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September 11, 2019

By Email

Hon. Noel J. Francisco,
Solicitor General of the United States,
Office of the Solicitor General,
950 Pennsylvania Ave., NW,
Washington, D.C. 20530.

Matthew Z. Leopold,
General Counsel,
Environmental Protection Agency,
1200 Pennsylvania Ave., NW,
Washington, DC 20460.

Re: *Envt'l Protection Comm'n of Hillsborough Cty., et ano.* v. *Volkswagen Grp. of Am., et al.*, Case No. 18-15937 (9th Cir.)

Dear General Francisco and Mr. Leopold:

On behalf of Volkswagen Group of America, Inc. ("VWGoA"), Porsche Cars North America, Inc. ("PCNA"), and Robert Bosch LLC, we write regarding the above-referenced appeal pending before the U.S. Court of Appeals for the Ninth Circuit. On August 22, 2019, after oral argument, the Ninth Circuit issued an order ("Order") inviting "the Solicitor General and the Environmental Protection Agency (EPA), or either of them," to submit within 30 days (*i.e.*, September 23, 2019), a statement of whether they intend to submit an *amicus curiae* brief on whether the Clean Air Act ("CAA") preempts state and local governments from using their anti-tampering laws to regulate vehicle manufacturers' model-wide conduct affecting emissions control devices in vehicles already sold to consumers. (Exhibit A hereto at 1.)

The case involves the attempt by two counties from Florida and Utah (the "Counties") to impose massive "anti-tampering" penalties of up to "$11.2 billion per year"[1] against a vehicle manufacturer for installing software known as "defeat devices," which reduced the effectiveness of those vehicles' emissions control systems when they were being driven on the road. In the history of the United States, no county has ever before sought to impose such penalties on vehicle manufacturers for such conduct. Because allowing every state and thousands of localities to impose anti-tampering penalties on vehicle manufacturers based on conduct that the EPA comprehensively regulates under the CAA would conflict with the Congressional scheme, undermine federal regulatory objectives, and be fundamentally unworkable, we urge the United States to submit an *amicus* brief supporting preemption and affirmance of Judge Charles Breyer's well-reasoned opinion below. That position would align with the conclusion of every jurisdiction in the country in which courts have issued reasoned decisions—including the Alabama Supreme Court, intermediate appellate courts in Minnesota and Tennessee, and trial courts in Missouri, Illinois, and Ohio—in dismissing identical claims to those at issue here as preempted.[2]

This appeal implicates the CAA's comprehensive regulatory regime over the design, installation, and post-sale updating of emissions control systems in vehicles mass-produced for sale across the United States. It is clear from that statutory framework that Congress

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[1] *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1045 (N.D. Cal. 2018) ("*Counties*").

[2] *See State* v. *Volkswagen AG*, 2018 WL 6583430 (Ala. Dec. 14, 2018) ("*Alabama*") (Exhibit C); *State* v. *Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018) ("*Minnesota*") (Exhibit D); *State ex rel. Slatery* v. *Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. Mar. 13, 2019) ("*Tennessee*") (Exhibit E); *People ex rel. Madigan* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3384883 (Ill. Cir. June 5, 2018) ("*Illinois*") (Exhibit F); *State* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3349094 (Mo. Cir. June 26, 2018) ("*Missouri*") (Exhibit G); *Ohio ex rel. DeWine* v. *Volkswagen Aktiengesellschaft*, 2018 WL 8951077 (Ohio Ct. C.P. Dec. 7, 2018) ("*Ohio*") (Exhibit H). The only contrary decision is by a Texas trial court, which ruled *before* Judge Breyer's decision at issue in this appeal and provided no reasoning whatsoever. *See* Order, *In re Volkswagen Clean Diesel Litig.*, No. D-l-GN-16-000370 (Tex. Dist. Ct. Apr. 11, 2018) ("*Texas*") (Exhibit I). VWGoA and PCNA sought mandamus review by the Texas Court of Appeals, which declined without reasoning to review the decision. *See In re Volkswagen Group of Am., Inc. et al.,* 2019 WL 3367548 (Tex. App.—Austin July 26, 2019) (Exhibit J). VWGoA and PCNA intend to seek further mandamus review by the Texas Supreme Court.

gave primacy to the EPA over the regulation of vehicle manufacturers' nationwide conduct and sought to avoid parallel regulation by States and literally thousands of local governments.

First, the CAA's text, structure, and legislative history demonstrate that Congress granted the EPA comprehensive authority to regulate vehicle emissions, including by setting emissions limits with which vehicles must comply for their entire useful life, requiring manufacturers to test used vehicles for continuing compliance and to report any emissions-related defects affecting a significant number of used vehicles, and ordering recalls or penalizing unlawful post-sale tampering.

Second, to protect EPA's primacy and to prevent overlapping regulation by state or local governments, Congress provided in CAA § 209(a) that "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a). Congress reserved to the states the "right *otherwise* to control, regulate, or restrict the *use*, *operation*, or *movement* of registered or licensed motor vehicles." *Id.* § 7543(d) (emphasis added). But as the EPA has explained for more than 25 years, "state regulations that may be characterized as 'in-use' regulations may [nonetheless] be preempted" if they "amount to a standard relating back to the original design of the engine by the original engine manufacturer." 59 Fed. Reg. 31,306, 31,313 (June 17, 1994). And the CAA elsewhere expressly prohibits the states from regulating the conduct of nationwide auto manufacturers and distributors in exercising their in-use authority, as CAA § 207(h) directs that "no new motor vehicle manufacturer or dealer may be required [by a State] to conduct testing" of a "motor vehicle after the date of sale of such vehicle to the ultimate purchaser." 42 U.S.C. § 7541(h)(3).

This case arises out of Volkswagen AG's ("VW AG," and together with VWGoA, "Volkswagen") admissions in the fall of 2015 that certain models of diesel vehicles manufactured by it or affiliated companies and sold throughout the United States were manufactured with a defeat devices. VW AG also admitted that it created a software update to improve the defeat devices' precision, which it installed during nationwide voluntary recalls. In 2016 and 2017, Volkswagen and certain affiliates pled guilty to violations of the CAA and were sued by the EPA for civil penalties and injunctive relief under the CAA. These federal enforcement actions were

resolved by a series of consent decrees (two of which included PCNA) with the EPA that, along with a guilty plea by VW AG, covered both the initial installation of the defeat devices and the post-sale updates installed during recalls.

