No. _____

In The
Supreme Court of the United States

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION.

MARSHALL B. LLOYD; *ET AL.*,

Petitioners,

V.

FORD MOTOR COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 32919(b) of the Energy Policy and Conservation Act (EPCA) expressly permits a State "to adopt or enforce a law or regulation on disclosure of fuel economy" where "the law or regulation is identical" to requirements under section 32908.

Section 32908(b) requires that "[u]nder regulations of the Administrator of the Environmental Protection Agency, a manufacturer of automobiles shall attach a label to a prominent place on each automobile" containing "the fuel economy of the automobile."

Under regulations of the EPA, Ford is required to test its automobiles' fuel economy in compliance with specific and repeatable "coastdown" tests.

Petitioners who purchased Ford automobiles allege in their complaint that Ford violated these coastdown test requirements and seek to hold Ford accountable under state deceptive advertising statutes for representations regarding fuel economy determined in violation of EPA regulations.

The question presented is:

Are state deceptive advertising statutes impliedly preempted when the EPCA expressly permits state laws with requirements identical to those under the Act and Ford is alleged to have violated EPA requirements, such that parallel state enforcement aids in the accomplishment of Congressional objectives?

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. They are: Marshall B. Lloyd, Tracey Travis, Dustin Dawson, Rick Shawley, Michael Smith, Evan Allen, Al Balls, Brian Lega, Stephen Mattson, John Sautter, Randy Transue, Rick Shurtliff, Ronald J. Dismukes, Jeffery Foshee, Accurate Construction Corporation, Steve Beavers, David Brewer, Ryan Combs, Victor Perez, Harold Brower, Kyle Mannion, Nicholas Leonardi, Dean Kriner, James Williams, Matthew Combs, Dustin Walden, Steven Hull, Kenneth Bernard, Mark Hill, Cody Smith, Daniel Gardner, Robert Goolsby, John Jung, Matthew Smith, Josh Brumbaugh, Ryan Hubert, William Don Cook, Hilary Goodfriend, Kathryn Hummel, Scott Forman, Dillon Drake, Ramin Sartip, Darren Honeycutt, Ahmed Abdi, Jamar Haynes, Scott Whitehill, Matthew Brownlee, Benjamin Bischoff, Stephen Leszczynski, Cassandra Morrison, Robert Raney, David Polley, Mark Napier, Keith Fencl, Mark Arendt, Harvey Anderson, Rosalynda Garza, Jeffrey Quizhpi, Jeffrey Kaloustian, Ronald Ceremello, Randall Maingot, George Andrew Rayne, Robert Lovell, and Samuel Huffman, individually and on behalf of others similarly situated.

Respondent was appellee in the court of appeals. It is: Ford Motor Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Accurate Construction Corporation does not have any parent corporation and there is no publicly held corporation that holds 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

(1) *In re: Ford Motor Company F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, No. 22-1245 (6th Cir.) (memorandum opinion issued April 21, 2023); and

(2) *In re: Ford Motor Company F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, No. 2:19-md-02901 (order granting motion to dismiss filed February 23, 2022).

There are no other proceedings in state or federal trial or appellate courts directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 65 F.4th 851 and reprinted in the Appendix (App.) at 1a. The district court's opinion has not been published, but is reported at 2022 WL 551221 and reprinted at App. 44a.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2023. App. 37a. A petition for rehearing en banc was denied on June 21, 2023. App. 35a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 32919(b) of the EPCA states: "When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile

covered by section 32908 only if the law or regulation is identical to that requirement." 49 U.S.C. 32919(b).

Section 32908(b) of the EPCA states: "Under regulations of the Administrator of the Environmental Protection Agency, a manufacturer of automobiles shall attach a label to a prominent place on each automobile manufactured in a model year. . . . The label shall contain the following information: (A) the fuel economy of the automobile . . . ." 49 U.S.C. 32908(b).

Section 32908(e) of the EPCA states that a "violation of subsection (b) of this section is . . . . an unfair or deceptive act or practice in or affecting commerce under the Federal Trade Commission Act . . . ." 49 U.S.C. 32908(e)(2).

At 71 Fed. Reg. 77872-01, the EPA's final rulemaking states: "it is essential that our fuel economy estimates continue to be derived primarily from controlled, repeatable, laboratory tests."

EPA regulations requiring controlled and repeatable "coastdown" tests, 40 C.F.R. 1066.210, 1066.301, 1066.305, 1066.315, 1066.401, and 1066.1010, are set forth at App. 111a-123a.

Section 600.312-08 of the EPA regulations states:

"(a)(1) The manufacturer shall determine label values (general and specific) using the procedures specified in subparts C and D of this part and submit the label values, and the data sufficient to calculate

the label values, to the Administrator according to the timetable specified in § 600.313.

(2) Except under paragraph (a)(4) of this section, the manufacturer is not required to obtain Administrator approval of label values prior to the introduction of vehicles for sale.

(3) The label values that the manufacturer calculates and submits under paragraph (a)(1) of this section shall constitute the EPA fuel economy estimates unless the Administrator determines that they are not calculated according to the procedures specified in subparts C and D of this part.

(4) If required by the Administrator, the manufacturer shall obtain Administrator approval of label values prior to affixing labels to vehicles."

40 C.F.R. 600.312-08.

Section 1066.2 of the EPA regulations states:

"(a) You are responsible for statements and information in your applications for certification, requests for approved procedures, selective enforcement audits, laboratory audits, production-line test reports, or any other statements you make to us related to this part 1066 . . . .

(b) In the standard-setting part and in 40 CFR 1068.101, we describe your obligation to report

truthful and complete information and the consequences of failing to meet this obligation . . . ."

