet. App. 31a. Instead, they come within what this Court has described as the States' "broad residual power over used motor vehicles." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972); see *ibid.* (observing that States retain this power "[b]ecause federal motor vehicle emission control standards apply only to new motor vehicles").

The fact that anti-tampering laws sometimes treat a vehicle's pre-sale design as a baseline from which future modifications are judged (see Pet. 27) does not change that conclusion. Since every in-use vehicle was once new, every regulation of in-use vehicles' emissions has some connection to the emission-control features of a new vehicle. Congress presumably intended, however, that Section 209(a)'s specific reference to "*new* motor vehicles" would meaningfully limit the provision's pre-emptive scope. Use of a vehicle's original emissions equipment as a benchmark, to determine whether unlawful post-sale tampering has occurred, takes the manufacturer's choice of new-vehicle emission-control equipment as given and therefore is unlikely to affect that choice. And if use of new-vehicle emissions equipment as a baseline were sufficient to trigger Section 209(a), States and municipalities could not apply their anti-tampering laws even to vehicle owners or mechanics who modify factory-installed emission-control systems. Petitioners acknowledge, however, that the Act does not preempt enforcement of state or local law in such cases. See Pet. 27; see also 50 Fed. Reg. 30,960, 30,961 (July 31, 1985)

(expressing EPA approval of an Indiana anti-tampering law prohibiting any person from disabling "any emission control system installed by the manufacturer").

2. Contrary to petitioners' contentions (Pet. 25-27), Section 209(a) does not establish a special preemption rule for manufacturers. Neither Section 209(a) itself, nor any other Clean Air Act provision, suggests that the express-preemption inquiry—*i.e.*, the determination whether a state or local anti-tampering rule "relat[es] to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a)—turns on the identity of the alleged tamperer. The Act's own anti-tampering provision groups all potential violators together, making it unlawful for "any person" to tamper with an emission-control system. 42 U.S.C. 7522(a)(3)(A). There is no textual basis for reading Section 209(a) to confer a broad, manufacturer-specific immunity from otherwise valid state and local anti-tampering laws.

Petitioners' reliance (Pet. 25-26) on *Allway Taxi* is misplaced. The *Allway Taxi* court correctly explained that, while States and localities may not enforce their "own emission control standards the moment after a new car is bought and registered," they are generally free to adopt emissions rules that apply to vehicles at a later point, such as "upon the resale or reregistration of the automobile." 340 F. Supp. at 1124. The court observed that, in that context, "the burden of compliance" with permissible standards generally "would be on individual owners and not on manufacturers and distributors." *Ibid.* But the court in *Allway Taxi* did not state —and the Act cannot reasonably be read to mean—that manufacturers are categorically exempt from otherwise valid state and local emissions regulations.

3. Petitioners contend (Pet. 27) that respondents' claims are preempted because they "rest on the fact that, *as manufactured*, the vehicles violated EPA standards." That argument is based (*ibid.*) on the premise that petitioners' "post-sale updates reduced emissions," so that the updates' only deficiency was their failure to reduce emissions by "enough to comply with the [federal] emissions standards."

That premise, however, contradicts the allegations of the operative complaints, which must be taken as true at this stage of the case. While petitioners assert that their modifications partially reduced emissions, the complaints allege that petitioners' post-sale tampering had the opposite effect. See Pet. App. 65a (district court explains that "[respondents'] allegations support that the post-sale software changes *increased* emissions"); C.A. E.R. 96, ¶ 88; *id.* at 125, ¶ 42. And in connection with the federal criminal guilty plea, Volkswagen acknowledged that the post-sale updates "improve[d] the defeat device's precision in order to reduce the stress on the emissions control systems," meaning that the changes allowed those emission-control systems to operate at reduced capacity (*i.e.*, not in compliance with federal emissions standards) more than the factory-installed software had. C.A. E.R. 51.[2] Accordingly, even assuming that Section 209(a) would preempt anti-

[2] Petitioners point to a statement by the government that regulators found "a 'limited reduction in the rates of emissions of NOx'" in the modified vehicles. Pet. 27 (citation omitted). That statement, however, reflected in part the preliminary results of tests that petitioners' software was designed to circumvent. The government has never determined that petitioners' post-sale modifications actually reduced real-world emissions from their vehicles.

tampering claims that depended on showing deficiencies in a vehicle's pre-sale design, respondents' claims cannot be dismissed on that basis.