Pursuant to those and related settlements, Volkswagen has: (i) paid $4.3 billion in penalties to the federal government; (ii) established a $2.925 billion fund that the EPA determined in the consent decrees will "fully mitigate" all environmental harm throughout the country resulting from Volkswagen's conduct; (iii) along with PCNA, swiftly removed from use, or remedied the emissions problems of, the vast majority of affected vehicles by offering buybacks or EPA-approved emissions control modifications, as well as additional compensation to consumers, at a total cost of up to $11 billion; and (iv) agreed to an independent compliance monitor, former Deputy Attorney General Larry Thompson, to oversee the implementation of the injunctive remedies designed to prevent recurrence of similar conduct. In total, Volkswagen has agreed to pay more than $23 billion for its conduct in the United States.

Notwithstanding this comprehensive federal enforcement, a number of states and counties across the country filed unprecedented actions under state or local environmental laws, seeking their own civil penalties and injunctive relief for the exact same conduct. Those entities include Salt Lake County, Utah and Hillsborough County, Forida, the appellants in this appeal. In the decision under review by the Ninth Circuit, Judge Breyer correctly dismissed the Counties' claims as preempted by the CAA. *Counties*, 310 F. Supp. 3d 1030. Based on a thorough analysis of the text, structure, and legislative history of the CAA, Judge Breyer held that—at least as to states that have not adopted California's emissions standards ("Non-177 States")[3]—Congress gave the EPA *exclusive* authority to regulate auto manufacturers' conduct affecting emissions control systems of entire models or classes of vehicles, whether that conduct occurs in the factory or after vehicles have been sold to consumers. He therefore dismissed the Counties' claims based on (i) the

[3] The CAA grants a limited exception from the broad preemptive scope of CAA § 209(a) to California and states which adopt California's emissions standards. 42 U.S.C. §§ 7507, 7543(b). Because counties may not adopt California's emissions standards, and because in any event the plaintiffs here are counties that are located in Non-177 States (Florida and Utah), Judge Breyer's decision did not reach the scope of preemption as applied to 177 States. With the exception of California, the states discussed in this letter as pursuing parallel litigation are all non-177 States.

factory installation of defeat devices and (ii) VWGoA's model-wide software updates to those defeat devices in vehicles that had been sold to consumers.

Judge Breyer's decision is entirely correct. Reversal by the Ninth Circuit would allow all 50 states and thousands of counties across the country to independently regulate manufacturers' nationwide conduct. Manufacturers would be required to seek approval from all of those authorities before making any software updates to their vehicles' emissions controls—an increasingly frequent occurrence for modern motor vehicles containing complex computer systems—and each of those jurisdictions could use its prosecutorial discretion in differing ways based on its own political priorities—all resulting in precisely the "anarchic patchwork of federal and state regulatory programs" that Congress sought to avoid in Title II of the CAA. *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (internal quotation omitted). For example, in this case, as part of its comprehensive settlement with Defendants, the EPA approved an emissions modification that would reduce on-road emissions without bringing subject vehicles fully into compliance with the certified standard, yet under the Counties' reading of the CAA and of their local regulations, they could seek to penalize Volkswagen for "tampering" for installing the very modification the EPA approved. In addition to the regulatory chaos such circumstances would create, it would severely undermine the willingness of manufacturers to reach the kind of quick, comprehensive settlements that the EPA reached with Volkswagen and PCNA. We therefore request that the Solicitor General and EPA respond to the Ninth Circuit that the CAA preempts all of the Counties' claims, including those for post-sale software updates to emissions control systems. We would welcome the opportunity to discuss with you in person your response to the Ninth Circuit's Order.

A. Background

1. The CAA's Regulatory Framework

The CAA's regime for motor vehicle emissions regulation is relatively recent, and when Congress enacted it "only California ha[d] actively engaged in" regulating tailpipe emissions. S. Rep. No. 90-403 (1967), at 33; *see also Engine Mfrs. Ass'n*, 88 F.3d at 1079 n.9 ("California . . . was the only state that had adopted [vehicle] emissions control standards prior to

March 30, 1966."). No other state had any history of involvement in motor vehicle emissions regulation.

The CAA allocates different responsibilities for regulating air pollution to the federal government and state and local governments based on the source of emissions. Title I governs the regulation of emissions from *stationary* sources, like power plants, which are subject to "federally encouraged state control." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996). Title II, on the other hand, governs the regulation of emissions from *mobile* sources, and provides that "the EPA, and with the EPA's permission California, are responsible for regulating emissions from motor vehicles and other mobile sources." *Nat'l Ass'n of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control Dist.*, 627 F.3d 730, 733 (9th Cir. 2010). The rationale for this regulatory distinction is that power plants are built one at a time and remain "stationary" within a state, making them well suited for state regulation. By contrast, cars are mass-produced for sale nationwide and "readily move across state boundaries," making national uniformity of regulation by the EPA much more important. *Engine Mfrs. Ass'n*, 88 F.3d at 1079.

Exercising the authority provided under Title II, the EPA comprehensively regulates automobile manufacturers with respect to vehicles sold across the United States. Such regulation applies not only to the initial design and manufacture of new vehicles to meet federal emissions standards, but continues long after the vehicles are sold. As the drafters of the CAA recognized, "'[s]tandards for new cars will have little impact if [Congress] cannot assure compliance with those standards over the *useful life* of those vehicles.'" (Emphasis added.) *Tennessee*, 2019 WL 1220836, at *11 (quoting 116 Cong. Rec. 32,915, 42,385). As a result, "Congress has given" the EPA regulatory "tools . . . to police vehicle manufacturers' compliance with emissions standards before and after vehicles are put in use." *Counties*, 310 F.Supp.3d at 1044; *see also Minnesota*, 2018 WL 6273103, at *8 ("the EPA has 'substantial authority' to regulate a manufacturer's conduct in motor vehicles used nationwide, even after the vehicles are sold to the end-user"); *Illinois*, 2018 WL 3384883, at *17 ("[F]ederal regulation of vehicle emissions does not stop after vehicles are sold or put in use.").

