No.

In the Supreme Court of the United States

VOLKSWAGEN AKTIENGESELLSCHAFT, ET AL.,
PETITIONERS

v.

STATE OF OHIO *EX REL.* DAVE YOST, ATTORNEY GENERAL, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title II of the Clean Air Act ("CAA") grants the U.S. Environmental Protection Agency ("EPA") broad and exclusive authority to enforce auto manufacturers' compliance with CAA standards over the entire useful life of their vehicles. To avoid conflicting regulation, Congress directed that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . ." 42 U.S.C. § 7543(a).

Exercising its authority, EPA reached a multi-billion-dollar resolution with petitioners relating to, among other things, post-sale software updates made to their vehicles on a nationwide basis. Certain state and local governments nonetheless brought unprecedented lawsuits seeking substantial additional penalties based on the same updates. The Ohio Supreme Court below—following a decision of the U.S. Court of Appeals for the Ninth Circuit and deepening a direct conflict with final decisions of the Alabama Supreme Court and intermediate appellate courts in Tennessee and Minnesota—held that all 50 states and thousands of local governments may freely regulate manufacturers' post-sale, nationwide updates to vehicle emission systems.

The question presented is whether the CAA preempts state and local governments from regulating manufacturers' post-sale, nationwide updates to vehicle emission systems.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Volkswagen Aktiengesellschaft ("Volkswagen AG"), AUDI Aktiengesellschaft ("AUDI AG"), Volkswagen Group of America, Inc. ("VWGoA"), Audi of America, LLC, Dr. Ing. h.c. F. Porsche AG ("Porsche AG"), and Porsche Cars North America, Inc. ("PCNA").

Volkswagen AG is the parent corporation of VWGoA and AUDI AG. Audi of America, LLC is a wholly owned subsidiary of VWGoA. Volkswagen AG is a publicly held German corporation that owns 10% or more of the stock of VWGoA and AUDI AG, and owns indirectly 10% or more of the stock of Porsche AG. Porsche Automobil Holding SE is a publicly held corporation that owns 10% or more of the stock of Volkswagen AG.

Porsche AG owns the stock of two companies that own stock of a company that owns stock in differing shares of PCNA and has been described as an indirect parent corporation of PCNA.

Respondent is the State of Ohio *ex rel.* Dave Yost, Ohio Attorney General.

RELATED PROCEEDINGS

Ohio Court of Common Pleas (Franklin County):

State ex rel. DeWine v. *Volkswagen Aktiengesellschaft, et al.*, No. 16-cv-010206 (Dec. 7, 2018)

Ohio Court of Appeals (Tenth District):

State ex rel. Yost v. *Volkswagen Aktiengesellschaft, et al.*, No. 19AP-7 (Dec. 10, 2019)

Ohio Supreme Court:

State ex rel. Yost v. *Volkswagen Aktiengesellschaft, et al.*, Slip Op. No. 2021-Ohio-2121 (June 29, 2021)

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OPINIONS BELOW

The opinion of the Ohio Supreme Court (App., *infra*, 1a-26a) has been designated for publication but is not yet reported. It is available at Slip Op. No. 2021-Ohio-2121 ("*Ohio*"). The opinion of the Ohio Court of Appeals (App., *infra*, 27a-46a) is reported at 137 N.E.3d 1267. The opinion of the Ohio Court of Common Pleas (App., *infra*, 47a-69a) is available at 2018 WL 8951077.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on June 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 70a-85a. Section 209(a) of the CAA, 42 U.S.C. § 7543(a), provides in relevant part:

> 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.

Section 209(d) of the CAA, 42 U.S.C. § 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.

Section 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1), provides in relevant part:

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

> complete systems or incorporate devices to prevent or control such pollution.

Section 207(h)(2) of the CAA, 42 U.S.C. § 7541(h)(2), provides:

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

STATEMENT

This case concerns a question of critical importance to the automobile industry that continues to divide courts across the country: whether Congress, when vesting EPA with the exclusive authority to set emissions standards and enforce manufacturers' compliance with those standards for vehicles during their entire useful life, also intended to allow all 50 states and thousands of local governments to regulate separately any post-sale updates those manufacturers make to their vehicles' emission systems on a nationwide basis. In a split decision, a majority of the Ohio Supreme Court followed the Ninth Circuit in recognizing such state and local authority for the *first time* in the more than 50 years since Congress directed EPA to regulate auto emissions. See *Ohio*, App., *infra*, 16a; *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201 (9th Cir. 2020), cert. pending ("*Counties*"). Volkswagen has sought review by this Court of the Ninth Circuit's decision, and this Court has requested the Solicitor General's views in that case. See *Volkswagen Group of America, Inc.* v. *EPC of Hillsborough Cty.*, No. 20-994 (Apr. 26, 2021). This Court's review is warranted for several reasons.

First, there is a deepening split on the question presented. The *Ohio* and *Counties* decisions squarely conflict with final decisions of the Alabama Supreme Court and intermediate courts of appeals in Minnesota and Tennessee, which held that the CAA preempts state and local governments from challenging manufacturers' post-sale emissions updates. See *State* v. *Volkswagen AG*, 279 So. 3d 1109 (Ala. 2018) ("*Alabama*"); *State ex rel. Slatery* v. *Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. Mar. 13, 2019) ("*Tennessee*"); *State ex rel. Swanson* v. *Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018) ("*Minnesota*"). Those courts addressed this legal question on the same set of allegations brought against the same defendants, yet reached the exact opposite conclusion from the Ohio Supreme Court and the Ninth Circuit. Moreover, the *Ohio* decision itself was divided—four justices joined the majority opinion, two concurred in judgment only, and one dissented. Of the 33 judges and justices that have now addressed the question presented, 16 have found the claims preempted. This case presents the ideal vehicle to resolve this conflict.

Second, this issue is of national importance. Respondent admitted as much when joining in petitioners' request that the Ohio Supreme Court grant discretionary review in this case, stating that the case "involves a substantial question" that is "being litigated nationwide." Ohio Juris. Mem., Ohio S.C. Dkt., at 1, 6 (Feb. 14, 2020). And in granting discretionary review, the Ohio Supreme Court likewise found that the case was one of "public or great general interest." Ohio Const., Art. IV, § 2(B)(2)(e). This issue is of urgent significance to the automobile industry, which contributes 2.1% to the U.S. Gross Domestic Product and supplies products to 90% of U.S. households. And numerous *amici* have already urged this Court to grant

review in the *Counties* case. See *Volkswagen Group of America, Inc.* v. *EPC of Hillsborough Cty.*, No. 20-994.