40 C.F.R. 1066.2.

Section 1068.101 of the EPA regulations states:

"(7) Labeling.

(i) You may not remove or alter an emission control information label or other required permanent label except as specified in this paragraph (b)(7) or otherwise allowed by this chapter. Removing or altering an emission control information label is a violation of paragraph (b)(1) of this section. However, it is not a violation to remove a label in the following circumstances: . . .

(D) The original label is incorrect, provided that it is replaced with the correct label from the certifying manufacturer or an authorized agent. This allowance to replace incorrect labels does not affect whether the application of an incorrect original label is a violation."

40 C.F.R. 1068.101.

The state consumer protection statutes that Ford is alleged to have violated by advertising fuel economy numbers calculated in violation of EPA regulations are set forth at App. 124a-143a.

INTRODUCTION

Under the EPCA, manufacturers are required to label vehicles with fuel economy estimates based on standardized and repeatable coastdown tests. With respect to certain 2018-2020 model year F-150s and Rangers, however, Ford's coastdown tests did not comply with EPA regulations, leading to multiple government investigations. Petitioners, who are purchasers of these vehicles, brought suit for damages under state consumer protection laws, based on Ford's advertising of inflated fuel economy estimates calculated in violation of EPA regulations.

The district court dismissed the complaint for a host of reasons, including express and implied preemption. The court of appeals focused on one reason: implied preemption—specifically conflict (as opposed to field) preemption and specifically obstacle (as opposed to impossibility) preemption—even though parallel state enforcement aids in the accomplishment of Congressional objectives.

Simply ignoring plain language expressing an intent to permit parallel state law claims, the Sixth Circuit curtailed state law beyond the reach intended by Congress. Section 32919(b) of the EPCA specifically allows a State "to adopt or enforce a law or regulation on disclosure of fuel economy" where "the law or regulation is identical" to requirements under section 32908. And this is consistent with the presumption against preemption when states are exercising their historic police power. But the court of

appeals did not address this statutory text or apply the normal presumption.

Instead, in a sharp break from other circuits, the Sixth Circuit relied on this Court's decision in *Buckman* to preclude Petitioners' claims. But the Second, Fifth, Seventh, and Ninth Circuits—relying on this Court's decisions in *Silkwood*, *Medtronic*, and *Bates*—hold that *Buckman* does not apply to claims premised on identical duties arising under state law. And neither is impossibility preemption applicable, because there is no "clear evidence" under this Court's decision in *Wyeth* that Ford could not correct its fuel economy estimates to reflect coastdown testing in compliance with EPA regulations.

Finally, the Sixth Circuit's preemption decision is of national importance because it affects the states' traditional police power, and it does so in a manner with immediate implications in the fight against climate change. Cases that have been litigated for years to hold other car manufacturers responsible for the use of "defeat devices" to artificially reduce emissions (the flip side of this case involving artificially inflated fuel economy estimates) have been dismissed based on the decision below. The upshot: contrary to express Congressional intent, state enforcement has been disallowed in circumstances where it should serve as a critical complement to EPA's fight against global warming.

STATEMENT OF THE CASE

I. The EPCA requires manufacturers to label vehicles with fuel economy estimates based on standardized and repeatable coastdown tests.

The EPCA requires manufacturers of automobiles to attach a label, known as a Monroney Sticker, that includes the fuel economy of the automobile. 49 U.S.C. 32908(b). The manufacturer is required to determine the label values and submit them to the EPA. 40 C.F.R. 600.312-08(a)(1). These values then constitute the EPA fuel economy estimates. 40 C.F.R. 600.312-08(a)(3). But manufacturers are "not required to obtain Administrator approval of label values prior to the introduction of vehicles for sale." 40 C.F.R. 600.312-08(a)(2). [1] Manufacturers remain "responsible for statements and information" made to the EPA. 40 C.F.R. 1066.2(a). Manufacturers have an "obligation to report truthful and complete information." 40 C.F.R. 1066.2(b). And manufacturers are permitted to remove a label when the "original label is incorrect, provided that it is replaced with the correct label." 40 C.F.R. 1068.101(b)(7)(i)(D).

A bedrock principle of EPA fuel economy estimates is that they be derived "from controlled, repeatable, laboratory tests" to enable fair comparison across vehicle manufacturers. 71 Fed. Reg. 77872-01. To calculate fuel economy estimates, EPA requires

[1] Unless required, but that is neither alleged by Petitioners nor contended here by Ford. 40 C.F.R. 600.312-08(a)(2) and (4).

manufacturers to perform controlled and repeatable "coastdown" tests to measure "road load." EPA conducts independent testing only "on about 15% of vehicle models each year,"[2] and Ford has not asserted that EPA did in this matter.

According to EPA regulations, the coastdown test and road load measurement are governed according to standards developed by the Society of Automotive Engineers (SAE). *See, e.g.*, 40 C.F.R. 1066.301, 40 C.F.R. 1066.305, 40 C.F.R. 1066.315, 40 C.F.R. 1066.1010. In a coastdown test, the manufacturer brings the vehicle to a high speed on a flat, straight road and then sets the vehicle coasting in neutral until it slows. 40 C.F.R. 1066.305. By recording the time this takes, the manufacturer can measure the resistance encountered by a given vehicle model from aerodynamic drag, tire rolling resistance, and drivetrain frictional losses. 40 C.F.R. 1066.301. This is known as the road load measurement. 40 C.F.R. 1066.210.

