No. 21-312

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

REPLY BRIEF FOR PETITIONERS

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The divided decision below casts aside a half-century of national regulation of auto manufacturers' development and maintenance of emission controls. The decision's reasoning would allow the State of Ohio—and every other state and local government—to regulate *any* changes manufacturers make to emissions systems after sale, including routine fixes to meet federal warranty requirements. Having deepened a split of authority that has injected substantial uncertainty and disarray into the regulatory landscape facing auto manufacturers, the decision below warrants this Court's immediate review.

First, this Court has jurisdiction because this case falls within well-established exceptions to the final judgment rule:

- The Ohio Supreme Court has "finally decided" the federal preemption issue, and reversal of the deci-

sion below "would be preclusive of any further litigation." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975). Deferring review of that preemption issue would "seriously erode [the] federal policy," *id.* at 483, of protecting auto manufacturers from the regulatory chaos—and resulting burden on interstate commerce—of every state and locality separately regulating manufacturers' nationwide emissions conduct.

- Because the Clean Air Act ("CAA") restricts states from even "*attempt[ing]* to enforce" tampering laws against manufacturers' nationwide conduct, allowing this case to proceed would itself violate the very right petitioners seek to vindicate. See *Abney* v. *United States*, 431 U.S. 651, 659-660 (1977).
- Finally, the Court's "failure to decide the question now will leave [companies] operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Cox*, 420 U.S. at 485-486.

Second, respondent admits that the decision below conflicts with decisions on the same question by the Alabama Supreme Court and Tennessee and Minnesota appellate courts. Respondent can only disparage those other state courts' decisions and speculate that the conflict may resolve itself if those courts abandon their own precedent and follow the flawed decision below (and the erroneous Ninth Circuit decision on which it relied, which is the subject of another pending petition for certiorari). See *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201 (9th Cir. 2020) ("*Counties*"), cert. pending, No. 20-994. There is nothing approaching consensus here: fifteen courts have now ruled on the question presented, and 16 of the 33 judges

have correctly found that the CAA preempts state and local tampering claims against manufacturers based on nationwide conduct. Lower courts have stayed other cases brought by states and counties pending this Court's resolution of this conflict.[1]

Respondent has also previously agreed that the question squarely presented here is exceptionally important. See Ohio Juris. Mem., Ohio S.C. Dkt., at 1, 6 (Feb. 14, 2020) (stating the case "involves a substantial question" that is "being litigated nationwide"). As has been explained by seven organizations representing U.S. and global automakers, part suppliers, dealers, and other manufacturers, as well as four former senior EPA, California Air Resources Board, and Department of Justice officials, the present uncertainty on this question of nationwide importance is untenable. Manufacturers perform post-sale emissions updates on millions of cars annually, including to fulfill their obligations under federal warranties. But under the majority's reasoning below, they cannot do so without risking exposure to "potentially ruinous liability." Product Liability Advisory Council *et al.* Br. 7; Alliance for Automotive Innovation *et al.* Br. 5. The only way to avoid this risk is if manufacturers can first ensure that no state or locality deems such updates "tampering" under local law—far from a straightforward determination given the complexity of emissions controls. Alliance Br. 15-16. The cost of doing so (or threat of suit) will chill even beneficial updates.

Third, like the majority below, respondent misconstrues the preemptive scope of the CAA. Whether as a

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[1] See Order, *People* v. *Volkswagen Aktiengesellschaft*, Appeal No. 1-18-1382 (Ill. App. Ct. Mar. 16, 2021); *Env. Prot. Comm'n of Hillsborough Cty.* v. *Mercedes-Benz USA, LLC*, No. 20-cv-2238, Dkt. No. 81 (M.D. Fla. Feb. 24, 2021).

matter of express or implied preemption, the CAA authorizes EPA alone to regulate manufacturers' nationwide conduct affecting their vehicles' emissions compliance throughout their "useful life." By allowing 50 states and thousands of localities to separately sue manufacturers under their own laws and local priorities, the *Ohio* majority would prevent EPA from fulfilling its congressionally mandated role to enforce uniform national emissions standards.

