APPENDIX

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APPENDIX A

SLIP OPINION NO. 2021-OHIO-2121

THE STATE EX REL. YOST, ATTY. GEN., APPELLEE, V. VOLKSWAGEN AKTIENGESELLSCHAFT, D.B.A. VOLKSWAGEN GROUP AND/OR VOLKSWAGEN AG, ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, Slip Opinion No. 2021-Ohio-2121.]

Federal preemption—Vehicle-emissions anti-tampering claims—The federal Clean Air Act neither expressly nor impliedly preempts R.C. 3704.16(C)(3) or precludes an anti-tampering claim against a vehicle manufacturer under Ohio's Air Pollution Control Act for the manufacturer's post-sale tampering with a vehicle's emissions-control system—Court of appeals' judgment affirmed.

(No. 2020-0092—Submitted January 26, 2021—Decided June 29, 2021.)

APPEAL from the Court of Appeals for Franklin County, No. 19AP-7, 2019-Ohio-5084.

FISCHER, J.

{¶ 1} In this case, we are asked to decide whether the federal Clean Air Act, 42 U.S.C. 7401 et seq.,

preempts Ohio law and precludes an anti-tampering claim under Ohio's Air Pollution Control Act, R.C. 3704.01 et seq. For the reasons that follow, we hold that it does not and therefore affirm the judgment of the Tenth District Court of Appeals.

I. BACKGROUND

{¶ 2} Starting around 2009, appellant Volkswagen Aktiengesellschaft, d.b.a. Volkswagen Group and/or Volkswagen AG ("Volkswagen"),[1] programmed vehicles manufactured and sold under its various labels with software that would enable those vehicles to perform better than they otherwise would have on federal emissions tests. The software, sometimes referred to as a "defeat device," would identify when a Volkswagen vehicle was being tested by regulators for compliance with federal emissions standards. Once the software detected that an emissions test was in progress, the software would trigger equipment within the vehicle that would reduce the vehicle's emissions to an acceptable level. In reality, of course, emissions from the vehicle during everyday driving, i.e., under non-test conditions, were well above the federally imposed legal limit.

{¶ 3} Several years into that scheme, Volkswagen learned that its emissions-control software was not working properly and was causing certain performance

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[1] Other defendants named in the complaint and appellants here are Audi AG; Volkswagen Group of America, Inc., d.b.a. Volkswagen of America, Inc., or Audi of America, Inc.; Volkswagen of America, Inc.; Audi of America, L.L.C.; Dr. Ing. h.c. F. Porsche AG, d.b.a. Porsche AG; and Porsche Cars North America, Inc.

problems in its vehicles. Volkswagen updated the software to fix those problems and to continue skirting federal emissions standards. Starting around 2013, Volkswagen installed the improved and updated software in new vehicles slated for sale in the United States. Without telling its customers the true reason why, Volkswagen also installed the updated software in its older vehicles through a voluntary recall program and when its customers brought their vehicles in for routine maintenance.

{¶ 4} Eventually, the United States Environmental Protection Agency ("EPA") discovered Volkswagen's scheme. In a subsequent enforcement action, Volkswagen admitted to all of this and agreed to pay a $2.8 billion penalty in connection with its wrongdoing.

{¶ 5} In 2016, then Ohio Attorney General Mike DeWine sued Volkswagen for its vehicle-emissions tampering, alleging that Volkswagen's conduct, which impacted approximately 14,000 vehicles that had been sold or leased in Ohio, violated Ohio's Air Pollution Control Act, R.C. 3704.01 et seq. As relevant here, Volkswagen moved to dismiss the attorney general's claims on the grounds that Ohio's anti-tampering statute was preempted by the federal Clean Air Act, 42 U.S.C. 7401 et seq., and that the attorney general's claims were therefore precluded. The trial court agreed with Volkswagen's preemption argument and granted Volkswagen's motion to dismiss.

{¶ 6} On appeal to the Tenth District, appellee, Ohio Attorney General Dave Yost,[2] argued that the trial court erred when it determined that federal preemption principles barred the state's claims against Volkswagen, because the federal Clean Air Act draws a critical distinction between new and used vehicles. While the attorney general conceded below that federal law alone governs emissions from new vehicles, he argued that the federal legislative scheme does not preempt Ohio law and preclude state-based claims concerning *post-sale* tampering with a vehicle's emissions-control system.

{¶ 7} The Tenth District agreed with the attorney general, concluding that the federal Clean Air Act evinces "no clear and manifest congressional purpose to [expressly or impliedly] preempt the State's in-use motor vehicle emission control system tampering claims." 2019-Ohio-5084, 137 N.E.3d 1267, ¶ 29. As a result, the court of appeals reversed the trial court's judgment and remanded the matter for further proceedings. *Id.* at ¶ 35.

{¶ 8} Following the Tenth District's decision, Volkswagen appealed to this court and we accepted its appeal to consider whether the federal Clean Air Act either expressly or impliedly preempts state-law claims against a manufacturer for its post-sale emissions control tampering. *See* 158 Ohio St.3d 1450, 2020-Ohio-1090, 141 N.E.3d 985.

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[2] Attorney General Yost was substituted for former Attorney General DeWine as a party during the appeal below to the Tenth District. *See* App.R. 29(C)(1).

II. ANALYSIS

A. Federal Preemption

{¶ 9} Before turning to whether federal law expressly or impliedly preempts Ohio's anti-tampering law and precludes the state-law claims involved here, it is helpful to review some basic principles regarding federal preemption.

{¶ 10} The doctrine of federal preemption originates from the Supremacy Clause of the United States Constitution, which provides that the "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, cl. 2.

{¶ 11} Under the Supremacy Clause, the United States Congress has the power to preempt state law. *In re Miamisburg Train Derailment Litigation*, 68 Ohio St.3d 255, 259, 626 N.E.2d 85 (1994); *see also Gibbons v. Ogden*, 22 U.S. 1, 210-211, 6 L.Ed. 23 (1824) ("the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it"). Congress may do so either expressly or impliedly. *Kansas v. Garcia*, ___U.S. ___, 140 S.Ct. 791, 801, 206 L.Ed.2d 146 (2020); *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St.3d 79, 2012-Ohio-5370, 979 N.E.3d 1273, ¶ 14.

{¶ 12} When Congress expressly preempts state law, it explicitly says so with clear statutory language. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). When considering

whether preemption is implied, courts look to congressional intent to determine whether Congress meant to preempt state law without saying as much. *See id.* at 79. Identifying implied preemption is thus a little more complicated than identifying express preemption, but courts generally find this type of preemption in two circumstances.

{¶ 13} The first circumstance occurs when Congress has enacted a legislative and regulatory scheme that is so pervasive "'that Congress left no room for the States to supplement it'" or when the legislative and regulatory scheme "'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (Brackets added in *English*.) *Id.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Implied preemption of this variety is referred to as "field preemption." *English* at 79. Volkswagen has not presented a field-preemption argument here, so we focus our analysis on the second type of implied preemption, which is discussed below.

{¶ 14} The second circumstance in which implied preemption is found occurs when a state law "actually conflicts with federal law." *Id.* This type of implied preemption is fittingly referred to as "conflict preemption." *Id.* at fn. 5. Conflict preemption may be broken down further into subcategories depending on whether the conflict exists because (1) compliance with both state and federal law is impossible, *id.* at 79, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963),

or (2) the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.*, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

B. Standard of Review

{¶ 15} Because the "purpose of Congress is the ultimate touchstone," *Retail Clerks v. Internatl. Assn., Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), preemption—whether express or implied—is primarily a question of legislative intent and so our focus is on the text and structure of the provisions involved. *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, 98 Ohio St.3d 214, 2002-Ohio-7213, 781 N.E.2d 951, ¶ 46; *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978). Preemption is thus a question of law, *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, ¶ 39, and we conduct a de novo review of a judgment that was based on preemption grounds. *See Menorah Park Ctr. for Senior Living v. Rolston*, ___ Ohio St.3d ___, 2020-Ohio-6658, ___ N.E.3d ___, ¶ 12.

C. The Federal Clean Air Act and Ohio's Air Pollution Control Act

1. The Federal Clean Air Act Does Not Expressly Preempt Ohio's Vehicle-Emissions Anti-Tampering Law and Preclude the Attorney General's Claims

{¶ 16} When it comes to preemption, Section 209 of the federal Clean Air Act expressly 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).

{¶ 17} Volkswagen contends that the Ohio statute at issue here, R.C. 3704.16(C)(3), is expressly preempted by 42 U.S.C. 7543(a) and that the attorney general's claims are precluded as a result. Specifically, Volkswagen asserts that by prohibiting states from adopting or enforcing standards relating to emissions from new motor vehicles and new motor-vehicle engines, Congress has expressly precluded states from regulating anything relating to a vehicle's emissions-control system in any way, including post-sale tampering by the manufacturer. We disagree.

{¶ 18} Congress has told us exactly what it meant to include within the scope of the Clean Air Act's express-preemption provision in 42 U.S.C. 7543(a): "new motor vehicles" and "new motor vehicle engines." It has also defined both of those terms.

{¶ 19} A "new motor vehicle" is defined as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. 7550(3). A "new motor vehicle engine" is defined similarly as "an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser." *Id.*

{¶ 20} Congress has also helpfully defined the term "ultimate purchaser," as it is used in 42 U.S.C. 7550(3), as "the first person who in good faith purchases such new motor vehicle or new engine for purposes other than resale." 42 U.S.C. 7550(5).

{¶ 21} Taken together, the plain text of the applicable statutes indicates that after a new motor vehicle or new motor-vehicle engine is first sold, the express-preemption clause in 42 U.S.C. 7543(a) no longer applies. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation* (*"In re Volkswagen"*), 959 F.3d 1201, 1216 (9th Cir.2020). Put differently, the Clean Air Act expressly preempts only state and local laws regulating or setting vehicle-emissions standards for new motor vehicles and new motor-vehicle engines. *See* 42 U.S.C. 7543(a).

{¶ 22} In this case, the relevant Ohio statute, R.C. 3704.16(C)(3), provides that "[n]o person shall knowingly * * * [t]amper with any emission control system installed on or in a motor vehicle after sale, lease, or rental and delivery of the vehicle to the ultimate purchaser, lessee, or renter."

{¶ 23} Notably, R.C. 3704.16(C)(3) does not create or adopt any emissions-control standards and does not apply to new motor vehicles or new motor-vehicle engines. Instead, it applies only to conduct (tampering) that takes place *after* a vehicle has reached its "ultimate purchaser, lessee, or renter." Consequently, R.C. 3704.16(C)(3) does not fall within the scope of the federal Clean Air Act's express-preemption provision.

{¶ 24} In an attempt to get around the plain text of these laws and to avoid the obvious conclusion that the federal Clean Air Act does not expressly preempt R.C. 3704.16(C)(3) and preclude anti-tampering claims under Ohio's Air Pollution Control Act, Volkswagen calls our attention to the decisions in *Allway Taxi, Inc. v. New York*, 340 F.Supp. 1120 (S.D.N.Y.1972), and *Engine Mfrs. Assn. v. S. Coast Air Quality Mgt. Dist.*, 541

U.S. 246, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004). Neither *Allway Taxi* nor *Engine Mfrs. Assn.*, however, supports Volkswagen's arguments or requires a different conclusion regarding the applicability of the express-preemption provision in Section 209 of the Clean Air Act, 42 U.S.C. 7543(a).

