No.

In the Supreme Court of the United States

VOLKSWAGEN GROUP OF AMERICA, INC., ET AL.,
PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA, AND SALT LAKE COUNTY, UTAH, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL H. STEINBERG
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, CA 90067

JUDSON O. LITTLETON
SULLIVAN & CROMWELL LLP
1700 New York Ave., N.W.
Washington, DC 20006

ROBERT J. GIUFFRA, JR.
Counsel of Record
DAVID M.J. REIN
MATTHEW A. SCHWARTZ
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
giuffrar@sullcrom.com

Counsel for Petitioners Volkswagen Group of America, Inc. and Audi of America, LLC

[Additional parties and counsel listed on signature page]

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 billions more in penalties based on the same updates. The Ninth Circuit below—in 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 Group of America, Inc. ("VWGoA"), Audi of America, LLC, Porsche Cars North America, Inc., and Robert Bosch LLC ("Bosch").

VWGoA is a wholly owned subsidiary of Volkswagen Aktiengesellschaft ("Volkswagen AG"). Audi of America, LLC is a wholly owned subsidiary of VWGoA. Dr. Ing. h.c. F. Porsche AG ("Porsche AG") owns the stock of two companies that own stock of a company that owns stock in differing shares of Porsche Cars North America, Inc. and has been described as an indirect parent corporation of Porsche Cars North America, Inc. Volkswagen AG is a publicly held German corporation that owns 10% or more of the stock of VWGoA, and owns indirectly 10% or more of the stock of Porsche AG.

Petitioner Bosch is an indirect wholly owned subsidiary of Robert Bosch GmbH, which is a privately owned German company with 93.992% of its share capital being held by Robert Bosch Stiftung GmbH, a charitable foundation.

Respondents are the Environmental Protection Commission of Hillsborough County, Florida and Salt Lake County, Utah.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

The Environmental Protection Commission of Hillsborough County, Florida v. *Volkswagen AG et al.*, No. 16-cv-2210 (MDL No. 2672) (Apr. 16, 2018)

Salt Lake County v. *Volkswagen Group of America et al.*, No. 16-cv-5649 (MDL No. 2672) (Apr. 16, 2018)

United States Court of Appeals (9th Cir.):

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, No. 18-15937 (June 1, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued:

Cases—Continued:

Cases—Continued:

Statutes:

Miscellaneous—Continued:

In the Supreme Court of the United States

No.

VOLKSWAGEN GROUP OF AMERICA, INC., ET AL.,
PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA, AND SALT LAKE COUNTY, UTAH, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 959 F.3d 1201. The opinion of the district court (App., *infra*, 47a-87a) is reported at 310 F. Supp. 3d 1030.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2020. A timely petition for rehearing was denied on August 24, 2020. App., *infra*, 88a-89a. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari in all cases due on or after that date to 150 days from the date of the lower court judgment, order

denying discretionary review, or order denying a timely petition for rehearing. Order, 589 U.S. __ (Mar. 19, 2020), https://tinyurl.com/March19Order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 90a-106a. 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 has divided courts across the country: whether Congress in the CAA, by vesting EPA with exclusive authority to set and enforce emission standards for vehicles during their entire useful life, also intended to allow 50 states and thousands of local governments to regulate manufacturers' post-sale, nationwide updates to vehicle emission systems. The decision below recognized such state and local authority for the *first time* in the more than 50 years since Congress directed EPA to regulate auto emissions. This Court's review is warranted for several reasons.

First, the Ninth Circuit's decision squarely conflicts with final decisions of the Alabama Supreme Court and intermediate courts of appeals in Minnesota and Tennessee holding that the CAA preempts state and local government actions challenging manufacturers' post-sale updates to emission systems. 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 Ninth Circuit. This case presents the ideal vehicle to resolve this conflict. At a minimum, petitioners respectfully submit that this Court should call for the views of the Solicitor General, who declined the Ninth Circuit's request to participate as *amicus* "at this stage of the litigation." C.A. Dkt. 70, at 2.

Second, 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. Since 1967, EPA has exclusively regulated manufacturers' post-sale changes, such as software updates, to their cars' emission control systems. The decision below 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 impose conflicting regulation on manufacturers. EPA's evaluation of emissions updates involves the highly technical exercise of judgment over 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 Ninth Circuit's decision, if any state or locality disagrees with EPA's determinations, manufacturers could face what that court described as "staggering liability" from state and local enforcement actions. App., *infra*, 45a. The threat of such state and local regulation will discourage manufacturers from making beneficial modifications to emission systems.