Since 1967, EPA has exclusively regulated manufacturers' post-sale changes, such as software updates, to their cars' emission control systems. The decision below (like the Ninth Circuit's decision in *Counties*) upends that longstanding history by concluding that all 50 states and thousands of localities can separately regulate such manufacturer updates.

Permitting thousands of governments to regulate post-sale, nationwide updates will undermine EPA's ability to regulate manufacturers and lead to conflicting regulation. EPA's evaluation of emissions updates involves a highly technical exercise of judgment regarding numerous potential tradeoffs, such as weighing one type of pollutant against another and balancing emissions reductions against the potential for engine or vehicle damage. Under the Ohio Supreme Court's decision, however, if any state or locality reaches a different conclusion from EPA, then manufacturers could face significant liability from state and local enforcement actions. This threat will discourage manufacturers from making beneficial post-sale modifications to emission systems.

This is not a theoretical concern: respondent, for example, explicitly claimed that it has the authority to challenge EPA-approved updates. See *infra* at 21. And Hillsborough County, Florida has already brought an analogous lawsuit against Daimler AG seeking relief that conflicts with the careful balance that EPA struck in its resolution with Daimler over the same conduct. See *infra* at 22-23.

Technological developments in the 50 years since Congress directed EPA to regulate manufacturers have only heightened the chaos that the Ohio Supreme Court's de-

cision will cause. Emission control systems are now computer-operated, leading to the need for more frequent updates to such emission systems: manufacturers apply post-sale updates to, on average, six million cars every year under EPA oversight. EPA, *2014-2017 Progress Report: Vehicle & Engine Compliance Activities* (Apr. 2019), at 7 ("EPA Recall Report"), https://tinyurl.com/EPARecallReport (manufacturer recalls affected over 24 million cars between 2014 and 2017). And recalls are now increasingly accomplished through "over-the-air" software updates that are delivered wirelessly to vehicles without "requir[ing] customers to bring their vehicles to a dealership's service department." Doug Newcomb, *The Upsides and Downside of Over-the-Air Software Updates for Automobile Dealers*, WardsAuto (Nov. 6, 2020), https://tinyurl.com/WardsAuto.

Third, the Ohio Supreme Court's decision is wrong. Congress enacted Title II of the CAA to avoid exposing auto manufacturers to an "anarchic patchwork" of federal, state, and local regulation, which would needlessly increase the cost of vehicles to consumers. *Engine Mfrs. Assn.* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (quotation omitted). Congress included a sweeping express preemption provision in § 209(a) of the CAA, which provides that "[n]o 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) (emphases added).[1]

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[1] Congress gave California an exception from preemption and allowed other states to adopt and enforce California's EPA-approved standards. 42 U.S.C. §§ 7543(b), 7507. This exception is not relevant here because Ohio has not adopted California's standards.

The Ohio Supreme Court misinterpreted that provision, literally reading the phrase "relating to" out of the statute: "[T]he Clean Air Act expressly preempts *only state and local laws regulating or setting vehicle-emissions standards for new motor vehicles and new motor-vehicle engines*." App., *infra*, 9a (emphasis added). See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (rejecting interpretation that "simply reads the words 'relating to' out of the statute"). In doing so, the court ignored that "relating to" is an expansive phrase that this Court has recognized "indicates Congress' intent to pre-empt a large area of state law," *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 85 (2008), and to bar state regulation with any "connection with or reference to" the relevant subject matter, *Rutledge* v. *Pharm. Care Mgmt. Assn.*, 141 S. Ct. 474, 479 (2020) (quotation omitted); see *infra* at 24-25. The Ohio Supreme Court's erasure of the term "relating to" led it to adopt the same erroneous, bright-line rule as the Ninth Circuit: that § 209(a) preemption "no longer applies" after a vehicle "is first sold." See *infra* at 15, 24. That interpretation has long been rejected by other federal courts and EPA, which have interpreted § 209(a) to preempt state and local regulation of post-sale conduct that "relates back" to the original design of a motor vehicle. The post-sale updates here necessarily meet that criteria, because they simply modified the cars' original (noncompliant) software.

Moreover, the *Ohio* majority did not follow this Court's instruction in *Engine Manufacturers Association* v. *South Coast Air Quality Management District* to examine how Congress directed EPA to enforce CAA standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. 246, 253 (2004). Congress did not provide that EPA's enforcement of the CAA

new-vehicle emission standards would cease once a vehicle is sold. Instead, Congress directed EPA, through multiple enforcement provisions that expressly apply post-sale, to ensure that manufacturers maintain and update their cars in compliance with those CAA new-vehicle standards for their cars' full "useful life." 42 U.S.C. § 7521(a)(1), (d)(1). Ohio's action impermissibly seeks to duplicate this post-sale enforcement authority Congress gave exclusively to EPA, in contravention of § 209(a). Further confirming this interpretation, the CAA expressly bars states from even requiring emissions testing by manufacturers, an essential tool for enforcing emission compliance. 42 U.S.C. § 7541(h)(2).

Finally, as the dissenting justice below explained, the majority erred in finding no implied preemption. The comprehensive structure of the CAA demonstrates Congress's intent that EPA exclusively regulate manufacturers' emissions compliance before and after vehicles are sold. Multiple interrelated CAA provisions grant EPA alone the authority to regulate every aspect of manufacturers' nationwide conduct throughout the "useful life" of their cars, including by setting federal emission standards, requiring manufacturers to conduct testing of in-use vehicles, overseeing manufacturers' post-sale warranty obligations, administering post-sale recalls, and penalizing manufacturers' post-sale CAA violations. See *infra* at 9-10. Overlapping regulation by states and localities would conflict with that clear congressional purpose.

Likewise, as the dissent correctly recognized, the *Ohio* majority's analysis would undermine EPA's ability to achieve expedient, nationwide resolutions of future CAA violations, as manufacturers will know that settling with EPA could trigger copycat state and local government actions, as occurred here. Congress instructed EPA to consider specific factors in assessing penalties, and EPA has

promulgated a comprehensive policy for doing so. The potential for innumerable state and local follow-on actions will make it impossible for EPA to discharge that mandate. That respondent seeks substantial penalties for conduct that EPA comprehensively penalized vividly illustrates this conflict. See *infra* at 31-32.

This Court should grant the petition.

A. Background

1. In the CAA, Congress allocated responsibility for air pollution differently based on the source of emissions. Title I governs stationary sources, like power plants, which are subject to "federally encouraged state control." *Engine Mfrs. Assn.*, 88 F.3d at 1079-1080. Title II governs mobile sources, like cars, and provides that "the EPA, and with the EPA's permission California, are responsible for regulating emissions from motor vehicles and other mobile sources." *Nat. Assn. of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control Dist.*, 627 F.3d 730, 733 (9th Cir. 2010). Thus, pursuant to Title II, EPA has been the exclusive regulator of auto manufacturers' compliance with emission control laws for more than 50 years.