{¶ 25} To begin, the federal district court in *Allway Taxi* upheld a local ordinance that required taxi cabs operating in New York City to be equipped with emissions-control devices. 340 F.Supp. at 1122, 1124. In doing so, that court specifically stated that the definition of "new motor vehicles" provided in the Clean Air Act reveals a clear congressional intent to "preclude states and localities from setting their own exhaust emission control standards only with respect to the manufacture and distribution of *new automobiles*." (Emphasis added.) *Id.* at 1124. In other words, the Clean Air Act prohibits states and local governments from "setting standards governing emission control devices *before the initial sale* or registration of an automobile." (Emphasis added.) *Id.* So, although the *Allway Taxi* court cautioned that its decision should not be read to sanction the imposition of "emission control standards the moment after a new car is bought and registered," *id.*, it nonetheless read the Clean Air Act's express-preemption provision as drawing a distinction between pre- and post-sale emissions regulations.

{¶ 26} Next, nothing in the United States Supreme Court's decision in *Engine Mfrs. Assn.* calls into question this pre- and post-sale distinction. In fact, in determining whether the Clean Air Act preempted rules regulating the types of commercial vehicles that could be purchased or leased within a particular region in

California based on different emissions criteria, the court was careful to note that its decision did not answer whether 42 U.S.C. 7543(a) also preempts rules that apply "beyond the purchase of *new vehicles*." (Emphasis added.) *Engine Mfrs. Assn.* at 259. Thus, *Engine Mfrs. Assn.* does not help this court to decide this particular case, which involves state-law claims under a statute governing post-sale conduct and used vehicles.

{¶ 27} Accordingly, we hold that Section 209 of the federal Clean Air Act, 42 U.S.C. 7543(a), does not expressly preempt R.C. 3704.16(C)(3) and preclude the attorney general's anti-tampering claims.

2. The Federal Clean Air Act Does Not Impliedly Preempt Ohio's Vehicle- Emissions Anti-Tampering Law and Preclude the Attorney General's Claims

{¶ 28} In addition to its arguments regarding express preemption, Volkswagen also argues that claims brought under R.C. 3704.16(C)(3) are impliedly preempted by the Clean Air Act. According to Volkswagen, 42 U.S.C. 7543(a) impliedly preempts Ohio law because R.C. 3704.16(C)(3) conflicts with and stands as an obstacle to the federal government's ability to ensure continued compliance with its vehicle-emissions standards after a new motor vehicle or new motor-vehicle engine is sold and interferes with the federal EPA's ability to bring and resolve enforcement actions. As with our conclusion regarding its express-preemption arguments, we find these arguments unpersuasive.

{¶ 29} Again, arguments calling for a finding of implied preemption, "like all preemption arguments,

must be grounded 'in the text and structure of the statute at issue.'" *Garcia*, ___ U.S. at ___, 140 S.Ct. at 804, 206 L.Ed.2d 146, quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). It is therefore not enough to claim that a state law is impliedly preempted by simply ascribing "unenacted purposes and objectives to a federal statute." *Virginia Uranium, Inc. v. Warren*, ___ U.S. ___, 139 S.Ct. 1894, 1907, 204 L.Ed.2d 377 (2020). Instead, an *actual conflict* between the state and federal law is required. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), citing *English*, 496 U.S. at 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65. For Volkswagen, the lack of an actual conflict is the problem with its argument here.

{¶ 30} First, although it is true that the Clean Air Act contains provisions that apply post-sale and provide the federal government with tools to ensure continued compliance after a new motor vehicle or new motor-vehicle engine is sold, Ohio's anti-tampering law does not stand as an obstacle to the federal scheme or make it impossible to comply with that scheme.

{¶ 31} Indeed, Ohio's law specifically makes it possible to comply with it and the federal scheme by stating that it is not a violation of R.C. 3704.16(C)(3) if the conduct in question is "taken for the purpose of repair or replacement of the emission control system or is a necessary and temporary procedure to repair or replace any other item on the motor vehicle and the action results in the system's compliance with the 'Clean Air Act Amendments.'" R.C. 3704.16(E)(1).

{¶ 32} Importantly, that means that Ohio's law does not conflict with the federal vehicle-warranty statute,

42 U.S.C. 7541(a)(1), federal vehicle-recall procedures, 42 U.S.C. 7541(c)(1), or federal useful-life requirements, 42 U.S.C. 7521(a)(1) and (d). It also means that Volkswagen's fears that it will be punished for actions taken in response to EPA guidelines or for modifications approved by the EPA are unfounded.

{¶ 33} The bottom line here is that as long as Volkswagen complies with, rather than circumvents, federal law it will have nothing to worry about in Ohio regarding actions brought under R.C. 3704.16(C)(3). By definition, under these circumstances, there is no conflict between the relevant federal and state statutes or any obstacle to Congress's objectives.

{¶ 34} We also disagree with Volkswagen that there is a conflict between federal and Ohio law merely because the Clean Air Act also prohibits emissions-control tampering, *see* 42 U.S.C. 7522(a)(3)(A), and punishes that conduct, *see* 42 U.S.C 7524(a). To begin, the fact that there is some overlap between the state and federal provisions does not automatically indicate that the applicable state law is impliedly preempted. *Garcia*, ___ U.S. at ___, 140 S.Ct. at 806-807, 206 L.Ed.2d 146. Likewise, it is no problem for preemption purposes that emissions-control tampering is punished under both Ohio and federal law. As a matter of fact, it has long been settled that a state government may punish conduct that the federal government also punishes. *California v. Zook*, 336 U.S. 725, 731, 69 S.Ct. 841, 93 L.Ed. 1005 (1949), quoting *United States v. Marigold*, 50 U.S. 560, 569, 13 L.Ed. 257 (1850) ("'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might

draw to its commission the penalties denounced by either, as appropriate to its character in reference to each'").

{¶ 35} Moreover, and perhaps most significantly, the Clean Air Act does not suggest that Congress intended to shield vehicle manufacturers from state-law emissions-control-tampering liability. *In re Volkswagen*, 959 F.3d at 1223. Certainly, if Congress had wished to preclude states from punishing companies or persons for emissions-control tampering, it could have said so. After all, as the Ninth Circuit pointed out in *In re Volkswagen*, a number of states had laws on their books prohibiting tampering with emissions-control systems in motor vehicles during the period in which Congress amended the Clean Air Act, *id.* at 1219-1220, and Congress did not make "any changes to the preservation of state authority," id. at 1220. Because we can presume that Congress was aware of those state laws when it amended the Clean Air Act, *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988), its silence on the issue is "'powerful evidence that Congress did not intend' to preempt local anti-tampering laws," *In re Volkswagen* at 1220, quoting *Wyeth v. Levine*, 555 U.S. 555, 575, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

{¶ 36} Finally, we reject Volkswagen's argument that the potential imposition of state-law penalties under R.C. 3704.06 makes it impossible for the federal EPA to administer its vehicle-emissions program or interferes with the federal EPA's ability to resolve enforcement actions.

{¶ 37} First of all, it is not impossible for a violator to pay federal penalties and state-law penalties relating to the same conduct, so exposure to liability at the state level does not necessarily frustrate the purpose of the federal scheme. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). The fact that such penalties might be considerable when aggregated, as Volkswagen contends, does not change that conclusion. *California v. ARC Am. Corp.*, 490 U.S. 93, 105, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) ("Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law").

{¶ 38} Additionally, there is no evidence that the potential for liability under Ohio's anti-tampering law actually frustrates or interferes with the federal government's interests in any way. In fact, despite the likelihood of subsequent actions by states and local governments here, the federal EPA was tellingly able to resolve its case against Volkswagen. The mere *possibility* that future enforcement actions might be slightly more difficult because of a defendant's potential exposure to dual liability does not provide a basis for this court to hold that Ohio's anti-tampering law is preempted and that the attorney general's claims here are precluded. *Garcia*, ___ U.S. at ___, 140 S.Ct. at 807, 206 L.Ed.2d 146, quoting United States Constitution, Article VI, cl. 2 ("The Supremacy Clause gives priority to 'the Laws of the United States,'" not the "enforcement priorities or preferences of federal officers").

{¶ 39} Since "as in any field of statutory interpretation, it is our duty to respect not only what Congress

wrote but, as importantly, what it didn't write," *Virginia Uranium*, ___ U.S. at ___, 139 S.Ct. at 1900, 204 L.Ed.2d 377, we cannot ignore these realities and manufacture a conflict that has no basis in the text and structure of the applicable state and federal statutes just because it would be advantageous for a particular party. We therefore conclude that Ohio's anti-tampering law, R.C. 3704.16(C)(3), and the attorney general's claims under that provision are not impliedly preempted by the federal Clean Air Act.

III. CONCLUSION

{¶ 40} For the reasons stated above, we hold that the federal Clean Air Act neither expressly nor impliedly preempts R.C. 3704.16(C)(3) or precludes an anti-tampering claim under Ohio's Air Pollution Control Act for a manufacturer's post-sale tampering with a vehicle's emissions-control system. Accordingly, we affirm the judgment of the Tenth District Court of Appeals.

Judgment affirmed.

DEWINE, STEWART, and DELANEY, JJ., concur.

O'CONNOR, C.J., and KENNEDY, J., concur in judgment only.

DONNELLY, J., dissents, with an opinion.

PATRICIA A. DELANEY, J., of the Fifth District Court of Appeals, sitting for BRUNNER, J.

DONNELLY, J., dissenting.

{¶ 41} I respectfully dissent from the majority's holding that the federal Clean Air Act, 42 U.S.C. 7401 et seq., does not preempt the anti-tampering claim brought by appellee, the Ohio Attorney General, pursuant to Ohio's Air Pollution Control Act, R.C. 3704.01 et seq. I would hold that appellant Volkswagen Aktiengesellschaft, d.b.a. Volkswagen Group and/or Volkswagen AG ("Volkswagen"), has met its burden of showing that the state-law claim is impliedly preempted by federal law.

{¶ 42} Generally, there are two ways in which federal law may impliedly preempt state law: (1) the federal law is so comprehensive in scope that it occupies the entire field of the regulated activity ("field preemption"), or (2) the federal law and the state law are actually in conflict with each other ("conflict preemption"). *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 7. Because the parties here have framed their arguments around conflict preemption rather than field preemption as a distinct matter, I will focus on the conflict-preemption aspect of the preemption doctrine.

{¶ 43} Within the category of conflict preemption there are two subcategories: (1) "impossibility preemption," which applies when it is impossible to comply with both the state law and the federal law, and (2) "obstacle preemption," which applies when the "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581

(1941). Regarding impossibility preemption, given that the attorney general is seeking to penalize Volkswagen for its fraud against the United States Environmental Protection Agency ("EPA") relating to motor vehicles that were certified by the EPA, motor-vehicle-emissions standards that were set by the EPA, and actions monitored by the EPA, and for violations that have already been penalized by the EPA, it is readily apparent that it was possible for Volkswagen to have complied with both the Ohio and federal laws that prohibit tampering with motor-vehicle-emissions systems. Thus, obstacle preemption is the only type of conflict preemption that might apply in this case.

{¶ 44} For Volkswagen's violations of Title II of the federal Clean Air Act, which spanned about a decade and affected motor vehicles throughout the United States, the EPA carefully crafted a multibillion-dollar penalty that balanced a variety of financial and environmental factors pursuant to 42 U.S.C. 7524. In my view, the attorney general's decision to seek an additional judgment that could total more than $1 trillion involves nothing more than the attorney general's disagreement with the penalty that the federal government carefully crafted. In this immediate sense, I believe that there is a clear conflict between the federal and state objectives. And when considering the possibility of similar lawsuits from other states and municipalities across the United States, a broader conflict is apparent; such an action threatens to undermine the enforcement power of the EPA and thereby the efficacy of the entire federal scheme. Because the attorney general's anti-tampering claims stand as an obstacle to the execution of the full purposes of Congress in the Clean Air Act, they are preempted by federal law.