To determine fuel economy, the manufacturer places the vehicle on a dynamometer—essentially a treadmill for cars—with a fixture to hold the vehicle in place while its wheels turn. *Id.* The manufacturer inputs road load data from the coastdown test to simulate the load on the engine during on-road driving, and the manufacturer is thus able to measure fuel consumption and emissions in a controlled environment. 40 C.F.R. 1066.401. The manufacturer then calculates estimated fuel economy pursuant to

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[2] EPA, Fuel Economy Label Updates: Overview, https://www.epa.gov/recalls/fuel-economy-label-updates.

another set of EPA regulations, *see* 40 C.F.R. 600.210-12, and posts the estimated fuel economy on the Monroney Sticker.

II. Ford's coastdown tests did not comply with EPA regulations, leading to multiple government investigations.

Petitioners allege that Ford miscalculated road load in violation of EPA regulations. By departing from SAE standards, Ford underestimated aerodynamic drag, tire rolling resistance, and drivetrain frictional losses during coastdown testing determining road load. Ford then used incorrect road load measurements when testing its vehicles on the dynamometer, leading to results that artificially inflated the fuel economy of Ford's vehicles. Dkt. 78 (¶¶ 438-50).

For instance, with correct model inputs, the fuel economy estimates for the Ford F-150 would be 18 mpg for city driving, 23 mpg for highway driving, and 20 mpg combined. Compared with Ford's reported estimates, this represents a difference in estimated fuel economy of 2 mpg for city driving (10%), 3 mpg for highway driving (12%), and 2 mpg combined (9%). Over the stated lifetime mileage of 150,000 miles, this amounts to an additional 833 gallons consumed for city driving, 752 gallons for highway driving, or 682 gallons combined. Based on a national average fuel price of $2.79, this represents an added estimated lifetime fuel cost of $2,324, $2,098, or $1,903 for city, highway, or combined driving, respectively, based on the advertised fuel

economy estimates—or $1.9 billion combined across all vehicles sold. Dkt. 78 (¶¶ 13, 453).

In September 2018, several Ford employees expressed concerns about its coastdown testing. In February 2019, Ford disclosed to the EPA and the California Air Resources Board (CARB) that it was looking into concerns about its "computer-modeling methods and calculations used to measure fuel economy and emissions." By March 2019, Ford was under criminal investigation by the DOJ for its fuel economy and emissions certifications practices. Dkt. 78 (¶¶ 430, 432). EPA and CARB also opened their own investigations. By late 2021, all of these investigations had closed. Dkt. 85-3, 94.

III. There is no information in the record regarding the terms under which these governmental investigations closed.

The only information in the record regarding the closures of these investigations is Ford's own description in SEC filings. In Ford's 10-K for the fiscal year ending December 31, 2021, it stated: "Beginning in 2018 and continuing into 2020, the Company investigated a potential concern involving its U.S. emissions certification process. The matter focused on issues related to road load estimations, including analytical modeling and coastdown testing . . . . We received notifications from EPA, CARB, and DOJ that these agencies have closed their inquiries into the matter and do not intend to take any further action." Dkt. 94-1; *see also* Dkt. 85-3.

In the proceedings below, Ford did not provide the notifications from the agencies themselves—only Ford's summary description of them in its SEC filing. The use of "any further action" implies that Ford had already taken some action in conjunction with the agency investigations. But there is no information about that in the record. *See* CA Transcript (when questioned whether EPA "has made a determination that what was submitted complies with their rules and regulations," counsel for Petitioners responded that "[t]here's nothing in the record"). App. 40a. Notably, Ford did *not* report mpg estimates for at least some vehicle models at issue in 2022[3] and *reduced* estimates compared to 2018 once they reappeared in 2023.[4]

IV. Ford advertised fuel economy estimates that were determined in violation of EPA regulations, and Petitioners brought suit under state consumer protection laws.

By cheating on coastdown tests in a manner that artificially inflated the fuel economy of Ford's vehicles—to the point of being named "best in class" for fuel economy for some F-150's—Ford made them

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[3] *Compare* Dkt. 78 (¶¶ 469-70) (2018 F-150 3.3L estimated fuel economy ratings: 19 city / 25 hwy / 22 combined mpg), *with* https://www.ford.com/trucks/f150/2022/models/f150-xl/ (2022 F-150 3.3L estimated fuel economy ratings: N/A).

[4] *Compare* Dkt. 78 (¶¶ 469-70) (2018 F-150 3.3L estimated fuel economy ratings: 19 city / 25 hwy / 22 combined mpg), *with* https://www.ford.com/trucks/f150/models/f150-xl/?gnav=vhpnav-specs (2023 F-150 3.3L estimated fuel economy ratings: 19 city / 24 hwy / 21 combined mpg).

more appealing and competitive in the marketplace. Dkt. 78 (¶¶ 20-22, 456). Ford did so not only by putting an inflated mpg rating on the Monroney window stickers, but also by misrepresenting the fuel economy in television and radio advertisements, on its website, in brochures, and in press releases. Dkt. 78 (¶¶ 462-70).

For example, Plaintiff Foshee recalls that "before he purchased the 2019 Ford F-150, he saw representations about the vehicle's performance, including its fuel economy, in Ford's print brochures, Ford's radio and television ads, and on the vehicle's window sticker. Dkt. 78 (¶ 46). And before Plaintiff Ceremello purchased his 2019 Ranger, he "saw representations about the vehicle's performance, including its fuel economy, on Ford's website, dealer brochures, television commercials and on the vehicle's window sticker." Dkt. 78 (¶ 54). Petitioners selected and ultimately purchased their vehicles in part due to the fuel economy representations. *Id*.

