

No. 21-312

IN THE
Supreme Court of the United States

VOLKSWAGEN AKTIENGESELLSCHAFT, ET AL.
Petitioners,

v.

THE STATE EX REL. YOST, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the Supreme
Court of Ohio

**AMICI CURIAE BRIEF OF FORMER
ENVIRONMENTAL PROTECTION AGENCY,
CALIFORNIA AIR RESOURCES BOARD, AND
DEPARTMENT OF JUSTICE OFFICIALS
JEFFREY E. HOLMSTEAD, RONALD J.
TENPAS, JOHN D. DUNLAP III, AND LYNN
BUHL IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici Jeffrey E. Holmstead, Ronald J. Tenpas, John D. Dunlap III, and Lynn Buhl are a group of former EPA, CARB, and DOJ officials.

Mr. Holmstead served as a former assistant administrator of the EPA for Air and Radiation from 2001 to 2005.

Mr. Tenpas is a former Assistant Attorney General for the DOJ's Environmental and Natural Resources Division. He is also a former United States Attorney for the Southern District of Illinois, responsible for both civil and criminal enforcement. He worked for DOJ from 1997 to 2009.

Mr. Dunlap is a former Chairman of CARB, serving in that role from 1994 to 1998. He continued as a Board member of CARB until 1999.

Ms. Buhl was a EPA Regional Administrator for Region V from 2008 to 2009. She was a Deputy

¹ Under Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel provided timely notice under Rule 37.1(a) of intent to file this brief to Petitioners and Respondents. Petitioners Volkswagen Group of America, Inc., Audi of America, LLC, and Robert Bosch LLC filed a blanket consent to the filing of amicus briefs. Respondents The Environmental Protection Commission of Hillsborough County, Florida, and Salt Lake County, Utah, have consented to the filing of this brief.

Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance from 2006 to 2008. In 2003 she was Acting Secretary of the Maryland Department of the Environment in 2003. And she was the director of the Southeast Offices of the Michigan Department of Environmental Quality from 1999 to 2003.

Their service collectively spans over 20 years, from 1997 to 2009 in Republican and Democratic administrations. Each amicus personally worked to develop and enforce motor vehicle emissions regulations that applied to vehicles throughout their useful lives.

Amici share the view that Congress required EPA and CARB, alone, to regulate manufacturers' emissions-related conduct throughout the useful life of motor vehicles; and Congress empowered DOJ to enforce those regulations by representing EPA in federal court. That congressional directive of consolidating regulatory authority in EPA and CARB allowed *amici* to uniformly regulate motor vehicle emissions standards throughout America.

EPA and CARB, in carrying out their directive from Congress, developed a special expertise for regulating motor vehicle emissions standards and addressing the unique tradeoffs required to enforce those regulations. The Ohio Supreme Court's decision, however, elevates States and thousands of local governments, with no experience in this field, to this same regulatory status the moment an initial purchaser drives a vehicle off a dealer's lot. That decision undoes Congress's carefully tailored scheme

by empowering thousands of new regulators to countermand EPA and CARB's directives or enforcement of emissions standards. In doing so, the Ohio Supreme Court's decision invites the "anarchic patchwork of federal and [S]tate regulatory programs" that Congress sought to avoid in Title II of the Clean Air Act.

SUMMARY OF ARGUMENT

In the Clean Air Act, Congress empowered EPA and CARB to regulate vehicle emissions standards throughout the "useful life" of motor vehicles. That authority empowers EPA and CARB with extensive and exclusive regulatory and compliance oversight of manufacturers' motor vehicle emissions conduct—even after vehicles' initial public sale. Properly understood, and as recognized by several courts, the CAA preempts state-law attempts to regulate automobile emission control systems throughout the vehicle's useful life.

The Supreme Court of Ohio disagreed. It held that the CAA permits a state to regulate emission control devices so long as the automobile is no longer a "new motor vehicle" and the engine is no longer a "new motor vehicle engine." *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, --- N.E. 3d ----, 2021 WL 2654338, *4-6 (Ohio June 29, 2021). This bright-line rule disrupts Congress's carefully-struck balance of state and federal interests in the CAA.