A. This Court has jurisdiction.

As respondent has recently recognized (when not trying to avoid this Court's review), "the finality doctrine is 'pragmatic.'" Reply to Brief in Opposition in *Ohio* v. *Ford*, No. 19-1191, p. 7 (quoting *Cox*, 420 U.S. at 486). This case squarely falls within several well-established exceptions to the final judgment rule. See *Cox*, 420 U.S. at 482-486; S. Shapiro, et al., Supreme Court Practice § 3.7, pp. 3–30 to 3–31 (11th ed. 2019). Respondent is thus wrong (at 1) that this case presents a "worse vehicle than *Counties* for addressing the question presented."[2]

1. First, this Court has jurisdiction over cases where: (i) "the federal issue has been finally decided in the state courts"; (ii) "reversal of the state court on the federal issue would be preclusive of any further litigation"; and (iii) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-483. Respondent does not dispute that reversing the *Ohio* majority's final decision on this purely legal, threshold preemption question would end this litigation (and others).

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[2] If anything, this case would offer a *better* vehicle if, unlike in *Counties*, No. 20-994, the full Court can participate in consideration of the question presented.

As to the third element, the decision below upends a federal policy in place for 50 years that EPA alone should regulate auto manufacturers' emissions-related conduct. As Congress recognized, the economic realities of the industry require manufacturers to design, maintain, and modify their vehicles on a nationwide basis. Congress's central purpose in preempting state and local regulation was thus to avoid an "anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Engine Mfrs. Assn.* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (quotation omitted).

That "regulatory chaos" and unpredictability is precisely what the decision below creates, and this conflict can be resolved only by this Court's immediate review. Alliance Br. 3, 5. As *amici* explained, "a wait-and-see approach is untenable for the auto industry," as manufacturers "now cannot implement . . . post-sale updates without potentially exposing themselves to state and local tampering claims and potentially ruinous liability." *Id.* at 5. This Court has frequently exercised jurisdiction when state-court preemption decisions threaten such important federal policies. See, *e.g.*, *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1195-1196 (2017) (denial of summary judgment regarding preemption under Federal Employees Health Benefits Act); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988) (remand to administrative agency regarding preemption concerning nuclear facility); *Southland Corp.* v. *Keating*, 465 U.S. 1, 5-7 (1984) (denial of motion to compel arbitration involving issue of Federal Arbitration Act preemption of state law limiting arbitrability).

2. This Court also has jurisdiction under the exception for "cases where the subsequent state proceedings would themselves deny the federal right for the vindication of

which review is sought in the Supreme Court." Supreme Court Practice § 3.7, at 3-31; see *Abney*, 431 U.S. at 659-660. CAA Section 209(a) prohibits states and localities from even "*attempt[ing] to enforce*" tampering laws against manufacturers' nationwide conduct. See *Engine Mfrs. Assn.* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (examining the "standard-*enforcement efforts* that are proscribed by § 209" (emphasis added)). Thus, petitioners "contest[] the very authority of the Government to hale [them] into court." *Abney*, 431 U.S. at 659-660.

3. Finally, respondent ignores that, in *Cox*, this Court held that it had jurisdiction to review a non-final state supreme court decision where: (i) the decision was "plainly final on the federal issue"; (ii) reversal would "terminate[]" the litigation, even though petitioners "may prevail at trial on nonfederal grounds"; and (iii) "a failure to decide the [federal] question now will leave" companies "operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." 420 U.S. at 485-486. Respondent does not dispute that the first two criteria are satisfied, and the third is likewise easily met, given the unprecedented nature of respondent's action and the deep split of authority on whether such claims are preempted.[3]

B. The square conflict among lower courts warrants review.

Respondent correctly admits (at 10) that "there is a split of authority" between *Ohio* and the Ninth Circuit on

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[3] While respondent's action involves only civil liability, other states have enacted criminal anti-tampering provisions. See, *e.g.*, Ariz. Rev. Stat. § 28-1522 (making it a misdemeanor to "tamper[] with or remove[] any part of a vehicle" under certain conditions).

one side, and the decisions of the Alabama Supreme Court and courts of appeals in Minnesota and Tennessee on the other. See Pet. 17 n.4 (citing Missouri and Illinois trial court decisions also finding preemption).