Petitioners brought suit under state consumer protection statutes and common laws because the fuel economy estimates that Ford touted were artificially inflated by coastdown tests that failed to comply with EPA regulations, including SAE standards. Dkt. 78 (¶¶ 493-3957.) Other statements in Ford's advertising also related to these noncompliant fuel economy estimates. *See* CA Transcript (when asked, "Do you agree that the representations were all related to -- when it says 'best in class' and 'most fuel efficient gas-powered mid-sized pick-up in America they were -- do you understand that Ford was

referring to what the tests were under the EPA?" counsel for Petitioners answered, "I agree with that, Your Honor."). App. 42a. And Petitioners seek only damages. *See* CA Transcript (when asked, "[A]t this point you're only seeking damages?" counsel for Petitioners answered, "That's correct."). App. 40a.

V. The district court held that Petitioners' state law claims were expressly and impliedly preempted by the EPCA.

The district court had diversity jurisdiction over Petitioners' lawsuit pursuant to 28 U.S.C. § 1332, as modified by the Class Action Fairness Act of 2005. With respect to preemption, the district court first held that the state law claims were expressly preempted under section 32919(b), because by seeking to require disclosure of "true" fuel economy estimates, Petitioners' claims went beyond the "identical" requirement of the express preemption provision. App. 65a, 77a-79a. Second, the district court held that Petitioners' state law claims were impliedly preempted, because "requir[ing] Ford to construct and disclose to consumers an additional, supposed 'true fuel economy' for their vehicles" would "stand as an obstacle to the accomplishment and execution" of the EPCA. App. 86a.

VI. The court of appeals held that Petitioners' state law claims were impliedly preempted by the EPCA.

The court of appeals stated that it would "begin and end with implied preemption," specifically conflict preemption. App. 17a. Accepting Ford's

recharacterization of Petitioners' claims as "fraud-on-the-agency," the Sixth Circuit held that they "inevitably conflict with the EPCA and its regulatory scheme." *Id.* Relying on this Court's decision in *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001), the court of appeals held that Petitioners' claims would "allow[] juries to second-guess the EPA's fuel economy figures" and "usurp the EPA's fraud-policing powers." App. 17a-27a. And the court of appeals rejected Petitioners' argument that *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), *Medtronic Inc.* v. *Lohr*, 518 U.S. 470 (1996), *Bates* v. *Dow Agrosciences*, 544 U.S. 431 (2005), and *Wyeth* v. *Levine*, 555 U.S. 555 (2009), compelled a different outcome. App. 27a-31a. On June 21, 2023, the Sixth Circuit denied Petitioners' request for rehearing en banc. App. 35a.

REASONS FOR GRANTING THE PETITION

I. In a sharp break from the other circuits that hold *Buckman* does not apply to claims premised on identical duties arising under state law, the Sixth Circuit held that *Buckman* precluded Petitioners' claims.

In *Buckman*, plaintiffs injured by orthopedic bone screws alleged that a consulting firm that assisted the device manufacturer in gaining regulatory approval made fraudulent representations to the FDA and that, "[h]ad the representations not been made, the FDA would not have approved the

devices, and plaintiffs would not have been injured." 531 U.S. at 343.[5] Because "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied," the Court declined to invoke the presumption against preemption. *Id.* at 347. And *Buckman* went on to find implied preemption: "The conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Agency, and that this authority is used by the Agency to achieve a somewhat delicate balance of statutory objectives." *Id.* at 348. Thus, the "balance sought by the Agency can be skewed by allowing fraud-on-the-FDA claims under state tort law." *Id.*

Here, the Sixth Circuit embraced Ford's recharacterization of Petitioners' consumer fraud claims as "fraud-on-the-FDA" claims and, in consequence, relied on *Buckman* to hold that the claims "inevitably conflict with the EPCA and its regulatory scheme." App. 17a. While recognizing it normally would "apply a strong presumption against implied preemption in fields that States traditionally regulate," it declined to do so based on *Buckman*'s admonition that "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied." App. 18a. The Sixth Circuit determined that, as in *Buckman*, the "EPA is empowered to investigate suspected fraud" and "has at its disposal a variety of enforcement options." App. 22a. And the Sixth Circuit explained that "[s]uch

[5] Cleaned up to omit internal citations and quotations throughout, unless otherwise indicated.

explicit authority was a foundational reason *Buckman* determined the claims at issue were preempted." App. 26a.[6]

The Sixth Circuit's analysis and outcome conflict with the Second, Fifth, Seventh, and Ninth Circuits in *Desiano*, *Hughes*, *Bausch*, and *Gilstrap*, respectively.

In urging a similar recharacterization, the manufacturer defendants in *Desiano* v. *Warner-Lambert & Co.* argued that "there is no meaningful difference between the fraud-on-the-FDA claims struck down in *Buckman* and [the plaintiffs]' claims under Michigan tort law." 467 F.3d 85, 93 (2d Cir. 2006), *aff'd sub nom. Warner-Lambert Co.* v. *Kent*, 552 U.S. 440, 441 (2008) ("The judgment is affirmed by an

[6] The Sixth Circuit also relies on two federal circuit decisions purportedly invoking *Buckman* in the same manner. App. 20a-21a. But the Ninth Circuit's decision actually involved claims of harm arising from agency action itself, as in *Buckman*. *See Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199 (9th Cir. 2002) (claim that pesticide manufacturer submitted false information to EPA, so that EPA would allow only manufacturer's protective bags to be used during application and not those made by the plaintiff competitor). And the Third Circuit's decision in *Farina* involved an allegation that a product was unsafe to operate *despite* compliance with agency regulations. *Farina* v. *Nokia Inc.*, 625 F.3d 97, 122 (3rd Cir. 2010) ("Farina's claims rest on the allegation that defendants warranted that their cell phones were safe to operate, but that these phones were, in fact, unsafe to operate without headsets because of their emission of RF radiation—despite the fact that their emission levels were in compliance with FCC standards.").