Although the Ohio Supreme Court adopted an incorrect view of the CAA, it is far from novel. The court reached its erroneous decision by disagreeing

with contrary decisions. See *State v. Volkswagen AG*, 279 So.3d 1109 (Ala. 2018); *State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. March 13, 2019); *State ex rel. Swanson v. Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018). It instead borrowed heavily from *In re Volkswagen “Clean Diesel” Marketing*, 959 F.3d 1201 (9th Cir. 2020). This Court is familiar with *In re Volkswagen*, having recently reviewed the petition for appeal and invited the Acting Solicitor General to file a brief expressing the views of the United States (which the United States since filed on September 27, 2021). See Docket 20-994.

This conflicting authority across the Nation has serious implications for EPA’s regulatory authority. Much like the erroneous decision *In re Volkswagen* from which it draws much inspiration, the Supreme Court of Ohio has issued a ruling that threatens EPA’s and CARB’s exclusive authority to regulate and enforce auto manufacturers’ compliance with motor vehicle emissions standards. That exclusive authority has been the cornerstone of Title II, allowing EPA and CARB alone to effectively regulate motor vehicle emissions—even for vehicles in use by the public. By chiseling away at that exclusive authority, the Supreme Court of Ohio significantly undermined EPA’s and CARB’s ability to regulate motor vehicle emissions and preserve public health.

ARGUMENT

I. EPA and CARB have exclusive authority to regulate motor vehicle emissions standards.

In the Clean Air Act, Congress created a comprehensive scheme allowing EPA and CARB to regulate manufacturers to ensure that they build and maintain vehicles that comply with mobile emissions standards—not only when new, but throughout their useful lives. Congress did not segregate EPA and CARB’s authority by whether the vehicles have already been sold to the public. Instead, Congress issued the imperative that they alone have authority over vehicle manufacturers’ emissions-related conduct.

A. In Title II of the Clean Air Act, “Congress endeavor[ed] to resolve the problems caused by moveable sources or vehicle emissions.” *Motor Vehicle Manufacturers Ass’n v. New York State Dep’t of Environment Conservation*, 17 F.3d 521, 525 (2d Cir. 1994).

Unlike the State-led regulatory scheme for stationary source emissions under Title I of the Act, “regulation of motor vehicle emissions ha[s] been a principally federal project.” *Engine Manufacturers Ass’n v. US EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996). Two related concerns compelled Congress to impose a unifying, *federal* regulatory scheme for motor vehicle emissions. First was “the difficulty of subjecting motor vehicles, which readily move across [S]tate boundaries, to control by individual [S]tates.” *Id.* Second was that “the possibility of 50 different [S]tate regulatory regimes raised the spectre of an

anarchic patchwork of federal and [S]tate regulatory programs, a prospect which threatened to create nightmares for the manufacturers.” *Id.* Even “*identical* Federal and State standards, separately administered, would be difficult for the industry to meet since different administration could easily lead to different answers to identical questions.” H.R. Rep. No. 90-728 (1967) (emphasis added). “The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production.” *Id.*

As a result, Congress empowered EPA to regulate emissions “from any class or classes of new motor vehicles or new motor vehicle engines.” 42 USC § 7521(A)(1). The “cornerstone of Title II is” found in § 209(a) of the Act, which provides for the “express preemption of [S]tate regulation of automobile emissions.” *Motor Vehicle Manufacturers*, 17 F.3d at 526; *see also* 42 USC § 7543(a) (“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.”). Congress believed this expansive preemption provision was “necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles.” H.R. Rep. No. 90-728 (1967).

B. Despite this need for a federal regulatory scheme, Congress also recognized that California, unique among the States, had been regulating automobile emissions before passage of the Act.

California had led “in the establishment of standards for regulation of automotive pollutant emissions.” S. Rep. No. 192, 89th Cong., 1st Sess. 5 (1965). In fact, “[t]he first federal emission standards were largely borrowed from California.” *Motor & Equip. v. EPA*, 627 F.2d 1095, 1110 n.34 (D.C. Cir. 1979).