In this regime, Congress intended state and local regulatory authority to be local in scope. Congress intended States' role to be limited "reduction in air pollution" through local

measures that "control [the] movement of vehicles" and encourage "alternative methods of transportation." S. Rep. No. 90-403, at 34 (1967). Examples of such local measures include "carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles." *Engine Mfrs. Ass'n*, 88 F.3d at 1094. States and local governments may also enforce tampering laws "to regulate vehicles within their borders," for example where "a mechanic removes or alters a vehicle's emission control system during routine maintenance." *Counties*, 310 F. Supp. 3d at 1044.

2. The Regulation of Modern Auto Manufacturers Under the CAA

The EPA's continuing regulatory authority over manufacturers throughout their vehicles' useful lives is particularly important in light of how vehicles are presently manufactured. As explained by the Alliance of Automobile Manufacturers, the Association of Global Automakers, and the U.S. Chamber of Commerce (collectively, the "Automakers"), which have filed an *amicus* brief in this appeal in support of Defendants-Appellees, modern emissions systems, like other parts of vehicles, are heavily reliant on software updates that have "become even more frequent and important" as "vehicles have become increasingly complex and computerized." (Automakers *Amicus* Br. at 8-9, ECF No. 34.) "Manufacturers frequently make post-launch changes to . . . emission control software . . . as they seek to improve the vehicles' performance, reliability, driveability, safety, and emissions control and resolve problems identified in the field," often "to mirror changes made to vehicles on the assembly line, thereby preserving consistency." (*Id.* at 4.) In exercising its authority under Title II, the EPA oversees such model-wide changes through a "comprehensive and orderly process." (*Id.* at 6.)

This CAA regulatory process operates as a dynamic back and forth in which manufacturers "interact extensively with EPA technical staff to provide information, address concerns, and ultimately obtain [approval]." (*Id.* at 22-23.). Manufacturers "invest significant resources to investigate" emissions problems in the field, and then implement "running changes" and "field campaigns" to rectify issues "that the manufacturer or EPA has identified." *Id.* at 12-13. And the EPA long ago established a procedure "by which manufacturers can assure themselves that EPA will not consider a field fix to be a violation of [the CAA's anti-tampering provisions]." Advisory Circular 2B, Field Fixes Related to Emission Control-Related Components, at 1 (March

17, 1975). Manufacturers routinely rely on these assurances when implementing their software updates. As a result of this integrated regulatory process, EPA is "best positioned to evaluate model-wide, in-use changes in a manner that balances performance, emissions, and other considerations," and concurrent regulation by state and localities would undermine the CAA's carefully calibrated scheme. (Automakers *Amicus* Br. at 21.)

3. History of these Proceedings

i. *EPA's Enforcement Action Against Defendants*

In the fall of 2015, the EPA issued Notices of Violation and later brought an enforcement action alleging that Volkswagen, PCNA, and certain affiliates violated the CAA by selling approximately 580,000 model year 2009-to-2016 diesel vehicles nationwide containing defeat devices. EPA Am. Compl. ¶¶ 56-64, *United States* v. *Volkswagen AG*, No. 16-cv-295, Dkt. No. 32-3 (N.D. Cal. Oct. 7, 2016). The EPA also alleged that VW AG created and installed a "software update" in certain used vehicles that "improve[d] the [existing defeat device's] precision in order to reduce the stress on the emission control systems." *Id.* at ¶¶ 115-16, 136-41. The EPA asserted that this conduct violated the CAA's defeat device and anti-tampering provisions, among other provisions. *Id.* at ¶¶ 179, 185, 197, 205-07.

In proceedings before Judge Breyer, the EPA, the California Air Resources Board ("CARB"), and Volkswagen swiftly reached three groundbreaking, comprehensive settlements (two of which included PCNA) that imposed multibillion-dollar monetary penalties and injunctive remedies for this conduct. Together with VW AG's federal guilty plea, these settlements resulted in $4.3 billion in civil and criminal penalties and substantial injunctive relief, including an environmental mitigation fund that the EPA determined will "fully mitigate" any nationwide environmental damage caused by the vehicles.[4] Under these and related settlements with nationwide classes of consumers, Volkswagen has committed more than $11 billion dollars to buy back or implement EPA-approved fixes to affected vehicles nationwide and to provide additional

[4] First Partial Consent Decree, *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 15-md-2672, Dkt. No. 2103-1, at 12-18 & Appx. D (2.0L injunctions); Second Partial Consent Decree, Dkt. No. 3228-1, at 5, 9, 14-17 & 3.0L Mitigation Appx. (3.0L injunctions); Third Partial Consent Decree, Dkt. No. 3155, ¶ 9 (civil penalty).

compensation to the owners or lessees of those vehicles. As a result, the vast majority of affected vehicles have either been removed from use or had their emissions fixed. Volkswagen also agreed to invest an additional $2 billion to support increased use of zero emission vehicle technology in the United States.

ii. *Subsequent State and County Actions Against Defendants*

Following the EPA's Notices of Violation, hundreds of lawsuits were filed against Volkswagen, PCNA, and Bosch LLC (a parts supplier), and were consolidated in the federal multi-district litigation before Judge Breyer. These included an action brought by the State of Wyoming, which sought penalties and injunctive relief under Wyoming law based on the installation and on-road operation of the defeat devices. *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1042 (N.D. Cal. 2017) ("*Wyoming*"). Dozens of states and counties also filed actions in state courts around the country asserting similar claims. Judge Breyer dismissed Wyoming's action as preempted by CAA § 209(a) because its claims based on factory-installed defeat devices impermissibly "attempt[ed] to enforce [a] standard relating to the control of emissions from new motor vehicles.'" *Wyoming*, 264 F. Supp. 3d at 1057 (quoting 42 U.S.C. § 7543(a)). In the wake of *Wyoming*, state courts uniformly dismissed similar claims based on the original installation and on-road operation of the defeat device.[5] In an attempt to avoid *Wyoming*'s reasoning, the states and counties with similar pending enforcement actions against VWGoA and PCNA—including the Counties—amended their complaints to add claims based on Volkswagen's post-sale updates to the defeat device software, relying on VW AG's guilty plea and the allegations in the EPA's amended complaint.