{¶ 45} The EPA plays a central role in the Clean Air Act, and its enforcement and penalty powers are crucial to the effectiveness of the federal law. In Title II of the Clean Air Act, Congress directs the EPA to "prescribe * * * standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. 7521(a)(l). In order for it to be able to follow that mandate, the EPA is empowered to set emissions standards for motor vehicles, 42 U.S.C. 7521(a)(l) and (3), establish emissions-control technology requirements, *e.g.*, 42 U.S.C. 7521(a)(6), and regulate the use of emissions-control devices, 42 U.S.C. 7521(a)(4)(A). These exclusively federal standards apply throughout a vehicle's "useful life," 42 U.S.C. 7521(a)(1), and the EPA is authorized to monitor vehicles and their manufacturers throughout that time, 42 U.S.C. 7541 and 7542.

{¶ 46} In order for it to enforce the standards and regulations, the EPA is empowered by the Clean Air Act to conduct testing to ensure that new motor vehicles comply with the federal law as a prerequisite to certification and to refuse to certify vehicles that do not meet the requirements. 42 U.S.C. 7521(m); 42 U.S.C. 7525. Even when a vehicle is no longer considered new under the Clean Air Act, the EPA requires the manufacturer to report any emissions-related defect that affects 25 or more of the vehicles of the same model year, 40 C.F.R. 85.1903, including defects in "software * * * which must function properly to ensure continued compliance with emission standards," 40 C.F.R. 85.1902(b)(2). The EPA requires manufacturers to test a portion of the in-use vehicles that they manufactured, 40 C.F.R. 86.1845-04 and 86.1827-01, and if the vehicles fail those tests then the EPA may require the vehicles

to be recalled, 42 U.S.C. 7541(c)(1). The EPA also has the power to bring civil enforcement actions against manufacturers for their violations of the federal law, 42 U.S.C. 7523 through 7525, including violations of the federal statute prohibiting tampering with a motor vehicle's emissions system either before *or after* the sale of the vehicle, 42 U.S.C. 7522(a)(3)(A).

{¶ 47} The EPA's central enforcement mechanism is its power to impose civil penalties pursuant to 42 U.S.C. 7524. The EPA may begin the penalty process either by filing suit in a federal court or by imposing an administrative penalty that may later be subject to judicial review. 42 U.S.C. 7524(b) and (c). Through either method, the goal is to determine an appropriate penalty amount by balancing various factors such as "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance * * *, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." 42 U.S.C. 7524(b) and (c)(2). It is in that method of enforcing the Clean Air Act and, particularly in its requirements for determining an appropriate penalty, that the conflict between the federal and Ohio laws is most apparent.

{¶ 48} In crafting an appropriate penalty for a violation of Title II of the Clean Air Act, the EPA's goal is to adequately deter future violations. But it must also balance the need for deterrence with factors such as the potential for the penalty to cause the manufacturer to go out of business, the need to not create precedent that adversely affects the EPA's ability to enforce the

law, and any relevant "competing public interest considerations." United States Environmental Protection Agency, Clean Air Act Title II Vehicle & Engine Civil Penalty Policy, at 18-19, available at https://www.epa.gov/sites/production/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf (accessed June 9, 2021) [https://perma.cc/95DE-8JMB]. Imposing a penalty so steep that it causes a manufacturer to go out of business might have the immediate negative effect of rendering the manufacturer unable to pay any of its penalties and a wider negative effect of wiping out a large swath of jobs from the United States automotive industry and making vehicles less affordable for United States citizens. Such effects would certainly go against the public's best interests.

{¶ 49} Moreover, if states and municipalities are permitted to sue motor-vehicle manufacturers based on admissions made when settling civil actions with the EPA, manufacturers will be deterred from making such admissions. The efficacy of the EPA's rulemaking and enforcement powers would be severely reduced if manufacturers were to be disincentivized from cooperating with the EPA and other federal governmental entities.

{¶ 50} Following Volkswagen's cooperation with the federal government, it entered into a plea agreement and consent decrees with the EPA in 2017, which required Volkswagen "to pay $4.3 billion in civil and criminal penalties, to invest $2.0 billion in Zero Emission Vehicle technology, to recall and/or repair the affected vehicles, and to contribute $2.925 billion to an emis-

sions mitigation trust." *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation*, 264 F.Supp.3d 1040, 1044 (N.D.Cal.2017). Of the $2.925 billion that Volkswagen paid into the emissions-mitigation trust, over $75 million was allocated to the state of Ohio. The fact that the EPA was empowered by Congress through the Clean Air Act to reach such a large-scale settlement with Volkswagen regarding its nationwide misconduct—and the fact that the federal law obligates the EPA to craft a penalty that thoughtfully balances a multitude of competing interests—indicates to me that the attorney general's seeking a potential additional $1 trillion penalty pursuant to Ohio's Air Pollution Control Act, R.C. 3704.01 et seq., for a local portion of that same misconduct conflicts both with the EPA's immediate authority and the longer-term goals underlying the federal law.

{¶ 51} Courts in Alabama, Minnesota, and Tennessee have concluded that similar anti-tampering claims filed in their respective states conflicted with the Clean Air Act, because the claims stood as an obstacle to the EPA's effective execution of the purposes and objectives of the Clean Air Act. See *State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, Tenn.App. No. M2018-00791-COA-R9-CV, 2019 WL 1220836, *13 (Mar. 13, 2019); *State of Alabama v. Volkswagen AG*, 279 So.3d 1109, 1128-1129 (Ala.2018) ("*Alabama*"); *State by Swanson v. Volkswagen Aktiengesellschaft*, Minn.App. No. A18-0544, 2018 WL 6273103, *6-9 (Dec. 3, 2018). I recognize that one federal circuit court of appeals has come to the opposite conclusion. *See In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation* ("*In re Volkswagen*"), 959 F.3d 1201 (9th Cir.2020). But this court is not required to follow

those rulings, including any ruling of a federal circuit court. See State v. Burnett, 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001). We are free to determine which ruling is better-reasoned and more persuasive, and I find the decisions from the courts in Alabama, Minnesota, and Tennessee more compelling.

{¶ 52} I disagree with the view of the United States Court of Appeals for the Ninth Circuit, adopted by the majority here, that any conflict between the federal and state laws is rendered irrelevant by the fact that it is perfectly permissible in other circumstances for the same conduct to be punished by both the state and federal governments. *In re Volkswagen* at 1224-1225; *see also* majority opinion at ¶ 34-35, citing *California v. Zook*, 336 U.S. 725, 731, 69 S.Ct. 841, 93 L.Ed. 1005 (1949), and *United States v. Marigold*, 50 U.S. 560, 569, 13 L.Ed. 257 (1850). In *Zook* and *Marigold*, the United States Supreme Court rejected the notion that federal preemption of state law is implicated simply when the federal and state laws prohibit the same conduct and create the possibility of "double punishment." *Zook* at 737 (regarding state and federal prosecutions for selling transportation of persons without an Interstate Commerce Commission permit); *Marigold* at 568- 569 (regarding state and federal prosecutions for counterfeiting). But the concern here does not implicate the mere possibility of double punishment; the concern is that punishment by the state will undermine the ability of the federal government to effectively enforce its environmental laws. In *Marigold*, the state criminal prosecution did not undermine any attempt by the federal government to negotiate with counterfeiters across the nation to reach a resolution that adequately penalized the counterfeiters but that still took into account the

public's interest in not crippling the entire counterfeiting industry; the prosecution simply sought to punish discrete conduct that was also punishable by federal law. The context of *Marigold* and *Zook* render the court's holdings in those cases inapplicable to the case at hand.

{¶ 53} The decisions by the courts in Alabama, Minnesota, and Tennessee more persuasively reason that state emissions-tampering lawsuits (like that at issue here) conflict with the federal Clean Air Act, because the penalties sought in such lawsuits would upset the balance that the EPA is both empowered and obligated to achieve when penalizing manufacturers under the federal law and undermine the

EPA's ability to achieve such a balance in the future. *See Slatery* at *13; *Alabama* at 1128-1129; *Swanson* at *8. Rather than having only the effect of exacting a double punishment against Volkswagen, the potential state sanctions here are "at odds with achievement of the federal decision about the right degree of pressure to employ," and the inconsistency of the potential sanctions "undermines the congressional calibration of force," *Crosby v. Natl. Foreign Trade Council*, 530 U.S. 363, 380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *see also Alabama* at 1126; *Swanson* at *8.

{¶ 54} The regulation of motor-vehicle emissions reflected in Title II of the Clean Air Act has been "a principally federal project," and the exclusive federal regulation of motor-vehicle emissions is necessary in part because "the possibility of 50 different state regulatory regimes 'raise[s] the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect

which threaten[s] to create nightmares for the manufacturers.'" *Engine Mfrs. Assn. v. United States Environmental Protection Agency*, 88 F.3d 1075, 1079 (D.C.Cir.1996), quoting *Motor & Equip. Mfrs. Assn., Inc. v. Environmental Protection Agency*, 627 F.2d 1095, 1109 (D.C.Cir.1979). Allowing states like Ohio to individually regulate and penalize manufacturers for violations relating to motor-vehicle emissions undermines the EPA's comprehensive and carefully balanced enforcement power and creates the anarchic patchwork of federal and state regulatory programs that the Clean Air Act is specifically designed to prevent. Accordingly, because the anti-tampering claims brought by the attorney general pursuant to R.C. 3704.01 et seq. undermine the purpose and efficacy of the federal Clean Air Act, they are preempted by federal law.

{¶ 55} Because I would hold that the attorney general's state-law claims are impliedly preempted by federal law and would reverse the judgment of the Tenth District Court of Appeals, I dissent.

David Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor General, and Aaron S. Farmer and Karia A. Ruffin, Assistant Attorneys General, for appellee.

Reminger Co., L.P.A., Hugh J. Bode, and Jackie M. Jewell; and Sullivan & Cromwell, L.L.P., Robert J. Giuffra Jr., David M.J. Rein, Matthew A. Schwartz, and Judson O. Littleton, for appellants Volkswagen Aktiengesellschaft, d.b.a. Volkswagen Group and/or

Volkswagen AG; Audi AG; Volkswagen Group of America, Inc., d.b.a. Volkswagen of America, Inc., or Audi of America, Inc.; Volkswagen of America, Inc.; and Audi of America, L.L.C.

Porter, Wright, Morris & Arthur, L.L.P., L. Bradford Hughes, and Elizabeth L. Moyo; and King & Spalding, L.L.P., and Joseph Eisert, for appellants Dr. Ing. h.c. F. Porsche AG, d.b.a. Porsche AG; and Porsche Cars North America, Inc.

Arnold & Porter Kaye Scholer, L.L.P., Jayce Born, Jonathan S. Martel, and S. Zachary Fayne; and Kevin D. Shimp, urging reversal for amici curiae, United States Chamber of Commerce, Ohio Chamber of Commerce, and Alliance for Automotive Innovation.

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APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. [DAVE YOST], OHIO ATTORNEY GENERAL, PLAINTIFF-APPELLANT,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT, D.B.A. VOLKSWAGEN GROUP AND/OR VOLKSWAGEN AG, ET AL., DEFENDANTS-APPELLEES

No. 19AP-7

DECISION

Rendered on December 10, 2019

On brief: Dave Yost, Attorney General, Aaron S. Farmer, and Karia A. Ruffin, for appellant. **Argued:** Aaron S. Farmer.