2. Congress directed EPA to regulate manufacturers' emissions-related conduct both before *and* after those vehicles are sold:

- Manufacturers must certify to EPA that their cars will comply with federal standards throughout their "useful life" (10 years or 120,000 miles). 42 U.S.C. § 7521(a)(1), (d)(1); 40 C.F.R. § 86.1805-04(a).
- Manufacturers must provide EPA-specified warranties for emission controls and bear the cost of

fixing them for years after sale. 42 U.S.C. § 7541(a)(1), (a)(3), (b)(2)(C).

- EPA has "establish[ed] . . . methods and procedures" to test "whether, when in actual use," cars "compl[y] with . . . emission standards." 42 U.S.C. § 7541(b). EPA requires manufacturers to conduct "in-use verification testing," including of "high mileage" post-sale cars. 40 C.F.R. §§ 86.1845-04, 86.1846-01(a)(1).
- Manufacturers must "establish and maintain records" of in-use emissions testing on post-sale cars during their useful life and "make reports and provide information [EPA] may reasonably require." 42 U.S.C. § 7542.
- If EPA "determines that a substantial number of any class or category of vehicles or engines" in use do not conform to EPA standards at any point during their "useful life," EPA may order a nationwide recall. 42 U.S.C. § 7541(c)(1).

3. To protect EPA's exclusive authority, Congress enacted a sweeping express preemption provision: "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) (emphasis added).[2] Congress also barred states from requiring

[2] In § 209(d), Congress preserved states' and localities' authority "*otherwise* to control, regulate, or restrict the *use, operation, or movement* of registered or licensed motor vehicles." 42 U.S.C. § 7543(d) (emphases added). This provision contemplates state regulation of drivers' local conduct that does not intrude on EPA's author-

emissions testing by auto manufacturers "after the date of sale." 42 U.S.C. § 7541(h)(2).

4. Congress specifically authorized EPA to regulate manufacturers' unlawful changes to emission controls on vehicles that have been sold. Pub. L. No. 91-604, 84 Stat. 1676, 1693 § 7(a)(3) (1970) (making it unlawful "for any manufacturer or dealer" to tamper with emission controls "after such sale and delivery to the ultimate purchaser"), *codified as amended at* 42 U.S.C. § 7522(a)(3)(A); see also 42 U.S.C. § 7523(b). Congress imposed specific penalties for tampering violations by manufacturers of up to $25,000 per violation. 42 U.S.C. § 7524(a). Congress further directed EPA to balance statutory factors in assessing penalties for such violations—including the "gravity of the violation," "the economic benefit or savings (if any) resulting from the violation," and "the effect of the penalty on the violator's ability to continue in business." 42 U.S.C. § 7524(c)(2).

Starting in 1975, EPA has promulgated guidance outlining how manufacturers may modify emission systems *after sale* without violating the CAA's tampering prohibition. EPA, *Field Fixes Related to Emission Control-Related Components*, MSAPC Advisory Circular No. 2B, at 1 (Mar. 17, 1975), https://tinyurl.com/FieldFixGuidance. Unsurprisingly, no state or locality has attempted to provide any such guidance to manufacturers. EPA has also promulgated a detailed Civil Penalty Policy establishing a framework to apply the CAA's statutory penalty factors.

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ity, such as through "carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles." *Engine Mfrs. Assn.*, 88 F.3d at 1094; see also S. Rep. No. 90-403, p. 34 (1967) (Congress enacted § 209(d) to encourage states to pursue "reduction in air pollution" through measures that "control [the] movement of vehicles" and encourage "alternative methods of transportation").

EPA, *Clean Air Act Title II Vehicle & Engine Civil Penalty Policy* (Jan. 18, 2021), https://tinyurl.com/2021EPA-PenaltyPolicy.

5. As *amici* representing U.S. and global automakers and dealers explained in a brief supporting Volkswagen's petition in *Counties*, post-sale updates have become "more common today than ever" as cars have grown increasingly computerized. Brief of *Amici Curiae* for Alliance for Automotive Innovation et al. in *Counties* ("Alliance *Counties* Br."), at 8-9. Manufacturers now conduct dozens of emissions recalls affecting, on average, six million cars annually. EPA Recall Report, at 7. Field fixes (post-sale updates conducted outside of a recall) are even more frequent. Manufacturers perform these post-sale updates under EPA oversight to fulfill their CAA obligations, including to ensure that their cars meet—throughout their "useful life"—the emission standards that they are certified to meet when they were new.

These updates raise technical questions requiring scientific expertise and balancing of competing regulatory objectives, whereby the update "reduc[es] some types of emissions while increasing others." Alliance *Counties* Br., at 3. For example, updates may require accepting emissions increases under certain conditions to prevent vehicle or engine damage. *Id.* at 3-4. Manufacturers work closely with EPA to address these tradeoffs. See *id.* at 3; EPA Recall Report, at 62.

B. Facts and Procedural History

1. In 2015, EPA issued notices of violation alleging that Volkswagen installed software "defeat devices" in new diesel cars that allowed them to emit higher levels of nitrogen oxides ("NOx") than allowed under EPA regula-

tions. EPA, Notice of Violation (Sept. 18, 2015), https://tinyurl.com/SeptemberNOV; EPA, Notice of Violation (Nov. 2, 2015), https://tinyurl.com/NovemberNOV.

In its civil enforcement action, EPA alleged that during an EPA-overseen recall, Volkswagen also implemented software updates to refine (without disclosing) the factory-installed defeat device. EPA Am. Compl., *In re: Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.* ("*VW MDL*"), No. 15-md-2672, Dkt. No. 2009-3, ¶¶ 115-116, 136-141 (N.D. Cal. Oct. 7, 2016). Volkswagen installed these software updates in new vehicles still in production and in post-sale vehicles during nationwide recalls conducted under EPA oversight. *Id.* ¶¶ 115-116. EPA's testing showed that these updates *reduced* NOx emissions, although not enough to bring the cars into compliance with the originally certified emissions standards. *Id.* ¶ 141.