Respondent's speculation (at 11) that the split may "resolve itself"—*i.e.*, if state agencies disregard precedent and bring preempted claims in an attempt to persuade those courts to reverse themselves—is no reason to allow the split to persist and likely deepen. States and localities in the Ninth Circuit, Ohio, and Texas are currently permitted to bring these claims, whereas states and localities in at least Alabama, Minnesota, Tennessee, Illinois, and Missouri may not. The decision below is not binding in those states, nor is its flawed reasoning likely to persuade those courts.

As *amici* have explained, manufacturers conduct recalls affecting, on average, six million cars annually, plus additional voluntary, post-sale field fixes. Alliance Br. 7, 9. In fact, manufacturers are often *required* to make post-sale emissions updates to satisfy their CAA obligations, including CAA warranty requirements. It is thus critical that this Court resolve this issue now rather than allowing this split to persist on a question over which Congress clearly intended nationwide uniformity.

Neither the split nor the importance of resolving it is minimized by respondent's argument (at 10-11) that there is no conflict on express preemption. All forms of preemption "work in the same way," *Murphy* v. *Nat. Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018): whether labeled "express" or "implied," preemption "fundamentally is a question of congressional intent," *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

C. The decision below is incorrect.

1. Respondent acknowledges (at 12) that "'relating to' [in § 209(a)] has a broad meaning," and that "laws nominally targeting post-sale conduct can 'relate to' emission-control systems on new cars." But that is not what the decision below held. Instead, relying on the Ninth Circuit's flawed reasoning in *Counties*, the *Ohio* majority adopted a bright-line rule that § 209(a) "no longer applies" after a car "is first sold." Pet. App. 9a. That broad holding renders the expansive phrase "relating to" in § 209(a) a nullity. See Pet. 24-25. States and counties will undoubtedly rely on the *Ohio* majority's "pre- and post-sale distinction," Pet. App. 10a, as supporting their efforts to engage in unlimited regulation of manufacturers' post-sale updates, including those that, while not formally pre-approved by EPA, are necessary to comply with federally-required emission warranties.

As courts and EPA have long recognized, state and local enforcement impermissibly "relates back to the original design" of the engine whenever it seeks penalties based on how the manufacturer designed and built the original engine. Pet. 25-26. That occurs whenever the post-sale modification seeks to rectify issues with the factory-installed emissions system. The claims here unquestionably relate back: had there been no defeat device installed in the factory, there would have been no post-sale modifications to the defeat device for respondent to penalize.

Moreover, because the post-sale updates *reduced* emissions, respondent's claims depend on the cars' noncompliance *as manufactured*. Respondent's only answer is to assert (at 13) that its tampering claims have "nothing to do with problems pertaining to 'factory-installed software,'" but that merely confirms that its view of the law

requires accepting that states can punish manufacturers for cars that *comply* with EPA standards.

2. As this Court explained in *South Coast*—its only decision construing § 209—courts must examine how Congress directed EPA to enforce the CAA's new-vehicle standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. at 253. Respondent's *ipse dixit* (at 14) that "nothing about the EPA's enforcement of new-vehicle standards suggests that Ohio's Anti-Tampering Law is the sort of 'standard-enforcement effort[]' that the Clean Air Act proscribes" ignores the numerous *post-sale* enforcement mechanisms the CAA directs EPA to employ—such as in-use testing, defect reporting, warranty compliance, recalls, and the CAA's anti-tampering provision, Pet. 9-11—to ensure vehicles *continue* to meet those standards during their *full useful life*, as required by the EPA certificate of conformity.[4] Through these post-sale mechanisms, EPA "enforce[s] standard[s]" "relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a), and Congress enacted § 209(a) at a minimum to bar states and localities from "attempt[ing]" to duplicate that exclusive EPA role, as confirmed by the CAA's express bar on states even requiring manufacturers to *test* vehicle emissions post-sale, 42 U.S.C. § 7541(h)(2). Respondent never reconciles Congress's bar on state testing with the *Ohio* majority's view that Congress thought all 50 states and thousands of localities could freely regulate manufacturers once their cars are sold.[5] And respondent's strawman argument (at

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[4] Former Officials Br. 13-17; Alliance Br. 10-14.

[5] Notably, while touting its "E-Check" program requiring Ohio "residents" to "test their cars' emissions" (at 2), respondent fails to acknowledge that it *never* requires manufacturers to test their vehicles' emissions because it is *prohibited* by federal law from doing so.