equally divided Court.").[7] But the Second Circuit disagreed. *Desiano*, 467 F.3d at 94. Having refused to recast the case, the court held that the normal presumption "against federal preemption of state law" applied. *Id.* at 93. And *Desiano* explained that the plaintiffs were "not pressing 'fraud-on-the-FDA' claims, as the plaintiffs in *Buckman* were understood by the Supreme Court to be doing." *Id.* at 94. Instead, they were "asserting claims that sound in traditional state tort law." *Id.*[8]

As the Second Circuit explained, in *Buckman* there were "two characteristics of preempted 'fraud-on-the-FDA' claims that distinguish[ed] them from claims sounding in preexisting common law." *Desiano*, 467 F.3d at 94. The first characteristic was the source of the duty allegedly breached by the defendant. In *Buckman*, the preempted claim was based on a "newly-concocted duty between a manufacturer and a federal agency," whereas the claims in *Desiano* were "premised on traditional duties between a product manufacturer and Michigan consumers." *Id.* at 94-95. Indeed, this was how *Buckman* distinguished the non-preempted claims in *Silkwood*, which were "not based on any sort of fraud-on-the-agency theory, but on traditional state tort law

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[7] *Desiano* recognized that its holding conflicted with *Garcia* v. *Wyeth-Ayerst Labs.*, 385 F.3d 961 (6th Cir. 2004), *see Desiano*, 467 F.3d at 89, on which the Sixth Circuit below relied. App. 20a.

[8] *See also McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1040-41 (9th Cir. 2015) (rejecting the defendants' "attempts to characterize [the plaintiff]'s claims as torts in form only" in reliance on *Buckman*).

principles of the duty of care owed by the producer of plutonium fuel pins to an employee working in its plant." *Id.* (quoting *Buckman*, 531 U.S. at 352 (distinguishing 464 U.S. 238)). Here, Petitioners' clams likewise arise from state law duties to make truthful representations about advertised products. And unlike the Sixth Circuit, the Second Circuit in *Desiano* was concerned that by concluding that the claims were preempted, it "would be holding that Congress, without any explicit expression of intent, should nonetheless be taken to have modified (and, in effect, gutted) traditional state law duties." *Id.* at 95.

The second distinguishing characteristic of a "fraud-on-the-agency" theory is that proof of fraud against the agency "is alone sufficient to impose liability." *Id.* As *Desiano* states, "[i]n *Buckman*, there were no freestanding allegations of wrongdoing apart from the defendant's purported failure to comply with FDA disclosure requirements." *Id.* And this was how *Buckman* distinguished the non-preempted claims in *Medtronic*, which allowed "certain state-law causes of actions that parallel federal safety requirements." *Id.* The *Medtronic* claims "arose from the manufacturer's alleged failure to use reasonable care in the production of the product, not solely from the violation of FDCA requirements." *Id.* (quoting *Buckman*, 531 U.S. at 352-53 (distinguishing 518 U.S. 470)). Similarly, Petitioners' claims under state law are premised on Ford's failure to follow SAE guidelines for coastdown testing, which are incorporated into and parallel the EPA requirements—but also exist independently of them. Thus, the state law claims

that the Sixth Circuit held were preempted would be allowed in the Second Circuit.

Petitioners' claims would also be permitted in the Fifth Circuit. In *Hughes* v. *Bos. Sci. Corp.*, the court of appeals held that the plaintiffs' Mississippi tort claim was "not analogous to the 'fraud-on-the-FDA' theory in *Buckman,*" where the plaintiffs "were attempting to assert a freestanding federal cause of action based on violation of the FDA's regulations" and "did not assert violation of a state tort duty." 631 F.3d 762, 775 (5th Cir. 2011). In *Hughes*, on the other hand, the plaintiff asserted a tort claim "based on the underlying state duty to warn about the dangers or risks of a product" and sought to prove "breach of the state duty by showing that [the defendant] violated the FDA's MDR regulations." *Id.* Thus, the Fifth Circuit held that the state damages claims survived preemption based on *Silkwood* and *Medtronic* (as in *Desiano*). *Id.* at 775-76. Here, Petitioners likewise assert state law claims based on underlying state law duties precluding false and misleading advertising and seek to prove breach of these duties by showing that Ford violated EPA regulations.[9]

Hughes recognized that the Seventh Circuit also has "reached a similar conclusion," holding in *Bausch* v. *Stryker Corp.* that the "plaintiffs' negligence claims based on the manufacturer's violation of the FDA's specifications were not impliedly preempted

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[9] And section 32908(e)(2) prohibits labeling that is noncompliant with EPA regulations as an "unfair or deceptive act or practice," such that the duties arising under state law are also identical to that under the EPCA. 49 U.S.C. 32908(e)(2).

under *Buckman* because the plaintiffs were asserting breach of a 'recognized state law duty' rather than 'an implied right of action under federal law.'" 631 F.3d at 775 (quoting 630 F.3d 546, 558 (7th Cir. 2010)). The Seventh Circuit stated that the plaintiff's claims, "like those in *Lohr* [v. *Medtronic*], and unlike those in *Buckman*, [we]re tort law claims based on manufacturing defects, not fraud on a federal agency." *Bausch*, 630 F.3d at 557. And the court of appeals explained that the "evidence showing a violation of federal law" went "a long way toward showing that the manufacturer breached a duty under state law." *Id.*[10]