On brief: Reminger Co., L.P.A., and Hugh J. Bode; Sullivan & Cromwell, LLP, Robert J. Giuffra, Jr., David M.J. Rein, Matthew A. Schwartz, and Judson O. Littleton, for appellees Volkswagen Aktiengesellschaft d.b.a. Volkswagen Group and/or Volkswagen AG, Audi AG, Volkswagen Group of America, Inc. d.b.a. Volkswagen of America, Inc., or Audi of America, Inc.,

Volkswagen of America, Inc., and Audi of America, LLC. **Argued:** Matthew A. Schwartz.

On brief: Porter, Wright, Morris & Arthur LLP, Terrance M. Miller, and Elizabeth L. Moyo; King & Spalding LLP, and Joseph Eisert, for appellees Dr. Ing. h.c. F. Porsche AG d.b.a. Porsche AG, and Porsche Cars North America, Inc.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, State of Ohio, ex rel. Dave Yost, Ohio Attorney General (the "State"), appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendants-appellees, Volkswagen Aktiengesellschaft d.b.a. Volkswagen Group and/or Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., d.b.a. Volkswagen of America, Inc. or Audi of America, Inc., Volkswagen of America, Inc., Audi of America, LLC, Dr. Ing. h.c. F. Porsche AG d.b.a. Porsche AG, and Porsche Cars North America, Inc. (collectively "Volkswagen"). For the following reasons, we reverse and remand.

I. Factual and Procedural Background

{¶ 2} In October 2016, the State initiated this action against Volkswagen under Ohio's Air Pollution Control Act, R.C. Chapter 3704, seeking relief for "the massive, emissions-control-tampering scheme perpetrated by [Volkswagen] in connection with their sale or lease to

U.S. consumers of more than 550,000 vehicles, including approximately 14,000 in Ohio, from model year 2009 to 2016." (Oct. 26, 2016 Compl. at 1.)

{¶ 3} In November 2016, and pursuant to 28 U.S.C. 1446, Volkswagen removed the matter to the United States District Court for the Southern District of Ohio. The matter was transferred to the United States District Court for the Northern District of California, which served as the multi-district litigation ("MDL") court for various actions against Volkswagen. The MDL court remanded this matter to Ohio state court based on the court's conclusion that Volkswagen had failed to demonstrate "arising under" jurisdiction pursuant to 28 U.S.C. 1331.

{¶ 4} In August 2017, Volkswagen moved to dismiss the State's complaint pursuant to Civ.R. 12(B)(6) on the basis that the State's claims were preempted by the federal Clean Air Act., 42 U.S.C. 7401 et seq. ("CAA"). Additionally, Volkswagen moved to dismiss defendants Volkswagen AG, Audi AG, and Porsche AG for lack of personal jurisdiction.

{¶ 5} In September 2017, the State filed an amended complaint seeking relief based on Volkswagen's emission-control-tampering scheme. More specifically, the State alleged Volkswagen tampered with the subject vehicles, certain 2009-2016 Volkswagen, Audi, and Porsche model-year vehicles with 2.0 or 3.0 liter diesel engines, to effectively disable their emission control systems. The State's first cause of action alleged Volkswagen tampered with emission control systems of the subject vehicles during normal driving operation by factory installing a software-based device (known as a "defeat device") that increased the effectiveness of

the emission control systems during laboratory testing but reduced the effectiveness of those systems during normal driving conditions (Count I). The State's second cause of action alleged Volkswagen tampered with the emission control systems of the subject vehicles when it recalled and updated the software-based defeat device on vehicles already in use (Count II). The State's third cause of action alleged Volkswagen tampered with the emission control systems of the subject vehicles when the vehicles with updated defeat devises were driven on Ohio's roads (Count III). The State's final claim was that the named defendants engaged in a civil conspiracy to violate R.C. Chapter 3704 (Count IV).

{¶ 6} In October 2017, Volkswagen moved to dismiss the State's amended complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6) on the grounds that the CAA preempted the State's claims. Volkswagen also again moved to dismiss the State's claims against defendants Volkswagen AG, Audi AG, and Porsche AG for lack of personal jurisdiction.

{¶ 7} On December 7, 2018, the trial court granted Volkswagen's motion to dismiss. As to Count I of the State's complaint, the court reasoned that this claim was based on Volkswagen's alleged misconduct before the subject vehicles were sold to end users, and therefore was expressly preempted by the CAA. As to the State's two claims regarding Volkswagen's alleged misconduct occurring after the sale of the subject vehicles (Counts II and III), the court determined that such conduct was not expressly preempted by the CAA. However, the court concluded that Congress intended only the federal government to regulate model-

wide tampering of vehicle emission control devices, and therefore the CAA preempted the State's claims based on Volkswagen's post-sale changes to those devices on the subject vehicles. Based on the trial court's disposition of the State's first three underlying tampering claims, it concluded that the State's civil conspiracy claim also must fail. Because the trial court concluded that the complaint must be dismissed pursuant to Civ.R. 12(B)(6), it declined to address Volkswagen's personal jurisdiction arguments.

{¶ 8} The State timely appeals.

II. Assignment of Error

{¶ 9} The State assigns the following error for our review:

> The trial court erred as a matter of law when it found that federal conflict preemption barred the State of Ohio's claims against Volkswagen (Counts Two and Three) for tampering with emissions controls on registered or licensed cars during, and after, recall and maintenance activities in Ohio.

III. Discussion

{¶ 10} In the State's sole assignment of error, it alleges the trial court erred in finding that federal law preempted the State's post-sale vehicle emission control system tampering claims against Volkswagen. We agree.

{¶ 11} As outlined above, the State alleged Volkswagen violated Ohio law by installing software-

based emission control defeat devices on the subject vehicles during manufacturing (Count I), and by tampering with the emission control systems after the sale of those vehicles (Counts II and III). The trial court concluded that, while Counts II and III were not barred by express preemption, they were barred by conflict preemption. Based on this disposition, the court concluded that the State's civil conspiracy claim (Count IV) also failed. In this appeal, the State concedes the trial court properly dismissed Count I based on federal preemption, but challenges the trial court's conclusion that federal preemption also barred Counts II and III.

{¶ **12**} Whether federal law preempts state law is a question of law, and therefore we must apply a de novo standard of review without deference to the trial court's decision. Ba*iley v. Manor Care of Mayfield Hts.*, 8th Dist. No. 99798, 2013-Ohio-4927, ¶ 12. The doctrine of federal preemption arises from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI, cl. 2. Pursuant to the Supremacy Clause, the United States Congress has the power to preempt state laws. *In re Miamisburg Train Derailment Litigation*, 68 Ohio St.3d 255, 259 (1994).

{¶ **13**} There are three ways federal law can preempt state law: (1) where federal law expressly preempts state law (express preemption); (2) where

federal law has occupied the entire field (field preemption); or (3) where there is a conflict between federal law and state law (conflict preemption). *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, ¶ 7. Express preemption occurs when Congress explicitly defines the extent to which its enactments preempt state law. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). In the case of field preemption, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* at 79, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English* at 79, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Natl. Foreign Trade Council*, 530 U.S. 363, 373 (2000).

{¶ **14**} In determining whether federal law preempts state law, "'[t]he purpose of Congress is the ultimate touchstone.'" *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks Internatl. Assn. v. Schermerhorn*, 375 U.S. 96, 103 (1963);

see Riverside v. State, 190 Ohio App.3d 765, 2010-Ohio-5868, ¶ 22 (10th Dist.) ("The Supreme Court has framed preemption analysis as asking whether Congress intended to exercise its constitutionally delegated authority to set aside state laws."). "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. * * * Also relevant, however, is the 'structure and purpose of the statute as a whole,' * * * as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (Internal citations omitted.) *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

{¶ **15**} Additionally, a court reviewing possible preemption must consider federalism as part of that analysis. Federalism, which is "central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). "[B]ecause the States are independent sovereigns in our federal system," the United States Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic* at 485. The "historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress," and therefore "a presumption exists against preemption of state police-power regulations." *Darby v. A-Best Prods. Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, ¶ 27; *PNH, Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St.3d 278, 2011-Ohio-4398, ¶ 18, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Rice* at

230. A traditional exercise of the states' "police powers [is] to protect the health and safety of their citizens." *Medtronic* at 475; see *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."). In view of these principles, there is a "high threshold [that] must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." (Internal quotation marks omitted.) *Chamber of Commerce of United States of Am., v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion).

{¶ **16**} The dispute in this case centers on whether the State's post-sale motor vehicle emission control system tampering claims against Volkswagen were conflict preempted. There is no suggestion that it was impossible for Volkswagen to comply with both state and federal requirements; thus, our focus concerns whether Ohio law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ultimately, the issue is whether Congress demonstrated a clear and manifest intent that there is exclusive federal regulatory jurisdiction over manufacturer conduct relating to model-wide emission control system tampering of in-use motor vehicles.

{¶ **17**} The CAA establishes a framework for the nationwide protection of air quality standards. While Title I of the CAA addresses fixed sources of pollution, such as factories and power plants, 42 U.S.C. 7401-7431, Title II of the CAA addresses mobile sources of air pollution, including motor vehicles. 42 U.S.C. 7521-

7590. In declaring the purpose of the CAA, Congress expressly stated that "[a] primary goal of the [CAA] is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this [CAA], for pollution prevention." 42 U.S.C. 7401(c). Regarding motor vehicle emission control systems, the CAA prohibits any "person" from removing or rendering "inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser." 42 U.S.C. 7522(a)(3)(A). The civil penalty for violating this anti-tampering provision is up to $25,000 per violation for a manufacturer or dealer, and $2,500 per violation for any person other than a manufacturer or dealer. 42 U.S.C. 7524(a). The Administrator of the federal Environmental Protection Agency ("EPA") may commence in an appropriate federal district court a civil action to assess and recover any civil penalty available under 42 U.S.C. 7522(a)(3)(A). 42 U.S.C. 7524(b). Or, in certain circumstances, the federal EPA Administrator may assess any civil penalty prescribed in 42 U.S.C. 7524(a). 42 U.S.C. 7524(c)(1).

{¶ **18**} The CAA contains an express preemption provision. 42 U.S.C. 7543(a) states as follows:

> 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. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Thus, the CAA expressly precludes the states from enforcing "any standard relating to the control of emissions from" any "new motor vehicle," which means "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C.S. 7550(3). While not expressly stated, this provision effectively nationalizes the standards for emission control devices in new motor vehicles, thereby preventing the existence of a patchwork of standards for manufacturers to comply with as to vehicles they design and manufacture. In view of this provision, the states are precluded from regulating manufacturer conduct relating the manufacturing of emission controls systems in new motor vehicles. However, this statute's savings clause, subsection (d), provides that "[n]othing in this part [42 USCS §§ 7521 et seq.] 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." 42 U.S.C. 7543(d).

{¶ **19**} The CAA's express preemption provision does not address the regulation of emissions of in-use motor vehicles. "[A]n express definition of the preemptive reach of a statute * * * supports a reasonable inference * * * that Congress did not intend to preempt other matters." *Freightliner Corp. v. Myrick*, 514

U.S. 280, 288 (1995). Thus, based on this provision, it may be inferred that Congress did not intend to preempt state law prohibiting manufacturers from tampering with in-use motor vehicle emission control systems. However, while the CAA's express preemption provision may support this reasonable inference, it "does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.*

{¶ **20**} The CAA also directs the federal EPA Administrator to "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." 42 U.S.C. 7521(a)(1). These standards are "applicable to such vehicles and engines for their useful life." 42 U.S.C. 7521(a)(1). In view of the CAA, "[t]he sovereign prerogatives to force reductions in greenhouse gas emissions * * * and (in some circumstances) to exercise the police power to reduce motor-vehicle emissions are now lodged in the Federal Government." *Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007).