So when it came to the Clean Air Act, Congress provided a waiver process for exemption from Title II’s federal preemption of State and local regulation. See 42 USC § 7543(b)(1). The terms of this exemption, which require a State to have had regulatory emission standards before 1966, qualified California as the only State that could seek waiver. *Engine Manufacturers*, 88 F.3d at 1079 & n.9.

In turn, California empowered CARB with “the responsibility” of regulating motor vehicle emissions. Cal. Health & Safety Code § 39002.

C. The result of this carefully-crafted “legislative compromise” was neither the “51 different standards” that manufacturers “had feared,” nor was it the single federal standard they “had sought.” *Engine Manufacturers*, 88 F.3d at 1080. Instead, “manufacturers must cope with two regulatory standards” as established by EPA and CARB. *Id.*

“Generally speaking,” then, “the Act gives the [S]tates the job of regulating stationary sources of pollution” under Title I—but under Title II, “EPA, and with the EPA’s permission [CARB], are responsible for regulating emissions from motor vehicles and other mobile sources.” *Nat’l v. San*

Joaquin Valley Unified Air Pollution Control District,
627 F.3d 730, 733 (9th Cir. 2010).

II. EPA and CARB have long been the exclusive emissions regulators for the entire life of a motor vehicle.

Given EPA's and CARB's exclusive authority to regulate vehicle manufacturers' emissions-related conduct, under the Clean Air Act both EPA and CARB have an extensive history of regulatory and compliance oversight of manufacturers that both pre- and post-date the initial public sale of vehicles.

In fact, the Ohio Supreme Court acknowledged that the CAA "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." *Yost*, 2021 WL 2654338, *5. To that point, manufacturers regularly engage in post-sale conduct that impacts EPA's and CARB's regulatory authority over new motor vehicle emissions. As a result, as part of Congress's design, EPA and CARB thoroughly oversee and regulate manufacturer activities both before and after an initial vehicle sale to the public.

A. EPA's timeline for regulatory and compliance actions begins at the very beginning of a vehicle's design and build stage. EPA will review a manufacturer's initial application for a Certificate of Conformity and conduct testing, while manufacturers will also be performing their own emissions and durability testing. At the end of the design and build phase and before the vehicle is first sold to the public, EPA will review and either grant or deny a

manufacturer's final application for a Certificate of Conformity.

During a vehicle's design and build phase, EPA's primary objective for compliance activities is to ensure that emissions from vehicles and engines match the specifications in a Certificate of Conformity. These specification standards apply to the vehicles and engines "for their useful life." 42 USC § 7521(a)(1). These Certificates act as a license for the manufacturer to produce and sell vehicles for one model year in a manner consistent with the terms of that certificate and the vehicle description. In effect, they ensure that manufacturers design compliant vehicles to conform to emission standards throughout their useful life. As a result, obtaining a Certificate of Conformity is a prerequisite under the Clean Air Act for any engine or vehicle to enter U.S. commerce.

EPA allows manufacturers some flexibility in achieving emissions compliance during this design phase. This flexibility permits manufacturers to meet emissions requirements within their business model. But this flexibility also requires greater attention and specialized knowledge from EPA, as the same regulation and emissions standards may allow for different vehicles and engines to have different emissions levels. Flexibility also implicates tradeoffs, as designs for a particular engine to better protect against one type of emissions might increase another. EPA's expertise helps balance these tradeoffs to ensure that the best product for both consumer and the environment reaches the market.

During the design and build phase for vehicles, manufacturers will conduct initial vehicle emissions and durability testing. This testing is extensive. Testing procedures include Federal Test Procedure; Highway Fuel Economy Test; High Speed/Acceleration Cycle; Air Conditioning Test Cycle; Cold CO Test; Evaporative Emissions Test; On-Board Recovery Vapor Refueling Test; and Running Loss Emissions Test.