Lastly, the Ninth Circuit also interprets *Buckman* in a way that would permit Petitioners' claims. In *Gilstrap* v. *United Air Lines, Inc.*, the court of appeals held that the case was more like *Silkwood* than *Buckman*, because "the plaintiff's claims rely on traditional state tort law." 709 F.3d 995, 1009 (9th Cir. 2013). The court explained: "Under California law, proving that United violated the [Air Carrier Access Act] regulations may help Gilstrap to establish certain rebuttable presumptions regarding the scope of an airline's duty to individuals in Gilstrap's circumstances." *Id.* "But if the ACAA and its implementing regulations did not exist, she could still have alleged the same claims"—as Petitioners here could have based on violation of SAE guidelines. *Id.* So the Ninth Circuit held that the ACAA did not

[10] *See also Stengel* v. *Medtronic Inc.*, 704 F.3d 1224, 1233 (9th Cir. 2013) ("In holding that the Stengels' failure-to-warn claim is not preempted, we join the Fifth and Seventh Circuits, which reached the same conclusion with respect to comparable state-law claims in *Hughes* and *Bausch*.").

preempt "any state remedies that may be available when airlines violate those standards." *Id.* at 1010. "For instance—but only insofar as state law allows it—tort plaintiffs may incorporate the ACAA regulations as describing the duty element of negligence, and rely on state law for the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies." *Id.*[11] This is just what the Sixth Circuit precluded Petitioners from doing here.

II. The Sixth Circuit's decision is wrong because it relies on *Buckman*, ignores statutory language allowing parallel state enforcement, and conflicts with precedent from this Court.

The "different ways in which federal statutes may displace state laws" include express, field, and conflict preemption. *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1901 (2019). But "these categories are not rigidly distinct." *Id.* Conflict preemption occurs when a state law "stands as an impermissible obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "makes compliance with a federal statute impossible." *Id.* at 1907, 1908; *see also Kansas*

[11] *See also Lefaivre* v. *KV Pharm. Co.*, 636 F.3d 935, 944 (8th Cir. 2011) (holding that the plaintiffs' "state-law claims [we]re not fraud-on-the-FDA claims, as they focus on harm that is allegedly perpetrated against consumer rather than the FDA," whereas the "misrepresentation at issue in *Buckman* was not made to the plaintiff—or consumers at large—but to the FDA itself").

v. *Garcia*, 140 S. Ct. 791, 808 (2020) (Thomas, J., concurring) ("I [] cannot apply 'purposes and objectives' pre-emption doctrine, as it is contrary to the Supremacy Clause," which requires analysis of "whether the ordinary meaning of federal and state law directly conflict.") The Sixth Circuit wrongly held that purposes-and-objectives conflict preemption precluded Petitioners claims, by relying on *Buckman*, ignoring statutory language allowing parallel state enforcement, and failing to follow precedent from this Court.

First, based on the Sixth Circuit's flawed application of *Buckman*, it held that the normal presumption against preemption of laws within the historic police powers of the state did not apply. App. 18a-19a & n.7. And the court of appeals explained that it was "[g]iven that lack of presumption" that *Buckman* held that the claims there were impliedly preempted. App. 19a. But because *Buckman* is inapplicable here, the court of appeals should have instead applied the presumption against implied preemption. *Medtronic*, 518 U.S. at 485.[12] Indeed, enforcement of laws "designed to free from pollution the very air that people breathe clearly falls within the exercise of . . . the police power." *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 442 (1960).

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[12] *Cf. Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016) (holding that the presumption against preemption did not apply when analyzing an express preemption provision); *see also R.J. Reynolds Tobacco Co.* v. *Cnty. of Los Angeles*, 29 F.4th 542, 553 & n.6, 561 (9th Cir. 2022) (applying presumption to implied but not express preemption analysis based on *Franklin*).

And "advertising" is likewise "a field of traditional state regulation," giving rise to the "assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541-42 (2001); *see also Virginia Uranium*, 139 S. Ct. at 1904 ("preemption of state laws represents a serious intrusion into state sovereignty").

Second, in assessing implied preemption, the court of appeals inexplicably ignored the statutory language of the express preemption provision allowing states to "adopt or enforce a law or regulation on disclosure of fuel economy" that is "identical" to EPA requirements. 49 U.S.C. 32919. This is eyebrow raising. How can a court ignore statutory language *permitting* parallel enforcement in determining that a statute impliedly preempts parallel enforcement?

Jurisprudence regarding the intersection of express and implied preemption has evolved over the years. In the 1992 decision in *Cipollone* v. *Liggett Group*, this Court stated that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted," explaining that "[s]uch reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius."* 505 U.S. 504, 517 (1992). In 1995, in *Freightliner Corp.* v. *Myrick*, this Court clarified that "[a]t best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." 514 U.S. 280, 289 (1995). And in 2000 in *Geier* v. *American Honda*

Motor Co., this Court stated that there is no "special burden" that "necessarily arises from the limits of an express pre-emption provision." 529 U.S. 861, 873 (2000); *see also Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 65 (2002); *Arizona* v. *United States*, 567 U.S. 387, 406 (2012) ("existence of an express preemption provision does *not* bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause").

The court below follows this trajectory even further by ignoring the express preemption provision altogether in analyzing implied preemption. But as this Court recently stated in *Virginia Uranium*, arguments regarding "both field and conflict preemption" are examined much "as we would any other about statutory meaning, looking to the text and context of the law in question and guided by the traditional tools of statutory interpretation." 139 S. Ct. at 1901 (plurality opinion). But the Sixth Circuit did not even mention the statutory section entitled "Preemption," 49 U.S.C. 32919, in its preemption opinion.[13]

Other circuits, conversely, begin the search for implied preemptive intent with express preemption provisions. In *Nelson* v. *Great Lakes Educ. Loan Servs., Inc.*, for example, the Seventh Circuit began its analysis regarding whether a state false advertising

[13] Because the claim at issue arose solely from agency action and not from state law duties, *Buckman* had no reason to review the MDA's express preemption provision regarding parallel state enforcement. 531 U.S. 341.

claim conflicted with the Higher Education Act by reviewing the "several express preemption provisions in the HEA," which "show[ed] that Congress considered preemption issues and made its decisions." 928 F.3d 639, 650 (7th Cir. 2019).