This is not a theoretical concern: the State of Ohio, for example, has explicitly claimed that it has the authority to challenge EPA-approved updates. See *infra* at 19. And, citing the Ninth Circuit's decision, one of the respondents (Hillsborough County) has already brought an analogous lawsuit against Daimler AG, petitioner Robert Bosch LLC, and their affiliates seeking relief that conflicts with the careful balance that EPA struck in its resolution with Daimler over the same conduct. See *infra* at 20-21.

The Ninth Circuit mistakenly assumed that manufacturers' post-sale emission updates are "rare." App., *infra*, 45a. In fact, now that emission control systems are computer-operated, manufacturers apply post-sale software 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).

Third, the Ninth Circuit's decision misconstrues the CAA and conflicts with numerous decisions from this Court and others interpreting its provisions. 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). The Ninth Circuit misinterpreted § 209(a) to

draw a bright-line between "new" and "used" cars, such that preemption ends at the point of initial sale. See *infra* at 24. This interpretation gives no effect to the expansive phrase "relating to"—a 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 Ninth Circuit's interpretation also contradicts the interpretation of other federal courts and EPA, which have long 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 relate back to the cars' original (noncompliant) software because the updates modified that factory-installed software.

Moreover, in interpreting § 209(a), the Ninth Circuit did not follow this Court's instruction in *Engine Manufacturers Association* v. *South Coast Air Quality Management District* to examine how EPA enforces CAA standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. 246, 253 (2004). The CAA commands EPA to regulate manufacturers' emissions-related conduct throughout a car's "useful life," 42 U.S.C. § 7521(a)(1), (d)(1), through a number of obligations and enforcement provisions that expressly apply to manufacturers after the sale of such cars, refuting the Ninth Circuit's conclusion that EPA's exclusive role safeguarded under § 209(a) ends once a car is sold.[1] The CAA

[1] Congress gave California an exception from preemption and allowed other states to adopt and enforce California's EPA-approved

also expressly bars states from requiring emissions testing by manufacturers, an essential tool for enforcing emission compliance. 42 U.S.C. § 7541(h)(2).

The Ninth Circuit relied heavily on a novel and overbroad interpretation of § 209(d), which preserves state and local authority to "otherwise" regulate the "use, operation, or movement" of vehicles, 42 U.S.C. § 7543(d). The Ninth Circuit's reading of "operation" to include manufacturer software updates cannot be squared with the plain meaning of § 209(d)—which contemplates regulation of how cars are driven or used—and conflicts with the D.C. Circuit's and EPA's interpretation of § 209(d).

Finally, the Ninth Circuit erred in finding no implied preemption. The comprehensive structure of the CAA demonstrates Congress's intent that EPA exclusively regulate auto 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 8-10. Conversely, Congress stripped states of even basic enforcement tools like requiring manufacturer emissions testing. Overlapping regulation by states and localities would conflict with that clear congressional purpose.

---

standards. 42 U.S.C. §§ 7543(b), 7507. This exception is not relevant here because local governments like respondents may not enforce California's standards.

Likewise, the Ninth Circuit's decision hinders 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 infeasible for EPA to discharge that mandate. That respondents—just two counties—seek billions of dollars per year in penalties for conduct that EPA comprehensively enforced vividly illustrates this conflict. See *infra* at 32-33.

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. 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 granted EPA authority to regulate manufacturers' emissions-related conduct both before sale *and* throughout their "useful life":

- 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 control systems 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.
- Manufacturers must "establish and maintain records" of emissions testing on in-use 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). Congress also barred states from requiring 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' tampering with emissions controls after cars are 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 also 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 CAA 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. EPA, *Clean Air Act Mobile Source Civil Penalty Policy—Vehicle and Engine Certification Requirements* (Jan. 16, 2009), https://tinyurl.com/EPAPenaltyPolicy.

5. As national and global auto manufacturers' associations explained as *amici* below, post-sale software and other updates have become "even more frequent and important" as cars have grown increasingly computerized. C.A. Dkt. 34, at 8. 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' updates to emission systems raise technical questions requiring scientific expertise and balancing of competing regulatory objectives, whereby the update "reduc[es] some types of emissions while increasing others." C.A. Dkt. 79, at 4. Updates may require accepting emissions increases under certain conditions to prevent vehicle or engine damage, or to ensure proper start-up. *Ibid.* Manufacturers work closely with EPA to address these tradeoffs when remedying nonconformities in emission systems. See EPA Recall Report, at 62. EPA's exclusive regulation of such updates has, so far, avoided potentially conflicting determinations by different regulators about such updates.