Manufacturers then submit initial applications for Certificates of Conformity, which EPA reviews. In those applications, EPA requires manufacturers to provide extensive and detailed information showing how the vehicles and engines meet emissions requirements. For example, EPA requires manufacturers to submit information and data about:

- the basic engine design and a list of distinguishable configurations;
- an explanation of how the emission control system operates;
- a description of the test engine representing the test group or engine family seeking certification;
- a description of each test group or engine family;
- a description of the test procedures and equipment used to test the engine;
- all emissions data for each test engine;

- the intended useful life of the engine family seeking certification and the emission deterioration characteristics over that useful life; production volumes for the test group or engine family;
- the durability group—that is, the group of vehicles and engines with similar emission deterioration and emission component durability;
- durability test procedures;
- a description of vehicles used to show tailpipe emissions and emission control component durability;
- test results, official certification levels, and applicable emissions standards for each vehicle and engine tested;
- unconditional certification that all engines comply with the Clean Air Act and other regulatory requirements;
- statement of compliance with applicable emission standards for untested vehicles; and
- for light-duty vehicles, information on their emission control diagnostic systems, and their evaporate and on-board recovery vapor refueling.

Later, EPA will conduct random and targeted confirmatory testing after manufacturers submit their applications. This program is more than just a

rubber stamp. EPA has found that manufacturers take seriously the testing requirements, but EPA regulators believe in a “trust but verify” approach and thus conduct testing as well. Every year EPA does fail some vehicles.

EPA’s compliance actions are not limited to just testing of products. As part of its compliance audits, EPA also conducts records inspections, emission laboratory audits, test monitoring, and assembly line audits. *See* 42 USC § 7542(b) (authorizing these oversight activities). EPA then reviews manufacturers’ submissions of final applications for Certificates of Conformity.

After vehicles and engines come off the production line, but before their initial sale, EPA continues to conduct audits and other compliance testing. EPA will also issue Certificates of Conformity at this stage.

To help facilitate EPA’s issuance of certificates, it uses a comprehensive information system to collect and verify data from manufacturers. This system is known as “Engines and Vehicles – Compliance Information System,” or EV-CIS for short. EV-CIS is a significant investment that improves EPA’s ability to oversee mobile source emissions compliance. Rather than disparate systems of data collection for various vehicle and engine sectors as used in past years, EV-CIS encompasses many mobile source industries by including modules for 14 industries, and modules for light-duty and heavy-duty greenhouse gas programs.

Manufacturers can efficiently submit information to EPA through EV-CIS, and the system captures more than 11,000 data elements submitted by manufacturers. The system has built-in validation for some manufacturer data which helps prevent errors in data entry. EV-CIS also permits EPA to more easily share non-confidential data with government partners, like the National Highway Traffic Safety Administration.

B. Even after a new motor vehicle's initial sale to the public, Congress required EPA to continue its extensive and exclusive relationship with manufacturers to regulate emissions during the useful life of vehicles.

For example, EPA and manufacturers often identify defects and noncompliance with emissions standards that manifest after the first sale of a new motor vehicle through various types of testing. Passenger car and light truck manufacturers must participate in the In-Use Verification Program. Manufacturers recruit vehicles owned by private citizens, screen them for obvious tampering, and then test the vehicles at low mileage (10,000 miles) and high mileage (50,000 miles). And between 20,000 and 90,000 miles, EPA conducts in-use surveillance testing.

More than just conducting these tests, manufacturers must also report their testing data to EPA. Relatedly, manufacturers must report post-sale emissions-related defects to EPA even if the defect does not increase emission levels. 40 CFR 85.1902(b), 85.1903(a). Manufacturers need not report every

defect, however. In accordance with its specialized expertise, EPA has established reporting requirements based on certain amounts of confirmed defects that manifest for in-use vehicles. *Id.* Any testing failure rates that surpass the regulatory threshold will automatically require the manufacture to conduct In-Use Confirmatory Test Program on the failed test group. Depending on the results of that Test Program, manufacturers may implement a recall or other remedies to correct the problem.

