No. 18-15937

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION (MDL NO. 2672)

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Nos. 16-cv-2210 & 16-cv-5649
Hon. Charles R. Breyer

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Plaintiffs-Appellants are governmental parties. Therefore, no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

Date: October 4, 2018

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INTRODUCTION

For some eight years, from model years 2009 through 2016, Volkswagen ("VW") and its subsidiaries, Audi and Porsche (collectively, "Volkswagen" or "Defendants"), flouted federal, state, and local laws designed to protect air quality and public health and safety by placing over half a million cars on the road that exceeded permissible emissions levels by as much as 35 times. They did this by installing so-called defeat devices on the vehicles—software that allowed emission controls to operate when the vehicles were being tested ("dyno mode") but that turned off the emission controls when the vehicles were being driven ("road mode"). Not only did the vehicles come from the factory equipped with defeat devices, but when the devices in some vehicles stopped working as designed, after the vehicles had been certified, sold, and in use for some time, Volkswagen provided dealers and mechanics with "fixes"—new software—to help the defeat devices work more effectively.

When Volkswagen was finally caught, it faced a number of lawsuits. The United States sued Volkswagen both civilly and criminally. Owners of the affected vehicles also sued, as did dealers, who were facing angry customers and inventory that could not now be sold, and investors, who saw the value of their stock decrease. Many civil cases were consolidated into a single multidistrict

litigation in the Northern District of California (MDL no. 2672), before the Honorable Charles R. Breyer.

The Environmental Protection Commission of Hillsborough County, Florida, and Salt Lake County, Utah (collectively, the "Counties"), were among the state and local governments that sued Volkswagen for violating state and local laws that prohibit tampering with emission control devices. Judge Breyer granted the Defendants' motion to dismiss the Counties' claims, holding that the Counties' enforcement mechanisms were preempted (impliedly, if not expressly) by the federal Clean Air Act ("CAA").

In enacting the CAA, Congress intended for state and local governments to be partners with the federal government in achieving National Ambient Air Quality Standards ("NAAQS"). Rather than preempting state and local action, Congress explicitly preserved in the CAA the power of states and local governments to regulate vehicles "in use." The Counties did so by implementing and enforcing emissions programs and rules that prohibited any person from tampering with a vehicle's emission control system. The Defendants violated the Counties' anti-tampering rules in two ways: first, by equipping new vehicles with software that turned off the emission controls whenever the vehicles were operated on county roads, and, second, by providing new software to be installed on used vehicles when they were brought in for maintenance or recalls. Enforcement of the

Counties' anti-tampering rules does not interfere with Congress's purpose of protecting the environment and consequently public health and safety. Thus, the Counties' claims are not preempted.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these cases under 28 U.S.C. § 1332 (diversity). The Hillsborough County case was originally filed in the U.S. District Court for the Middle District of Florida. The Salt Lake County case was originally filed in a Utah state court and removed to the U.S. District Court for the District of Utah. The Judicial Panel on Multidistrict Litigation transferred the cases to the Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation pending in the U.S. District Court for the Northern District of California, MDL No. 2672 CRB (JSC). On April 16, 2018, the district court entered an order granting the defendants' motions to dismiss the amended complaints of Hillsborough and Salt Lake Counties. The order dismissed all of the counties' claims against all defendants in their entirety and with prejudice.[1]

[1] *See* Excerpts of Record ("ER") at 30. The district court's decision is published at *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018).

The counties filed their notice of appeal on May 15, 2018.[2] This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.[3]

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

ISSUE PRESENTED

Whether the district court erred in holding that all of the Counties' claims against the Defendants for tampering with emission controls on their vehicles driven in the counties were preempted where Congress expressly authorized "any State or political subdivision thereof" to "control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."

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[2] ER at 1-2.

[3] On June 7, 2018, this Court issued an Order to show cause why the case should not be dismissed on the grounds that the district court's order may not have disposed of the action as to all claims and all parties. (Appellate Dkt. Entry 5.) The appellants responded to the Order, explaining why the Court has jurisdiction over this appeal. (*See* Appellate Dkt. Entry 6.) The defendants-appellees did not file any response and did not dispute that the Court had jurisdiction. On August 1, 2018, the Court issued an Order discharging the order to show cause and setting a briefing schedule. (Appellate Dkt. Entry 13.)

