No. 21-312

In the Supreme Court of the United States

VOLKSWAGEN AKTIENGESELLSCHAFT, ET AL.,

Petitioners,

v.

OHIO, EX REL. DAVE YOST,
ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Clean Air Act, 42 U.S.C. 7401 *et seq.*, preempts state and local governments from regulating manufacturers' post-sale, nationwide updates to vehicle-emission systems.

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are the Product Liability Advisory Council, Inc. (PLAC) and the Motor & Equipment Manufacturers Association (MEMA).[1]

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] Those companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for all parties received notice of *amici*'s intention to file this brief at least 10 days before its due date and consented to the filing of this brief. Sup. Ct. R. 37.2(a).

[2] See https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

seeking fairness and balance in the application and development of the law as it affects product risk management.

MEMA represents manufacturers and remanufacturers of components and systems for use in passenger vehicles and heavy trucks. Those suppliers provide original equipment to new vehicles and aftermarket parts used to service, maintain, and repair the over 275 million vehicles on the road today. MEMA's supplier members are the largest manufacturers in the United States. Together, they employ 907,000 Americans. And because of the economic activity that those members generate, they contribute to 4.26 million American jobs. MEMA regularly files briefs as *amicus curiae* to address matters important to the automotive industry.

The issue in this case is whether States and localities may prescribe rules for auto manufacturers' nationwide post-sale updates to vehicle-emission control software. In *amici*'s view, the answer is no. The Clean Air Act gives the EPA the exclusive authority to regulate post-sale vehicle-emission system updates, and its express preemption provision bars States and their political subdivisions from setting or enforcing their own regulatory standards. Even without the Act's express preemption provision, the Act impliedly preempts state and local regulation of post-sale updates because that regulation interferes with the Act's objective of creating a comprehensive, uniform scheme for regulating vehicle emissions.

If allowed to stand, the Ohio Supreme Court's decision in this case will encourage States and local governments to adopt their own post-sale auto emission rules, which will harm members of the auto industry and ultimately consumers. *Amici* urge this Court to

grant review in this case (and in the other pending case presenting this issue) and confirm that the federal government has the exclusive authority to regulate fleet-wide vehicle emissions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition in this case is the second in a matter of months seeking this Court's review of a decision that authorizes a State or locality to impose massive financial penalties on petitioners for conduct already addressed by the federal EPA. In the first case, the Ninth Circuit held that the environmental protection commission of a Florida county and a Utah county can regulate auto manufacturers' post-sale updates to vehicle-emission control software, despite the Clean Air Act, which gives that authority exclusively to the EPA. See *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201 (9th Cir. 2020) (*Counties*), petition for cert. pending, No. 20-994 (filed Jan. 21, 2021). In the petition-stage briefs in the *Counties* case, petitioners and their *amici* warned that the court of appeals' decision would spawn additional litigation and create substantial regulatory uncertainty.

That prediction has been borne out in this case and in multiple other lawsuits brought by States and their subdivisions. Here, the Ohio Supreme Court held that the State of Ohio can regulate post-sale vehicle-emission system updates however it wishes, without regard to federal law. The result is to authorize a patchwork of over 3,000 different enforcement regimes – the EPA, fifty States and the District of Columbia, and every county in the country – with the potential for truly astounding monetary penalties for

companies unable to comply. It is time for this Court to step in.

The question presented is important. The decision below invites States and localities to regulate the millions of instances each year in which manufacturers provide post-sale updates to vehicle-emission control systems – to the tune of billions, or even trillions, of dollars in potential liability. Auto manufacturers regularly make updates to the software in their vehicles after the vehicles are sold to consumers. Manufacturers do that to ensure that the software stays up to date, to keep vehicles in optimal working condition. Now any one of those commonplace software updates could be the basis for liability under state or local law.

That would lead to an unworkable patchwork of post-sale emission regulations. Even the largest manufacturers would struggle to comply. One predictable consequence would be many more public and private lawsuits, which would serve only to increase costs with no corresponding benefit. And consumers ultimately would pay, through higher prices for their vehicles and less innovation through post-sale updates. The United States, in its *amicus curiae* brief in the *Counties* case, suggests that this problem is overstated and perhaps could correct itself. But the lower courts have divided, and the question presented undoubtedly is important, because it affects a major segment of the U.S. economy, and it implicates billions (or trillions) of dollars in potential liability.