iii. *Judge Breyer's Decision in* Counties

On April 16, 2018, Judge Breyer dismissed all of the Counties' claims as preempted by the CAA. *First*, as in *Wyoming*, Judge Breyer held that tampering claims "based on the

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[5] *See Alabama* v. *Volkswagen AG*, 2017 WL 6551054 (Ala. Cir. Ct. Dec. 19, 2017) (Exhibit K); *Minnesota* v. *Volkswagen Aktiengesellschaft*, 2018 WL 1660911 (Minn. Dist. Ct. Mar. 12, 2018) (Exhibit L); *Tennessee* v. *Volkswagen Aktiengesellschaft*, No. 16-1044-I (Tenn. Ch. Ct. Mar. 21, 2018) (Exhibit M); *Texas*.

manufacture and installation of a defeat device in new vehicles" are "expressly preempted by Section 209(a)" of the CAA because "they are 'attempt[s] to enforce [a] standard relating to the control of emissions from new motor vehicles,' which states and local governments cannot do." *Counties*, 310 F. Supp. 3d at 1039 (quoting 42 U.S.C. § 7543(a)).[6]

Second, Judge Breyer held that "tampering claims . . . based on post-sale software changes to the affected vehicles . . . on a model-wide basis" are conflict-preempted by the CAA because "Congress intended for only EPA to regulate such conduct." *Id.* at 1047. After thoroughly examining the CAA's text, structure, and history, Judge Breyer explained that Congress divided authority over vehicle emissions between the EPA and the states, with the "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." *Id.* at 1043. This division is a "sensible" one, Judge Breyer noted, because it "best utilizes the comparative advantages of EPA and the states and local governments," including the EPA's authority over conduct crossing state lines and the agency's testing data and "preexisting relationships" with manufacturers from the certification process. *Id.* Allowing every state and thousands of counties to attempt to impose their own penalties for "post-sale software changes . . . on a model-wide basis"—the same conduct that the EPA regulates and has heavily penalized—would therefore conflict with congressional intent. *Id.* at 1045-46.

iv. *The Ninth Circuit Proceedings*

The Counties appealed Judge Breyer's dismissal of their claims to the Ninth Circuit. Briefing concluded on January 28, 2019, and the Ninth Circuit heard oral argument on August 8, 2019. On August 22, the Ninth Circuit issued the Order inviting the United States to file a brief stating its "views on a key issue in this case: Do the provisions of the Clean Air Act that prohibit

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[6] Because the Counties have largely declined to defend their claims based on the installation of defeat devices during manufacturing (*see* Oral Argument, *Envt'l Protection Comm'n of Hillsborough Cty., et ano.* v. *Volkswagen Grp. of Am., et al.*, Case No. 18-15937 (9th Cir.), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034314), and the Order does not reference those claims, the remainder of this letter focuses on the Counties' claims based on model-wide, post-sale software updates.

installing defeat devices or tampering with vehicle emissions controls, *see* 42 U.S.C. § 7522(a)(3), preempt a state or its political subdivision from enforcing state or local anti-tampering laws (either in their entirety or only as to civil financial penalties) against vehicle manufacturers for post-sale software updates that render inoperative (or less effective) the emissions controls in vehicles that are not 'new' within the meaning of the Clean Air Act, *see id.* § 7550(3)?"[7]

The Court also asked for the United States' "views as to the effect on our preemption analysis, if any, of":

- "(1) 42 U.S.C. § 7543(d), which preserves the ability of a state or its political subdivision to 'control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles'"; and

- "(2) 42 U.S.C. § 7524, which provides that a person who violates § 7522(a)(3) is subject to a civil penalty of not more than a specified amount, *see id.* § 7524(a), and requires the EPA to consider certain factors when imposing such a penalty, *see id.* § 7524(c)(2)."

Finally, the Court requested the United States' views on:

- "(1) whether its agreements to settle its federal claims against Volkswagen were intended to foreclose subsequent state or local civil financial penalties;"

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[7] Although not presented on this appeal from the grant of a motion to dismiss, as a factual matter, the "post-sale software updates" at issue in this litigation did not "render inoperative (or less effective) the emissions controls" in in-use vehicles. To the contrary, both EPA and CARB determined that the post-sale software updates at issue "did reduce the emissions to some degree but NOx emissions were still significantly higher than expected." (CARB Letter to Volkswagen at 2, Sept. 18, 2015, https://www.arb.ca.gov/newsrel/in_use_compliance_letter.pdf; *see also* EPA Notice of Violation at 4, Sept. 18, 2015, https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf (testing "showed only a limited *benefit* to the recall" (emphasis added).) Moreover, the Counties claim authority to regulate post-sale software updates "whether or not the tampering had any effect on the control of emissions"—in other words, the Counties claim the power to punish automakers for updates that *reduced* emissions. (Counties Br. at 27, ECF No. 16.)

- "(2) the effect of this court's ruling on future settlements and federal enforcement of nationwide environmental regulations;" and
- "(3) whether these considerations are relevant to our preemption analysis."

(Exhibit A at 1-2.)

B. Issues Raised in the Ninth Circuit's Order

1. Allowing the Counties' Claims To Proceed Would Pose a Substantial Obstacle to the Ability of the EPA to Regulate Automobile Emissions.

The Order requests the United States' views on the "key issue" whether "the provisions of the Clean Air Act that prohibit installing defeat devices or tampering with vehicle emissions controls, *see* 42 U.S.C. § 7522(a)(3)," preempt state and local anti-tampering claims against vehicle manufacturers for post-sale software updates. (Ex. A at 1.)

This question frames the conflict preemption issue in the appeal too narrowly. VWGoA and PCNA have not argued, and Judge Breyer did not hold, that the CAA's anti-tampering provision alone is what preempts the Counties' claims. Rather, conflict preemption analysis requires an examination of the entire CAA statutory scheme as a whole (including its express preemptive provisions discussed in more detail below) to ascertain Congress's intent as "implicitly contained in [the statute's] structure and purpose," *Morales* v. *Trans World Airlines*, 504 U.S. 374, 383 (1992), to then determine whether the claims at issue stand 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).