Volkswagen acknowledged its wrongdoing and, in three consent decrees with EPA, agreed to: (i) establish a $2.925 billion trust for use by all states for environmental mitigation initiatives, which EPA determined will "fully mitigate" any environmental harm caused nationwide by the affected vehicles; (ii) pay a $1.45 billion civil penalty; (iii) pay up to $14 billion to compensate owners and buy back or repair affected vehicles nationwide; (iv) invest an additional $2 billion in zero-emissions-vehicle technology; and (v) retain an independent compliance auditor. See *VW MDL*, Dkt. Nos. 2103-1, at 12-18, Apps. A-B, App. C, at 1 & App. D; 3155 ¶¶ 9, 27-29; and 3228-1 at 5, 14-17, Apps. A-B & Initial 3.0 Liter Mitigation Allocation App. Volkswagen AG also pled guilty and paid a $2.8 billion criminal penalty. Ohio Supp., Ohio S.C. Dkt., at S-123 (Aug. 10, 2020). In sum, Volkswagen bought back, or installed EPA-approved updates in, nearly all affected vehicles and agreed to pay more than $23 billion,

including more than $343 million for Ohio and its residents.

2. EPA's notices of violation triggered a flood of lawsuits, including novel claims brought by ten states and 35 counties. Parroting EPA's allegations, respondent sued under its state anti-tampering laws, challenging the factory installation of the defeat device. After another state's analogous claims were dismissed as preempted, respondent amended its complaint to add separate claims challenging the post-sale updates to that factory-installed defeat device. App., *infra*, 50a-51a. Respondent seeks daily penalties of $25,000 per affected car per day, totaling $350 million per day for roughly 14,000 cars. *Id.* at 65a.

3. The trial court dismissed respondent's claims as preempted by federal law. *First*, the trial court held that respondent's claims targeting pre-sale conduct were expressly preempted under § 209(a). *Id.* at 60a.

Second, the trial court held that respondent's claims targeting post-sale conduct were impliedly preempted, reasoning that the claims were "an attempt to enforce vehicle emission standards on a model-wide basis," which "Congress intended for only the EPA to regulate." *Id.* at 67a.

4. Respondent appealed only the dismissal of its claims targeting post-sale conduct. The Ohio Court of Appeals held that respondent's claims targeting post-sale software updates were not preempted by federal law. The Court of Appeals summarily held that § 209(a) "does not address the regulation of emissions of in-use motor vehicles" but rather solely "relates to the manufacturing of vehicles before they are sold and placed on the roads." *Id.* at 37a. It also concluded that the CAA does not reflect "clear and manifest congressional intent to preempt state law regarding post-sale tampering conduct of manufacturers." *Id.* at 44a.

5. Petitioners asked the Ohio Supreme Court to "consider whether the federal Clean Air Act either expressly or impliedly preempts state-law claims against a manufacturer for post-sale emissions control tampering," *id.* at 4a, and respondent "agree[d] that th[e] case [was] proper for the Court's jurisdiction." Ohio Juris. Mem., Ohio S.C. Dkt., at 6 (Feb. 14, 2020). The Ohio Supreme Court affirmed the Ohio Court of Appeals in an opinion by four of its seven justices, with two justices concurring in the judgment only, and one justice dissenting. See App., *infra*, 16a. Relying exclusively on the phrase "new motor vehicles," the majority held that "after a new motor vehicle or new motor-vehicle engine is first sold, the express-preemption clause in 42 U.S.C. 7543(a) no longer applies." *Id.* at 8a-9a. The majority further concluded that "the Clean Air Act does not suggest that Congress intended to shield vehicle manufacturers from state-law emissions-control-tampering liability." *Id.* at 14a. The dissenting opinion would have held that respondent's claims were impliedly preempted because Ohio's attempt to obtain significant penalties "for a local portion of that same misconduct [that EPA redressed] conflicts both with the EPA's immediate authority and the longer-term goals underlying the federal law." *Id.* at 22a.

The Ohio Supreme Court granted petitioners' motion to stay the mandate pending this Court's review. Entry, Ohio S.C. Dkt. (Aug. 18, 2021).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS THE EXISTING SPLIT AMONG FEDERAL AND STATE COURTS ON THE QUESTION PRESENTED.

1. The Ohio Supreme Court's decision deepens the direct conflict described in Volkswagen's *Counties* petition

(No. 20-994), with respect to which this Court has requested the views of the United States.

Like respondent, the states of Alabama, Tennessee, and Minnesota sued Volkswagen under their own anti-tampering laws, seeking penalties for the same post-sale updates at issue in this case. Those states' courts correctly held that the CAA preempts such claims.

The Supreme Court of Alabama dismissed as preempted the claims brought by the state of Alabama, concluding that those claims "would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Alabama*, 279 So. 3d at 1129.

Similarly, the Minnesota Court of Appeals dismissed the state of Minnesota's claims as preempted, reasoning that "Congress, by enacting the CAA, provided that the federal government—rather than state or local governments—regulate the conduct at issue here." *Minnesota*, 2018 WL 6273103, at *10. Minnesota's petition for further review of this decision was rejected as untimely. Dkt., *Minnesota* v. *Volkswagen Aktiengesellschaft*, Case No. A18-0544 (Minn. Ct. App. Jan. 4, 2019).

The Tennessee Court of Appeals likewise dismissed Tennessee's claims as preempted, reasoning that Congress created the federal CAA regime in part to "avoid the problems that would result if automobile manufacturers had to answer to a number of different regulators enforcing the same standard." *Tennessee*, 2019 WL 1220836, at *8 n.9. Tennessee did not appeal this decision.

By contrast, in a case brought by two counties asserting parallel claims against Volkswagen, the Ninth Circuit considered the identical legal question, involving the same defendants and conduct, but reached the opposite conclusion. *Counties*, 959 F.3d at 1225.

The *Ohio* majority agreed with the Ninth Circuit's analysis. App., *infra*, 9a, 14a. Unlike the dissent, the *Ohio*

majority did not acknowledge (much less attempt to reconcile) the contrary state court opinions in its decision.

As a consequence, respondents and state and local governments within Ohio and the Ninth Circuit may regulate manufacturers' nationwide, post-sale updates to their vehicles' emission control software, whereas state and local governments in Alabama, Tennessee, and Minnesota may not. A conflict between a federal court of appeals and a state supreme court, on the one hand, and another state supreme court and two intermediate appellate courts, on the other, warrants this Court's review under Rule 10. See *Hillman* v. *Maretta*, 569 U.S. 483, 489-490 (2013).[3]

2. Including non-final and trial-court decisions, five courts have found analogous claims against Volkswagen to be preempted; four courts, including the decision below, have held the opposite.[4] Because the issue has been

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[3] The fact that two additional decisions were from intermediate state appellate courts does not make this Court's review any less warranted. See *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 53 (2015) (resolving conflict between Ninth Circuit and intermediate California appellate court); *Riley* v. *California*, 573 U.S. 373, 378-381 (2014) (resolving conflict between First Circuit and intermediate California appellate court); *Carchman* v. *Nash*, 473 U.S. 716, 723-724 & n.3 (1985) (resolving conflict involving intermediate appellate courts).