The Ohio Supreme Court's decision is wrong. Federal law preempts state and local efforts to regulate nationwide post-sale updates to vehicle-emission systems. The plain language of the Clean Air Act expressly precludes state and local governments from "attempt[ing]" to enforce against manufacturers "any"

standard "relating to" emission systems. The court below failed to give effect to the Act's broad language, and it drew an unwarranted distinction between pre-sale-to-consumer and post-sale system updates. And even without the express preemption provision, state and local authorities' attempts to set or enforce standards for software updates are impliedly preempted by federal law, because they interfere with the uniform federal regime for regulating fleet-wide emissions.

ARGUMENT

The Ohio Supreme Court held that the Clean Air Act does not preempt state-law anti-tampering claims against manufacturers for post-sale updates to vehicle-emission software. Pet. App. 7a-16a. Specifically, the court concluded that the Act's express preemption provision, 42 U.S.C. 7543(a), does not apply once a new vehicle is sold. Pet. App. 10a-11a. The court also held (over a dissent) that the Act does not impliedly preempt state anti-tampering liability. *Id.* at 11a-16a. The decision below builds on a Ninth Circuit decision from earlier this year, where that court similarly held that the Clean Air Act does not preempt liability under state and county anti-tampering regulations.

The Ohio Supreme Court's decision further opens the door to litigation and threatens to impose staggering penalties on manufacturers. If left uncorrected, it would result in a patchwork of emission rules, and it would be difficult (or impossible) for manufacturers to comply with those rules. This Court should grant review and hold that federal law provides the exclusive rules in this area.

I. The Petition Presents An Important Question Of Federal Law

The Ohio Supreme Court's decision threatens to impose potentially ruinous liability on the automotive industry. It gives license to a patchwork of vehicle-emission rules. Several States and localities already have adopted and sued to enforce their own standards, and the situation will get worse without this Court's intervention.

A. This Issue Is Of Tremendous Importance To The U.S. Auto Industry

The sheer number of post-sale vehicle-emission updates each year makes the potential liability here enormous. Manufacturers apply post-sale software updates to millions of light-vehicle-emission systems each year. *See* EPA, *2014-2017 Vehicle Engine Compliance Activities Progress Report* 7 (Apr. 2019), https://perma.cc/5HKD-JKG4. For example, from 2014 to 2017, manufacturers applied updates to 24 million vehicle-emission systems. *Ibid.* Today, it is the norm, not the exception, for manufacturers to offer post-sale updates on their vehicles, including to vehicle-emission systems. Those millions of updates affect millions of vehicles in every part of the United States.

Typically, post-sale updates are highly beneficial to consumers. Manufacturers use post-sale updates to keep vehicles in top working condition and ensure they continue to meet federal regulatory requirements. See, *e.g.*, John R. Quain, *With Benefits – and Risks – Software Updates Are Coming to the Car*, Digital Trends (Oct. 29, 2018) (Quain, *Benefits*), https://perma.cc/LVE6-VL5W; see also 42 U.S.C. 7521(a)(1), (d) (requiring manufacturers to ensure that their vehicles' emission-control systems remain functional for

at least 10 years or 100,000 miles). The updates extend the life of vehicles by making sure that vehicles perform as designed and take advantage of technological advances. See, *e.g.*, Quain, *Benefits*. The factual circumstance in this case, where updates were used to attempt to evade federal emission requirements, is not typical. Neither the Ohio Supreme Court's decision nor the Ninth Circuit's decision is limited to that atypical circumstance.

Under the Ohio Supreme Court's rule, any one of those routine, beneficial vehicle-emission updates could be the basis for both public and private lawsuits. In this case, respondent brought suit under a state anti-tampering law authorizing penalties of $25,000 per violation, asserting that each day after the emission software update counts as its own separate violation, multiplied by all of the vehicles that received the update. See Pet App. 65a. With 14,000 vehicles in the State, that comes to a penalty of $350 million per day, and $128 billion per year. See *ibid.* That is just for Ohio, and just for Volkswagen. Add the two counties from the Ninth Circuit case – each of which was authorized to seek $5,000 per violation per day – and that adds $11.2 billion more per year, again just for one manufacturer. *Counties*, 959 F.3d at 1210. Even if only *some* other States and localities decided to regulate in this area, the liability easily could grow to trillions of dollars, which is potentially ruinous liability for automobile manufacturers and parts suppliers.