6. Finally, § 209(d) reserves to states and localities the 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). In this provision, Congress preserved state authority over *local* conduct that does not intrude on EPA's authority, such as through carpool lanes. See *infra* at 30-31.

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 regulations. 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 action to enforce the notices of violation, EPA alleged that during an EPA-overseen recall,

Volkswagen also installed software updates to refine the factory-installed defeat device. D. Ct. Dkt. 2009-3, ¶¶ 115-116, 136-141. 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 by a sufficient amount to bring the cars into compliance with the originally certified emissions standard. *Id.* ¶ 141.

Volkswagen quickly acknowledged its wrongdoing. In three consent decrees with EPA, Volkswagen 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 D. Ct. 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. C.A. Dkt. 29, at 89. In total, Volkswagen agreed to pay more than $23 billion and bought back or installed EPA-approved updates in nearly all affected vehicles.

2. EPA's notices of violation triggered a flood of lawsuits, including novel claims brought by ten states and 35 counties. Certain of those actions were transferred to a multi-district litigation before the district court below. Parroting EPA's allegations, the two counties that are respondents here sued under their own state and local anti-tampering laws, challenging the factory installation of the defeat device. After another state's claims against

Volkswagen based on pre-sale conduct were dismissed as preempted, respondents amended their complaints to include claims challenging the post-sale updates to that factory-installed defeat device. App., *infra*, 11a-12a. Respondents seek daily penalties of $5,000 per affected car per day, totaling $11.2 billion annually for roughly 6,100 cars—more than EPA deemed appropriate for the 590,000 cars affected nationwide. *Id.* at 53a-54a.

3. The district court (Breyer, J.) dismissed respondents' claims as preempted. *First*, the district court held that respondents' claims targeting pre-sale conduct were expressly preempted under § 209(a). *Id.* at 64a.

Second, the district court held that respondents' claims targeting post-sale conduct were impliedly preempted, reasoning that where "a manufacturer's actions affect vehicles model wide, the [CAA] manifests Congress' intent that EPA, not the states or local governments, will regulate that conduct." *Id.* at 74a.

4. Respondents appealed. After oral argument, the Ninth Circuit invited the Solicitor General and EPA to submit *amicus curiae* briefs addressing the "significant questions" at issue. App., *infra*, 4a n.4. The government declined to participate "at this stage of the litigation," stating that its decision "should not be construed as an indication of the government's views about the proper resolution of this case." C.A. Dkt. 70, at 2.

The Ninth Circuit affirmed the dismissal of respondents' pre-sale claims, but held that respondents' claims targeting post-sale software updates are not preempted, twice citing the government's decision not to file an *amicus* brief. App., *infra*, 4a n.4, 34a n.21.

Relying exclusively on the phrase "new motor vehicles," and ignoring the phrase "relating to," the Ninth Circuit summarily held that § 209(a) "does not apply to post-

sale vehicles." *Id.* at 30a. The Ninth Circuit also concluded that "[n]othing in the CAA raises the inference that Congress intended to place manufacturers beyond the reach of state and local governments," and that the CAA's overall "cooperative-federalism partnership" supported allowing additional local penalties for conduct EPA comprehensively redressed. *Id.* at 39a, 42a. The Ninth Circuit also broadly construed § 209(d) of the CAA—which narrowly preserves state and local authority to regulate the "use, operation, or movement" of motor vehicles—to permit states to regulate any aspect of the post-sale vehicle. *Id.* at 25a.

The Ninth Circuit denied rehearing, *id.* at 88a-89a, but granted petitioners' motion to stay the mandate pending this Court's review. C.A. Dkt. 86.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH FINAL DECISIONS OF SEVERAL STATE COURTS.

1. In concluding that the CAA does not preempt respondents' post-sale claims, the Ninth Circuit's decision directly conflicts with the final appellate determinations of three state courts. Like respondents, the states of Alabama, Tennessee, and Minnesota sued petitioners under their own anti-tampering laws, seeking penalties for the same post-sale updates at issue in this case. Unlike the Ninth Circuit, those state 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 this federal 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.

The Ninth Circuit then considered the identical legal question, involving the same defendants and conduct, but reached the opposite conclusion. App., *infra*, 30a-46a. The Ninth Circuit did not acknowledge or reconcile those contrary state court opinions in its decision.