{¶ **21**} Like the CAA, Ohio's Air Pollution Control Act ("APCA"), R.C. Chapter 3704, governs air pollution control. The stated purposes of the APCA are "to protect and enhance the quality of the state's air resources" and "[t]o enable the state, through the director of environmental protection, to adopt and maintain a program for the prevention, control, and abatement of air pollution that is consistent with the federal Clean

Air Act." R.C. 3704.02(A)(1) and (2). The APCA prohibits certain acts to further its purposes. Here, the State alleged Volkswagen violated R.C. 3704.16(C)(3), which provides that "[n]o person shall knowingly * * * [t]amper with any emission control system installed on or in a motor vehicle after sale, lease, or rental and delivery of the vehicle to the ultimate purchaser, lessee, or renter." *See also* Ohio Adm.Code 3745-80-02(F) ("No person shall knowingly tamper with any emission control system installed on or in a motor vehicle after sale, lease, or rental and delivery of the motor vehicle to the ultimate purchaser, lessee or renter."). "Tamper with" means "to remove permanently, bypass, defeat, or render inoperative, in whole or part, any emission control system that is installed on or in a motor vehicle." R.C. 3704.16(A)(1). Pursuant to R.C. 3704.06(C), a "person who violates * * * 3704.16 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation."

{¶ **22**} Volkswagen generally argues that the CAA contemplates comprehensive federal regulation of manufacturers' conduct relating to emission control systems on new and in-use motor vehicles, and limits state and local authority over emission control systems tampering to those involving individual motor vehicles. Volkswagen contends that duplicative enforcement by every state regarding nationwide post-sale tampering would undermine congressional intent as it relates to the assessment of penalties for CAA violations, and that an unduly burdensome patchwork of regulatory schemes impacting manufacturers' conduct relating to emission control systems of in-use motor vehicles also would be contrary to congressional intent. We are unpersuaded.

{¶ 23} As set forth above, congressional intent that federal law supersede state law as to standards relating to new motor vehicle emission control systems is clearly expressed in 42 U.S.C. 7543(a). This preemption relates to the manufacturing of vehicles before they are sold and placed on the roads. And this intent is consistent with the idea that a patchwork of regulatory programs across the country would be unduly burdensome on vehicle manufacturers, as it relates to the engineering and production of those vehicles. But this concept is not entirely applicable as it relates to the tampering of emission control systems in vehicles that have been sold to end users. Given this substantive difference, we find that congressional intent that the federal government solely regulate emission control systems in new motor vehicles, as a means to mitigate obstructions to interstate commerce, does not also demonstrate an intent that the federal government solely regulate any tampering with those devices in motor vehicles already placed in the stream of commerce.

{¶ 24} Further, by suing Volkswagen for post-sale motor vehicle emission control system tampering, the State is exercising its traditional police power to protect air quality within its jurisdiction. To preclude such action, congressional intent to preempt must be clear and manifest. The CAA's Title II savings clause reflects congressional intent that the states maintain significant authority in regulating conduct affecting motor vehicle emissions. And the preemption of state action designed to curtail and discourage the type of in-use motor vehicle emission control system tampering alleged here would be contrary to Congress' stated purpose for the CAA. A clear purpose of the CAA is to

reduce air pollution, and the savings clause reflects an intent that the states maintain authority in that endeavor.

{¶ 25} The trial court found that the use of the word "otherwise" in the savings clause indicates that state and local regulation of in-use motor vehicles is limited by the division of authority between the federal EPA and the states and local governments. We disagree. This statute provides that "nothing" in 42 U.S.C. 7521 et seq. "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." (Emphasis added.) 42 U.S.C. 7543(d). But Congress' use of the word "otherwise" does not further define that division so as to preclude overlap in the authority to regulate manufacturer (but not non-manufacturer) tampering of the emission control systems of in-use motor vehicles. Thus, while the CAA places exclusive authority to regulate new motor vehicle emission control systems with the federal government, the CAA does not draw such a clear division of exclusive authority as it relates to emission control systems of in-use motor vehicles.

{¶ 26} We also disagree with Volkswagen's contention that imposition of State penalties would disrupt the calibration of force reflected in the federal penalties. According to Volkswagen, the prospect of massive penalties under Ohio law against Volkswagen could be far more than the amount paid to the federal EPA, and that this circumstance demonstrates an undermining of the congressional calibration of force as to emission control system tampering by vehicle manufacturers. Relatedly, Volkswagen asserts that the factors that

must be considered in assessing federal penalties demonstrates congressional intent that the federal penalties constitute the exclusive penalties for vehicle emission systems tampering conduct.

{¶ 27} A manufacturer can be penalized up to $25,000 per violation of 42 U.S.C. 7522(a)(3)(A). 42 U.S.C. 7524(a). In an administrative assessment of penalties, 42 U.S.C. 7524(c)(2) directs the federal EPA Administrator to consider "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this title, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." *See* 42 U.S.C. 7524(b) (directing a federal district court to consider the same factors in determining the amount of any civil penalty). Thus, in fashioning the appropriate penalty for violation of federal law, 42 U.S.C. 7524 directs either the Administrator of the EPA or the court to consider various circumstances, including "such other matters as justice may require." This framework does not preclude the consideration of possible additional state action against a violator.

{¶ 28} Furthermore, state law is not preempted simply because it imposes a penalty for prohibited conduct that is also prohibited and penalized under federal law. *See Westfall v. United States*, 274 U.S. 256, 258 (1927) (states may enact laws imposing penalties for conduct that federal law also prohibits); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (supporting same general principle). Here, the State seeks

to impose penalties for violation of Ohio law, not federal law. The application of state law to supplement the total potential financial penalty faced by a manufacturer aligns with the purpose of reducing air pollution because it acts as an additional deterrent to misconduct.

{¶ **29**} Based on our review of the CAA, we find no clear and manifest congressional purpose to preempt the State's in-use motor vehicle emission control system tampering claims. In reaching this conclusion, we are mindful of other courts reaching a contrary conclusion. In particular, Volkswagen relies heavily on the federal MDL court's conclusion that Congress intended for only the federal EPA to regulate post-sale motor vehicle emission control system tampering. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liability Litigation*, 310 F.Supp.3d 1030 (N.D.Cal.2018) ("*Counties*"). Volkswagen also relies on appellate court decisions in Tennessee, Alabama, and Minnesota, wherein the courts, citing the Counties decision with approval, concluded that the CAA preempted post-sale motor vehicle emission control system tampering regulation by the states. *State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, App. No. M2018-00791-COA-R9-CV, 2019 Tenn. App. LEXIS 125 (Mar. 13, 2019); *State v. Volkswagen AG*, No. 1170528, 2018 Ala. LEXIS 133 (Dec. 14, 2018); *State v. Volkswagen Aktiengesellschaft*, App. No. A18-0544, 2018 Minn. App. Unpub. LEXIS 995 (Dec. 3, 2018).

{¶ **30**} Ohio courts are not bound by decisions of courts in other states, or even "rulings on federal statutory or constitutional law made by a federal court

other than the United States Supreme Court," but we are free to consider the persuasiveness of such decisions. *State v. Burnett*, 93 Ohio St.3d 419, 424 (2001); *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, ¶ 33; *State v. Chinn*, 2d Dist. No. 16764, 1998 Ohio App. LEXIS 3857 (Aug. 21, 1998). Here, we are unpersuaded by the reasoning of the MDL court, and the Tennessee, Alabama, and Minnesota state appellate courts that largely followed that reasoning.

{¶ **31**} The *Counties* court acknowledged the dual authority of the federal government and the states to prohibit in-use motor vehicle emission control systems tampering by individuals, but then discerned a differentiation between conduct of individuals and manufacturers to support its conclusion that only the federal government may take action against model-wide in-use motor vehicle emission control system tampering by a manufacturer. The *Counties* court reasoned that this distinction aligns with the division of authority in the enforcement of emission standards between the federal EPA and the states and the practical advantages the federal EPA has over the states in regulating model-wide emission issues that have a nationwide scope. *Counties* at 1043. We agree that it is clear that Congress intended the federal EPA to regulate model-wide emission control system tampering. And while we also agree there is a difference in scale between an individual that tampers with one motor vehicle and a manufacturer that tampers with thousands of vehicles on a nationwide scale, that difference does not, in and of itself, mean that there exists clear and manifest congressional intent to preempt state law regarding post-sale tampering conduct of manufacturers (but not non-manufacturers). Likewise, we are unconvinced that the

CAA's provision authorizing the EPA to regulate motor vehicle emissions standards extending through their useful life, 42 U.S.C. 7521(a)(1), demonstrates congressional intent that States are precluded from independently sanctioning widespread cases of tampering with in-use motor vehicle emission control systems occurring within their respective jurisdictions.

{¶ 32} In support of its finding that Congress intended manufacturer tampering of emission control systems of in-use motor vehicles only to be regulated by the federal government, the *Counties* court emphasized the difficulties potentially faced by manufacturers in being subject to many different regulatory schemes relating to such conduct. While lessoning manufacturer burdens relating to updates or other changes to vehicles that are already in the stream of commerce may constitute a legitimate congressional concern, such a concern is reasonably diminished when that conduct involves tampering with the existing emission control systems to reduce their effectiveness. Conversely, preserving traditional state police power to protect the health of its residents, as it relates to the tampering of existing in-use motor vehicle emission control systems, aligns with the expressed purpose of the CAA. As determined above, the CAA lacks clear and manifest congressional intent to supersede that state police power.

{¶ 33} Lastly, we note that, as an alternative argument in support of the trial court's judgment, Volkswagen argues the State's claims based on post-sale misconduct were expressly preempted by 42 U.S.C. 7543(a), which prohibits any "State or any polit-

ical subdivision thereof [from] adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." Volkswagen reasons that the post-sale software tampering related back to the original design of the motor vehicles by Volkswagen and therefore effectively related to the design of a new motor vehicle. The trial court rejected this argument. We agree with the trial court on this issue because the State's regulation of post-sale software tampering does not constitute an attempt to impose emission standards relating to the original design of the motor vehicles and their emission control systems.

{¶ 34} Because the trial court erred in granting Volkswagen's motion to dismiss, we sustain the State's sole assignment of error.

IV. Disposition

{¶ 35} Having sustained the State's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this decision.

Judgment reversed;

cause remanded.

BROWN and BRUNNER, JJ., concur.

APPENDIX C

IN THE FRANKLIN COUNTY
COURT OF COMMON PLEAS
CIVIL DIVISION

———————

Case No. 16CVH10-10206

STATE OF OHIO, EX REL, MICHAEL DEWINE OHIO ATTORNEY GENERAL, PLAINTIFF,

V.

VOLKSWAGEN AKTIENGESELLSCHAFT D/B/A VOLKSWAGEN GROUP AND/OR VOLKSWAGEN AG, ET AL, DEFENDANTS.