4. Petitioners argue (Pet. 28-31) that the court of appeals misconstrued Section 209(d), which states 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." 42 U.S.C. 7543(d). The court appeared to read that provision broadly, as extending beyond a driver's "operation" of a vehicle on the roads to encompass the way in which the vehicle's emission-control system functions. See Pet. App. 24a-25a. We agree with petitioners that Section 209(d) does not authorize States to impose post-sale emissions standards that would have the practical effect of compelling manufactures to modify the original design of their vehicles. See pp. 12-13, *supra*; see also Pet. 29 (identifying narrower definitions of "operation").

Other aspects of the court of appeals' opinion, however, suggest that the court would not read Section 209(d) in that expansive manner. See Pet. App. 30a-31a (discussing "the leading case of *Allway Taxi*," and emphasizing that respondents' anti-tampering rules do not "impose a standard that would effectively require car manufacturers to alter their manufacture of new vehicles before sale"). In any event, because Section 209(a) by its own terms does not preempt respondents' claims based on modifications that allegedly increased emissions from in-use vehicles, the court of appeals' reading of Section 209(d) was unnecessary to its resolution of the express-preemption issue in this case. Indeed, the court did not cite Section 209(d) in addressing that issue. See *ibid.*

B. The Clean Air Act Does Not Impliedly Preempt Respondents' Claims

The district court held (Pet. App. 67a-87a), and petitioners continue to assert (Pet. 31-34), that the Clean Air Act impliedly preempts respondents' claims. That argument lacks merit.

1. The text and structure of the Clean Air Act do not reflect congressional intent broadly to displace state and local anti-tampering laws. See Pet. App. 31a-36a. On the contrary, most applications of such laws are consistent with the regime of cooperative federalism that the Act establishes, under which the federal government possesses generally exclusive authority to regulate "new" motor vehicles but States retain "broad residual power over used motor vehicles." *General Motors Corp.*, 406 U.S. at 115 n.4.

Section 116 of the Act preserves "the right of any State or political subdivision thereof to adopt or enforce * * * requirement[s] respecting control or abatement of air pollution," except where doing so would be inconsistent with other provisions of the Act. 42 U.S.C. 7416; see *ibid.* (citing, *inter alia*, Section 209 of the Act, 42 U.S.C. 7543). Respondents' claims for civil monetary penalties would not give rise to any such inconsistencies. Because those claims do not seek to enforce "standard[s] relating to the control of emissions from new motor vehicles," they are not inconsistent with Section 209(a). 42 U.S.C. 7543(a); see pp. 12-17, *supra*. And by discouraging manufacturers from disabling emission-control systems that were necessary to obtain pre-sale EPA certificates of conformity, claims like respondents' can further Congress's purpose of limiting vehicles' emissions throughout their useful lives. See 42 U.S.C. 7521, 7522(a)(1).

EPA accordingly has long maintained that 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. 10,198, 10,206 (Mar. 25, 1986); see 50 Fed. Reg. at 30,961. EPA's view that such laws generally do not undermine the Clean Air Act's objectives "should make a difference" in a court's preemption analysis. *Williamson* v. *Mazda Motor of America, Inc.*, 562 U.S. 323, 335 (2011) (citation omitted). That is particularly true here, where petitioners have identified no instance in which a state or local anti-tampering law has obstructed the Act's proper operation, even though such laws exist in "the vast majority of states." Pet. App. 33a. The agency's informed judgment that federal, state, and local enforcement efforts can beneficially coexist, combined with petitioners' inability to identify concrete examples of past conflicts, weighs strongly against a finding of implied preemption here.