STATEMENT OF THE CASE[4]

A. Facts

From 2009 through 2015 (model year 2016), VW and its subsidiaries[5] caused certain software, known as a "defeat device," to be installed on some 585,000 vehicles sold in the United States. The software caused the vehicles' emission control devices to work when the vehicles were being tested for emissions but not when they were driven on the road.[6] The net effect of this scheme was that the vehicles emitted up to 35 times the permissible limit of nitrogen oxides (NOx) and other pollutants.[7]

In about 2012, Volkswagen learned of hardware failures in certain of the subject vehicles in use in the United States. Those failures were caused by the vehicles remaining in dyno (or "test") mode under road conditions, which caused increased stress on the vehicles' exhaust systems. The resulting damage caused

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[4] The facts in the Statement of the Case are taken primarily from the Statement of Facts accompanying Volkswagen AG's Rule 11 Plea Agreement in the Eastern District of Michigan. (*See* ER at 32-61.) VW admitted in that agreement that the factual allegations in the Statement of Facts (Exhibit 2 to the plea agreement) are true and that "it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding." R. 11 Plea Agreement, *U.S. v. Volkswagen AG*, No. 16-CR-20394, doc. 68 (E.D. Mich. Mar. 10, 2017), at 7.

[5] Audi and Porsche are subsidiaries of VW. *See* ER at 4 & n.1. VW, Audi, and Porsche will be referred to collectively as "Volkswagen."

[6] *See* ER at 43-45, ¶¶ 33-38; 58, ¶ 72.

[7] ER a 43-44, ¶ 34.

significant warranty problems for Volkswagen, which had to reimburse customers or dealers for the hardware failures. To avoid hardware failures, Volkswagen added a "steering wheel angle recognition" feature that interacted with the vehicle's software to detect more accurately when the vehicle was being tested for emissions. Volkswagen provided new software to be installed on existing, "in use" vehicles during maintenance and recalls. The software updates did nothing to reduce emissions but only improved the defeat devices' function, allowing the vehicles to pollute more than they had before the updates.[8]

B. Procedural History and District Court Ruling

Salt Lake County sued Volkswagen Group of America, Inc., and Audi of America, LLC, in a Utah state court. After Salt Lake County amended its complaint to allege additional claims for relief, the defendants removed the case to federal court based on diversity of citizenship, and the case was transferred to the multidistrict litigation ("MDL") pending before Judge Breyer in the Northern District of California. Salt Lake County later amended its complaint to add Porsche Cars North America, Inc., as a defendant and to clarify its factual allegations. Salt Lake County's third amended complaint alleges that the Defendants' conduct violated Utah statutes and regulations prohibiting (among other things) anyone from removing or making inoperable an emission control

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[8] ER at 49-51, ¶¶ 47-51.

device.[9] It also alleged that the defendants' conduct was fraudulent, violated Utah's Pattern of Unlawful Activity Act ("PUAA"),[10] and created a public nuisance.[11]

Hillsborough County sued Volkswagen AG (the German parent company); Volkswagen Group of America, Inc. (its U.S. company); Audi AG (the German company); Audi of America, LLC (its U.S. company); Dr. Ing. H.C. F. Porsche AG (the German company); Porsche Cars North America, Inc. (its U.S. company); Robert Bosch GmbH (the German company); and Robert Bosch LLC (the U.S. company),[12] in the United States District Court for the Middle District of Florida. The case was then transferred to the MDL. Hillsborough County's first amended complaint alleges that Volkswagen's conduct violated Rule 1-8 of the Environmental Protection Commission of Hillsborough County ("EPC"), which prohibits anyone from tampering or allowing tampering with a vehicle's emission control system or from manufacturing, installing, or selling any defeat device.[13]

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9 ER at 127 (citing Utah Code Ann. § 26A-1-123(1) and Utah Admin. Code R307-201-4).

10 UTAH CODE ANN. §§ 76-10-1601 through -1609.

11 ER at 127-31.

12 Robert Bosch GmbH and Robert Bosch LLC (collectively, "Bosch"), designed, manufactured, and supplied the defeat device software to Volkswagen. (*See* ER at 67-68, ¶ 18.)