———————

Filed: December 7, 2018

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JUDGE HOLBROOK

DECISION AND ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants Volkswagen AG, AUDI AG, Volkswagen Group of America, Inc., AUDI of America, LLC, Porsche AG, and Porsche Cars North America, Inc. (collectively, "Defendants") motion to dismiss Plaintiff State of Ohio, ex rel, Michael De Wine, Ohio Attorney General's ("Plaintiff") amended complaint. Plaintiff opposed the motion via memorandum in opposition to which Defendants' have replied. At the request of the parties,

oral argument on the motion was held. Having fully and carefully reviewed the amended complaint, the briefs, the arguments of counsel, and the salient law, the Court issues the following decision.

Background

Plaintiff brings this action for relief under Ohio's Air Pollution Control Statute, R.C. Chapter 3704, which establishes a comprehensive regulatory scheme designed to prevent pollution from negatively impacting the environment and public health.

Pursuant to the amended complaint, for model years 2009 through 2016, Defendants designed, developed, marketed, and ultimately sold a line of turbocharged direct injection 2.0 and 3.0 liter, lite duty diesel vehicles (the "Subject Vehicles") throughout the United States, including Ohio. Amended Complaint, ¶39. During the design and development of the Subject Vehicles, Defendants faced numerous challenges in attempting to engineer diesel engines that did not generate excessive nitrous oxides ("NOx") and soot. Id., ¶¶49-74. Instead of altering the design, Defendants developed technology that activates or increases the effectiveness of the vehicle's emissions controls when the device detects that the vehicle is being tested under laboratory conditions, making it appear that the vehicle complies with federal emission standards. Id. Then, when the vehicle is operated under normal driving conditions the vehicle's air pollution control system is deactivated. Id. This technology is known as a "defeat device" and is defined as an auxiliary emission control device ("AECD") "that reduces the effectiveness of the emission control system under conditions which may rea-

sonably be expected to be encountered in normal vehicle operation and use." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 264 F. Supp. 3d 1040, 1042-43 (N.D. Cal. 2017) ("Wyoming"), quoting 40 C.F.R. § 86.1803-01. Defeat devices are prohibited in all new passenger vehicles under federal law. Id. at 1043.

In September 2015, Defendants publicly admitted using this non-conforming technology to tamper with the air pollution control systems in the Subject Vehicles from 2008 to 2015. Amended Complaint, ¶¶82, 85-86. Defendants also admitted that the defeat devices were modified on used vehicles to remedy hardware failures that developed in some of the Subject Vehicles. Id., ¶¶91-92. Defendants hypothesized that the failures were the result of a glitch with the defeat device, whereby the vehicles were staying in testing or "dyno" mode even when driven on the road, which was placing increased stress on the vehicles' exhaust systems. To solve the problem, the Defendants developed a "steering wheel angle recognition" feature, which enabled Subject Vehicles to detect whether they were being tested or being driven on the road. Id., ¶¶78, 91. In or around April 2013, Defendants installed the steering wheel angle recognition feature in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance and recalls. Id., ¶¶91-92.

Hundreds of lawsuits were filed against Defendants for this admitted misconduct. *Wyoming*, 264 F. Supp. 3d at 1044. Cases included those like this one in states filed suit in state-court based on the operation of the

Subject Vehicles in their respective jurisdictions. In addition, counties in Florida and in Utah filed tampering claims against Defendants in federal court alleging that Defendants "perhaps even added new defeat devices, through software updates during vehicle maintenance and post-sale recalls." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 310 F. Supp. 3d 1030, 1032 (N.D. Cal. 2018) ("Counties"). The cases against Defendants were consolidated in the United States District Court for the Northern District of California as a part of a multidistrict litigation ("MDL"). *Wyoming*, 264 F. Supp. 3d at 1044.

In October 2016, Plaintiff initiated this action against Defendants. The Original Complaint alleged Defendants "tampered with the emissions control system installed on or in each of the Subject Vehicles before the sale and delivery to the ultimate purchaser or lessee of each Subject Vehicle and/or knowingly tampered with the emissions control systems installed on each or in each Subject Vehicle after the sale, lease, rental and delivery to the ultimate purchaser, lessee, or renter of each Subject Vehicle." Complaint at ¶111. Defendants filed a notice of removal of the case to the United States District Court for the Southern District of Ohio where it was consolidated into the MDL.

On June 6, 2017, this case was remanded back. In the remand order, Judge Breyer found that Defendants' arguments for removal were insufficient to give rise to §1331 "arising under" jurisdiction, but amounted to no more than a preemption defense. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation*, N.D.Cal. No. 2672

CRB (JSC), 2017 U.S. Dist. LEXIS 79778, at *1 (N.D. Cal. May 23, 2017).

In August 2017, the MDL court also issued a ruling granting Defendants' motion to dismiss the state of Wyoming's claims. *Wyoming*, 264 F. Supp. 3d 1040, 1057 (N.D. Cal. 2017). In Wyoming, the only alleged conduct by Defendants that could have violated the state's tampering law took place during vehicle manufacturing. Id. at 1055, 1057. The MDL court recognized that in enacting the CAA congress determined that the EPA, and not the 50 states, was best situated to regulate the original design and manufacture of the emissions systems. Accordingly, the MDL court concluded that Wyoming's tampering claim was expressly preempted by the Clean Air Act ("CAA"). Id. at 1052, 1054, 1057, citing 42 U.S.C. § 7543(a).

Following the remand order and the MDL's dismissal of Wyoming's tampering claim, Plaintiff filed its First Amended Complaint on September 25, 2017, to which the underlying motion to dismiss is directed.

Plaintiff's amended complaint alleges three causes of action for violation of Ohio's Air Pollution Control Statute. In the first claim, Plaintiff alleges the originally installed defeat devices tamper with emissions control systems during normal driving operation on Ohio's roadways. The second claim for a violation stems from the tampering with emissions control systems on used vehicles during recalls, software updates, and maintenance. Finally, the third cause of action, asserts that the tampering occurred after the recalls and updates, and during normal driving operation.

Defendants moved to dismiss this action on the grounds that the claims are expressly and impliedly preempted by the CAA. Defendants further assert and that the Court lacks personal jurisdiction over the German parent defendants. In support of their motion, Defendants direct the Court to *Wyoming*, an Alabama Circuit Court decision, and the supplemented authority from the MDL court in *Counties* and the Minnesota Court of Appeals. Opposing the motion, Plaintiff argues that federal law does not preempt its claims for tampering with used vehicles. Plaintiff also relies on *Wyoming*, as well as Minnesota and Texas District Court decisions to support its position. The parties' respective positions were heard at oral argument on March 16, 2018.

Approximately one month after the oral argument, the MDL court issued its ruling on the tampering claims brought by the Florida and Utah counties regarding post sale modification of the defeat devices during vehicle maintenance and recalls. Counties, 310 F. Supp.3d at 1030. Following an in-depth analysis of the legislative intent regarding the scope of the CAA, the MDL court concluded that the software updates to the defeat devices on used vehicles was likewise preempted, and dismissed the case. Id. at 1049-50.

Thereafter, the Minnesota Court of Appeals followed suit. *State v. Volkswagen Aktiengesellschaft*, App. No. A18-0544, 2018 Minn. App. Unpub. LEXIS 995 (Minn. App. Dec. 3, 2018) ("*Minnesota*"). It also undertook a detailed analysis of the legislative history of the CAA, and scrutinized the Counties decision. Id. Ultimately, the Minnesota court found Counties to be

"compelling and well-reasoned." Id. at *25. Accordingly, like the MDL court in *Counties* and *Wyoming*, the Minnesota Court of Appeals concluded that the state's original tampering claim as well as the recall and update tampering claims were preempted by the CAA and subject to dismissal. Id at *30.

Law and Analysis

Defendants have moved to dismiss Plaintiff's amended complaint pursuant to Civ.R. 12(B)(6) and 12(B)(1). In order for a court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recovery. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶12. A similar standard applies to Civ.R. 12(B)(1) motions: the court must dismiss if the complaint fails to allege any cause of action cognizable in the forum. *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608, 611 (1982).

Preemption

The primary issue before the Court is whether Plaintiffs claims are preempted by the CAA. The Constitution and laws of the United States are the supreme law of the land, U.S. Const. art. VI, cl. 2 (the "Supremacy Clause"). Accordingly, where a state statute conflicts, or frustrates, federal law, the former must give way. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993), citing *Maryland v. Louisiana*, 451 U.S. 725,746 (1981).

Under the supremacy clause, federal preemption may occur in a number of ways. Preemption can be express or implied: "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519,525 (1977). First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. Id. at 525.

In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Hillsborough County, Fla. v. Auto. Med. Labs.*, 471 U.S. 707 (1985). Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject." Id., quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Finally, the Supreme Court has repeatedly held that state laws can be preempted by federal regulations as

well as by federal statutes. *Hillsborough County*, 105 S. Ct. at 2375.

The Clean Air Act

As set forth above, the preemptive effect of one such federal regulation, the CAA, is at issue here. The Act contains both express preemption and savings clauses. Section 209(a) sets forth the express preemption provision, and provides:

> 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. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a) ("Section 209(a)"). The CAA defines "new motor vehicle" as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." Id. § 7550(3). The Act does not define a "standard relating to the control of emissions," but the Supreme Court analyzed the phrase in *South Coast Air Quality*. It started with the recognition of definition of "standard," i.e. that which "is established by authority, custom, or general consent, as a model or example; criterion; test." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004), quoting Webster's Second New International Dictionary 2455 (1945). The Supreme Court then went

on to offer two examples of such a standard. The first is a rule that a vehicle "not emit more than a certain amount of a given pollutant." Id. The second is a rule that a vehicle "be equipped with a certain type of pollution-control device." Id.

These "standards" are the same types of rules that Congress requires EPA to enact and enforce in Title II of the CAA. Specifically, Congress has tasked EPA with setting emission limits for new vehicles introduced into commerce, 42 U.S.C. § 521(a); setting standards governing the use of emission-control devices in those vehicles, e.g., id. § 7521(a)(4)(A)-(m); running a certification and testing program to ensure that new vehicles meet these standards, id. § 7525; and enforcing these standards by refusing to certify vehicles that do not meet all regulatory requirements and by bringing civil enforcement actions against violators, see id. §§ 7522(a), 7524, 7525(a). Section 209(a) prohibits States and political subdivisions from doing the same. Through this give and take, Congress has created a uniform regulatory regime governing emissions from new vehicles, which it has done to avoid "the possibility of 50 different state regulatory regimes" governing vehicle emissions, which would "raise[] the spectre of an anarchic patchwork of federal and state regulatory programs" and would threaten "to create nightmares for the manufacturers." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (citation omitted) ("*EMA*").

Notwithstanding the forgoing, the savings provision found in Section 209(d) of the CAA states, "[n]othing in this part shall preclude or deny to any State or po-

litical subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S. Code§ 7543(d) ("Section 209(d)").

Ohio's Air Pollution Control Statute

Pursuant to Section 209(d), Ohio enacted its own Ohio's Air Pollution Control Statute in R.C. Chapter 3704. Together with the rules promulgated thereunder, the Ohio statute establishes a comprehensive regulatory scheme designed to prevent pollution from air contaminants like NOx. Relevant to this action, R.C. 3704.16(C)(3) provides that, "[n]o person shall knowingly ... tamper with any emission control system installed or in a motor vehicle after sale, lease, or rental and delivery of the vehicle to the ultimate purchaser, lessee, or renter." Tampering means "to remove permanently, bypass, defeat or render inoperative, in whole or in part, any emission control system that is installed on or in a motor vehicle." R.C. 3704.16(A)(1). Under R.C. 3704.06(C), "[a] person who violates section ... 3704.16 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation."