[4] Compare *Alabama*, 279 So. 3d at 1129 (claims preempted; final); *Tennessee*, 2019 WL 1220836, at *13-14 (same); *Minnesota*, 2018 WL 6273103, at *10 (same); *State* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3349094, at *3 (Mo. Cir. Ct. June 26, 2018) (same); and *People* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3384883, at *19-20 (Ill. Cir. Ct. June 5, 2018) ("*Illinois*") (claims preempted, appeal pending); with App., *infra*, 30a-46a; *Counties*, 959 F.3d 1201 (claims not preempted; petition for certiorari pending); Order, *Montana Dept. of Env. Quality* v. *Volkswagen Aktiengesellschaft*, Cause No. DDV-2016-1045 (Mont. Dist. Ct. Feb. 21, 2020) (declining to dismiss analogous claims as preempted in a non-final decision); and Order, *In re*

sharply defined and briefed extensively in these courts, including with input from industry associations and former senior EPA, Department of Justice ("DOJ"), and California Air Resources Board ("CARB") officials as *amici*, further percolation is unnecessary.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

A. National Uniformity in the Regulation of Emission Systems Has Been of Critical Importance for Decades.

1. This case presents a critically important question affecting EPA's nationwide regulation of automobiles, which play a central role in American life. More than 90% of U.S. households have access to a car. Census Bur., Household Size by Vehicles Available, https://tinyurl.com/VehicleAccess. Tens of millions of people rely on cars to travel to work and fulfill other basic needs. Approximately 4.3 million Americans work in the auto industry, including more than 900,000 in auto manufacturing, see Bur. of Labor Statistics, Automotive Industry, https://tinyurl.com/AutoEEs, which constitutes 2.1% of U.S. Gross Domestic Product, see Bur. of Economic Analysis, Value Added by Industry as a Percentage of Gross Domestic Product, https://tinyurl.com/PercentGDP ValueAdded (choose "Value added by Industry as a Percentage of Gross Domestic Product (A)(Q)") (lines 21 and 36).

The importance of the question presented is confirmed by the numerous *amici*—seven organizations representing U.S. and global automakers, part suppliers, dealers, and other manufacturers, as well as four former senior

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Volkswagen Clean Diesel Litig., Cause No. D-1-GN-16-000370 (Tex. Dist. Ct. Feb. 21, 2018) (same).

EPA, CARB, and DOJ officials—that have urged this Court to grant review of a pending petition presenting the identical preemption question. See *Counties*, No. 20-994. Moreover, respondent itself urged the Ohio Supreme Court to accept discretionary review of this case on the basis that it "involve[d] a substantial question of federal preemption" that is "being litigated nationwide." Ohio Juris. Mem., Ohio S.C. Dkt., at 1, 6 (Feb. 14, 2020). And by accepting review, the Ohio Supreme Court agreed that the appeal presented a question of "public or great general interest," as required by the Ohio Constitution. Ohio Const., Art. IV, § 2(B)(2)(e).

More than 50 years ago, Congress recognized that the tens of millions of cars on the road require "motor vehicle exhaust control standards on a national scale." H.R. Rep. No. 89-899, p. 5 (1965). But because cars are mass-produced and "readily move across state boundaries," Congress recognized the need for uniform, nationwide regulation. *Engine Mfrs. Assn.*, 88 F.3d at 1079. Congress found that "[t]he ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance," recognizing that even "identical Federal and State standards, separately administered, would be difficult for the industry to meet since different administration could easily lead to different answers to identical questions." H.R. Rep. No. 90-728, pp. 21-22 (1967). Overlapping state and local regulation of manufacturers, on the other hand, would "lead to increased costs to consumers nationwide, with benefit only to those in one section of the country." *Ibid.* Accordingly, Congress entrusted EPA with *exclusive* power to regulate manufacturers'

emission compliance throughout the useful life of their vehicles.

EPA's authority includes the power to mandate and supervise post-sale manufacturer recalls like those at issue here. 42 U.S.C. § 7541(c)(1). Recalls are a "critical component[] of compliance" with emission standards, and manufacturers conduct dozens of recalls affecting, on average, six million cars every year, all coordinated with EPA. See EPA Recall Report, at 7.

As EPA has explained, "[i]n-use testing is an important aspect of EPA's light-duty vehicle compliance program, identifying emissions concerns and resolving them." EPA Recall Report, at 58. Because "[l]ight-duty emission standards are the most stringent of any sector and light-duty vehicles have the most sophisticated and complex emission control systems," there is "a greater opportunity for defects to occur." *Id.* at 7. Like many computerized products, emission controls often can be fixed (or improved) by a software update.

2. The Ohio Supreme Court's decision threatens to throw one of America's largest industries into regulatory chaos, to the detriment of manufacturers, dealers, consumers, and the environment. For decades, auto manufacturers have relied on exclusive EPA regulation in making updates to their vehicles. But the Ohio Supreme Court's decision would allow all 50 states and 3,000 counties to separately regulate these updates according to their own local policies, priorities, and preferences, and to sue manufacturers for billions of dollars for supposed violations of local anti-tampering laws. Every state and locality could second-guess EPA's expert determinations in this complex, highly technical area.

For example, as part of EPA's settlement with Volkswagen, EPA allowed Volkswagen to substantially reduce NOx emissions of affected cars, even if not by

enough to meet the originally certified standards, as long as Volkswagen also offered to buy back those cars. *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1046 n.7 (N.D. Cal. 2018). EPA's expert judgment was that removing all affected vehicles from use, even if customers wanted to keep their cars, would cause "undue waste and potential environmental harm." *Ibid.* (quotation omitted). The Ohio Supreme Court's decision, however, would allow states and localities to penalize these EPA-approved modifications. Indeed, Ohio's complaint *expressly seeks* such penalties. See First Am. Compl. ¶¶ 25 n.1, 109-110, VW Supp., Ohio S.C. Dkt., at 33, 53 (June 22, 2020) (seeking "civil penalties of up to twenty-five thousand dollars ($25,000.00) for each day of each violation" from "2008 through the present," and "*not . . . conced[ing]* that Defendants corrected their violations *at any time*" (emphases added)).

