No. 20-994

In the Supreme Court of the United States

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

v.

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

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

In the Supreme Court of the United States

No. 20-994

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

The Solicitor General offers no persuasive reason to deny certiorari; in fact, the government's brief makes this Court's review *more* critical.

First, the Solicitor General concedes there is a square conflict on the legal question of whether the Clean Air Act ("CAA") preempts state and local enforcement of manufacturers' post-sale model-wide modifications to vehicle emissions controls. This conflict means that state and local governments in Alabama, Illinois, Minnesota, Missouri, and Tennessee cannot regulate manufacturers' post-sale updates, but every governmental body in the Ninth Circuit, Ohio, Montana, and Texas is free to engage in unfettered post-sale regulation. This conflict recently

deepened with the Ohio Supreme Court's decision adopting the Ninth Circuit's flawed reasoning. That decision is subject to another pending petition for certiorari that is similarly supported by numerous *amici* urging this Court to grant review. See *Volkswagen Group of America, Inc.* v. *Ohio*, No. 21-312 ("*Ohio*").

The Solicitor General's conjecture that this conflict "may" resolve itself because state courts "may" decide to abandon their own precedent and follow the decision below (though even the Solicitor General disagrees with the Ninth Circuit's reasoning in material respects) is implausible. Moreover, any such theoretical process would take years, doing nothing to mitigate the current "regulatory chaos" and unpredictability threatening the auto industry. Alliance Br. 3. As *amici* explained in *Ohio* in response to the Solicitor General's brief here, "a wait-and-see approach is untenable for the auto industry"—one of the most important in our Nation—as manufacturers "now cannot implement" "post-sale updates without potentially exposing themselves to state and local tampering claims and potentially ruinous liability." Alliance *Ohio* Br. 5. Indeed, one respondent in this action has already sued Daimler based on alleged post-sale model-wide conduct.

As Congress recognized in the CAA, the economic realities of the auto industry require manufacturers to design, maintain, *and* modify post-sale their vehicles' emissions systems on a nationwide basis. Having been subject to exclusive EPA regulation for more than 50 years since the CAA's enactment, manufacturers need certainty about whether they must now be prepared to answer to thousands of non-expert regulators, seeking theoretically massive penalties, for every post-sale modification to their vehicles, including updates manufacturers are *required* to make pursuant to CAA warranty obligations. The need

for national clarity, which only this Court can provide, is even more acute given the government's position (at 20-21, 24) that manufacturers can no longer rely on consultations with EPA regarding post-sale modifications absent "formal" pre-approval—which EPA does not typically provide. This uncertainty will have enormous real world impact: manufacturers update *six million* cars on average each year through recalls, Reply 6, and even more through "field fixes"—all in coordination with EPA, Alliance Br. 9-15.

Second, the Solicitor General contends this Court's review is unnecessary because the Ninth Circuit's decision is (mostly) correct. But the government's (partial) defense of that decision is flawed.

Contrary to the Ninth Circuit's holding that § 209(a) categorically "does not apply to post-sale vehicles" (Pet. App. 30a), the Solicitor General contends that § 209(a) preempts *some* post-sale regulation of manufacturers, but *only* if it might force the manufacturer to redesign engines in new cars. This cramped and vague interpretation has no basis in § 209(a)'s text and instead contradicts § 209(a)'s expansive phrase "relating to." And it ignores that Congress enacted § 209(a) to bar state and local governments from attempting to supplant *any* of the ways EPA enforces manufacturers' compliance with CAA standards—from certifying an engine's design to regulating the type of nationwide, post-sale recalls at issue here. Indeed, although the government correctly admits (at 13) that states are barred from requiring manufacturer recalls (or even manufacturer *testing*, 42 U.S.C. § 7541(h)(2)), the government never explains how a state (or county) could permissibly *penalize* conduct during a recall it has no authority to require or oversee.

The Solicitor General likewise offers no persuasive defense of the Ninth Circuit's conflict-preemption analysis.

The brief's focus on EPA's support for states' general anti-tampering laws ignores the lack of *any* prior state or local enforcement against *manufacturers*, and the Solicitor General tellingly points to no EPA statement even contemplating that states or localities could use such laws to regulate manufacturers' post-sale, nationwide conduct, as opposed to localized tampering by mechanics and owners.