This testing has two important consequences. First, EPA can work with manufacturers to fix problems that arise during vehicles' useful lives. Second, EPA can work with manufacturers to identify potential design issues for future model years, so that EPA and manufacturers can target vehicles that might need more attention in their design and build phase.

Testing, however, is not the only type of post-sale manufacturer activity that EPA oversees. Title II also requires that every manufacturer warrant "to the ultimate purchaser and each subsequent purchaser" that "each new motor vehicle and new motor vehicle engine" complies with EPA's emissions regulations. 42 USC § 7541(a)(1). Congress empowered EPA to "prescribe regulations" to "require" this warranty, as well as to "establish . . . methods and procedures" to ensure "each vehicle and engine . . . complies with the emission standards" when those new motor vehicles are "in actual use throughout . . . the warranty period." *Id.* § 7541(b), (b)(1), (b)(2). That warranty period extends beyond the initial sale and for the useful life of the vehicle.

Id. § 7541(i)(1); *see also id.* § 7521(d)(1) (generally providing that the useful life of light duty vehicle engines is 5 or 10 years, and 50,000 or 100,000 miles).

Because the Clean Air Act requires manufacturers to design and build vehicles and engines that comply with new motor vehicle emissions standards throughout the vehicles' useful life, recalls focus on that compliance. So, an emissions-related defect will not lead to a mandatory recall if it does not increase emissions. But if the defect leads to excessive pollution from in-use vehicles or engines, and the manufacturer does not institute a voluntary recall, EPA requires a recall.

Additionally, EPA can require a recall if it determines that a substantial portion of in-use vehicles within a category or class fail to meet emission standards. 42 USC § 7541(c)(1). Those determinations result from EPA's review of extensive data, including EPA and manufacturer test results. EPA can require this recall-and-fix even if those vehicles are otherwise being properly maintained and used.

Every year, EPA oversees recalls affecting millions of vehicles on America's roads, with the numbers of affected vehicles increasing over time. For the 1979 calendar year, manufacturers recalled 1.5 million vehicles for emissions-related problems. EPA, *Emission Recall Report*, Table I (June 1980). In 2008, it was more than 2.5 million vehicles. EPA, *2008 Progress Report, Vehicle, and Engine Compliance Activities*, at 31 (August 2010). And for 2014 through 2017, manufacturers recalled an

average of 6 million vehicles each year. EPA, *2014-2017 Progress Report: Vehicle & Engine Compliance Activities*, at 7 (2010).

EPA seldom needs to exercise its authority to mandate recalls. See 40 CFR 1068.505(f), 1068.535 (providing for a voluntary recall). EPA's working relationship with manufacturers to ensure compliance with emissions regulations often leads to voluntary recalls once EPA discovers potential noncompliance with emissions standards.

Recalls require manufacturers to fix the emission-related defect, which often demands post-sale software updates to vehicle emission control devices. But separate from the formal recall process, manufacturers often change their design and calibration of their engines and emission control systems (including software updates) to correct emission-related defects for in-use vehicles. These field-fixes are distinct from recalls, often reflect changes made to vehicles in the design and build phase, and do not require EPA pre-approval. Nonetheless, because such field-fixes do alter emission devices or systems, EPA has long reviewed fixes that result in "modification, removal or replacement of an emission-control related component." EPA, Advisory Circular 2B, *Field Fixes Related to Emission Control-Related Components*, at 1 (1975) (explaining that EPA views these field fixes as not falling under the Act's prohibition of "remov[ing] or render[ing] inoperative any device or element of design installed . . . in compliance with [Clean Air Act] regulations" in 42 USC § 7522(a)(C)(A)).

To be sure, EPA does not view itself as having absolute authority over *all* conduct affecting motor vehicle emissions after the initial sale. EPA has explained that States may enforce requirements that “do not amount to a standard relating back to the original design of the engine by the original engine manufacturer.” *Control of Air Pollution*, 59 FR 31306-01, at 31313 (1994). In fact, Congress clarified as much when it legislated that “[n]othing in part [governing motor vehicle emission standards] 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 USC § 7543(d). But that reserved authority does not permit States and localities to intrude on EPA’s authority over how the vehicles are built or reconfigured. Instead, EPA’s exclusive regulatory authority encompasses “[i]n-use testing and recall programs [that] ensure compliance with standards required to be met by manufacturers at the time of certification of the engine,” because “these in-use standards relate to the original manufacture of the engine and place the burden of compliance upon the manufacturer.” *Control of Air Pollution*, 59 FR 31306-01, at 31330 n.28.