As a consequence, respondents and state and local governments within the Ninth Circuit may regulate manufacturers' post-sale updates to their vehicles' emission control software, whereas state and local governments in Alabama, Tennessee, and Minnesota may not. This conflict warrants this Court's review. See *Hillman* v. *Maretta*, 569 U.S. 483, 489-490 (2013). The fact that two of those decisions were from intermediate appellate courts does not make this Court's review any less warranted.[2]

---

[2] See *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 53 (2015) (resolving conflict between Ninth Circuit and intermediate California

2. A number of other courts have addressed this same issue and likewise reached different conclusions. To date, including non-final and trial-court decisions, five courts have found analogous claims against petitioners to be preempted; four courts, including the Ninth Circuit, have held the opposite.[3] Because the issue has been sharply defined and briefed extensively in these courts, including with input from automobile industry associations and the U.S. Chamber of Commerce 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,

---

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).

[3] 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; *State ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, 137 N.E.3d 1267, 1275-1276 (Ohio Ct. App. 2019) (claims not preempted, appeal 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 Volkswagen Clean Diesel Litig.*, Cause No. D-1-GN-16-000370 (Tex. Dist. Ct. Feb. 21, 2018) (same).

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, 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/PercentGDPValueAdded (choose "Value added by Industry as a Percentage of Gross Domestic Product (A)(Q)") (lines 21 and 36).

More than 50 years ago, Congress recognized that the tens of millions of cars on the road are a significant source of pollution requiring "motor vehicle exhaust control standards on a national scale." H.R. Rep. No. 89-899, p. 5 (1965). But Congress also 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." H.R. Rep. No. 90-728, p. 21 (1967). 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. Accordingly, Congress entrusted EPA with exclusive power to regulate auto manufacturers' emission compliance throughout the useful life of their vehicles. Congress was concerned 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, p. 22. Congress believed state and local regulation of manufacturers would "lead to increased

costs to consumers nationwide, with benefit only to those in one section of the country." *Ibid.*

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. EPA Recall Report, at 7. Contrary to the Ninth Circuit's mistaken assumption (without citation) that post-sale updates to emission systems are "rare," App., *infra*, 45a, manufacturers conduct dozens of recalls affecting, on average, six million cars every year, all coordinated with EPA. See EPA Recall Report, at 7.

As the Alliance of Automobile Manufacturers, the Association of Global Automakers, and the U.S. Chamber of Commerce explained in their *amici* brief below (which the Ninth Circuit did not address in its decision), emission control updates have become "vastly more common" in recent years because (i) engines and emission controls have become more "complex and computerized," and (ii) EPA's in-use testing requirements have increased the detection of failures in in-use cars. C.A. Dkt. 34, at 8, 17, 20-21. "In-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, defective emission controls often can be fixed by a software update.

2. The Ninth Circuit'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 Ninth Circuit held that all 50 states and 3,000 counties may separately regulate these updates according to their own local policies, priorities, and preferences, and sue manufacturers for billions of dollars for supposed violations of local anti-tampering laws. Under the Ninth Circuit's interpretation, every state and locality can 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. App., *infra*, 79a n.7. 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 Ninth Circuit's decision would allow states and localities to penalize these EPA-approved modifications. As the district court recognized (and respondents have never disavowed), respondents' theory would permit them to challenge even EPA-approved updates, and the State of Ohio has already claimed that it has such authority. See Merit Br. of Appellee 40, *State of Ohio ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, Case No. 2020-0092 (Ohio Aug. 10, 2020).

Facing potentially "staggering liability" for post-sale updates to emission systems, App., *infra*, 45a, manufacturers may now 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.

The impact of the Ninth Circuit's decision extends to all types of automobile manufacturers (including passenger cars, motorcycles, heavy-duty trucks, and recreational vehicles), as well as to manufacturers of farm equipment, construction equipment, and locomotives, which are likewise subject to uniform, federal regulation by EPA. The relevant CAA preemption provision for those sources mirrors § 209(a). See 42 U.S.C. § 7543(e)(1) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter."). This Court's decision construing § 209(a) would thus also prevent the regulatory turmoil that would result in these other industries if the decision below were applied by lower courts to the analogous language of § 209(e).

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 32-34.

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

1. The Ninth Circuit's assumption that its decision would have a limited impact because "this conduct will be as rare as it is unprecedented," see App., *infra*, 45a, has already been proven wrong: the Ninth Circuit's decision

emboldened one of the respondents to try to regulate another manufacturer's alleged post-sale emission software updates by piggybacking on another EPA settlement.