Finally, the Solicitor General's suggestion that preemption would apply only if EPA *formally* approved a particular update does not alleviate regulatory chaos. EPA admittedly oversees even "voluntary" recalls; for decades the auto industry has relied on EPA as the exclusive regulator of post-sale, nationwide emissions updates. Preemption does not exist solely to protect federal agencies from conflicts with states; it also safeguards important industry and consumer interests. See *Murphy* v. *Nat. Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018) (preemption "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints"). Here, allowing thousands of new state and local regulators to invade what has always been EPA's exclusive province will harm innovation and increase costs for the millions of Americans who buy cars.

Certiorari should be granted.

A. This Court should resolve the undisputed conflict on this question of substantial nationwide importance.

The Solicitor General admits that the decision below squarely conflicts with decisions of the Alabama Supreme Court and courts of appeals in Minnesota and Tennessee. U.S. Br. 23; see Pet. 16 (citing Missouri and Illinois trial court decisions also finding preemption).

The Solicitor General's speculation (at 23) that these state courts "may reconsider the issue if it arises in a future case"—*i.e.*, if state agencies disregard precedent—is no reason to allow the split to persist. This Court has previously rejected this same argument from the government in a federal preemption case, see U.S. Br. at *20, *Riegel* v. *Medtronic, Inc.*, 2007 WL 1511526 (U.S. May 23, 2007) (No. 06-179), and should do so again here.

Manufacturers conduct recalls affecting, on average, six million cars annually, plus additional voluntary, post-sale field fixes. Reply 6. In fact, they are often *required* to make post-sale updates to satisfy the CAA's emissions warranty requirements, among other obligations. It is thus critical that this Court resolve this issue *now* to eliminate the uncertainty and conflict about who can regulate those updates. This Court should not allow this split to persist on a question over which Congress clearly intended nationwide uniformity.

B. The Solicitor General cannot rehabilitate the Ninth Circuit's cramped interpretation of § 209.

1. The Ninth Circuit held that § 209(a) categorically "does not apply to post-sale vehicles," Pet. App. 30a, and *Ohio* recently relied on that decision to likewise hold that preemption "no longer applies" after a vehicle "is first sold." *State ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, 2021-Ohio-2121 ¶ 21 (June 29, 2021). Declining to endorse that broad interpretation, the Solicitor General acknowledges (at 12-13) that § 209(a) bars *some* regulation of post-sale conduct, but only if the regulation "would have an evident practical tendency to alter manufacturers' choices" in making new vehicles.

This unduly narrow and vague interpretation disregards § 209(a)'s expansive text. As courts and EPA have long recognized, Congress used "relating to" to bar states

from regulating *post-sale* conduct that "relate[s] back to the original design" of the emissions system. 59 Fed. Reg. 31,306, 31,313 (June 17, 1994). The government's argument (at 14) that this principle applies only when post-sale enforcement might require manufacturers "to *modify* the design or emission-control features of new vehicles" (emphasis added) is contrary to § 209(a), which bars state or local enforcement of "*any* standard," not just *different* standards. Pet. 26. Instead, post-sale enforcement impermissibly "relates back to the original design" of the engine whenever it seeks penalties based on how the manufacturer designed and built the original engine—which occurs whenever the post-sale modification seeks to rectify issues with the factory-installed emissions systems. The claims here unquestionably relate back: respondents are simply seeking to penalize the post-sale modifications to how an unlawful factory-installed defeat device operated.

Beyond this, respondents' claims depend on the cars' noncompliance *as manufactured* because the post-sale updates *reduced* emissions. Pet. 26-27. The government is wrong (at 16 n.2) that EPA's acknowledgment that these updates reduced emissions "reflected in part the preliminary results of tests that petitioners' software was designed to circumvent." Rather, EPA's finding of a "limited" emissions "benefit" was based on "follow up testing" "both in the laboratory *and during normal road operation*." EPA, Notice of Violation at 4 (Sept. 18, 2015), https://tinyurl.com/SeptemberNOV (emphasis added). Respondents' ambiguous contrary allegations "need not [be] accept[ed] as true" as they "contradict facts that may be judicially noticed by the court." *Shwarz* v. *United States*, 234 F.3d 428, 435 (9th Cir. 2000).

2. The Solicitor General's framing of the issue as "whether a state or local anti-tampering rule 'relat[es] to the control of emissions from new motor vehicles'" (U.S.