In its brief in the *Counties* case, the United States makes short shrift of the importance of the question presented. It suggests that courts will "restrain overreaching claims." U.S. Br. at 24, *Counties*, No. 20-994 (filed Sept. 27, 2021). But how, and when? It surely

is not happening now. The Ninth Circuit did not restrain itself; instead, it freely admitted that its decision could result in "staggering liability." *Counties*, 959 F.3d at 1225.

The opinion below thus hangs a cloud of liability over the auto industry – a major part of the U.S. economy. See Kim Hill et al., *Contribution of the Auto Industry to the Economies of All Fifty States and the United States* 3, Center for Auto. Rsch. (Jan. 2015), https://perma.cc/TXT3-7NNU ("[The auto industry] historically has contributed 3.0 – 3.5 percent to the overall Gross Domestic Product (GDP)."); U.S. Bureau of Lab. Statistics, *Automotive Industry: Employment, Earnings, and Hours* (Feb. 11, 2021), https://perma.cc/37Q3-9HZU (noting that the auto industry as a whole employs over 4 million people and indirectly supports over 7 million private-sector jobs).

There is no reason to believe that the cloud of liability over the auto industry will dissipate of its own accord. As the petition explains (at 15-17), the lower courts have disagreed on the question presented, which means that some States and localities currently are able to regulate post-sale vehicle emissions, and others are not. Only this Court can finally resolve whether federal law gives the EPA the exclusive authority to regulate in this area.

B. If Left Uncorrected, The Ohio Supreme Court's Decision Would Create An Unworkable Patchwork Of Regulations

In the petition-stage briefs in the *Counties* case, petitioners and their *amici* warned that the Ninth Circuit's decision would spur additional state and local regulation of post-sale vehicle-emission updates. See Pet. at 20-21, *Counties*, No. 20-994 (Jan. 21, 2021); see

also, *e.g.*, PLAC & MEMA Amicus Br. at 16-19, *Counties*, No. 20-994 (Feb. 16, 2021). The Ohio Supreme Court's decision in this case confirms that that trend already is well underway. As additional States and localities follow suit, the patchwork of regulations will become entirely unworkable.

1. The Decision Below Would Create A Patchwork Of Emission Regulations

For decades, the federal government has exclusively regulated vehicle-emission systems. One of the reasons Congress gave the EPA that authority in the Clean Air Act is because a different regime would be unworkable. Specifically, Congress "assert[ed] federal control in this area" because the "possibility of 50 different state regulatory regimes raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1079 (D.C. Cir. 1996) (internal quotation marks and citation omitted). Even if state and local governments merely sought to enforce federal standards, as opposed to formulating their own standards, it "would be difficult for the industry" to comply because "different administration could easily lead to different answers to identical questions." H.R. Rep. No. 728, 90th Cong., 1st Sess. 2 (1967). Accordingly, Congress vested exclusive authority over vehicle emissions in the EPA.

Under the decisions of the Ohio Supreme Court and the Ninth Circuit, state and local governments are free to regulate post-sale vehicle-emission software updates however they wish. See *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) ("To allow Maine to insist that the carriers provide a special checking system would allow other

States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations."). As a result, if the EPA puts in place a new emission standard, and a manufacturer pushes a software update to all of its vehicles to comply with that standard, it could be held liable under state and local laws.

Any of the 50 States, the District of Columbia, or the over 3,000 counties in the United States could start regulating post-sale updates to vehicle-emission software. What might be perfectly acceptable under Minnesota law could be a violation under Wisconsin law. An update might run afoul of regulators in Hillsborough County (Tampa), but not Dade County (Miami). The prospect of so many different regulatory regimes, and the chaos that would follow, is precisely why "[t]wo years after authorizing federal emissions regulations, * * * Congress preempted the states from adopting their own emissions standards." *Engine Mfrs. Ass'n*, 88 F.3d at 1079.

2. The Decision Below Would Encourage Expensive And Needless Litigation

One predictable response to the decision below will be a flood of lawsuits – from States and localities as well as from private parties. State and local governments not only could adopt new rules for post-sale emission software updates, but they also could enforce those rules through litigation. That is exactly what happened here: Even though the EPA addressed petitioners' conduct and negotiated a multi-billion-dollar settlement – $75 million of which was allocated to Ohio, see Pet. App. 22a – respondent sued based on the same conduct under a state anti-tampering law,

seeking an additional hundreds of millions of dollars per day, *id.* at 65a.