13 ER at 111-12.

While the Counties' cases were pending, the MDL court granted the Defendants' motion to dismiss similar claims by the State of Wyoming.[14] Wyoming chose not to appeal that decision. Based on the court's reasoning in that decision, the Defendants moved to dismiss the Counties' complaints.[15]

Counsel for the parties conferred. The Counties' counsel explained that they would be seeking leave of court to amend their complaints to distinguish some of the factual allegations in their complaints from those that the district court had relied on in dismissing the Wyoming case and to clarify that they were alleging, among other things, that the Defendants continued to tamper with certain vehicles' emissions control devices after the vehicles were placed in operation on county roads. The Defendants agreed to allow the Counties to file amended complaints, which the Counties did.[16] In addition to clarifying the Counties' factual allegations, Hillsborough's amended complaint dropped as parties the defendants' foreign parent companies, and both counties dropped any claim for injunctive relief. The Defendants then filed new motions to dismiss for failure to state a

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[14] *See* ER at 133-56, published at *Wyo. V. Volkswagen Grp. of Am., Inc.* (*In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.)*, 264 F. Supp. 3d 1040 (N.D. Cal. 2017).

[15] *See* Docs. 4261 & 4262.

[16] *See* ER at 115-32 (Salt Lake County's Third Amended Complaint) & 62-114 (Environmental Protection Commission of Hillsborough County's First Amended Complaint).

claim.[17] The motions were fully briefed,[18] and the district court heard arguments on the motions.[19]

On April 16, 2018, the district court issued an order granting the Defendants' motions to dismiss with prejudice, concluding that all of the Counties' claims were preempted.[20] This appeal followed.[21]

SUMMARY OF ARGUMENT

For some eight years, the Defendants flouted federal, state, and local laws meant to clean up the nation's air. They did this through a scheme to evade emissions controls for both new and used vehicles. They equipped their diesel vehicles with software that turned off the emissions controls whenever the vehicles were in operation on roads. When the software did not work properly, they then told users to bring their cars in for maintenance or recalls and replaced the faulty software with new software that enabled the cars to continue to pollute the atmosphere. Hillsborough County, Florida, and Salt Lake County, Utah, sued the Defendants for damages caused by the added pollution in their jurisdictions.

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17 *See* Docs. 4583 (VW's motion to dismiss against both Counties) & 4584 (Bosch's motion to dismiss against Hillsborough County).

18 *See* Docs. 4583, 4584, 4640, 4641, 4668, & 4670.

19 *See* Doc. 4715 (Transcript, Feb. 1, 2018).

20 ER at 30.

21 ER at 1-2. *See also supra* note 3 for the subsequent history in this Court.

The district court held that all of the Counties' claims were preempted. It concluded that their claims based on the original defeat-device software were expressly preempted and that their claims based on the subsequent tampering were impliedly preempted.

Whether a claim based on state or local law is preempted by federal law depends on Congress's intent. The benchmarks for discerning the "purposes and objectives" of Congress—text, history, and agency interpretations—all point in one direction. Congress deliberately crafted the Clean Air Act (CAA) to preserve States' primary responsibility for air quality and made the federal government a partner with them in maintaining air quality within their jurisdictions. The line Congress drew was not between individual vehicles and whole models—the line the district court drew—but between enforcement of standards for new motor vehicles and the regulation of the use, operation, and movement of registered or licensed motor vehicles.

The anti-tampering laws the Counties are trying to enforce do not attempt to set any standard for emissions controls, nor do they impose any requirements for the design of new engines. They simply prevent anyone from tampering with (such as turning off) whatever emission control system the vehicle comes equipped with. They do not require any new design for new vehicles and thus do not

interfere with interstate commerce. And they only apply to vehicles that are registered or licensed in their jurisdictions and in use on county roads.

Similarly, they do not interfere with the cooperative federalism that Congress intended when it enacted the CAA. They do not create a "patchwork" of emissions standards or otherwise burden interstate commerce. They simply prohibit anyone—be it a manufacturer, a vehicle owner, or the neighborhood mechanic—from engaging in post-sale conduct that tampers with the emissions control systems of vehicles in use on county roadways. Thus, they are not impliedly preempted either.