Given these enormous risks created by the decision below, the entire auto industry—and likely states, counties, and private law firms—are closely watching how this Court rules on these issues. See, *e.g.*, John Mizerak, *Counties' Suit Against VW Could Complicate Emissions Regs*, Law360 (May 18, 2021), https://tinyurl.com/MizerakArticle (opining that, if the Ninth Circuit is not reversed, manufacturers "may be forced to change their practices—such as by generating a more defined record to defend any particular change, or seeking assurances from additional regulatory bodies" to avoid suit). If the Ohio Supreme Court and Ninth Circuit's analyses are adopted broadly, manufacturers may face lawsuits from states and counties seeking to penalize the nationwide, post-sale updates that manufacturers frequently make to fulfill their CAA obligations—previously, subject only to

EPA oversight. Faced with such exposure, manufacturers would take enormous risk by implementing a post-sale update based on approval from EPA alone, as has been done efficiently and effectively for 50 years. Manufacturers thus may need to take the entirely impractical step of seeking the approval of all 50 states and thousands of localities before implementing post-sale, nationwide updates. As a result, manufacturers may be forced either to avoid maintaining or improving their cars' emission control systems after sale (and resist EPA's requests that they do so voluntarily)—to the detriment of the environment and Congress's objectives—or pass on the substantial increased costs to consumers. And it will not be feasible for manufacturers to implement software updates that conform to inevitably conflicting federal-, state-, and locality-specific instructions across all of their vehicles.

3. Further, as explained below, CAA preemption safeguards the important enforcement powers that Congress granted to EPA, such as its statutory role to set appropriate penalties for CAA violations and its ability to achieve expedient resolutions and remediation of future harms. See *infra* at 31-32.

B. This Issue Has Already Arisen for Another Auto Manufacturer and Is Likely to Arise Repeatedly Going Forward.

After the Ninth Circuit's decision, Hillsborough County's outside counsel—a private law firm operating on a contingent-fee basis—"informed [Hillsborough County] that additional automotive companies have tampered and/or altered software to pass emission tests in its [*sic*] vehicles that operate in Hillsborough County." Hillsborough Cty. Env. Protection Comm'n, Comm'n Agenda, at 15 (Sept. 24, 2020), https://tinyurl.com/Hillsborough-

CtyAgenda. Seizing on the Ninth Circuit's decision, Hillsborough County sued Daimler and other defendants, based on their consent decree with EPA in connection with their alleged installation of defeat devices that caused emissions to exceed legal limits. EPA, Daimler AG and Mercedes-Benz USA, LLC Clean Air Act Civil Settlement (Sept. 14, 2020) ("Daimler Civil Settlement"), https://tinyurl.com/EPADaimler. As it did in the *Counties* case (and as respondent did here), Hillsborough County seeks its own penalties from Daimler for both the alleged installation of defeat devices and post-sale tampering "through a program of newly created field fixes and recall campaigns." *Env. Prot. Comm'n of Hillsborough Cty.* v. *Mercedes-Benz USA, LLC*, No. 20-cv-2238, Dkt. No. 7, ¶¶ 64-68, 90 (M.D. Fla. Sept. 25, 2020).

In addition to massive penalties, Hillsborough County seeks an order requiring defendants to "completely repair" the affected vehicles. *Id.* ¶ 95. Such relief would upset the careful balance that EPA struck in the consent decree, which required Daimler to bring all affected vehicles into compliance but recognized that might not be possible: "Daimler will be liable for stipulated penalties in the unlikely event that one or more AEMs do not meet the applicable emission standards . . . ." Daimler Civil Settlement; see also *United States* v. *Daimler AG*, No. 20-cv-2564, Dkt. No. 7-1, ¶ 53(c)(ii) (D.D.C. Dec. 17, 2020).

Hillsborough County has publicly stated that it also may bring similar claims against Fiat Chrysler Automobiles and General Motors. Hillsborough Cty. Env. Protection Comm'n, Comm'n Agenda, at 15 (Sept. 24, 2020), https://tinyurl.com/HillsboroughCtyAgenda (requesting "authorization for future related actions . . . (e.g. -Fiat Chrysler Automobiles, GM, etc.)").

The Ohio Supreme Court's uncritical adoption of the Ninth Circuit's decision will likely lead additional states

and counties to bring similar claims, especially if these decisions become final. This Court's resolution of the scope of preemption regarding the six million vehicles updated every year is imminently needed.

III. THE DECISION BELOW IS INCORRECT.

The Ohio Supreme Court's holding contravenes decades of precedent making clear that the CAA preempts respondent's claims. "[T]he purpose of Congress is the ultimate touchstone" in determining whether federal law preempts state and local law. *Altria*, 555 U.S. at 76 (quotation omitted). All forms of preemption, "'conflict,' 'express,' and 'field,' . . . work in the same way." *Murphy* v. *Nat. Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018). Where "Congress enacts a law that 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." *Ibid.*

A. The *Ohio* Majority's Interpretation of the CAA's Express Preemption Clause is Incorrect.

The majority incorrectly interpreted CAA § 209(a), which broadly prohibits states and localities from "adopt[ing] or attempt[ing] to enforce *any* standard *relating to* the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a) (emphases added).

1. Citing with approval the Ninth Circuit's erroneous interpretation, the *Ohio* majority adopted a "pre- and post-sale distinction" for purposes of preemption. App., *infra*, 10a. This analysis focused exclusively on the phrase "new motor vehicles," and gave no effect to the broad phrase "relating to." But as this Court has recognized, the phrase "relating to"—which means any "connection

with or reference to," *Rutledge*, 141 S. Ct. at 479 (quotation omitted)—"express[es] a broad pre-emptive purpose," *Morales*, 504 U.S. at 383, and "indicates Congress' intent to pre-empt a large area of state law," *Altria*, 555 U.S. at 85. Contrary to this instruction, the majority simply read the words "relating to" out of § 209(a) by holding that the CAA "expressly preempts only state and local laws *regulating or setting vehicle-emissions standards* for new motor vehicles and new motor-vehicle engines." App., *infra*, 9a (emphasis added); see *Morales*, 504 U.S. at 385 (rejecting an interpretation that "simply reads the words 'relating to' out of the statute.").

This interpretation conflicts with longstanding authority recognizing that preemption under § 209(a) continues past the point of initial sale. The seminal case of *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), held that preemption *must* extend post-sale to avoid an illogical interpretation of the CAA in which states and localities can freely regulate emission control standards the "moment after a new car is bought"—an "obvious circumvention of the [CAA]." State and local regulation of vehicles post-sale is permissible notwithstanding § 209(a) when it is "directed primarily to intrastate activities" and places "the burden of compliance . . . on individual owners and not on manufacturers and distributors." *Ibid.*; see *Engine Mfrs. Assn.*, 88 F.3d at 1086 (endorsing "*Allway Taxi* interpretation" of § 209(a), under which "the burden of compliance [may] not fall on the manufacturer"); see also *Rutledge*, 141 S. Ct. at 480 (construing ERISA's express preemption clause by looking to "ERISA's objectives 'as a guide to the scope of the state law that Congress understood would survive'" (citation omitted)).