And once a state or local government sues or takes enforcement action, public or private follow-on lawsuits inevitably follow. If each software update in each vehicle is a violation, the potential liability is enormous. Bringing a me-too suit would be easy to do if any state or local government already had taken some enforcement action against an auto manufacturer.

Those suits could be premised on any number of existing state or local laws. Options include anti-tampering laws like the Ohio law at issue here as well as unfair or deceptive trade practices laws, products liability laws, and the common law of negligence. The vast majority of States have anti-tampering laws or regulations similar to Ohio's.[3] And there is no shortage of state statutes and common-law causes of action that creative counsel could employ.

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[3] See, *e.g.*, Ala. Admin. Code r. 335-3-9.06; Alaska Admin. Code tit. 18, § 52.015; Ariz. Rev. Stat. Ann. § 28-1522; Cal. Code Regs. tit. 16, § 3362.1; Colo. Rev. Stat. § 42-4-314; Conn. Gen. Stat. Ann. § 14-164c; Del. Code Ann. tit. 21, § 6701; D.C. Mun. Regs. tit. 18, § 750; Fla. Stat. Ann. § 316.2935; Ga. Code Ann. § 40-8-130; Haw. Code R. § 11-60.1-34; Idaho Code Ann. § 49-229; Ill. Admin. Code tit. 35, § 240.103; 326 Ind. Admin. Code 13-2.1-3; Iowa Code § 321.78; La. Admin. Code tit. 55,§ 817; Md. Code Ann., Transp. § 22-402.1; 310 Mass. Code Regs. 60.02; Mich. Comp. Laws § 324.6535; Mo. Code Regs. Ann. tit. 10, § 10-5.381; Mont. Admin. R. 17.8.325; 129; Nev. Admin. Code § 445B.575; N.H. Code Admin. R. Ann. Env-A 1102.01; N.J. Admin. Code § 7:27-15.7; N.Y. Comp. Codes R. & Regs. tit. 6, § 218-6.2; 19A N.C. Admin. Code 3D.0542; N.D. Admin. Code 33.1-15-08-02; Ohio Admin. Code 3745-80-02; Okla. Stat. Ann. tit. 47, § 12-423; Or. Rev. Stat. Ann. § 815.305; 75 Pa. Stat. and Cons. Stat. Ann. § 4531; 280-30-15 R.I. Code R. § 1.13.2; S.C. Code Ann. § 16-21-

Salt Lake County, for instance, already pursued similar relief under Utah's Pattern of Unlawful Activity Act, common-law fraud, and common-law nuisance. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1034 (N.D. Cal. 2018), rev'd, 959 F.3d 1201 (9th Cir. 2020); see Utah Code Ann. §§ 76-10-1601 to -1609. And New Hampshire and Montana recently settled their own anti-tampering claims against Volkswagen. See Martina Barash, *VW Settles Two States' Diesel Software Update Cases*, Bloomberg Law (Sept. 27, 2021), https://perma.cc/2SXQ-P8QS. Given the number of vehicles on the road and the frequency of post-sale emission system updates, it is only a matter of time before enterprising States, localities, and class-action plaintiffs target other manufacturers.

There is no public benefit to be had that would justify the enormous costs of follow-on liability. In the short-term, it would serve only to impose potentially ruinous liability on a manufacturer. And in the long-term, it would actually frustrate the public interest in securing timely fixes to problems with vehicles. After all, as the dissent noted, "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." Pet. App. 21a (Donnelly, J., dissenting). And, of course, "[t]he efficacy of the EPA's rulemaking and enforcement powers would be se-

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90; Tenn. Comp. R. & Regs. 1200-03-36-.03; 30 Tex. Admin. Code § 114.20; Utah Admin. Code r. R307-201-4; 16-5 Vt. Code R. § 702; 9 Va. Admin. Code § 5-40-5670; Wash. Admin. Code § 173-421-100; W. Va. Code Ann. § 22-5-15; Wis. Admin. Code NR § 485.06.

verely reduced if manufacturers were to be disincentivized from cooperating with the EPA and other federal governmental entities." *Ibid.*

The United States acknowledges "[t]he possibility of follow-on state or local suits," but suggests that "any obstruction" to Congress's purposes and objectives in the Clean Air Act resulting from state and local regulation "can be addressed on a case-by-case basis if and when they arise." U.S. Br. at 19, 21, *Counties*, *supra*, No. 20-994. But the dominoes already have started to fall, and this Court should step in before the liability continues to cascade. The government's wait-and-see approach will provide cold comfort to the manufacturers that will be subjected to case-by-case adjudication threatening bet-the-company liability.