In September 2020, EPA announced a consent decree with Daimler AG and its affiliates based on 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), https://tinyurl.com/EPADaimler.

Seizing on the Ninth Circuit's decision in this action, respondent Hillsborough County sued Daimler and petitioner Robert Bosch LLC, and their affiliates, challenging their 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. Fl. 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 order: if Daimler fails to bring affected vehicles into full compliance, the consent order permits those vehicles to remain in use, provided Daimler pays money into a mitigation trust. EPA, Daimler AG and Mercedes-Benz USA, LLC Clean Air Act Civil Settlement (Sept. 14, 2020), https://tinyurl.com/EPADaimler ("Daimler will be liable for stipulated penalties in the unlikely event that one or more AEMs do not meet the appliable emission standards . . . ."); see also *United States* v. *Daimler AG*, No. 20-cv-2564, Dkt. No. 7-1 (D.D.C. Dec. 17, 2020), ¶ 53(c)(ii).

2. Hillsborough 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.)").

This Court's resolution of the scope of preemption regarding the six million vehicles updated every year is thus imminently needed.

III. THE DECISION BELOW IS INCORRECT.

The Ninth Circuit's holding contravenes decades of precedent making clear that the CAA preempts respondents' 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 Ninth Circuit Misconstrued the CAA's Framework and History.

1. Congress structured the CAA to allocate regulatory responsibility differently based on the source of emissions. The Ninth Circuit previously recognized that "the [CAA] gives the states the job of regulating *stationary sources* of pollution, but the EPA . . . [is] responsible for regulating emissions from *motor vehicles and other mobile sources*." *Nat. Assn. of Home Builders*, 627 F.3d at 733 (emphases added).

In its decision below, the Ninth Circuit did not adhere to this critical distinction, erroneously relying on cases interpreting Title I (regarding stationary emission sources)

to assert that "[t]he CAA is a joint venture" between EPA and the states where Congress "has consistently preserved the legitimacy of state regulations." App., *infra*, 21a-23a (citing *Gen. Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990) (Title I); *Comm. For a Better Arvin* v. *EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015) (same); and *GenOn REMA, LLC* v. *EPA*, 722 F.3d 513, 516 (3d Cir. 2013) (same)). Other decisions have rejected this reasoning.[4]

Illustrating its erroneous premise, the Ninth Circuit mistakenly invoked—*six times*—a supposed presumption against preemption to justify its narrow interpretation of the CAA's preemptive scope. App., *infra*, 3a, 16a, 32a, 35a, 41a, 43a n.23. But this Court has already declined to apply any such presumption in interpreting the scope of preemption under § 209(a). In *South Coast*, this Court, in a decision by Justice Scalia, declined to "invok[e] the 'presumption against preemption'" when interpreting § 209(a). 541 U.S. at 256. And applying such a presumption would be particularly inappropriate for mobile source emissions, which have always been principally regulated at the federal level. See *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (no presumption in areas with "a history of significant federal presence").

2. The CAA itself contradicts the Ninth Circuit's core rationale that Congress could not have intended to preempt respondents' claims because a manufacturer's

---

[4] See, *e.g.*, *Jensen Family Farms, Inc.* v. *Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 938 (9th Cir. 2011) (regulation of "stationary sources is primarily left to the states," but "the federal government sets nationwide emissions standards for mobile sources"); *In re Caterpillar, Inc.*, 2015 WL 4591236, at *14 n.19 (D.N.J. July 29, 2015) (so-called "cooperative structure" for stationary sources under Title I "irrelevant" to Title II framework for mobile sources).

tampering on a nationwide basis "could not have been anticipated by Congress." App., *infra*, 45a. To the contrary, Congress anticipated precisely such conduct more than 50 years ago when it empowered EPA alone to penalize "any manufacturer" that "knowingly [] remove[s] or render[s] inoperative" an emission-control device "after . . . sale." Pub. L. No. 91-604, 84 Stat. 1676, 1693 § 7(a)(3).

Because the statute potentially impacts post-sale conduct that EPA regulates, since 1975, EPA has provided extensive guidance on how manufacturers may make post-sale emission control changes without violating the CAA's tampering prohibition. See *supra* at 10.

B. The Ninth Circuit's Interpretation of the CAA's Express Preemption Clause Is Incorrect and Conflicts with Settled Law.