The Director of the Ohio Environmental Protection Agency, pursuant to his delegated authority, adopted Ohio Administrative Code Section 3745-80-02. Such regulation echoes the prohibitions found in R.C. 3704.16. See O.A.C. § 3745-80-02(F).

Count I – Original Tampering

With this legal framework, the Court turns its attention to Plaintiffs first cause of action. According to

the amended complaint, "[f]rom 2008 through the present, Defendants knowingly tampered with the emission control system installed on or in each Subject Vehicle after the sale, lease, or rental and delivery of each Subject Vehicle to the ultimate purchaser, lease, or renter of each Subject Vehicle." Amended Complaint, ¶109. The alleged violation occurred each day the originally installed defeat devices tampered with the emissions control systems during the Subject Vehicle's normal use or operation. Id., ¶111.

Defendants argue the forgoing allegations amount to an original tampering claim that is expressly preempted by Section 209(a). In opposition, Plaintiff contends that the claim falls outside of Section 209(a) as it specifically relates to used as opposed to new vehicles. Following the *Wyoming* decision, Plaintiff appears to all but have abandoned this claim. Nonetheless, the Court is compelled to address the parties' respective arguments.

In *Wyoming*, the MDL court held that EPA's rule prohibiting the installation of defeat devices in new vehicles is a "standard relating to the control of emissions from new motor vehicles." *Wyoming*, 264 F. Supp. 3d at 1052. Opposing Volkswagen's motion to dismiss, Wyoming argued that its tampering claim was nevertheless not an "attempt to enforce" the EPA's rule, but rather was only an attempt to regulate the use of Volkswagen's defeat device within the State's borders. Id. at 1055-56. Like the Plaintiff here, it was in used vehicles on the roads of Wyoming, the State argued, that the defeat device tampered with vehicle emission controls. Id. Framed in this way, Wyoming asserted that its claim not only escaped the reach of Section

209(a)'s express preemption clause, but also was protected by the Clean Air Act's savings clause, Section 209(d). Id.

The MDL court did not find Wyoming's in-use argument persuasive. While the defeat device operated in vehicles within the State, Volkswagen's misconduct took place during manufacturing, when it installed the defeat device in its new vehicles. *Wyoming*, 264 F. Supp. 3d at 1056. Wyoming, then, was attempting to regulate Volkswagen's conduct before its vehicles were sold to end users. And by doing so, the State was attempting to enforce a standard relating to the control of emissions from new motor vehicles. Id. The MDL court also noted that, by definition, all defeat devices work by reducing the effectiveness of emission controls during "normal vehicle operation and use." Id., quoting 40 C.F.R. § 86.1803-01. Under Wyoming's reading, then, "every defeat device installed in a new vehicle that is later registered in the State will violate its tampering ... rule[], without any additional action by the manufacturer who installed the device." Id. Thus, by regulating the use of defeat devices, Wyoming would "effectively [be] regulating their installation." Id.

Following the MDL court's decision in Wyoming, courts in Alabama, Minnesota, Texas, and Tennessee have all found the respective state's original tampering claims were preempted by the CAA. *State v. Volkswagen AG*, Ala.Cir. No. 01-CV-2016-903390.00 (Dec. 19, 2017); *State v. VolkswagenAktiengesellschaft*, Minn. App. No. A18-0544, 2018 Minn. App. Unpub. LEXIS 995 (Dec. 3, 2018); *In re: Volkswagen Clean Diesel Litig.*, Tx. Dist. D-1-GN-16-000370 (Feb. 21, 2018); *State v. VolkswagenAktiengesellschaft*, Tenn.

Dist. No. 16-1044-I (Mar. 21, 2018). In doing so each court adopted the reasoning in *Wyoming*. While *Wyoming* is not a binding case, it provides a compelling explanation of how the state and federal government interact with respect to control over air quality and the emissions from vehicles. Thus, the Court finds the same to be well-reasoned and persuasive.

Here, construing all the allegations in the amended complaint as true, Plaintiff's first tampering claim is clearly based on the manufacture and installation of a defeat device. Although the defeat device may operate in used vehicles within the Ohio, Defendants are alleged to have manufactured the device and installed it in these vehicles before the vehicles were sold to end users. As noted in *Wyoming*, the requirement that a vehicle not contain a defeat device is a criterion or test, compliance with which can readily be determined thereby falling within the definition of "standards" announced in *South Coast Air Quality*, supra. *Wyoming*, 264 F. Supp. 3d at 1052. Thus, to the extent Plaintiff seeks to regulate that conduct, it is "attempt[ing] to enforce [a] standard relating to the control of emissions from new motor vehicles," which states and local governments cannot do under Section 209(a).

Based on the forgoing, this Court finds that Plaintiff's first cause of action is expressly preempted by the CAA.

Counts II and III – Recall and Update Tampering

The post-sale software changes to the Subject Vehicles alleged in Counts II and III of the amended complaint require a different analysis. In these causes of action, Plaintiff alleges that Defendants modified the

defeat device in the Subject Vehicles during vehicle maintenance, or installed new defeat devices during post-sale recalls. In either case, this conduct occurred after manufactures and affected vehicles that had already been sold to consumers and were in use within Ohio. Thus, the Court finds that Ohio's attempts to regulate Defendants' post-sale software changes are not expressly preempted by Section 209(a).

The Court recognizes Defendant's argument concerning the relation-back concept discussed in *Allway Taxi, Inc. v. City of New York*, and cited favorably by EPA in a regulation implementing non-road vehicle emission standards brings Ohio's tampering claims within the scope of the Section 209(a). 340 F. Supp. 1120 (S.D.N.Y. 1972), aff'd, 468 F.2d 624 (2d Cir. 1972). However, it does not find the same to be persuasive. The idea behind relation-back concept is that if a state were to adopt "in-use emission control measures that would apply immediately after a new vehicle or engine were purchased," this would amount to "an attempt to circumvent [CAA] preemption and would obstruct interstate commerce," as manufacturers would feel pressure to ensure that their new vehicles complied with the state's in-use control measures. 59 Fed. Reg. at 31330. As a result, courts have reasoned that, even though such measures would be imposed on vehicles only after they were sold, the measures would relate back to the vehicle manufacturing process, and would therefore be preempted by the CAA. See *Allway Taxi*, 340 F. Supp. at 1123-24; EMA, 88 F.3d at 1086 ("The Allway Taxi interpretation, postponing state regulation so that the burden of compliance will not fall on the

manufacturer, has prevented the definition of 'new motor vehicle' from 'nullifying' the motor vehicle preemption regime.").

Ohio's attempt to regulate Defendants' post-sale software changes via its anti-tampering statute and regulations does not raise the same concerns. Ohio is not attempting to impose emission measures that would require manufacturers to change the way they construct new vehicles. Rather, Ohio is attempting to prevent manufacturers from tampering with their vehicles after the vehicles are sold to end users. Because the relation-back concept is not implicated here, it does not bring the Plaintiffs' claims within the express preemptive scope of the CAA.

This Court's inquiry into the issue of preemption does no end here though. This is because "neither an express pre-emption provision nor a saving clause 'bars the ordinary working of conflict pre-emption principles.'" *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 352 (2001), quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). Therefore, the Court must also consider whether, "under the circumstances of [this] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

Plaintiff alleges Defendants made the post-sale software changes at issue on a model-wide basis in thousands of vehicles nationwide. Consequently, the congressional objective the Court must identify is how Congress intended for model-wide tampering by vehicle manufacturers to be regulated. Plaintiff suggests

that when vehicles are tampered with when they are new the CAA prohibits states and local governments from attempting to regulate that conduct. On the other hand, when vehicles are tampered with when they are in use, Plaintiff contends that Section 209(d) allows states and local governments to regulate that conduct without interfering with the federal regulatory scheme. This is so regardless of the magnitude of the tampering offense or the identity of the offender.

Neither the CAA nor the case law interpreting the same draw such a clear distinction. For example, the CAA requires vehicles to meet EPA's emission standards during their "useful life." 42 U.S.C. § 7521(a)(1). Therefore, the federal regulation of vehicle emissions does not stop after vehicles are sold to end users. And although Congress has looked to both the EPA and the states and local governments to enforce these useful life standards, the enforcement roles of these entities do not entirely overlap. Instead, it is evident from the statutory scheme and legislative history that Congress intended for EPA and the states and local governments to serve specific and separate functions in regulating emissions from in-use vehicles.

The EPA's primary role after vehicles are put in use is to ensure that entire classes or models of vehicles remain in compliance with the agency's emission standards. *Counties*, 310 F. Supp. 3d 1041. Conversely, states and local governments are tasked with the enforcement these standards by inspecting individual vehicles for compliance. Id. at 1041-42. Indeed, in response to increasing emissions from vehicles in the 1970s and '80s resulting from the increasing use of ve-

hicles throughout the nation, some of these state inspection programs became mandatory under the CAA. Id. at 1042. However, by their nature, state inspection programs operate on an individual vehicle basis.

Considering the legislative history, this Court agrees with the MDL court which recognized that "[t]he division of authority discussed above—with EPA enforcing useful life vehicle emission standards primarily on a model-wide basis, and at the manufacturer level, and states and local governments enforcing the same standards on an individual vehicle basis at the end-user level—is sensible, as it best utilizes the comparative advantages of EPA and the states and local governments." *Counties*, 310 F. Supp. 3d at 1043. Indeed, the EPA, as a federal agency, is best positioned to enforce emission standards on a model-wide basis because model-wide emission problems will almost invariably affect vehicles in states throughout the country. Further, when investigating model-wide emission issues, the EPA can also rely on testing data it acquired from manufacturers during the new vehicle certification process. In turn, the EPA can utilize such information to understand how vehicle models are performing in use as compared to how they were performing during assembly-line testing. Likewise, because the new vehicle certification process requires the EPA to work directly with vehicle manufacturers, the agency has preexisting relationships that it can rely on when addressing model-wide emission defects in used vehicles. Finally, due to increased computerization and the potential for remote software updates the federal government and the EPA are in the best position to regulate the same. Although it may be characterized as

conduct that takes place at least in part within their borders, it is conduct on a much broader, national scale.

Ohio, in contrast, is in a better position than the EPA to enforce emission standards at the individual user level. While Congress could theoretically task the EPA with overseeing nationwide vehicle inspection programs—with the agency running testing centers and requiring vehicle owners to have their vehicles checked on a regular basis— states and local governments can more efficiently do so as they already oversee vehicle registration and drivers' licensing, and can use state police power to aid enforcement.

Furthermore, if Ohio were permitted to regulate the post-sale software changes, the size of the potential tampering penalties could significantly interfere with Congress' regulatory scheme. This is because "inconsistency of sanctions undermines the congressional calibration of force." *Crosby*, 530 U.S. at 379-80.

As relevant here, Congress has set specific penalties for vehicle tampering by manufacturers. See 42 U.S.C. § 7524(a) (up to $25,000 per violation by manufacturers and dealers, and up to $2,500 per violation by any other person). And Defendants' tampering triggered those penalties.

Ohio now seeks to impose additional, significant sanctions for the same conduct, for a violation of Ohio's Air Pollution Control Statute punishable by a civil penalty of up to $25,000 per offense per day of noncompliance. See R.C. 3704.06(C). With approximately 14,000 affected vehicles allegedly registered in Ohio, the potential penalties could reach $350 million per day. The potential penalties for Ohio alone could dwarf those

paid to the EPA, which would in turn result in undermining of the congressional calibration of force for tampering by vehicle manufacturers recognized in *Crosby*, supra.