3. The Decision Below Would Dramatically Increase Costs For Manufacturers

It would be difficult, if not impossible, for manufacturers to comply with a new patchwork regulatory regime for post-sale updates to vehicle-emission systems. Manufacturers sell their vehicles nationwide, and vehicles often do not remain in the State of sale. If every State and county were free to establish its own rules for emission software updates, manufacturers would have to comply with each of them before making any vehicle update. That might even require state-specific updates to a vehicle when the owner changes the place of registration, creating yet another new requirement for manufacturers. In fact, it may be an "insurmountable task" to comply with that "patchwork" of different requirements. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 339-340 (1983).

Even if it were logistically feasible for large manufacturers and auto-parts suppliers to navigate such a system, it would come at great cost. For example, suppose a manufacturer wanted to ensure compliance with state and local emission regulations in advance of making a software update, so as not to risk massive liability. That would require significant work by both the company's in-house legal team and its technical team. It would take a great deal of coordination, not only for the company but also for the relevant government officials, to ensure regulatory compliance with a variety of different, potentially conflicting rules. Indeed, compliance with conflicting rules would be impossible.

Some of the scarce resources that manufacturers could have spent on continuing to research and develop new post-sale updates instead would be spent on attempting to comply with state and local emission regulations. Auto manufacturers do not have limitless resources; the industry is cyclical and has high overhead costs. See, *e.g.*, Bill Vlasic & Nick Bunkley, *Obama Is Upbeat for G.M.'s Future*, N.Y. Times (Jun. 1, 2009), https://perma.cc/8PB8-2SBF. Given finite resources, a substantial increase in the cost and complexity of regulatory compliance would come at the expense of research and development.

4. The Decision Below Ultimately Would Harm Consumers

The end result would be that consumers lose out. Some manufacturers facing trillion-dollar liability may have "to go out of business," which would have a "wide 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." Pet. App. 21a (Donnelly, J., dissenting). For

those manufacturers that can comply, increased compliance costs ultimately would fall on consumers. Just as manufacturer savings in the automotive industry lead to lower consumer prices, see, *e.g.*, *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1352 n.11 (D.C. Cir. 1985), additional manufacturer expenditures lead to higher prices. Adding hundreds or thousands of new state and local regulations necessarily would increase those passed-on costs – and at a time when the price for vehicles is skyrocketing. See, *e.g.*, Chris Isidore, *Car Prices Are Soaring, and They're Not Going to Stop*, CNN Bus. (June 11, 2021), https://perma.cc/3NN5-ZSG4 (noting that retail prices rose 12% year-on-year for new vehicles and 20% for used).

The decision below would impose costs on consumers in other ways, too. A patchwork regulatory regime could, for example, negatively impact the value of customers' vehicles. Americans move from jurisdiction to jurisdiction and take their vehicles with them. See *Engine Mfrs. Ass'n*, 88 F.3d at 1079 (Vehicles "readily move across state boundaries."). A vehicle might comply with emission regulations in one State and not in another. Consumers who move to States or localities with stricter regulations might be surprised to learn that the value of their vehicles has decreased substantially. And if States and localities were free to set their own emission standards on entire vehicle fleets, consumers who move to new jurisdictions may not be able to register their vehicles there at all.

Further, consumers could lose the benefit of receiving post-sale emission software updates that keep their vehicles up to date. Auto manufacturers have begun rolling out new and innovative features through post-sale software updates to vehicle-emis-

sion systems. Just last year, for example, BMW released a remote update that, among other things, added an emission functionality to its hybrid vehicles that "automatically switches to pure electric drive mode" when in designated green areas. BMW Grp., Press Release, *BMW Group Rolls Out Biggest Remote Software Upgrade in Company History* (Oct. 16, 2020), https://perma.cc/4J8B-78NN. That provides vehicle owners greater automated efficiency and the public with vehicles that emit fewer pollutants in dense urban areas. *Ibid.*

The threat of state and local regulation would jeopardize continued innovation in this field. Even if a manufacturer tried to comply with a patchwork regulatory regime, it still would risk significant liability with each software update. That uncertainty could very well lead a manufacturer to forego updates that improve the vehicle's performance or employ new technologies. See, *e.g.*, *Caplinger* v. *Medtronic, Inc.*, 784 F.3d 1335, 1346 (10th Cir. 2015) (Gorsuch, J.) (observing that unpredictable liability might cause manufacturers to "delay or abandon at least some number of * * * innovations"). To continue to develop this field to its full potential, manufacturers need to know that they are not inviting lawsuits every time they send out a software update to vehicle-emission systems.