Contrary to the Ninth Circuit's unduly narrow interpretation, § 209(a) 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. The decision below focused solely on the phrase "new motor vehicles," and thus construed § 209(a) as ending preemption at the point of initial sale. But as this Court has recognized, the phrase "relating to," which means any "connection with or reference to," *Rutledge*, 141 S. Ct. at 479, "express[es] a broad pre-emptive purpose," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), and "indicates Congress' intent to preempt a large area of state law," *Altria*, 555 U.S. at 85. The Ninth Circuit did not follow this direction, and its exclusive focus on the phrase "new motor vehicles" resulted in an interpretation that eliminates "relating to" from the statute, as though § 209(a) merely barred states from

"controlling emissions from new motor vehicles." See *Morales*, 504 U.S. at 385 (rejecting an interpretation that "simply reads the words 'relating to' out of the statute."). The Ninth Circuit offered no interpretation of "relating to," let alone one that supports its conclusion that preemption ends at the point of initial sale.

The Ninth Circuit's interpretation thus conflicts with longstanding authority providing that preemption under § 209(a) continues past the point of sale. Because only manufacturers produce new cars, Congress used "new" in § 209(a) to set up a different emissions compliance regime for manufacturers. It did so to avoid "an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for [vehicle] manufacturers." *Engine Mfrs. Assn.*, 88 F.3d at 1079 (quotation omitted); see H.R. Rep. No. 90-728, p. 21 (broad preemption "necessary in order to prevent a chaotic situation from developing" in regulation of manufacturers).

The seminal case *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 state and local regulation of vehicles post-sale must be "directed primarily to intrastate activities" and place "the burden of compliance . . . on individual owners and not on manufacturers and distributors." This avoids an illogical interpretation 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]." *Ibid.*; see *Engine Mfrs. Assn.*, 88 F.3d at 1086 & n.39 (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'").

Likewise, EPA has long 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). EPA has endorsed *Allway Taxi* and considers "recall programs" (*i.e.*, regulation of manufacturers' post-sale updates) to "relate back" to the original design of the engine and thus fall within the scope of § 209(a) preemption. *Id.* at 31,330 & n.28.

The Ninth Circuit deemed petitioners' reliance on *Allway Taxi* "misplaced" because "[t]he Counties' anti-tampering rules do not require Volkswagen to comply with a local emission standard that is different from the federal standard." App., *infra*, 31a. But § 209(a) prohibits state or local enforcement of "*any* standard," not just different standards. 42 U.S.C. § 7543(a) (emphasis added); see H.R. Rep. No. 90-728, p. 22 (even "identical" standards, interpreted by different regulators, "would be difficult for the industry to meet").

The Ninth Circuit's interpretation thus conflicts with the Eleventh Circuit's decision in *Sims* v. *Fla., Dept. of Hwy. Safety & Motor Vehicles*, which held that "any standard" in § 209(a) means any standard, "federal or state," not solely "new or conflicting emission standards," and invalidated a state statute that merely required "compl[iance] with the [CAA]." 862 F.2d 1449, 1455 (11th Cir. 1989). It also conflicts with the decision of a New York appellate court rejecting New York's attempt to investigate a manufacturer's emissions compliance, reasoning that § 209(a) preempts even a state's attempt to "provide the manufacturer with additional incentive to comply with Federal [defeat device] standards." *In re Office of Atty. Gen.*, 269 A.D.2d 1, 10-11 (N.Y. App. Div. 2000).

2. Respondents' 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 itself 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 cars as certified at the factory. See D. Ct. Dkt. 2009-3, ¶ 141 (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. Respondents' claims thus rest on the fact that, *as manufactured*, the vehicles violated *EPA* standards.

By contrast, post-sale tampering with emission controls by mechanics and consumers within a state or locality does not "relate back" to the original design of the engine because such conduct does not place the "burden of compliance" on the manufacturer. *Engine Mfrs. Assn.*, 88 F.3d at 1086 & n.39 (quoting *Allway Taxi*, 340 F. Supp. at 1124). Thus, states and localities may regulate post-sale tampering by mechanics and consumers. Indeed, prior to this litigation, state and local anti-tampering laws had only ever been used against mechanics and consumers. See C.A. Dkt. 79, at 5.