14-15) that *South Coast* "cannot plausibly be read" "to mean that the Preemption Clause's scope ebbs and flows based on the EPA's current enforcement approach" ignores that the touchstone for *South Coast* is the *authority* granted to EPA alone *by Congress*—through multiple CAA provisions—not EPA's "current enforcement approach."

Moreover, respondent ignores EPA's own interpretation of § 209(a) as preempting states and localities from implementing "recall programs." EPA explained that "[i]n-use testing and recall programs of the type set forth in [CAA] section 207 ensure compliance with *standards required to be met by manufacturers at the time of certification of the engine.*" 59 Fed. Reg. 31,306, 31,330 n.28 (June 17, 1994) (emphasis added). EPA thus explained that because recall programs "relate to the original manufacture of the engine" and "place the burden of compliance upon the manufacturer," they fall within § 209(a)'s scope. *Ibid.* Respondent offers no principled explanation for how, under its view of preemption, states cannot *require* a recall, but can *penalize* one.

3. Respondent is also wrong (at 15) that there is no textual support for petitioners' interpretation that the CAA preempts tampering claims against manufacturers but not consumers or mechanics. Only manufacturers make "new motor vehicles," so § 209(a) by definition will almost always preempt enforcement directed to manufacturers' model-wide conduct. And only manufacturers are subject to EPA's comprehensive enforcement mechanisms ensuring nationwide compliance with CAA standards for vehicles' entire useful life, all of which "relat[e] to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

Relatedly, respondent is wrong (at 16) that petitioners "admit[]" that the savings clause in § 209(d)—which narrowly preserves states' authority to regulate the "use, operation, or movement" of cars—authorizes states to prosecute tampering by consumers and mechanics. Respondent's citation refers to petitioner's argument that *§ 209(a)* does not preempt states from prosecuting tampering by consumers and mechanics. As petitioners have consistently explained—and courts and EPA have found—§ 209(d) only preserves state authority to regulate how cars are *driven*, such as through "carpool lanes" or "programs to control extended idling of vehicles," *Engine Mfrs. Assn.*, 88 F.3d at 1094, and thus provides no support for respondent's position that Congress imposed no limits on state post-sale regulation of manufacturers.

4. Respondent cannot rehabilitate the majority's implied preemption analysis. As the dissent (which respondent ignores) emphasized, allowing state tampering claims based on manufacturers' model-wide conduct "conflicts both with the EPA's immediate authority and the longer-term goals underlying the [CAA]." Pet. App. 22a.

Respondent does not dispute that the majority's analysis would permit every state and locality to penalize manufacturers for any post-sale, model-wide change based on their own local interests and preferences—heralding what the Ninth Circuit called "staggering liability" for manufacturers. *Counties*, 959 F.3d at 1225. The dissent correctly recognized (Pet. App. 24a) that this would eviscerate Congress's penalty scheme and EPA's detailed penalty policy for manufacturer tampering, and also undermine EPA's ability to enter into comprehensive settlements with manufacturers, as EPA did here (before *Ohio* and other decisions interpreted the CAA to allow unfettered state and local regulation of manufacturers' post-sale updates). Pet. 31-33. Respondent's solution—that

manufacturers wait until oppressive penalties are assessed against them after trial, and hope to reverse them in an appellate court for abuse of discretion—is no answer given that Congress has expressed its intention that states not even "*attempt* to enforce" such laws against manufacturers. Moreover, the risk of exposure to these claims from all 50 states and thousands of localities will discourage manufacturers from making environmentally and economically beneficial updates under EPA's recall and field fix processes. See, *e.g.*, Alliance Br. 17.

5. Finally, respondent's claim (at 19) that it is not suing petitioners "because [Volkswagen] defrauded the EPA" is belied by respondent's multiple references (at 4-5, 16) to petitioners' "cheating" and "fraud[]." Respondent's claims seek penalties based on a post-sale update the true nature of which was misrepresented to EPA. This Court's holding in *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 347-353 (2001), that federal agencies should redress misrepresentations made to them, squarely applies here, where EPA has already comprehensively redressed petitioners' wrongdoing.

Respectfully submitted.

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