In finding that the CAA as a whole manifests Congress' intent that the EPA alone regulate manufacturers' model-wide conduct, whether pre- or post-sale, Judge Breyer relied in part on provisions giving the EPA comprehensive authority over that conduct, including that:

- "vehicles [must] meet EPA's emissions standards during their 'useful life,'" *Counties*, 310 F. Supp. 3d at 1041 (quoting 42 U.S.C. § 7521(a)(1));

- "EPA has established '[m]anufacturer in-use verification testing requirements'" to ensure such continued compliance, *id.* (citing 42 U.S.C. § 7541(b) and 40 C.F.R. § 86.1845-04);

- EPA may "inspect vehicle manufacturers' records related to emissions testing, and [to] observe activities at the manufacturers plants," *id.* (citing 42 U.S.C. § 7542);

- EPA may require recalls of vehicles where a "manufacturer's vehicles do not pass . . . in-use tests, or if EPA otherwise determines that a 'substantial number of any class or category of vehicles or engines, although properly maintained an used, do not conform to the regulations prescribed," *id.* (quoting 42 U.S.C. § 7541(c)(1));

- EPA may "bring civil enforcement actions against violators," of the CAA, including manufacturers for tampering with vehicle emissions systems, *id.* at 1038 (citing 42 U.S.C. §§ 7522(a), 7524, 7525(a)); and

- "Congress has set specific penalties for vehicle tampering by manufacturers," *id.* at 1045 (citing 42 U.S.C. § 7524).

Together, these statutory provisions demonstrate Congress's intent that only the EPA (and, with the EPA's approval, California) may regulate manufacturers' model-wide emissions-related conduct.

Section 7522(a)(3) further supports the conclusion that Congress intended the EPA to regulate the conduct here. That provision allows the EPA to regulate post-sale tampering by manufacturers on a model-wide basis and does not contain any gap for state and local governments to fill. As Congress intended, the EPA exercised this authority and relied on this provision, among others, in its comprehensive enforcement action against Volkswagen and PCNA. *See* Third Partial Consent Decree, *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672, Dkt. No. 3155 (filed Jan. 11, 2017), at 1 (EPA resolved claims "that

Defendants violated Sections 203(a)(l), (2), (3)(A), and (3)(B) of the Clean Air Act (the 'Act'), 42 U.S.C. §§ 7522(a)(l), (2), (3)(A), and (3)(B)." (emphasis added).)

As originally enacted and until 1977, the federal post-sale anti-tampering provision gave the EPA authority to penalize post-sale tampering *only by manufacturers or dealers*, confirming Congress's intent from the outset that such conduct would be regulated by the EPA. *See* Clean Air Act of 1970, Public Law 91-604, 84 Stat. 1693 (Dec. 31, 1970) (making it a violation of federal law for "any manufacturer or dealer knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser"). While Congress expanded the EPA's authority to encompass tampering of vehicles by individuals in 1990, that expansion, as Judge Breyer explained, was in order "to supplement state efforts" because "tampering by individuals was proving to be problematic in states with and without inspection and tampering programs." *Counties*, 310 F.3d at 1043 (citing S. Rep. 101-228, at 123 (1989)). Tellingly, however, "no similar provisions in the [CAA] reveal a crossover going the other way"—*i.e.*, any indication that Congress intended for states and local governments to regulate nationwide updates to emissions software by manufacturers.

The other statutory provisions listed in the Order further support this division of authority, in which the EPA regulates manufacturers for their nationwide conduct and states and local governments regulate individual owners and local mechanics.

i. *42 U.S.C. § 7543(d)*

The Order asks how "42 U.S.C. § 7543(d), which preserves the ability of a state or its political subdivision to 'control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles,'" should affect the court's preemption analysis.

Understood in the context of CAA Title II as a whole, Section 209(d) further confirms the division of authority between the EPA and state or local governments set forth above and thus provides no support for the Counties' claims here. First, as Judge Breyer recognized, Congress's specification that § 209(d) preserves states' authority "*otherwise*" to regulate certain vehicles confirms that state and local "regulation of in-use vehicles is subject to the limitations imposed by federal law." *Counties*, 310 F. Supp. 3d at 1046. Moreover, the Counties' claims do not seek to regulate the "use, operation, or movement" of motor vehicles. Under the natural

meaning of the terms, to "use," "operate," or "move" a car means to drive it; likewise "users," "operators" and "movers" of "registered or licensed motor vehicles" are individual drivers, not manufacturers. Accordingly, the plain reading of § 209(d) is that it permits states and local governments to play a role when "on-the-road performance issues were related to the *individual owner's* failure to maintain the vehicle," *Tennessee*, 2019 WL 1220836, at *12, not to regulate manufacturers' nationwide updates to emissions control software across entire models or classes of vehicles.

That natural meaning is supported by the legislative history and other judicial interpretations of § 209(d). Congress enacted § 209(d) to facilitate a "reduction in air pollution" through local measures that "control [the] movement of vehicles" and encourage "alternative methods of transportation." S. Rep. No. 90-403, at 34 (1967). As Judge Breyer explained, Congress's intent in enacting § 209(d) "was to give states and local governments a tool to *lessen* the burden on vehicle manufacturers—as manufacturers are ultimately the ones that must develop and implement the technology capable of meeting federal vehicle emission standards." *Counties*, 310 F. Supp. 3d at 1047. As a result, in-use regulations must be "directed primarily to intrastate activities" and place "the burden of compliance . . . on individual owners and not on manufacturers and distributors." *Allway Taxi* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972); *see* 59 Fed. Reg. at 31,330 (EPA "expects that the principles articulated in *Allway Taxi* will be applied by the courts"). Examples of such permissible traffic-control measures—enforceable against drivers, not manufacturers—include "carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996). By contrast, "a state's assertion of control over a manufacturer's nationwide activities has nationwide economic consequences," which conflicts with Congress's determination that as "'a national industry,' automobile manufacturers require 'national emission regulation.'" *Tennessee*, 2019 WL 1220836, at *12-13 (quoting 122 Cong. Rec. 23,859 (1976)).