C. Meanwhile, Congress permitted CARB to also have an extensive new vehicle and engine certification program. CARB certification involves a separate process from EPA, though it is much like EPA’s compliance and regulatory procedures.

Without CARB certification, vehicles cannot be sold legally in California, and violating the certification requirement can lead to fines reaching

\$37,500 per vehicle. Like EPA, CARB certifies vehicles based on engine families, test groups (for exhaust emissions), or evaporative emissions.

CARB will certify a vehicle only on a manufacturer's demonstration that its emissions control systems are durable and comply with the emissions standards for the vehicle's useful life. Manufacturers must also establish the vehicle's compliance with on-board diagnostics, anti-tampering, fuel tank fill-pipe and openings, crankcase emissions, and other standards or requirements that may apply to a vehicle. Manufacturers must make this showing through durability and certification testing.

CARB certifies vehicles grouped together by engine families or test groups by executive order.

Since 1983, CARB has had an In-Use Compliance Program to ensure that vehicles do not exceed applicable emissions standards during their useful life. Like EPA's in-use programs, CARB relies on private individuals providing their vehicles for inspection and, if necessary, restoration of the engine to the manufacturer's specifications. The vehicles then undergo emissions testing, observed by both CARB and manufacturer representatives, identical to the manufacturer's testing done during the emissions certification process. As with EPA testing, any test group that exceeds applicable emissions standard requires investigation and corrective action. Corrective actions often require statewide recalls. Unlike EPA, CARB also requires approval for *any* field fix manufacturers implement for in-use vehicles.

CARB also participates in the In-Use Verification Program that requires manufacturers to annually test vehicles to monitor emissions at low mileage (10,000 miles) and high mileage (50,000 miles) benchmarks.

III. The Ohio Supreme Court's decision conflicts with Congress's determination to give EPA and CARB the exclusive power to regulate and enforce motor vehicle emissions standards.

EPA's and CARB's exclusive regulatory authority extends beyond the point of sale of a new motor vehicle. The Ohio Supreme Court failed to afford the proper preemptive force to EPA's and CARB's authority and actions under the CAA that extend throughout the useful life of a vehicle, and which are critical for EPA and CARB to enforce the Act's new-vehicle emissions standards against manufacturers. In short, to regulate new motor vehicle emissions, it is just as important that EPA and CARB have the exclusive authority to issue Certificates of Compliance as it is that they have the exclusive authority to oversee post-sale design changes through recalls or field fixes.

Restricting the Act's preemption provision, which defines EPA's and CARB's exclusive regulatory authority, to the pre-sale period would be "an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (SDNY 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (remarking

that this situation would allow any State or locality to impermissibly “impose its own emission control standards the moment after a new car is bought and registered”).

EPA, CARB, DOJ, and motor vehicle manufacturers have followed this regulatory framework since the passage of Title II in 1970. In so doing, EPA and CARB officials have worked with industry to successfully oversee hundreds of emissions system recalls, while DOJ has negotiated many settlements for federal law violations—settlements which, themselves, can require corrective actions such as recalls. The regulators and the industry did so in large part because of EPA’s and CARB’s exclusive authority over motor vehicle emissions standards. It is unlikely that DOJ would have been able to achieve these settlements if all interested parties had to account for 50 states and thousands of counties in addition to EPA and CARB.