The Court should therefore reverse the district court's decision and remand these cases for further proceedings.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COUNTIES' CLAIMS WERE PREEMPTED.[22]

A. Standard of Review

A dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim (without leave to amend) is reviewed de novo.[23]

On review of a Rule 12(b)(6) motion, this Court accepts "all factual allegations in the complaint as true," construes the pleadings "in the light most favorable to the nonmoving party," and draws "all reasonable inferences in favor of" the plaintiffs.[24] To survive a motion to dismiss, it is only necessary that the plaintiff allege in its complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[25] A claim has "facial plausibility" when the facts alleged by the plaintiff would allow the court "to draw the

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[22] Whether the Counties' claims were preempted was raised in the Defendants' motions to dismiss (docs. 4583 & 4584), in the Counties' memoranda in opposition (docs. 4640 & 4641), and in the reply memoranda (docs. 4668 & 4670), as well as at oral argument (doc. 4715). The district court ruled on the issue in its order dismissing the cases. ER at 30.

[23] *E.g.*, *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

[24] *E.g.*, *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011) (citations and internal quotation marks omitted). *See also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009) (on an appeal from the grant of a motion to dismiss, the court will "assume the truth of the facts as alleged in [the] complaint").

[25] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

reasonable inference that the defendant is liable for the misconduct alleged."[26] Where, as here, the complaint's concrete allegations state a claim for relief, a case should not be dismissed under Rule 12(b)(6) unless "'it appears beyond doubt that the non-movant can prove no set of facts to support its claims.'"[27]

B. The Clean Air Act Was Meant to Establish a Partnership Between the States and the EPA.

The Defendants moved to dismiss the Counties' complaints on the grounds that (among other things) their claims were all preempted by the Clean Air Act (CAA).[28] The district court concluded that the Counties' claims based on the manufacture and installation of defeat devices on new vehicles that were later registered in the Counties were expressly preempted by the CAA.[29] The court further held that, even though the Counties' claims based on post-sale software changes to the vehicles were not expressly preempted by the CAA,[30] they were impliedly preempted.[31]

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26 *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

27 *Ass'n for Los Angeles Deputy Sheriffs*, 648 F.3d at 991 (citation omitted). *See also Twombly*, 550 U.S. at 563 (the "no set of facts" language describes "the breadth of opportunity to prove what an adequate complaint claims").

28 42 U.S.C. §§ 7401 et seq.

29 ER at 14.

30 *Id.*

31 *See id.* at 26, 29, 30. Alabama, Illinois, and Missouri courts have anticipated or followed the district court's decision dismissing claims for so-called recall tampering. *See State v. Volkswagen AG*, No. CV-2016-903390.00 (Jefferson Cnty., Ala., Cir. Ct. Dec. 18, 2017); *People v. Volkswagen Aktiengesellschaft*, No.

Before the CAA, states and local governments alone were responsible for air quality within their borders. In enacting the CAA, Congress intended the states to maintain their primary role: "The Congress finds that air pollution prevention (that is, the reduction or elimination, *through any measures*, of the amount of pollutants produced or created *at the source)* and air pollution control *at its source* is the *primary responsibility of States and local governments.*"[32] Congress further provided that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."[33] Congress gave the EPA power to set emissions standards, but it recognized that "[a]ll levels of government had to be given adequate tools to enforce those standards"; indeed, the "most effective enforcement of standards would take place on the State and