EPA has long endorsed *Allway Taxi* and interpreted § 209(a) preemption as extending beyond initial sale:

"certain state regulations that may be characterized as 'in-use' regulations may be preempted" if they "amount to a standard relating back to the original design of the engine by the original engine manufacturer." 59 Fed. Reg. 31,306, 31,313, 31,331 (June 17, 1994).

The *Ohio* majority acknowledged *Allway Taxi* but read that decision as only "drawing a distinction between pre- and post-sale emissions regulations." App., *infra*, 10a. This reading ignores *Allway Taxi*'s core holding that state and local post-sale regulation must be limited to conduct that affects intrastate activities and does not "place the burden of compliance on manufacturers." 340 F. Supp. at 1124.

2. Respondent's claims targeting manufacturers' post-sale, nationwide software updates necessarily "relat[e] back to the original design," just as updates to a smartphone's operating system necessarily relate back to the original software. EPA viewed petitioners' updates as inherently related to the pre-sale vehicle design when the agency tested those updates by comparing emissions from post-update cars to emissions from those cars as manufactured. See EPA Am. Compl., *United States* v. *Volkswagen AG*, No. 16-cv-295, Dkt. 32-3, ¶ 141 (N.D. Cal. Oct. 7, 2016) (finding a "limited reduction in the rates of emission of NOx").

Because the post-sale updates reduced emissions—albeit not enough to comply with the certified emission standards—the only basis for penalizing the updates is that they did not fully remedy the excess emissions caused by the factory-installed software. Respondent's claims thus rest on the fact that, *as manufactured*, the vehicles violated CAA new-vehicle emission standards.

3. The *Ohio* majority also did not heed this Court's instruction in *South Coast* that courts, when interpreting § 209(a), should examine how EPA enforces the CAA's

new-vehicle standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. at 253. EPA's enforcement of those standards is not limited to pre-sale conduct. Instead, Congress directed EPA to regulate comprehensively manufacturers' emissions-related conduct throughout their cars' useful life—from initial certification to in-use testing, defect reporting, warranty compliance, and recalls, as well as the authority to punish post-sale tampering, see *supra* at 9-11. The CAA also explicitly *bars* states from requiring manufacturers to test vehicle emissions, 42 U.S.C. § 7541(h)(2)—the most fundamental regulatory tool. Through the broad language of § 209(a), Congress barred states and localities from effectively duplicating EPA's enforcement of manufacturers' emissions-related conduct, whether that conduct occurs in the process of initially designing the emissions controls or ensuring their effectiveness for the full "useful-life" period required by Congress. Accordingly, states and localities may not penalize manufacturers for making impermissible changes to their certified emissions controls.

Confirming this interpretation, EPA itself has understood § 209(a) to preempt states from requiring manufacturers to conduct post-sale recall programs:

> In-use . . . recall programs . . . ensure compliance with standards required to be met by manufacturers at the time of certification of the engine. Because these in-use standards relate to the original manufacture of the engine and place the burden of compliance upon the manufacturer, they are deemed to be standards affecting a new motor vehicle.

59 Fed. Reg. 36,969, 36,973 n.15 (July 20, 1994); see also 49 Fed. Reg. 43,502, 43,503 (Oct. 29, 1984) ("[D]etermin[ing] that CARB's emission-related defects reporting,

in-use vehicle recall and in-use vehicle enforcement testing regulations and procedures are *included within the scope of waivers of Federal preemption*." (emphases added)). In other words, EPA recognized that nationwide, post-sale recalls are how manufacturers ensure that cars on the road continue to meet new motor vehicle emission standards throughout their "useful life" and, consistent with *South Coast* and *Allway Taxi*, regulation of such recalls thus "relat[es] to the control of emissions from new motor vehicles."

4. Apparently as an additional basis for finding no preemption, the *Ohio* majority erroneously concluded that Ohio's anti-tampering statute falls outside of § 209(a) because it "does not create or adopt any emissions-control standards." App., *infra*, 9a. But this Court has broadly interpreted "standard[s]" under § 209(a) to encompass not just "numerical" emissions limits, but also any requirement that a vehicle "must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions." *South Coast*, 541 U.S. at 253. A prohibition on installing or updating a defeat device squarely fits within this definition. Other than the *Ohio* majority, *every* court to consider this issue—including the Ninth Circuit—has agreed that when a state or county brings a tampering claim against a manufacturer, that state or county is "attempt[ing] to enforce [a] 'standard'" within the meaning of § 209(a). *Counties*, 959 F.3d at 1218 (quotation omitted); see also, *e.g.*, *In re: Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 264 F. Supp. 3d 1040, 1052 (N.D. Cal. 2017); *Tennessee*, 2019 WL 1220836, at *9.

5. The *Ohio* majority was wrong to conclude that Volkswagen's interpretation of § 209(a) means that states and localities are preempted "from regulating anything relating to a vehicle's emissions-control system *in any*

way . . . ." App., *infra*, 8a (emphasis added). That is not correct. For example, post-sale tampering with emission controls by mechanics and consumers within a state or locality does not "relat[e] to the control of emissions from new motor vehicles" because such conduct does not place the "burden of compliance" on the manufacturer or otherwise seek to duplicate EPA's regulator role with respect to manufacturers' emissions-related conduct. *Engine Mfrs. Assn.*, 88 F.3d at 1086 & n.39 (citing *Allway Taxi*, 340 F. Supp. at 1124).

B. The *Ohio* Majority's Implied Preemption Analysis Is Incorrect.

State law is conflict preempted when, "under the circumstances of th[e] particular case [it] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quotation omitted). The dissent below correctly recognized that respondent's claims are impliedly preempted by the CAA. App., *infra*, 18a.

1. Congress granted EPA alone the tools to regulate manufacturers' conduct both pre- and post-sale, see *supra* at 9-10, yet prohibited states from employing even the most fundamental among them—emissions testing. 42 U.S.C. § 7541(h)(2). These statutory provisions confirm that permitting 50 states and 3,000 counties to regulate manufacturers' post-sale updates would contravene "Congress's inten[tion] for EPA and the states and local governments to serve specific and separate functions in regulating emissions from in-use vehicles." App., *infra*, 63a.