Reading § 209(d) to allow state and local governments to directly regulate manufacturers' conduct affecting entire models and classes of vehicles nationwide would allow the savings clause to swallow the statutory scheme. But the Supreme Court "has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory

scheme established by federal law." *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000) (internal quotation omitted).

ii. *42 U.S.C. § 7524*

The Order also requests the United States' views of the relevance to the court's preemption analysis of the penalty provisions applicable to the CAA's anti-tampering prohibition, which provide that "a person who violates § 7522(a)(3) is subject to a civil penalty of not more than a specified amount, *see id.* § 7524(a), and require[] the EPA to consider certain factors when imposing such a penalty, *see id.* § 7524(c)(2)." (Ex. A at 1.) That Congress (i) set an express cap on the penalty the EPA can impose on manufacturers for post-sale tampering, 42 U.S.C. § 7524(a), and (ii) directed the EPA as to certain factors it should consider in setting a penalty in specific cases, § 7524(b), (c)(2), further confirms that Congress envisioned exclusive EPA regulation of such conduct, where the EPA would adjust the sanction it imposed to achieve the objectives of the CAA. To the contrary, allowing 50 states and thousands of counties to impose their own pile-on penalties, based on their own environmental, enforcement, and political preferences and priorities, together with their own assessment of an appropriate sanction, would conflict with Congress's statutory scheme.

First, duplicative state and local penalties would significantly impede the EPA's ability to properly calibrate the appropriate degree of sanctions for manufacturers' CAA violations. The CAA directs the EPA to consider certain factors in assessing penalties for CAA violations—including the "gravity of the violation," "the economic benefit or savings (if any) resulting from the violations," and "the effect of the penalty on the violator's ability to continue in business," 42 U.S.C. § 7524(c)(2)—which place discretion in crafting an appropriate penalty squarely in the EPA's hands. And the EPA's detailed Civil Penalty Policy, which "establishes a framework EPA expects to use in exercising its enforcement discretion in determining an appropriate settlement amount" for violations, notably includes no mention of potential supplemental state sanctions or how to account for them.[8] Indeed, it would be virtually impossible for the EPA to strike its

[8] *See* EPA, *Clean Air Act Mobile Source Civil Penalty Policy*, *available at* http://epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf.

preferred balance in quantifying a penalty—*i.e.*, attempting to recoup the full "economic benefit component" while deterring future violations by way of a "gravity component," all tempered by, *inter alia*, a "violator's ability to pay"—if the agency had to attempt to account for unpredictable pile-on penalties from 50 states and thousands of counties nationwide. Any such penalties inevitably will reflect idiosyncratic, local conditions rather than the careful consideration of a single expert agency.[9]

Second, the potential for interference with EPA authority is starkly reflected by the sheer scale of potential pile-on penalties, which could easily exceed the maximum penalties EPA itself is allowed to impose. As Judge Breyer noted, the Counties seek penalties that could reach "$30.6 million per day and $11.2 billion per year," which would "dwarf those paid to EPA," *Counties*, 310 F. Supp. 3d at 1045—and that was for only two counties with $5,000 per-vehicle per-day penalties. Tellingly, the Counties have never disputed—including when pressed at oral argument before the Ninth Circuit—that the penalties they seek reach into the billions of dollars. (Oral Argument at 14:30-14:41, *Envt'l Protection Comm'n of Hillsborough Cty., et ano.* v. *Volkswagen Grp. of Am., et al.*, Case No. 18-15937 (9th Cir.), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034314, (Judge N.R. Smith: "Will the Counties' liability on their own be permitted to impose a penalty in excess of $11.2 billion dollars?" Counsel for the Counties: "That may be.").) And those penalties are themselves dwarfed by what other states seek. Texas, for example, seeks $25,000 per vehicle per day for more than 23,000 vehicles—over $200 billion per year. Two Texas counties—Harris and Fort Bend—

[9] For example, Harris County, Texas, has "hired three law firms to handle" its ongoing enforcement action against Volkswagen "on a contingency basis," and a county attorney promised to "'use the maximum power of the law to penalize'" Volkswagen's conduct. Gabrielle Banks, *Harris County Seeks Millions from Volkswagen for Unlawful Fumes*, Houston Chronicle (Sept. 29, 2015), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-seeks-millions-from-Volkwagen-for-6538895.php. The maximum penalty Harris County seeks is $25,000 per day of violation for each of the thousands of vehicles registered there.

likewise seek $25,000 per vehicle per day for the thousands of vehicles registered in those jurisdictions.[10]

iii. *The EPA's Settlements with Volkswagen and PCNA and the Impact of this Case on Future Settlements*

Finally, the Order asks for the United States' views as to (1) whether the EPA's settlements with Volkswagen and PCNA "were intended to foreclose subsequent state or local civil financial penalties," and (2) "the effect of this court's ruling on future settlements and federal enforcement of nationwide environmental regulations," as well as whether either of those factors is relevant to the Ninth Circuit's preemption analysis. (Ex. A at 2.)

The comprehensive nationwide settlement reached between Volkswagen, PCNA, certain of their affiliates, and the EPA in three consent decrees does not purport of its own force to foreclose tampering claims for civil penalties by states and local governments. Of course, Volkswagen, PCNA, and the EPA were aware that certain states and local governments were attempting to bring such claims, even though no state or local government had ever brought claims like those before. In fact, before the EPA's first Notice of Violation to Volkswagen, the closest any state or local government had come to pursuing claims against vehicle manufacturers based on the nationwide, model-wide installation of defeat devices was in *In re Office of Attorney Gen. of State of N.Y.*, 709 N.Y.S.2d 1 (N.Y. App. Div. 2000). In that case, despite a settlement with the EPA, the New York Attorney General issued subpoenas for discovery regarding the same underlying conduct already regulated by the EPA. *Id.* The subpoenas were quashed because the underlying claims were preempted by CAA § 209(a). *Id.* at 12-13. In so holding, the court stressed that the state was "mistaken" in its belief that it could "us[e] its powers to provide the [vehicle] manufacturer with additional incentive to comply with Federal [emissions] standards." *Id.* at 8.