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16-CH-14507, 2018 WL 3384883 (Cook Cnty., Ill., Cir. Ct. June 5, 2018); Order & Judg't, *State v. Volkswagen Aktiengesellschaft*, No. 1622-CC10852-01, at *6 (22nd Jud. Circuit Ct., St. Louis, Mo., June 26, 2018). Minnesota, Tennessee, and Texas courts have allowed recall tampering claims. *See* Order for Partial Dismissal, *State v. Volkswagen Aktiengesellschaft*, No. 27-CV-16-17753, at *1 (4th Jud. Dist. Ct., Hennepin Cnty., Minn., Mar. 9, 2018); Order Granting in Part & Denying in Part Defs.' Mot. to Dismiss for Failure to State a Claim, *State v. Volkswagen Aktiengesellschaft*, No. 16-1044-C, at *8-9 (Ch. Ct., Davidson Cnty., 20th Jud. Dist., Tenn., Mar. 20, 2018); Order Granting in Part & Denying in Part Volkswagen & Porsche Defs.' Mot. for Summ. J. & Special Exceptions, *In re Volkswagen Clean Diesel Litig.: TCAA Enforcement Case*, Master File No. D-1-GN-16-000370, at *1 (353rd Jud. Dist. Ct., Travis Cnty., Tex., Apr. 11, 2018). The Alabama, Illinois, Minnesota, and Texas decisions are currently on appeal.

[32] 42 U.S.C. § 7401(a)(3) (emphasis added).

[33] *Id.* § 7407(a).

local levels."[34] For that reason, Congress expressly preserved the states' enforcement power for both stationary and mobile sources.[35] The CAA "made the States and the Federal Government partners in the struggle against air pollution."[36] The CAA is "a program based on cooperative federalism," not "centralized federal control."[37] The CAA establishes "a comprehensive program for controlling and improving the nation's air quality *through state and federal regulation.*"[38]

The "overriding purpose" of the CAA "is to force the states to do their jobs in regulating air pollution effectively so as to achieve baseline air quality standards."[39] Section 116 of the CAA provides that, except as otherwise provided in, among other sections, section 209 (the preemption section), "nothing in [the CAA] shall preclude or deny the right of any State *or political subdivision* thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," as long as the state or political subdivision does not adopt or enforce an emission

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[34] Senate Consideration of the Report of the Conference Committee (Dec. 18, 1970), *reprinted in* 1 A Legislative History of the Clean Air Act Amendments of 1970 (Jan. 1974), serial no. 93-18 ("CAA Legislative History"), at 127.

[35] *See* 42 U.S.C. §§ 7416 & 7543(d).

[36] *Gen. Motors Corp. v. U.S.*, 496 U.S. 530, 532 (1990).

[37] *EPA v. EME Homer City Generation, LP*, 572 U.S. 489, 134 S. Ct. 1584, 1617 (2014). *See also Conn. v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982) (the CAA is "a bold experiment in cooperative federalism").

[38] *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821-22 (5th Cir. 2003) (emphasis added).

[39] *Exxon Mobile Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000).

standard less stringent than the standard under its implementation plan or federal statute.[40] The regulations at issue here do not adopt or enforce emissions standards less stringent than the federal standards and thus are consistent with the CAA.

1. The CAA's Express Preemption Provision Was Meant to Prevent Conflicting Emissions Standards for New Vehicles.

Section 209(a), the CAA's express preemption provision, states, in relevant part:

> **(a) Prohibition**
>
> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.[41]

Section 209(a) was enacted to address a specific problem—to keep states from adopting emissions standards for new motor vehicles that conflicted with federal standards.[42] Congress feared "the spectre of an

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40 42 U.S.C. § 7416 (emphasis added).

41 *Id.* § 7543(a).

42 *See Motor Vehicle Mfrs. Ass'n of U.S. v. N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994).

anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers."[43]

Congress could have preempted the entire field of vehicle emissions regulations, but it chose not to. Nor did it preempt state and local governments from regulating vehicle manufacturers. Instead, it limited the scope of section 209(a) preemption to "new motor vehicles or new motor vehicle engines."

2. The CAA Expressly Reserves to States and Their Political Subdivisions the Power to Regulate Used Vehicles.

"Because federal motor vehicle emission control standards apply only to new motor vehicles, States . . . retain broad residual power over used motor vehicles."[44] Congress made this delineation explicit in section 209(d) of the CAA:

> **(d) Control, regulation, or restrictions on registered or licensed motor vehicles**
>
> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.[45]

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43 *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (footnote omitted).

44 *Wash. v. Gen. Motors Corp.*, 406 U.S. 109, 115 n.4 (1972).

45 42 U.S.C. § 7543(d).