Br. 15) ignores that § 209(a) addresses not only what rules local governments may "adopt," but also how they can "attempt to enforce" their rules. As this Court explained in *Engine Manufacturers Association* v. *South Coast Air Quality Management District*—which the government ignores—courts must examine how Congress directed EPA to *enforce* the CAA's new-vehicle standards to identify the "standard-enforcement efforts that are proscribed by § 209." 541 U.S. 246, 253 (2004).

As the government acknowledges (at 3-5) and *amici* detail,[1] EPA's enforcement of manufacturers' compliance with CAA emission standards does not stop once vehicles are no longer "new." Rather, Congress directed EPA to enforce compliance through *post-sale* mechanisms—such as in-use testing, defect reporting, warranty compliance, and recalls—to ensure vehicles *continue* to meet CAA standards during their useful life, as required by the EPA certificate of conformity. Through these post-sale mechanisms, EPA "enforce[s] standard[s]" "relating to the control of emissions from new motor vehicles," and Congress enacted § 209(a) at a minimum to bar states and localities from "attempt[ing]" to duplicate that exclusive EPA role, as confirmed by the CAA's express bar on states even requiring manufacturers to *test* vehicle emissions post-sale, 42 U.S.C. § 7541(h)(2). The government never reconciles Congress's state-testing bar with the Ninth Circuit's view that Congress thought all 50 states and thousands of localities could regulate manufacturers once cars are sold.

Moreover, the government struggles to reconcile its support for the Ninth Circuit's holding with its concession (at 13) that § 209(a) preempts states and localities from implementing "recall programs." In trying to thread the

[1] Former Officials Br. 12-16; Alliance Br. 9-15.

needle, the government suggests that EPA's prior statement may be limited to recalls "that require manufacturers to modify the '*original* manufacture of the engine.'" U.S. Br. 13 (emphasis added) (quotation omitted). That is wrong: accurately quoted, EPA correctly explained that "[i]n-use testing and recall programs of the type set forth in [CAA] section 207 ensure compliance with *standards required to be met by manufacturers at the time of certification of the engine.*" 59 Fed. Reg. at 31,330 n.28 (emphasis added). EPA thus explained that because recall programs "relate to the original manufacture of the engine" and "place the burden of compliance upon the manufacturer," they fall within § 209(a)'s scope. *Ibid.* This dictates the result here: if states cannot *require* a recall, they likewise cannot *penalize* a recall.

3. Accordingly, the Solicitor General's assertion (at 15) that § 209(a) "does not establish a special preemption rule for manufacturers" misapprehends the statute and EPA's prior positions. Only manufacturers make "new motor vehicles," so § 209(a) by definition will almost always preempt enforcement directed to manufacturers' model-wide conduct. And only manufacturers are subject to EPA's comprehensive enforcement mechanisms that ensure nationwide compliance with CAA standards for vehicles' entire useful life, all of which "relat[e] to the control of emissions from new motor vehicles."[2]

---

[2] The fact that the CAA currently authorizes EPA to pursue tampering violations against "any person" (U.S. Br. 15) is irrelevant to § 209(a)'s scope. When first enacted, the CAA's tampering provision *did* apply only to manufacturers. Pub. L. No. 91-604, § 7(a)(3), 84 Stat. 1676, 1693 (1970), codified as amended at 42 U.S.C. § 7522(a)(3)(A). Congress later expanded it to encompass "any person" so that EPA could supplement existing state prohibitions. S. Rep. No. 101-228, p. 123-124 (1989).

Allway Taxi, Inc. v. *City of New York* recognized that § 209(a) also preempts enforcement against "individual owners" in certain circumstances, but explained that § 209(a) at its core bars state and local regulation that would "interfer[e] with interstate commerce" by placing "the burden of compliance" on "manufacturers and distributors." 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972). Congress's specific *purpose* in enacting § 209(a) was to avoid "an anarchic patchwork of federal and state regulatory programs" that would "create nightmares for [vehicle] manufacturers." *Engine Mfrs. Assn.* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (quotation omitted). The government's statement (at 15) that the CAA "cannot reasonably be read to mean" preemption applies here ignores that allowing thousands of local regulators to penalize manufacturers' post-sale emissions updates would create the very "nightmares" for the industry Congress enacted § 209(a) to avoid.

4. Finally, the Solicitor General agrees (at 17) that the Ninth Circuit's interpretation of the § 209(d) savings clause is indefensible, providing another reason for this Court to step in. Otherwise, states and counties will undoubtedly rely on this misreading of § 209(d) to engage in unlimited regulation of manufacturers' post-sale updates.