3. The Ninth Circuit did not heed this Court's instruction in *South Coast* to look to how EPA enforces CAA standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. at 263. The multiple CAA provisions granting EPA authority to enforce manufacturers' compliance with emission standards throughout their cars' "useful life"—including warranty,

recall, in-use testing, and defect-reporting obligations, as well as the authority to determine and punish post-sale tampering, see *supra* at 8-10—confirm that EPA's exclusive enforcement authority over manufacturers does not end at the point of sale. See A. Scalia & B. Garner, Reading Law § 24, p. 167 (1st ed. 2012) (Courts should "consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

4. Confirming that Congress sought to bar overlapping regulation of manufacturers, the CAA prohibits states and localities from even requiring manufacturers to conduct post-sale testing—an essential tool needed for emissions regulation. See 42 U.S.C. § 7541(h)(2). It would have made no sense for Congress to bar states and localities from requiring manufacturers to conduct such testing, and at the same time allow states to bring claims that, at bottom, require such testing to establish a violation.

C. The Ninth Circuit's Interpretation of the CAA's Savings Clause Is Wrong and Conflicts with the D.C. Circuit's and EPA's Interpretations of that Provision.

The Ninth Circuit relied heavily on its expansive interpretation of the CAA's preemption savings clause in § 209(d), which reserves to states and localities the ability "otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). The Ninth Circuit's overbroad interpretation of § 209(d) led it erroneously to conclude that Congress expressly *preserved* authority that state and local agencies have never had, and have never before attempted to use, to regulate post-sale, nationwide updates by manufacturers.

1. The Ninth Circuit did not follow established and common-sense interpretations of § 209(d). Instead, it selected two of nineteen definitions from a 2002 dictionary (35 years after the provision's enactment) to conclude that "operation" refers to anything that "affects the vehicle's 'quality' and 'method' of functioning," and that § 209(d) "preserves state and local governments' authority to prohibit tampering with emission control systems in post-sale vehicles." App., *infra*, 25a.

In doing so, the Ninth Circuit overlooked the only definition in the same dictionary that refers to a vehicle: "the operating of or putting and maintaining in action of something (as a machine or an industry)," exemplified by "careful [operation] of a motor car." App., *infra*, 107a. Nor did the Ninth Circuit address the definition in a legal dictionary from 1968, the year after § 209(d) was enacted, that makes clear that "operate" in relation to automobiles signifies driving. App., *infra*, 108a ("when used with relation to automobiles, [operate] signifies a personal act in working the mechanism of the automobile"). Thus, in context, the dictionary definition of the word "operation"—like the adjacent terms "use" and "movement"—is a reference to driving and incidental acts (*e.g.*, idling or occupancy), not software updates. See Scalia & Garner, *supra*, App. A, at 418 (when dictionary provides "more than one meaning, you must use the context [of the word] to determine its aptest, most likely sense").

Congress's use of "operation" in relation to motor vehicles in other statutory provisions enacted around the same time as § 209(d) to mean driving or the use of a vehicle confirms this meaning. See, *e.g.*, 2 U.S.C. § 2163 (1976) (appropriating funds for "the purchase or rental, maintenance and *operation* of passenger motor vehicles to provide shuttle service for Members and employees of

Congress" (emphasis added)); 7 U.S.C. § 2262 (1965) (authorizing Secretary of Agriculture to obtain liability insurance covering acts committed "while *operating* a motor vehicle belonging to the United States in a foreign country" (emphasis added)). As this Court has held, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005).

The Ninth Circuit's analysis also violated the "fundamental principle of statutory construction" that "the meaning of a word cannot be determined in isolation, but must be drawn from" "context." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). Understood in the context of "use" and "movement," "operation" refers to the act of driving or otherwise using a motor vehicle. The Ninth Circuit's interpretation that "operation" encompasses everything affecting the "'quality' and 'method' of functioning," App., *infra*, 25a, incorrectly "ascrib[es] to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth" to § 209(d), *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (quotation omitted); see also *Lagos* v. *United States*, 138 S. Ct. 1684, 1688-1689 (2018) ("[W]e find here both the presence of company that suggests limitation and the absence of company that suggests breadth.").

2. Unlike the Ninth Circuit, the D.C. Circuit has correctly construed § 209(d) as limited to preserving state and local authority to regulate how car owners drive their cars, for example via "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. Other courts have recognized that § 209(d) does not give

states "'carte blanche' to regulate conduct after the initial vehicle sale." *Minnesota*, 2018 WL 6273103, at *9 (quoting App., *infra*, 83a-84a); *Tennessee*, 2019 WL 1220836, at *10 (same). EPA has likewise explained that § 209(d) permits state regulation of local conduct such as "time of use or place of use restrictions (e.g. high occupancy vehicle lanes) [that] are typically very site specific" and "primarily [a]ffect local users." 59 Fed. Reg. at 31,331.