2. According to the *Ohio* majority, "as long as Volkswagen complies with, rather than circumvents, federal law it will have nothing to worry about in Ohio." App.,

infra, 13a. But even if this comment correctly states current Ohio law (contrary to Ohio's claims, see *supra* at 21), nothing in the *Ohio* majority's CAA analysis—which holds that CAA preemption simply does not apply after sale—would bar states and localities from penalizing even modifications that EPA already *approved*. As the court recognized in *Tennessee*, these and other updates conducted under EPA oversight could be challenged and penalized by states and localities, even if (like here), those updates reduce emissions. See 2019 WL 1220836, at *13 (if state's claims could proceed, Volkswagen would continue to owe penalties for "vehicles with EPA-approved modifications").

The Ohio Supreme Court majority incorrectly asserted that "Volkswagen's fears that it will be punished for actions taken in response to EPA guidelines or for modifications approved by the EPA are unfounded." App., *infra*, 13a. But even if compliance with federal guidelines is a defense under Ohio law, that will not avoid regulatory chaos for several reasons.

First, such a rule would simply invite a fight over the validity of EPA approval, or a manufacturer's understanding of EPA guidelines: a manufacturer would be required to prove to a court that any given software update was "taken for the purpose of repair or replacement of the emission control system" or "results in the system's compliance with the 'Clean Air Act Amendments.'" Ohio Rev. Code § 3704.16(E)(1). Any state or locality that dislikes an update could embroil a manufacturer in costly and time-consuming litigation over whether the manufacturer's disclosures to EPA were sufficient, or whether the vehicles complied with federal emissions standards or EPA guidelines.

Second, environmental laws of all 50 states (and thousands of localities) are far from uniform. By allowing each

of those jurisdictions to insist on compliance with its own law, the *Ohio* majority creates a rule that would cause complete chaos for manufacturers installing software updates in nationwide recalls.

Third, as Congress recognized, even "identical Federal and State standards, separately administered, would be difficult for the industry to meet since different administration could easily lead to different answers to identical questions." H.R. Rep. No. 90-728, pp. 21-22. That is why the Eleventh Circuit recognized that "any standard" in § 209(a) means any standard whether "federal or state," not solely "new or conflicting standards," and invalidated a state statute that merely required "compl[iance] with the [CAA]." *Sims* v. *Fla. Dept. of Hwy. Safety & Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989).

3. The threat of duplicative state and local government claims will make it impossible for EPA to discharge its statutory mandate to quantify penalties. The CAA prohibits post-sale tampering by manufacturers and establishes a penalty framework for such violations. See *supra* at 11-12. The CAA directs EPA to consider specified factors in determining penalties for CAA violations, and EPA's detailed Civil Penalty Policy governs its exercise of that authority. As the dissent correctly recognized, in this case "the EPA carefully crafted a multibillion-dollar penalty that balanced a variety of financial and environmental factors pursuant to 42 U.S.C. 7524." App., *infra*, 18a. This comprehensive framework is meaningless if states and localities may, after an EPA resolution, pursue additional penalties based upon EPA's own enforcement work. Allowing such pile-on claims "threatens to undermine the enforcement power of the EPA and thereby the efficacy of the entire federal scheme," *ibid.*, and therefore conflicts with congressional intent, see *Alabama*, 279 So. 3d at 1126 (such a result "would seriously undermine the

congressional calibration of force for tampering by vehicle manufacturers"); see also *Arizona* v. *United States*, 567 U.S. 387, 402 (2012) ("Permitting the State to impose its own penalties . . . would conflict with the careful framework Congress adopted.").

This concern is compounded by the massive penalties authorized by state and local anti-tampering statutes. Respondent alone seeks up to $25,000 for "[e]ach day of each violation," for each of the "approximately 14,000" cars allegedly registered in Ohio, which, as the dissent recognized, conflicts both with the EPA's immediate authority and the longer-term goals underlying the" CAA. App., *infra*, 18a, 22a.

4. Permitting such state and local government claims also will likely prevent EPA from securing prompt and comprehensive resolution and remediation of future environmental harms. As the dissent emphasized, "if states and municipalities are permitted to sue motor-vehicle manufacturers based on admissions made when settling civil actions with the EPA, manufacturers will be deterred from making such admissions," which would "severely reduce[]" the "efficacy of the EPA's rulemaking and enforcement powers. . . ." App., *infra*, 21a.

In addition, as a result of the Ohio Supreme Court's decision, manufacturers may be unwilling to settle with EPA without coordinating that settlement with every state and local regulator that could try to second-guess the settlement. Manufacturers would need either to (i) obtain releases from every state and locality (a nearly insurmountable task), or (ii) litigate with EPA while polluting cars remain on the road—even if the pollution could be abated with a post-sale update. Either outcome would undermine EPA's ability to achieve quickly the type of nationwide environmental remediation it did here. As this Court explained in *Atlantic Richfield Co.* v. *Christian*, 140

S. Ct. 1335, 1356 (2020), state-law claims "would interfere with [EPA's resolution]" and could "trigger a lack of cooperation between EPA and [manufacturers]."

The majority reasoned that "despite the likelihood of subsequent actions by states and local governments here, the federal EPA was tellingly able to resolve its case against Volkswagen." App., *infra*, 15a. But this ignores that at the time of that nationwide settlement, the *only* state or county claims filed against Volkswagen were based on *pre-sale* conduct. Every court has agreed that the CAA preempts such original manufacturing claims. But with a path for all 50 states and thousands of localities to escape preemption for post-sale claims, manufacturers will be far less willing to entertain settlements with EPA.

5. Finally, respondent's claims are also impliedly preempted because they in essence reduce to allegations of fraud on EPA, which is the agency's—not state or local governments'—responsibility to address. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 346-352 (2001). In *Buckman*, this Court dismissed state-law tort claims against a medical-device manufacturer based on misrepresentations to the FDA as impliedly preempted. *Id.* at 348. This Court explained that "the FDA . . . has at its disposal a variety of enforcement options," and that allowing "[s]tate-law fraud-on-the-FDA claims [would] inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives." *Id.* at 349-350.

That is precisely the nature of respondent's claims here; as the dissent noted, respondent "is seeking to penalize Volkswagen for its fraud against the" EPA. App., *infra*, 18a. Indeed, in its briefing before the Ohio Supreme Court, respondent admits that "the whole purpose of the second round of cheating" by Volkswagen "was to cover up the first round." Appellee's Br., Ohio S.C. Dkt.,

at 38 (Aug. 10, 2020). In other words, respondent alleges that Volkswagen misled a federal agency with broad enforcement powers and now respondent seeks to second-guess the penalty EPA already deemed appropriate. This Court should confirm, as it did in *Buckman*, that it is EPA's responsibility alone to address that conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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