Even if actual penalties are lower, if tampering claims like Ohio's are allowed to proceed, vehicle manufacturers could be subjected to up to 50 state regulatory actions based on uniform conduct that happened nationwide. The substantial nature of the potential penalties for the Ohio's tampering claims, and the significant regulatory burden that would ensue if manufacturers were subject to tampering claims throughout the United States, further demonstrates the conflict that Ohio's claims create with federal policy. See *Crosby*, 530 U.S. at 380, quoting *Wis. Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) ("'Conflict is imminent' when 'two separate remedies are brought to bear on the same activity.'").

Section 209(d) does not alter any of the above analysis. That provision does not give states and local governments absolute authority to regulate any conduct that affects emissions from vehicles that are in use. Instead, the provision provides that "[n]othing 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." 42 U.S.C. § 7543(d). The use of the term "otherwise" indicates that state and local government regulation of in-use vehicles is subject to the limitations otherwise imposed by federal law. Those limitations include the division of authority between the EPA and the states and local governments discussed above.

To that end, like the MDL court, Minnesota Court of Appeals, and Alabama District Court, this Court finds the model-wide nature of the post-sale software changes alleged in Counts II and III of the amended complaint makes them the type of conduct that Congress intended EPA to regulate. And indeed, the EPA has regulated this conduct. Amended Complaint, ¶¶82-92. The actions taken by the EPA against Defendants have resulted in Defendants paying penalties and remediation payments. Any further imposition of civil penalties by Ohio under its Air Pollution Control Statute would necessarily conflict therewith. Thus, when the CAA is considered as a whole, it is clear that Congress intended for EPA to regulate vehicle emission standards on a model-wide basis, while states and local governments would regulate compliance with these standards at the individual vehicle level. Section 209(d) does not modify that framework.

Based on the forgoing, the Court finds that Plaintiff's tampering claims in Counts II and III of the amended complaint, which are based on post-sale software changes to the Subject Vehicles by Defendants, are an attempt to enforce vehicle emission standards on a model-wide basis. Because Congress intended for only the EPA to regulate such conduct, the Court concludes that these claims stand as an obstacle to Congress' purpose and are preempted by the CAA.

Count IV – Conspiracy

Defendants final cause of action is for civil conspiracy. As alleged in the amended complaint, "Defendants purposefully acted in concert or participation with one another to violate, cause, or allow violations of R.C. Chapter 3704 and Ohio Admin. Code Section 3745-80-

02." Amended Complaint, ¶121. Defendants advance two arguments in support of the dismissal of Plaintiff's conspiracy claim. First, Defendants argue a conspiracy claim cannot be maintained where there is no underlying tort. Alternatively, Defendants contend the claim fails because the alleged co-conspirators are part of the same corporate entity.

Responding, Plaintiff claims that it has sufficiently plead a tort claim in Counts I through III for the knowing violation of Ohio's Air Pollution Control Statute. Further, Plaintiff argues that the intra-corporate conspiracy defense bears no application to the allegations in the amended complaint.

"The tort of civil conspiracy is 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio- 294, quoting *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 1995-Ohio-61. "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams*, supra, at 475, citing *Gosden v. Louis*, 116 Ohio App.3d 195, 219 (1996); *Minarik v. Nagy*, 8 Ohio App.2d 194, 195 (1963). See, also, *Gosden*, at 221 ("the 'gist' of a conspiracy action is not the conspiracy itself, and the conspiracy becomes important only after the wrong is committed").

Because an underlying act is required before a civil conspiracy claim can succeed, and no violation of R.C. Chapter 3704 or Ohio Admin. Code Section 3745-80-02 can be maintained, the Court further finds Plaintiff's claim of civil conspiracy must likewise fail. See, e.g., *Porter v. Saez*, 10th Dist. No. 03AP-1026, 2004-Ohio-

2498 (concluding that because fraudulent transfer claim failed, as a matter of law, conspiracy claim also failed).

Personal Jurisdiction

Having concluded that the entirety of Plaintiff's Amended Complaint must be dismissed pursuant to Civ.R. 12(B)(6), the Court declines to address Defendants' arguments related to personal jurisdiction.

Conclusion

Based on the forgoing, the Court concludes that Plaintiffs' Amended Complaint failed to state a claim upon which relief may be granted. Accordingly, Defendants' motion to dismiss is hereby **GRANTED**, and Plaintiff's Amended Complaint is **DISMISSED**.

Pursuant to Civil Rule 58(B), the Clerk of Courts is directed to serve upon all parties notice and the date of this judgment. **This is a final appealable order; there is no just reason for delay.**

IT IS SO ORDERED.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

* * * * *

1. 42 U.S.C. § 7507 provides:

New motor vehicle emission standards in nonattainment areas

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine

certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

* * * * *

2. 42 U.S.C. § 7521(a) provides in pertinent part:

Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b)—

> (1) 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.

* * * * *

3. 42 U.S.C. § 7521(d) provides in pertinent part:

Emission standards for new motor vehicles or new motor vehicle engines

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall—

> (1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

* * * * *

4. 42 U.S.C. § 7522(a) provides in pertinent part:

Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

> (3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

* * * * *

5. 42 U.S.C. § 7523(b) provides:

Actions to restrain violations

(b) Actions brought by or in name of United States; subpenas

Actions to restrain such violations shall be brought by and in the name of the United States. In any such action, subpenas for witnesses who are required to attend a district court in any district may run into any other district.

* * * * *

6. 42 U.S.C. § 7524(a) provides:

Civil penalties

(a) Violations

Any person who violates sections 7522(a)(1), 7522(a)(4), or 7522(a)(5) of this title or any manufacturer or dealer who violates section 7522(a)(3)(A) of this title shall be subject to a civil penalty of not more than $25,000. Any person other than a manufacturer or dealer who violates section 7522(a)(3)(A) of this title or any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3)(A), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component. Any person who violates section 7522(a)(2) of this title shall be subject to a civil penalty of not more than $25,000 per day of violation.

* * * * *

7. 42 U.S.C. § 7524(c) provides in pertinent part:

Civil penalties

(c) Administrative assessment of certain penalties

(2) Determining amount

In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation,

the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.

* * * * *

8. 42 U.S.C. § 7541(a) provides in pertinent part:

Compliance by vehicles and engines in actual use

(a) Warranty; certification; payment of replacement costs of parts, devices, or components designed for emission control

(1) Effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after December 31, 1970, the manufacturer of each new motor vehicle and new motor vehicle engine shall warrant to the ultimate purchaser and each subsequent purchaser that such vehicle or engine is (A) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 7521 of this title, and (B) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under section 7521(d) of this title). In the case of vehicles and engines manufactured in the model year 1995 and thereafter such warranty shall require that the vehicle or engine is free from any such defects for the warranty period provided under subsection (i).

(3) The cost of any part, device, or component of any light-duty vehicle that is designed for emission

control and which in the instructions issued pursuant to subsection (c)(3) of this section is scheduled for replacement during the useful life of the vehicle in order to maintain compliance with regulations under section 7521 of this title, the failure of which shall not interfere with the normal performance of the vehicle, and the expected retail price of which, including installation costs, is greater than 2 percent of the suggested retail price of such vehicle, shall be borne or reimbursed at the time of replacement by the vehicle manufacturer and such replacement shall be provided without cost to the ultimate purchaser, subsequent purchaser, or dealer. The term "designed for emission control" as used in the preceding sentence means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions (not including those vehicle components which were in general use prior to model year 1968 and the primary function of which is not related to emission control).

* * * * *

9. 42 U.S.C. § 7541(b) provides:

Compliance by vehicles and engines in actual use

(b) Testing methods and procedures

If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its the warranty period (as determined under subsection (i)), each vehicle and engine to which regulations under section

7521 of this title apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) such methods and procedures are reasonably capable of being correlated with tests conducted under section 7525(a)(1) of this title, then—

(1) he shall establish such methods and procedures by regulation, and

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 7521 of this title applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph (2). The warranty under such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if—

(A) the vehicle or engine is maintained and operated in accordance with instructions under subsection (c)(3),

(B) it fails to conform at any time during its the warranty period (as determined under subsection (i)) to the regulations prescribed under section 7521 of this title, and

(C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. No such warranty shall be invalid on the basis of any part used in the maintenance or repair of a vehicle or engine if such part was certified as provided under subsection (a)(2).

* * * * *

10. 42 U.S.C. § 7541(c) provides in pertinent part:

Compliance by vehicles and engines in actual use

(c) Nonconforming vehicles; plan for remedying nonconformity; instructions for maintenance and use; label or tag

Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after December 31, 1970—

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life (as determined under

section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

* * * * *

11. 42 U.S.C. § 7541(h) provides in pertinent part:

Compliance by vehicles and engines in actual use

(h) Dealer certification

(2) 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).

* * * * *

12. 42 U.S.C. § 7542 provides:

Information collection

(a) Manufacturer's responsibility

Every manufacturer of new motor vehicles or new motor vehicle engines, and every manufacturer of new motor vehicle or engine parts or components, and other persons subject to the requirements of this part or part C, shall establish and maintain records, perform tests where such testing is not otherwise reasonably available under this part and part C (including fees for testing), make reports and provide information the Administrator may reasonably require to determine whether the manufacturer or other person has acted or is acting in compliance with this part and part C and regulations thereunder, or to otherwise carry out the provision of this part and part C, and shall, upon request of an officer or employee duly designated by the Administrator, permit such officer or employee at reasonable times to have access to and copy such records.

(b) Enforcement authority

For the purposes of enforcement of this section, officers or employees duly designated by the Administrator upon presenting appropriate credentials are authorized—

(1) to enter, at reasonable times, any establishment of the manufacturer, or of any person whom the manufacturer engages to perform any activity required by subsection (a), for the purposes of inspecting or observing any activity conducted pursuant to subsection (a), and

(2) to inspect records, files, papers, processes, controls, and facilities used in performing any activity required by subsection (a), by such manufacturer or by any person whom the manufacturer engages to perform any such activity.

(c) Availability to public; trade secrets

Any records, reports, or information obtained under this part or part C shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or a particular portion thereof (other than emission data), to which the Administrator has access under this section, if made public, would divulge methods or processes entitled to protection as trade secrets of that person, the Administrator shall consider the record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator shall be considered an employee of the United States for purposes of section 1905 of title 18. Nothing in this section shall prohibit the Administrator or authorized representative of the Administrator from disclosing records, reports or information to other officers, employees or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under

this chapter. Nothing in this section shall authorize the withholding of information by the Administrator or any officer or employee under the Administrator's control from the duly authorized committees of the Congress.

* * * * *

13. 42 U.S.C. § 7543(a) provides:

State standards

(a) Prohibition

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. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

* * * * *

14. 42 U.S.C. § 7543(b) provides:

State standards

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for

the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

* * * * *

15. 42 U.S.C. § 7543(d) provides:

State standards

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

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.

* * * * *

16. Ohio Rev. Code § 3704.16 provides in pertinent part:

Prohibiting tampering with motor vehicle emission control systems

(C) No person shall knowingly do any of the following:

> (3) Tamper with any emission control system installed on or in a motor vehicle after sale, lease, or rental and delivery of the vehicle to the ultimate purchaser, lessee, or renter.

(E) Notwithstanding divisions (B)(1) and (3) and (C)(3) of this section, it is not a violation of those divisions if either of the following conditions is met:

> (1) The action is taken for the purpose of repair or replacement of the emission control system or is a necessary and temporary procedure to repair or replace any other item on the motor vehicle and the

action results in the system's compliance with the "Clean Air Act Amendments[.]"