Yet if the Ohio Supreme Court is correct, EPA and CARB no longer have exclusive authority over these motor vehicle emissions matters. Thousands of States and localities would now have a say about whether post-sale changes to emission systems are permissible, as EPA might determine, or whether they violate State anti-tampering laws, as a State or locality might conclude. *See, e.g., Environmental Protection Commission of Hillsborough County v. Mercedes-Benz USA, LLC*, No. 20-02238, Doc. 7 ¶¶ 64-68, 90 (M.D. Fla.) (alleging that Mercedes-Benz “tamper[ed] with the emission control systems of used Affected Vehicles registered in Hillsborough

County, through a program of newly created field fixes and recall campaigns”).

Moreover, the Ohio Supreme Court’s decision hampers, if not eliminates, EPA, CARB, and DOJ’s ability to remedy violations of emissions standards through settlements with vehicle manufacturers. Such settlements often involve a manufacturer’s agreement to perform remedial measures, fix affected vehicles without charge to consumers, and sometimes pay significant fines. Manufacturers enter into these settlements, which can exceed several billion dollars in total costs, in exchange for the certainty of a final resolution with the exclusive regulatory authority. If States and local governments can institute their own enforcement after those agreements occur, or can claim that corrective actions are themselves violations of state or local law, manufacturers will be far less willing to entertain settlements with EPA, CARB, and DOJ. Instead, manufacturers will have great incentive to fight allegations that their vehicles emit excess emissions. This resistance will make EPA, CARB, and DOJ’s job of protecting the health of Americans and their environment far harder than in the past.

The Ohio Supreme Court downplayed this concern, remarking that it was “telling” that “EPA was . . . able to resolve its case against Volkswagen” “despite the likelihood of subsequent actions by states and local governments here.” *Yost*, 2021 WL 2654338, *7. But this situation is far from “telling” about EPA’s ability to secure appropriate penalties in *future* enforcement actions. EPA’s success in efficiently resolving its enforcement action against

Volkswagen was *before* the Ohio Supreme Court (and the Ninth Circuit before in *In re Volkswagen*) significantly limited the CAA's preemptive force. As a result, reasonably, EPA and Volkswagen likely did not anticipate a slew of tag-along enforcement actions that would escape prompt dismissal under preemption doctrine. The same cannot be said moving forward in jurisdictions, like Ohio and the Ninth Circuit, where courts have wrongly narrowed the CAA's preemptive scope.

Additionally, the Court should grant review to bring clarity to the law and EPA's and CARB's role. Other courts across the Nation come to the opposite conclusion from the Ohio Supreme Court. *See State v. Volkswagen AG*, 279 So.3d 1109 (Ala. 2018); *State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. March 13, 2019); *State ex rel. Swanson v. Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018).

This difference in opinion needlessly complicates EPA's work to protect the environment. EPA has 10 regional offices across the country, which implicate different rules between and within these regions. Region 5, for example, covers both Ohio and Minnesota. As a result, Region 5 *would* need to consider local regulators under the Ohio Supreme Court's decision below—at least in Ohio. On the other hand, Minnesota authority cuts the other way, and so Region 5 *would not* need to consider local regulators in Minnesota. And with the other states in Region 5 which have not yet addressed this issue, like Illinois, Indiana, Michigan, and Wisconsin, EPA *would not know* whether it must consider local regulators.

Meanwhile, Region 4 *would not* need to consider local regulators—at least for some states like Tennessee and Alabama. And Regions 9 and 10, which cover the Ninth Circuit, *would* need to consider local regulators under the Ninth Circuit’s decision *In re Volkswagen*. This Court’s pronouncement about the correct rule will benefit EPA by ensuring a uniform, nationwide approach.

Ultimately, Congress designed the Clean Air Act to provide EPA and CARB exclusive authority to regulate manufacturers’ new motor vehicle emissions conduct both before and after new motor vehicles are sold. The Ohio Supreme Court’s decision below allows State and local regulators to suddenly have a role—separate from Congress’s scheme under the Act—in determining new motor vehicles’ emissions standards. These competing and potentially conflicting determinations of whether the law permits post-sale changes to emission systems will frustrate EPA and CARB’s ability to effectively regulate motor vehicle emissions standards under Title II.

CONCLUSION

Amici ask this Court to grant certiorari.

Respectfully submitted,

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