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[10] Shortly after the EPA issued its first Notice of Violation, Harris County's then-chief executive made clear the county's reasons for filing a lawsuit—reasons equally applicable to every county in the country: "Volkswagen and everybody's already said this is going to be a big settlement . . . . [E]very county, every state, everybody's going to get involved. This just puts us in the line." Gabrielle Banks, *Harris County Seeks Millions from Volkswagen for Unlawful Fumes*, Houston Chronicle (Sept. 29, 2015), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-seeks-millions-from-Volkwagen-for-6538895.php.

Whether the consent decrees foreclosed the Counties' claims is *not* directly relevant, because the issue before the Ninth Circuit is whether the Counties' claims conflict with the CAA, not the consent decrees. *See Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 76 (2008) (in determining whether federal law preempts state and local law, "[t]he purpose of *Congress* is the ultimate touchstone" (quotation omitted; emphasis added)). In any event, the law in every one of the six states in which a reasoned opinion has been issued holds that claims such as those at issue here are preempted because they stand as an obstacle to Congress' purpose in the CAA.

By contrast, a ruling by the Ninth Circuit will have a profound effect on future enforcement actions by the EPA and that effect *is* relevant because a ruling in favor of the Counties would undermine the congressionally-mandated scheme under which EPA is charged with enforcing the CAA nationwide. Indeed, Congress specifically "wanted to avoid the problems that would result if automobile manufacturers had to answer to a number of *different regulators* enforcing the *same standard*." *Tennessee*, 2019 WL 1220836, at *8 n.9 (emphases added); *see also* H.R. Rep. No. 90-728 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 1938, 1957 ("[I]dentical 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."). The prospect of dozens, or even hundreds or thousands, of follow-on state and local actions seeking to penalize manufacturers' nationwide conduct will substantially interfere with the EPA's ability to secure prompt global resolution and remediation of environmental harms, as the EPA obtained here.

First, as recognized by an Illinois state court in dismissing claims identical to the Counties': "If manufacturing companies knew States could sue them based on admissions they made while settling civil and criminal actions with the federal government, they would be unlikely to make any admission with the federal government. This would certainly reduce the efficacy of the federal prosecution." *Illinois*, 2018 WL 3384883, at *13. Should *Counties* be reversed, the EPA would potentially be required to coordinate any nationwide resolution of CAA violations with the attorneys general of all 50 states, each of whom could insist on his or her own interpretation of the CAA and appropriate remedies, not to mention thousands of local governments. For example, earlier this year the EPA entered into a nationwide settlement with

Fiat Chrysler Automobiles ("FCA") stemming from the alleged model-wide installation of defeat devices in certain models of FCA's vehicles. The Non-177 States did not attempt to bring pile-on environmental or tampering claims, perhaps because *Counties*, *Wyoming*, and the state decisions mentioned above made clear that such claims would be preempted. If the Ninth Circuit reverses Judge Breyer's decision, however, pile-on claims will become far more likely, which will make it far more difficult for the EPA to reach global settlements like it did in the Volkswagen and FCA cases.

Second, even where the EPA on its own is able to reach a settlement with a manufacturer, pile-on state regulation of the same conduct could interfere with any injunctive relief secured by the EPA. This possibility is acutely present in this very case. As Judge Breyer noted, "[a]t the time of the consent decrees, EPA and Volkswagen acknowledged that there were 'no practical engineering solutions that would, without negative impact to vehicle functions and unacceptable delay,' bring the majority of the affected vehicles into compliance with existing emission standards." *Counties*, 310 F. Supp. 3d at 1046 n.7 (citations omitted). As the EPA recognized, however, simply removing those vehicles from the road would cause "undue waste and potential environmental harm." *Id.* (internal quotation omitted). The EPA thus determined that Volkswagen could offer emissions modifications that "would substantially reduce NOx emissions," even if those modifications did not bring all vehicles "into compliance with the originally certified emission standards." *Id.* (internal quotation omitted). The Counties have never disputed that their theory would permit them to punish VWGoA for updates that the EPA ordered VWGoA to install as part of the agency's federal remediation efforts. That the Counties' position would permit states or local governments to penalize manufacturers for *complying* with the EPA's instructions vividly illustrates the "anarchic patchwork of federal and state regulatory programs" that Congress intended the CAA to avoid. *Engine Mfrs. Ass'n*, 88 F.3d at 1079 (internal quotation omitted).

Third, a reversal of Judge Breyer's decision would limit the EPA's ability to regulate in the best interest of consumers. Congress was concerned that state regulation of vehicular emissions would "lead to increased costs to consumers nationwide, with benefit only to those in one section of the country." H.R. Rep. No. 90-728, at 1958. As explained above, modern

manufacturers can and do update their vehicles to improve their electronic systems, including emissions control systems, and the EPA comprehensively oversees the development and installation of those updates on a model-wide basis. (*See* Automakers *Amicus* Br. at 8-17, ECF No. 34.)

If the Ninth Circuit reverses Judge Breyer's decision, manufacturers would need to ensure that all of their model-wide updates conform not only with EPA's guidance, but also with the laws of 50 states and thousands of counties, as interpreted by local regulators and law enforcement officials in the exercise of their own prosecutorial discretion and priorities. Letting individual state and local governments regulate model-wide updates and impose penalties by labeling such updates "tampering" with in-use vehicles would chill manufacturers' incentives to update their vehicles—harming consumers with no regulatory benefit.

And this regulatory chaos would not stop at pile-on actions. The Counties assert that under the laws they seek to enforce "[a] vehicle does not have to exceed [federal] emission standards for a tampering violation to occur" (Counties Br. at 27, ECF No. 16), meaning that even full compliance with the EPA's directives would be no guarantee that manufacturers could update their vehicles without fear of massive liability. As a practical matter, manufacturers cannot simply choose to never update their vehicles as a way of avoiding liability. Such a conflict between the EPA and state and local governments will only grow as technology advances: modern emissions systems, like other parts of vehicles, are heavily reliant on software that periodically requires updating to improve performance and reliability, and to fix issues discovered after manufacturing. (*See* Automakers *Amicus* Br. at 8-9, 12, ECF No. 34.) Allowing every state and local government to regulate these updates through their tampering laws would effectively turn them into regulators of vehicle manufacturing.