D. The Ninth Circuit'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, 874 (2000) (quotation omitted).

1. The Ninth Circuit's ruling marks the end of 50 years of exclusive EPA regulation of manufacturer post-sale updates under the multiple, interrelating CAA provisions discussed above. Congress granted EPA alone the tools to regulate manufacturers' conduct both pre- and post-sale, see *supra* at 8-10, yet prohibited states from employing even the most fundamental among them—emissions testing—against manufacturers, see 42 U.S.C. § 7541(h)(2), and intended states to regulate only local conduct, see *supra* at 29-31. These statutory provisions confirm that permitting 50 states and 3,000 counties to regulate manufacturers' post-sale updates would "significantly interfere" with Congress's intention that EPA exclusively regulate manufacturers' nationwide conduct throughout their vehicles' "useful life." App., *infra*, 77a.

2. Under the Ninth Circuit's decision, states and localities could potentially penalize even modifications that EPA already *approved*, thereby imposing conflicting regulatory guidance over permissible post-sale modifications.

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"). As the court in *Minnesota* explained, allowing states and localities to freely regulate post-sale updates could lead to numerous separate regulators taking different approaches to determining which updates are permissible and which are tampering—exactly the regulatory chaos that Congress sought to prevent in the CAA. See 2018 WL 6273103, at *8; H.R. Rep. No. 90-728, pp. 21-22 (broad preemption "necessary in order to prevent a chaotic situation from developing").

This conflicting regulation will discourage manufacturers from maintaining or improving emission systems post-sale, undermining the CAA's basic purpose of improving air pollution.

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 10. The CAA expressly 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. This comprehensive framework is futile now that states and localities may, after an EPA resolution, pursue additional penalties based upon EPA's own enforcement work.

This concern is compounded by the massive penalties authorized by state and local anti-tampering statutes. For example, respondents alone—just two counties—seek an additional $5,000 per affected car per day, totaling

$11.2 billion in annual penalties, which the district court recognized "could dwarf those paid to EPA" and would "undermine the congressional calibration of force for tampering by vehicle manufacturers" prescribed in 42 U.S.C. § 7524. App., *infra*, 40a, 78a.

The Ninth Circuit correctly recognized that its decision would result in "EPA's inability to control the total liability that may be imposed for a tampering violation," App., *infra*, 43a, but then ignored the conflict this creates 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.").

4. Permitting such state and local government claims will likely prevent EPA from securing prompt and comprehensive resolution and remediation of future environmental harms. As an Illinois trial court emphasized, "[i]f manufacturing companies knew States could sue them based on admissions they made while settling civil and criminal actions with the federal government, they would be unlikely to make any admission with the federal government. This would certainly reduce the efficacy of the federal prosecution." *Illinois*, 2018 WL 3384883, at *13.

As a result of the Ninth Circuit'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]."

5. Respondents' claims are further preempted because they are, in essence, allegations of fraud on EPA, which is the federal agency's 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 respondents' claims here. Respondents allege that petitioners "duped" EPA and other regulators "through a program of surreptitious field fixes and fraudulent recall campaigns," D. Ct. Dkt. 4457, ¶¶ 1, 5, and "fraudulently manipulated testing data," D. Ct. Dkt. 4456, ¶¶ 48-50. In other words, respondents allege that Volkswagen misled a federal agency with broad enforcement powers and now seek to second-guess the penalty EPA already deemed appropriate. It is EPA's responsibility alone to address that conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL H. STEINBERG
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, CA 90067

JUDSON O. LITTLETON
SULLIVAN & CROMWELL LLP
1700 New York Ave., N.W.
Washington, DC 20006

ROBERT J. GIUFFRA, JR.
Counsel of Record
DAVID M.J. REIN
MATTHEW A. SCHWARTZ
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
giuffrar@sullcrom.com

Counsel for Petitioners Volkswagen Group of America, Inc. and Audi of America, LLC

CARI K. DAWSON
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree St.
Atlanta, Georgia 30309

Counsel for Petitioner Porsche Cars North America, Inc.

CARMINE D. BOCCUZZI, JR.
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006

MATTHEW D. SLATER
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Ave., N.W.
Washington, DC 20037

Counsel for Petitioner Robert Bosch LLC

JANUARY 2021