Thus, in analyzing conflict preemption in *Gilstrap*, the Ninth Circuit looked to the statutory language of the FAA's savings clause, *see* 49 U.S.C. 40120(c) ("A remedy under this part is in addition to any other remedies provided by law"), in concluding that "Congress did not intend any of the FAA administrative enforcement schemes to be exclusive of state-law *remedies*." 709 F.3d at 1004, 1010 (emphasis in original). And in *Bausch*, the Seventh Circuit recognized that where express preemption clauses require state law claims to track the federal statute, there is a gap before *Buckman* implied preemption comes into play: "The plaintiff must be suing for conduct that *violates* the [FDCA] (or else his claim is expressly preempted by § 360k(a)[14]), but the plaintiff must not be suing *because* the conduct violates the [FDCA] (such a claim would be impliedly preempted under *Buckman*)." 630 F.3d at 557-58. The court below, conversely, failed to address the statutory language permitting parallel state enforcement in deciding that the EPCA impliedly preempted parallel state enforcement.

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[14] Section 360k states that no state may establish any requirement "which is different from, or in addition to, any requirement applicable under this chapter." 21 U.S.C. 360k(a)(1).

Third, given the Sixth Circuit's failure to apply the presumption against presumption to state laws exercising historic police powers and its failure to address statutory language permitting parallel state enforcement, the court's stated rationales for finding purposes-and-objectives conflict preemption flounder. For example, in assessing the "delicate balance of statutory objectives" and in recognizing the FDA as having the authority "to punish and deter fraud," the court of appeals fails to even consider the Congressional desire to preserve parallel state enforcement conveyed in the statutory language of the preemption provision. App. 23a; *see also* App. 30a (failing to address preemption provision allowing state enforcement of identical requirements in concluding that "Congress intended that the EPCA be enforced by the federal government"). In so doing, the court of appeals ignored the delicate balance that is federalism—including Congress' express desire that states continue to play a role under the EPCA. 49 U.S.C. 32919.

This Court's decisions, however, cannot countenance this oversight. *Silkwood* and *Medtronic* both emphasized that "Congress' failure to provide any federal remedy for persons injured by such conduct" meant that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251; *Medtronic*, 518 U.S. at 487. Of course, here Congress did comment, in 49 U.S.C. 32919, such that the Sixth Circuit's determination that only the EPA should address

conduct that violates the Act cannot be squared with Congressional intent.

Moreover, both *Silkwood* and *Bates* make the critical point that exposure to state-imposed remedies does not "frustrate any purpose of the federal remedial scheme." *Silkwood*, 464 U.S. at 257. As *Bates* explains, "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA." 544 U.S. at 451. Indeed, the "EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits." *Id.*

Fourth, besides ignoring the statutory language of the preemption provision, the Sixth Circuit does not address statutory language stating that "the manufacturer is not required to obtain Administrator approval of label values prior to the introduction of vehicles for sale," 40 C.F.R. 600.312-08(a)(2). [15] Nor does the Sixth Circuit address statutory language permitting Ford to alter its Monroney Sticker if information on it is incorrect. 40 C.F.R. 1068.101. So Petitioners' claims do not "inevitably conflict with" and "challenge the EPA's figures" but challenge Ford's failure to correct the flawed numbers it provided to the FDA and consumers. App 24a.

Finally, given the explicit statutory allowance of state claims based on identical requirements, purposes-and-objectives conflict preemption fails and

[15] *Cf.* App. 9a (discussing 40 C.F.R. 600.312-08(a)(3)).

impossibility preemption fares no better. In *Silkwood*, this Court rejected preemption based on a purported conflict with the "federal remedial scheme" by which the agency was "authorized to impose civil penalties," because "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible." 464 U.S. at 257.

Moreover, in *Wyeth*, this Court held that the FDA's prior approval of the drug manufacturer's label did not preempt the plaintiff's failure to warn claim, rejecting the manufacturer's arguments that it would have been impossible to comply with both. 555 U.S. at 558-59, 563-64. The reason was simple: an FDA regulation "permit[ted] a manufacturer to make certain changes to its label before receiving the agency's approval." *Id.* at 568. So "absent clear evidence that the FDA would not have approved a change to [the] label," this Court would "not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Id.* at 571.[16] *See also PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 620 (2011) ("The question for impossibility is whether the private

[16] *See also Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1672 (2019) (holding that "'clear evidence' is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning"); *Sikkelee* v. *Precision Airmotive Corp.*, 907 F.3d 701, 713-14 (3d Cir. 2018) (holding no conflict preemption where engine manufacturer could have adjusted its design under the Federal Aviation Act and there was no "clear evidence that the [FAA] would not have approved a change") (quoting *Wyeth*).

party could independently do under federal law what state law requires of it.").

Similarly, here nothing precluded Ford from fixing its EPA fuel economy estimates. In fact, section 1068.101 of the EPA regulations states that a vehicle manufacturer may change a label if it is incorrect: "You may not remove or alter an emission control information label or other required permanent label except as specified in this paragraph . . . . The original label is incorrect, provided that it is replaced with the correct label from the certifying manufacturer . . . ." 40 C.F.R. 1068.101(b)(7)(i). The Sixth Circuit did not address this provision. Moreover, there is no "clear evidence" that the EPA would have prevented Ford from changing its fuel economy label. *See* section III, above; *Wyeth*, 555 U.S. at 571.