As Judge Breyer recognized, "[t]his is not the type of conduct that states and local governments are in the best position to regulate." *Counties*, 310 F. Supp. 3d at 1044. Rather, it is the EPA that "is best positioned to enforce emission standards on a model-wide basis" because such issues "almost invariably affect vehicles in states and counties throughout the country," and the EPA may rely on testing data and its preexisting relationships with manufacturers stemming from the pre-sale certification process in such enforcement efforts. *Id.* at 1043. And as the

Tennessee court stressed, given "the complexity of automobile engineering, having the manufacturer answer to a single regulator when the nonconformity concerns the design of the vehicle, whether new or used, makes the emissions control process more efficient and less costly." *Tennessee*, 2019 WL 1220836, at *12.

2. The Counties' Claims Are Also Preempted by the Clean Air Act's Broad Express Preemption Provision

Although the Order does not specifically seek the United States' view as to whether the Counties' claims are expressly preempted by CAA § 209(a), which prohibits states 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," 42 U.S.C. § 7543(a) (emphases added), VWGoA, PCNA, and Bosch LLC have maintained throughout this litigation that they are. Judge Breyer determined that the Counties' claims were conflict-preempted, but two other courts have found software-update claims to be *expressly* preempted: *Alabama* v. *Volkswagen AG*, 2017 WL 6551054 (Ala. Cir. Ct. Dec. 19, 2017); *Missouri,* 2018 WL 3349094. Consideration of the CAA's express preemption provision further demonstrates why, as a result of the CAA's structure and allocation of responsibilities, the Counties' claims are both expressly and conflict-preempted.

Section 209(a) 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." 42 U.S.C. § 7543(a) (emphasis added). Section 209(a) is a "sweeping preemption provision," *Jackson* v. *General Motors*, 770 F. Supp. 2d 570, 573 (S.D.N.Y. 2011), which Congress intended "to have a broad preemptive effect," *In re Office of Attorney Gen. of State of N.Y.,* 709 N.Y.S.2d 1, 9 (N.Y. App. Div. 2000). Congress's intent that § 209(a) be interpreted expansively is confirmed by Congress's use of the phrase "relating to," a phrase the U.S. Supreme Court has explained is "conspicuous for its breadth," *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990) (internal quotation omitted), "express[es] a broad pre-emptive purpose," *Morales*, 504 U.S. at 383, and "indicates Congress' intent to pre-empt a large area of state law," *Altria*, 555 U.S. at 85.

Applying this precedent to § 209(a), "enforcement actions that have any 'connection with or reference to' the control of emissions from motor vehicles are

preempted." *Jackson*, 770 F. Supp. at 577 (quoting *Morales*, 504 U.S. at 384). As the EPA has explained, permissible state regulations cannot "amount to a standard relating back to the original design of the engine by the original engine manufacturer." 59 Fed. Reg. 31,306, at 31,313 (June 17, 1994) ("[C]ertain state regulations that may be characterized as 'in-use' regulations may be preempted because they are effectively regulations on the design of new engines.").

The Counties' claims here fit squarely within the broad scope of § 209(a). Post-sale software updates to the factory-installed defeat device necessarily "relate back" to the original design of the emissions controls, because if the defeat devices had not been installed in the factory, Volkswagen never would have made updates to "help the defeat devices work more effectively." (Counties Br. at 1, ECF No. 16). The Counties argue that their anti-tampering regulations are not "standards" because they "do not mandate emissions control systems," but rather "just prohibit anyone from tampering with or disabling such systems." (*Id.* at 25.) But the Supreme Court has explained that explained that § 209(a) encompasses all state or local regulations concerning "emission-control technology" or requiring "a certain type of pollution-control device," *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004), and a "standard" is no less a "standard" because it *prohibits*, rather than *compels*, a "design feature relating to emissions control." *Jensen Fam. Farms* v. *Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 940 (9th Cir. 2011). Regardless of what their anti-tampering regulations *generally* prohibit, here the Counties seek to use those regulations to penalize Defendants for installing claimed defeat devices in new vehicles, and "it is clear that a rule that prohibits a person from installing a defeat device in a vehicle prior to registration is a 'standard relating to the control of emissions from new motor vehicles.'" *Wyoming*, 264 F. Supp. 3d at 1052 (quoting 42 U.S.C. § 7543(a)).

As explained above, modern emissions systems, like other parts of vehicles, are heavily reliant on software that periodically requires updating to improve performance and reliability, and to fix issues arising after manufacturing. (*See* Automakers *Amicus* Br. at 8-9, 12, ECF No. 34.)[11] Indeed, the CAA and EPA require emissions control equipment to meet their

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[11] In an *amicus* brief filed last Term, the United States cited *South Coast* (among other cases) in support of the proposition that "a State cannot escape preemption simply by regulating a stage of the production process or stream of commerce that lies outside the area of direct federal

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regulatory standards throughout their full useful life, and when significant deficiencies are founds, EPA can mandate recalls and updates. 42 U.S.C. § 7521(a)(1); 42 U.S.C. § 7541(c)(1). It would be impossible for EPA to fulfill its mandate, and for manufacturers to comply with EPA's directives, if the manufacturers would be subjected to penalty and injunctive actions by States and local governments for doing so.

This analysis supports the conclusion that the sweeping express preemption provision in § 209(a) provides an independent basis for concluding that the Counties' claims are preempted. (*See* VW Br. at 62-65, ECF No. 28.)

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regulation." Brief for the United States as Amicus Curiae Supporting Petitioners, *Virginia Uranium, Inc.* v. *Warren*, No. 16-1275, at 28 (July 26, 2018). That principle squarely applies to the Counties' claims here, which, by allowing every state and local government to separately regulate manufacturer *updates* to emissions control software, would effectively make the federal scheme impossible to apply in a uniform nationwide manner.

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We would appreciate the opportunity to meet with you to discuss these issues further. Please contact us if you have any questions.

Sincerely,

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