2. Petitioners' contrary argument (Pet. 31-34; Reply Br. 11-12) rests principally on their assertion that state and local anti-tampering claims are likely to obstruct EPA's regulation of manufacturers' post-sale conduct. No such obstruction has occurred in the past or exists in the circumstances of this case, however, and any future conflicts can appropriately be addressed on a case-by-case basis if and when they arise.

Petitioners do not contend that it would have been "impossible" in this case "to comply with both state and federal requirements." *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 480 (2013) (citation omitted). Far from being required by the Clean Air Act, the post-sale modifications alleged here would violate the Act and other federal laws. Petitioners could have complied

with federal, state, and local anti-tampering laws simply by not making those modifications.

This case likewise does not involve state or local attempts to impose liability for "EPA-approved updates." Pet. 5. EPA has suggested that it is "prudent" for manufacturers to "consult with [EPA] prior to initiating a voluntary emissions recall * * * to avoid EPA raising concerns after the campaign has been released"; but "[t]he regulations do not require a manufacturer to get EPA approval," and petitioners did not do so here. Office of Transportation & Air Quality, Office of Air & Radiation, EPA, *Voluntary Emissions Recall and Voluntary Service Campaign* (Apr. 6, 2015). Nor do petitioners claim to have pursued the "field fix approval procedure" described in EPA's 1975 Circular. Circular 2; cf. Pet. 19 (asserting that "respondents' theory would permit them to challenge even EPA-approved updates," but not contending that this case involves such a challenge).

Thus, while state or local anti-tampering claims based on EPA-required or EPA-approved modifications likely would be preempted in at least some circumstances, this case does not involve any such interference with EPA regulatory or enforcement activities. And because petitioners never obtained EPA approval of the modifications at issue, there is likewise no basis for petitioners' characterization of respondents' claims as depending upon "fraud on EPA." Pet. 34 (discussing *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)).

Under current EPA practice, moreover, no substantial number of conflicts between EPA-approved modifications and state or local anti-tampering laws is likely

to arise. When it issued the 1975 Circular on which petitioners and their amici focus (Pet. 10; Alliance for Automotive Innovation Br. 13-14), EPA stated that it would generally "treat requests for approval of field fixes in the same manner that running changes are treated." Circular 2. At that time, EPA regulations established a procedure for mandatory EPA pre-approval of running changes. See 35 Fed. Reg. 17,288, 17,293 (Nov. 10, 1970). In 1981, however, EPA revised those rules to allow manufacturers to "implement running changes without prior EPA approval," 46 Fed. Reg. 50,464, 50,465 (Oct. 13, 1981), and EPA regulations no longer establish a process for agency pre-approval of running changes. As a result, EPA currently has no formal procedure by which manufacturers may request pre-approval for field fixes either, and no regular practice of providing such pre-approvals exists.

3. Petitioners contend (Pet. 32-34) that allowing state and local penalty claims will make it harder for EPA to negotiate settlements with manufacturers and will prevent EPA from setting the maximum civil penalties those manufacturers might face. That possibility is always present, however, when federal, state, and local governments share overlapping regulatory authority, and "the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Kansas* v. *Garcia*, 140 S. Ct. 791, 807 (2020). The possibility of follow-on state or local suits is equally present in federal anti-tampering cases against mechanics or consumers, yet petitioners acknowledge (Pet. 27) that such suits are consistent with the Clean Air Act. Petitioners identify no persuasive reason for treating manufacturers differently.

II. THE DECISION BELOW DOES NOT WARRANT FURTHER REVIEW

Although the decision below implicates a shallow conflict of authority, that conflict does not warrant this Court's review. And while petitioners identify circumstances in which state or local regulation of vehicle updates might impede EPA's enforcement of the Clean Air Act, those circumstances are not present here.