III. The preemption issue presented here is of national importance because it affects the states' historical police power, and state enforcement of fuel economy and emissions regulations is a critical complement to EPA's fight against global warming.

As this Court recognized in *Silkwood*, the "issue addressed by the court below is important," because it affects "the States' traditional authority to provide tort remedies to their citizens." 464 U.S. at 248. As discussed, enforcement of laws "designed to free from pollution the very air that people breathe clearly falls within the exercise of . . . the police power." *Huron*, 362 U.S. at 442. And "advertising" is likewise "a field

of traditional state regulation." *Lorillard*, 533 U.S. at 541-42. Whether state enforcement in these traditional areas should be curtailed by the Sixth Circuit's decision—and contrary to Congressional intent—is an important issue in its own right within our federal system. *Virginia Uranium*, 139 S. Ct. at 1904 ("preemption of state laws represents a serious intrusion into state sovereignty").

Moreover, climate change is one of biggest issues affecting our planet, with fuel efficiency and regulation of emissions of paramount concern in combatting global warming. As the EPA has recognized, climate change "is a global issue that has far-reaching human health, social, economic, and biodiversity impacts on the planet, with direct adverse effects in the United States."[17] Indeed, the First Objective for the EPA in its FY2022-2026 strategic plan is "Tackle the Climate Crisis." *Id.* at 9. The EPA's strategic plan notes that "[t]he impacts of climate change affect people in every region of the country, threatening lives and livelihoods and damaging infrastructure, ecosystems, and social systems." *Id.* at 11. Relevant here, greenhouse gases (GHG) "from human activities are the most significant driver of observed climate change since the mid-20th century." *Id.* at 12. But "EPA can drive significant emissions reductions to mitigate climate change" and "will cut emissions by exercising its authorities to regulate GHG pollutants, including carbon dioxide (CO2), methane, and hydrofluorocarbons (HFCs),

[17] EPA, FY 2022-2026 EPA Strategic Plan, (Mar. 2022), https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf at 22.

across key sectors." *Id.* In particular, the EPA "set[s] robust federal GHG emissions standards" for "passenger cars and light-duty trucks to secure pollution reductions." *Id.* at 14.

But federal agencies have limited resources for monitoring and enforcement. As this Court recognized in *Wyeth*, the FDA, for example, "has limited resources to monitor the 11,000 drugs on the market." 555 U.S. at 578. So state tort suits are an important complement to that regulatory regime, as they "uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly." *Id.* at 579. Moreover, "[f]ederal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists."[18] The DOJ's Environment and Natural Resources Division, for example, takes into consideration voluntary disclosure by the offending party, its cooperation in the investigation, and preventative measures and compliance programs that have been put in place.[19] The EPA takes a variety of factors into account as well, with a commitment to "focus federal enforcement resources on the most serious environmental problems."[20] And CARB too weighs several factors when determining appropriate

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[18] U.S. Dep't of Just., Initiating and Declining Charges – Substantial Federal Interest, Just. Manual § 9-27.230, 2023 WL 4531530, at *1 (2023).

[19] U.S. Dep't of Just., Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (Jul. 1, 1991), http://www.justice.gov/enrd/3058.htm.

[20] FY 2022-2026 EPA Strategic Plan, at 39.

penalties for violators, including deterrence, investigation costs, litigation risks, and voluntary disclosure.[21] As this Court has explained, an agency must assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). State enforcement helps to fill in these resource gaps.

Thus, the parallel state enforcement that this Court found permissible in *Silkwood*, *Medtronic*, and *Bates*—and Congress provided for under the EPCA in 49 U.S.C. 32919—allows the traditional police power of the states to act in concert with Congressional objectives. But by concluding that the claims here were preempted, the Sixth Circuit essentially held that "Congress, without any explicit expression of intent, should nonetheless be taken to have modified (and, in effect, gutted) traditional state law duties." *Desiano*, 467 F.3d at 95. This has real consequences in terms of both state rights and the fight against global warming.

Indeed, the repercussions are already apparent beyond just this case. For instance, following "Deiselgate"—the 2015 scandal involving Volkswagen's illegal use "defeat devices" to emit more harmful pollutants than legally allowed—the Judicial

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[21] California Air Resources Board, Enforcement Policy (Apr. 2020), https://ww2.arb.ca.gov/resources/documents/enforcement-policy.

Panel on Multidistrict Litigation coordinated consumer false advertising cases into an MDL in the Northern District of California. And these cases settled for more than $10 billion dollars on behalf of consumers. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig.*, 2016 WL 6248426, at *12 (N.D. Cal. Oct. 25, 2016). Moreover, Deiselgate spurred other consumers to investigate—and discover—use of defeat devices by other car manufacturers. But two such consumer cases seeking to hold GM responsible for "installing devices that defeated the emissions testing approved by the EPA" were recently dismissed—after years of litigation—as preempted under the Clean Air Act based on the Sixth Circuit's decision here. *See Counts* v. *Gen. Motors*, 2023 WL 4494336, at *1 (E.D. Mich. July 12, 2023); *In re Duramax Diesel Litig.*, 2023 WL 4493595, at *1 (E.D. Mich. July 12, 2023); App. 144a, 167a. Moreover, the Sixth Circuit's decisions here and in *Garcia* would have precluded the consumer recovery obtained in the Volkswagen MDL had the JPML sent it to that circuit.

In short, this Court is needed to resolve a conflict among circuits regarding the intersection of *Buckman* with *Silkwood*, *Medtronic*, and *Bates*—including whether statutory language specifically allowing parallel state enforcement should be considered in determining whether Congress impliedly preempted parallel state enforcement—which has important consequences in terms of both states' rights and the fight against global warming.

CONCLUSION

The petition for a writ of certiorari should be granted.

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