C. The government's implied preemption arguments only heighten the need for this Court's review.

1. Despite the government's strawman argument (at 18), petitioners never argued that the CAA "reflect[s] congressional intent broadly to displace state and local anti-tampering laws." It is the Ninth Circuit's holding that such laws may be enforced *against manufacturers' nationwide conduct* that conflicts with Congress's intent to vest such enforcement exclusively in EPA. Petitioners do

not identify "concrete examples of past conflicts" (U.S. Br. 19) because until now no state or locality has ever *tried* to engage in such regulation of manufacturers, which the government does not dispute.

2. The Solicitor General does not dispute that the Ninth Circuit's analysis would permit every state and locality to penalize any manufacturer post-sale, model-wide change based on their own local interests. If that decision stands (heralding "staggering liability" for manufacturers, Pet. App. 45a), states and localities will have significant financial incentives to bring similar claims. See PLAC Br. 17-19. After the Ninth Circuit's decision, respondent Hillsborough's counsel—a private law firm operating on a contingent-fee basis—"informed [Hillsborough] that additional automotive companies have tampered." Hillsborough Cty. Env. Protection Comm'n Agenda, at 15 (Sept. 24, 2020), https://tinyurl.com/HillsboroughCtyAgenda. Hillsborough then filed similar claims against Daimler and has stated that it is considering suing other manufacturers. *Ibid.*

As *amici* explain, the risk of exposure to such claims will discourage manufacturers from making environmentally and economically beneficial updates under the EPA recall or field fix process (which the government now says offers no legal protection). See Intl. Org. Br. 24; PLAC Br. 20; Alliance Br. 20. The Ninth Circuit's decision accordingly does *not* "further Congress's purpose of limiting vehicles' emissions." U.S. Br. 18. And being forced to account for potentially thousands of new regulators will only make manufacturers innovate less and incur increased costs, which will be passed on to consumers. PLAC Br. 20-21. The government says nothing about the significant turmoil this will wreak on the auto industry.

3. The Solicitor General acknowledges (at 24) that "efforts to punish conduct that EPA has deemed necessary

or appropriate under the [CAA]" "might well be preempted," yet claims that conflict with EPA's regulatory authority is unlikely because EPA has no "regular" or "formal" practice of providing pre-approval for voluntary recalls or field fixes. But the government admits (at 3) that EPA requires manufacturers to notify it of "voluntary" recalls, and to report to EPA on the progress of those recalls. Manufacturers likewise "often consult with EPA before making any significant field fix." Alliance *Ohio* Br. 14. Manufacturers have always relied upon EPA's non-objection, but must now worry about whether every state and locality—lacking EPA's expertise and driven by their own local priorities—may disagree and seek massive penalties.

The government's argument makes it particularly inappropriate for this Court to wait for a court to impose liability for conduct "formally" pre-approved or mandated by EPA. See U.S. Br. 24. Such a case likely would not provide guidance for the vast majority of updates, which EPA does not formally pre-approve but is "extensively involved" with and "strictly supervise[s]." Alliance Br. 12, 15. In any event, the government's present position that manufacturers cannot rely on the reporting to and consultation with technical experts at EPA absent "formal" pre-approval only makes it *more* urgent that the Court grant review to avoid the regulatory chaos portended by the decision below.

4. The government dismisses the possibility that the Ninth Circuit's decision might impact EPA's ability to negotiate future resolutions with manufacturers, asserting that "[t]he possibility of follow-on state or local suits is equally present" if EPA sues individual mechanics or consumers. U.S. Br. 21. But individual mechanics or consumers are not subject to potentially *thousands* of overlapping suits seeking theoretically massive penalties based

on nationwide conduct, which manufacturers will be unable to ignore if the decision below stands. Congress set specific penalties for manufacturer tampering, and EPA has promulgated a detailed policy establishing a framework for the statutory penalty factors. Pet. 32. The decision below eviscerates this scheme.

5. In *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 347-353 (2001), this Court recognized that federal agencies should redress misrepresentations made to them. The Solicitor General acknowledges (at 7) that the claims here concern deception of EPA "about the true purpose and effect of the [software] update[s]," but points to nothing in *Buckman* suggesting that preemption of such fraud-on-the-agency claims turns on the agency's formal approval.

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

OCTOBER 2021