A. The Decision Below Does Not Implicate A Substantial Conflict Of Authority

Petitioners' primary argument on the merits (see Pet. 22-31) is that Section 209(a) expressly preempts respondents' claims. Every appellate court to have addressed that argument has rejected it. See Pet. App. 30a-31a; *State* v. *Volkswagen AG*, 279 So. 3d 1109, 1119 (Ala. 2018) (*Alabama*); *State ex rel. Swanson* v. *Volkswagen Aktiengesellschaft*, No. A18-544, 2018 WL 6273103, at *6 (Minn. Ct. App. Dec. 3, 2018) (*Minnesota*); *State ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, No. 2020-92, 2021 WL 2654338, at *3-*5 (Ohio June 29, 2021) (*Ohio*), petition for cert. pending, No. 21-312 (filed Aug. 27, 2021); *State ex rel. Slatery* v. *Volkswagen Aktiengesellschaft*, No. M2018-00791-COA-R9-CV, 2019 WL 1220836, at *10 (Tenn. Ct. App. Mar. 13, 2019) (*Tennessee*).

Petitioners identify a conflict of authority only on their implied-preemption argument. As to that issue, they correctly observe (Pet. 14) that the decision below conflicts with the decision of one "state court of last resort," Sup. Ct. R. 10(a), a 2018 decision of the Alabama Supreme Court.

That shallow conflict does not warrant this Court's review. The Alabama Supreme Court offered essentially no independent analysis of the implied-preemption

question, instead relying on an eight-page block quotation from the opinion of the district court in this case. See *Alabama*, 279 So. 3d at 1121-1129. In light of the court of appeals' subsequent decision rejecting the district court's analysis, the Alabama Supreme Court may reconsider the issue if it arises in a future case. Other state courts—including in Minnesota and Tennessee, where the issue has previously been addressed only in unpublished decisions by intermediate appellate courts—may also follow the court of appeals' analysis, as the Ohio Supreme Court did in the most recent decision to address the issue. See *Ohio*, 2021 WL 2654338, at *5-*7; see also *Minnesota*, 2018 WL 6273103, at *6-*10; *Tennessee*, 2019 WL 1220836, at *10-*14.

B. This Case Is An Unsuitable Vehicle For Clarifying The Preemption Rules That Would Apply To State Or Local Regulation Of Modifications That EPA Has Required Or Approved

Petitioners predict (Pet. 4) that enforcement of state and local anti-tampering laws against manufacturers will interfere with EPA determinations about, for example, modifications that would reduce emissions of one pollutant but increase emissions of another, or settlements that bring in-use vehicles into only partial compliance with federal standards. They assert (Pet. 19) that in *Ohio*, *supra*, the State "claimed that it has" authority "to challenge even EPA-approved updates"; and they contend (Pet. 21) that in *Environmental Protection Commission of Hillsborough County* v. *Mercedes-Benz USA, LLC*, No. 20-cv-2238 (M.D. Fla.), the plaintiff municipality has sought injunctive relief that could potentially conflict with an EPA consent decree.

The United States takes no position here on the proper result in those particular cases. It agrees, however, that efforts to punish conduct that EPA has deemed necessary or appropriate under the Clean Air Act, or to obtain injunctive relief that conflicts with or impairs the effectiveness of an existing EPA settlement, might well be preempted. Such claims could "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990) (citation omitted), or could relate back to the control of emissions from new vehicles in a way that would trigger express preemption under Section 209(a). As discussed above, pp. 19-20, *supra*, however, this case involves no such conflicts. Far from seeking to punish conduct that EPA required or approved, respondents' claims are based on post-sale modifications designed to violate the Clean Air Act.

Nor is it clear that the Court will *ever* need to clarify the preemption rules that would apply if manufacturers were subjected to state- or local-law liability for conduct that EPA had mandated or approved. Petitioners point only to legal arguments that litigants in other cases have raised; they identify no court that has actually granted relief of the sort they hypothesize. Indeed, the Ohio Supreme Court emphasized that its decision should not be understood as permitting relief "for actions taken in response to EPA guidelines or for modifications approved by the EPA." *Ohio*, 2021 WL 2654338, at *5. Other courts can likewise be expected to restrain overreaching claims. If they do not, this Court may choose to grant review in a future case that actually involves the sort of conflict that petitioners posit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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