II. The Decision Below Is Wrong

The exclusive federal authority to impose standards on manufacturers related to vehicle-emission systems is clear and longstanding. The Clean Air Act's broad preemptive scope is set out in its text, and state and local regulation of vehicle-emission software updates plainly interferes with the objectives of the Act. As the dissenting justice below explained, permitting state and local regulation "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." Pet. App. 24a (Donnelly, J., dissenting).

A. The Clean Air Act Expressly Preempts State And Local Regulation Of Post-Sale Emission-System Updates

This is a classic case of express preemption. The Clean Air Act's preemption clause is broad and unambiguous: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. 7543(a).

That provision applies expansively to any state or local government that "adopt[s]" or "attempt[s] to enforce" "any" vehicle-emission standard, whether the standard is the same as the EPA's standard or different from the EPA's standard. 42 U.S.C. 7543(a); see, *e.g.*, *Sims* v. *Florida Dept. of Hwy. Safety & Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989) (holding that Section 7543(a) bars States' attempts to enforce any emission standards against manufacturers, even federal standards). Further, the "relating to" language shows that the preemptive effect of federal law is broader than standards specifying permissible vehicle emissions; it also applies to standards regarding software updates "relating to" vehicle emission. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("relating to" "express[es] a broad preemptive purpose"). Accordingly, respondent's attempts to enforce state standards regarding vehicle-emission system updates fall within the text of Section 7543(a).

The Ohio Supreme Court distinguished between manufacturer updates made before and after vehicles are sold to consumers. See Pet. App. 8a-9a. The court focused on the "new motor vehicle" language in Section 7543(a), explaining that a "new motor vehicle" is a motor vehicle whose title has not yet been "transferred to an ultimate purchaser." *Id.* at 8a (quoting 42 U.S.C. 7550(3)). The United States, too, seizes on the word "new" to argue that the statute's preemptive effect cannot reach beyond the initial vehicle sale. U.S. Br. at 13-14, *Counties*, *supra*, No. 20-994. The fundamental problem with that approach is that it ignores the broad "relating to" language in the Act. Standards about post-sale updates to new vehicles after they have been sold "*relat[e] to* the control of emissions from new motor vehicles," because they update the emission control systems in those vehicles. See *Morales*, 504 U.S. at 383 ("relate to" means "concern" (internal quotation marks omitted)); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) ("relate to" means "has a connection with").

Further, the Ohio Supreme Court's rule makes no sense, because it would permit States and local governments to begin regulating federal emissions the moment the vehicle is sold, even though (as explained below) federal law gives the EPA exclusive authority over vehicle-emission systems. The "new motor vehicle" language was not intended to reverse that clear rule. Indeed, the EPA has long recognized that post-sale state regulation of vehicle-emission control systems is preempted if it "relat[es] back to the original design" by the manufacturer. 59 Fed. Reg. 31,306, 31,313 (Jun. 17, 1994) (discussing *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), aff'd, 468 F.2d 624 (2d Cir. 1972)); see also U.S. Br. at

17, *Counties*, *supra*, No. 20-994 ("We agree with petitioners that Section 209(d) does not authorize States to impose post-sale emission standards that would have the practical effect of compelling manufactures to modify the original design of their vehicles.").

Here, the state and local regulation at issue plainly relates to the original vehicle-emission system, because it updates that system's software. Manufacturers apply updates to vehicle computer systems to ensure that vehicles continue to perform as designed and to keep the vehicles in sound working condition. An exceedingly narrow reading of the Act's express preemption provision cannot be squared with its language or with common sense.

B. The Clean Air Act Impliedly Preempts State And Local Regulation Of Post-Sale Emission-System Updates

More broadly, state regulation of emission-system updates is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted).

Congress's primary purpose in enacting the Clean Air Act was to regulate emissions nationwide. Maintaining uniform federal control of vehicle-emission requirements is a key feature of the Act. That is because motor vehicles "readily move across state boundaries," and their emissions are not confined to one State. *Engine Mfrs. Ass'n*, 88 F.3d at 1079. An automobile manufactured in Michigan might be sold in Virginia, then be taken by its owner to Texas, and so on. If all States were allowed to set their own vehicle-emission standards, that would "defeat the congressional purpose" in

the Act of "preventing obstruction to interstate commerce." *Id.* at 1083 (quoting *Allway*, 340 F. Supp. at 1124).

Congress therefore authorized only the federal government to regulate "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines" that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). The EPA's authority under the Act extends to ensuring that vehicles remain in compliance with federal emission standards for a vehicle's "useful life." 42 U.S.C. 7521(a)(1). For example, the agency requires manufacturers to satisfy "in-use verification testing requirements." 40 C.F.R. 86.1845-04. If the testing shows that a class of vehicles does not conform to federal emission requirements, the EPA can order a recall. 42 U.S.C. 7541(c)(1). Similarly, manufacturers must report to the EPA any emission-related defects that affect 25 or more vehicles in a model year. 40 C.F.R. 85.1903(a). In all events, the focus is on ensuring that manufacturers' fleets remain in compliance with federal emission regulations.

The Act prescribes only a very limited role for state regulation that touches on individual vehicle emissions. For example, the Act permits States to have emission inspection programs as part of their vehicle registration requirements. See 42 U.S.C. 7511, 7511a, 7541, 7543. But the Act prohibits States from requiring manufacturers to conduct those tests. See 42 U.S.C. 7541(h)(2). Further, the Act expressly bars States and localities from attempting to "adopt" or "enforce" any "standard" related to vehicle emissions. 42 U.S.C. 7543(a). Nowhere does the Act bestow upon

States or localities a broad authority to impose emission-related liability on manufacturers for their fleets. Instead, the Act specifies the opposite.

The Act requires the EPA to make complicated decisions about when and how to regulate vehicle emissions. In that role, the EPA often must make decisions about the levels of emissions allowed, including making tradeoffs between different emissions, and balancing the effects on manufacturers and the public. See, *e.g.*, 42 U.S.C. 7521(a)(1) (authorizing EPA to use its "judgment" in regulating emissions); 42 U.S.C. 7521(a)(4)(B) (charging the EPA to balance several factors when developing rules, including the extent to which a device or system "increases, reduces, or eliminates emissions," any "available methods for reducing or eliminating any risk to public health [or] welfare," and the availability of alternative devices that might better "conform to requirements").

The United States reasons that States and localities can impose liability for emission violations because assessing penalties is different from enforcing standards. See U.S. Br. at 18-19, *Counties*, *supra*, No. 20-994 ("Respondents' claims for civil monetary penalties * * * do not seek to enforce standards relating to the control of emissions"). But the Act makes clear that the EPA's exclusive role in regulating fleet-wide vehicle emissions extends to setting appropriate penalties for any violations. For example, similar to how the agency decides whether to regulate, the EPA must balance several financial and environmental factors when assessing penalties for violations of its emission rules. See 42 U.S.C. 7524(c)(2). The EPA considers all of the facts and draws upon its vast experience to put in place rules and craft penalties that it believes workable and beneficial to consumers and the public.

Congress entrusted to the EPA decisions about both what standards to set and what penalties to seek. Permitting state and local regulation of vehicle emissions would directly interfere with Congress's decision to give the EPA exclusive authority in this area. Some state and local regulators no doubt would strike a different balance than the EPA did. That means that even if States and localities were to adopt the very same emission standards as the EPA, having multiple regulatory entities – each making its own separate demand for compliance with attendant penalties – still would disrupt the uniform nationwide system of emission regulation intended under the Act.

This case proves the point. As the dissenting justice explained below, the EPA "carefully crafted a multibillion-dollar penalty that balanced a variety of financial and environmental factors" under federal law, and the Ohio Attorney General's "decision to seek an additional judgment that could total more than $1 trillion" was based simply on his "disagreement with the penalty that the federal government carefully crafted." Pet. App. 18a (Donnelly, J., dissenting). So in an "immediate sense," this case shows the real conflict between state and federal law. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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