As other courts have recognized, section 209(d) "safeguards the historic power of 'states to adopt in-use regulations'" for cars.[46] Subsection (d) "preserves the field of regulation of *old* motor vehicles to state control *ab initio.*"[47]

The Counties' actions were meant to help achieve air quality standards within the counties.[48] As political subdivisions of their respective states (Florida and Utah), the Counties have a role in regulating air pollution, as the CAA recognizes. By tampering with their vehicles' emissions controls for nearly a decade, the Defendants made it more difficult for the Counties to attain baseline air quality standards, cheated the effectiveness of their inspection and maintenance programs, and threatened the health of their citizens.[49]

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[46] *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 538 n.6 (5th Cir. 2013) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996)).

[47] *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1107 n.19 (D.C. Cir. 1979) (italics in original).

[48] Hillsborough County is the fourth largest county in Florida, and Salt Lake County is the largest county in Utah. They are the nation's 30th and 39th most populous counties, respectively. Hillsborough County has 6.6% of Florida's population, and Salt Lake County has 37% of Utah's population. If the two counties were a state, they would be the 36th most populous state.

[49] In December 2017, for example, the EPA notified Utah's governor that, based on air quality data for 2014-16, Salt Lake County has more ozone in the air than is considered safe and that the EPA intended to designate it a "nonattainment area." The numbers for 2017 were expected to be even worse. Cars are the predominant source of ozone. *See* Emma Penrod, *Utah Has to Rein in Ozone, Feds Say*, SALT LAKE TRIB., Jan. 5, 2018, at A1, A4.

Congress added the CAA's preemption provision in 1967 and did not change it in the 1970 amendments to the CAA,[50] despite a proposal to let states fix their own, more stringent standards for new vehicles. Both the Administration and the Automobile Manufacturers Association opposed the proposal, on the grounds that manufacturers could not produce different vehicles for different states, but also because states could still regulate emissions from other than new cars.[51] The manufacturers recognized that "the existing preemption provisions are quite narrow and of limited applicability";[52] they only prevented the states from establishing emission standards for *new* motor vehicles and reserved to the states "the right to regulate motor vehicles in all other respects including emission standards for vehicles in *use*."[53]

Once the EPA establishes federal standards, each state is responsible for developing a plan to ensure that the federal standards will be achieved and enforced. The EPA approves these State Implementation Plans ("SIPs"). At least eleven times, the EPA has approved a state's submission of an anti-tampering

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[50] *Compare* Pub. L. 90-148, 81 Stat. 485, 501 (Nov. 21, 1967), *with* 42 U.S.C. § 7543.

[51] *See generally* Administration's Letter to Conference Comm. Recommending Certain Provisions, Nov. 17, 1970, *reprinted in* 1 CAA Legislative History at 213-14; Letter, Automobile Mfrs, Ass'n to Elliot L. Richardson, Aug. 27, 1970, *reprinted in* 1 CAA Legislative History at 725-26.

[52] Letter, Auto. Mfrs. Ass'n, *supra* note 51, *reprinted in* 1 CAA Legislative History, at 726.

[53] *Id.* (emphasis in original).

regulation or inspection as part of its approval of a state's SIP submission,[54] essentially finding that such regulations are not preempted but comport with principles of federalism.[55] When a state plan has conflicted with the federal anti-tampering policy, the EPA has disapproved the plan.[56] In the process, the EPA has recognized that "it is the responsibility of the State and local governments to adopt the measures necessary to allow attainment of the ozone standards. A State or local government is free to adopt and enforce an anti-tampering law on its own, if it feels that such a law would contribute to reducing motor vehicle emissions."[57] It

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[54] *See* 70 Fed. Reg. 50199 (Aug. 26, 2005) (approving Tennessee anti-tampering regulation); 70 Fed. Reg. 21384 (Apr. 26, 2005) (approving Pennsylvania inspection and maintenance ("I&M") anti-tampering program); 63 Fed. Reg. 69589 (Dec. 17, 1998) (approving New Hampshire I&M anti-tampering testing); 61 Fed. Reg. 15715 (Apr. 9, 1996) (approving Illinois I&M anti-tampering inspection); 55 Fed. Reg. 36290 (Sept. 5, 1990) (approving Oklahoma's anti-tampering regulations for Tulsa County); 52 Fed. Reg. 4921 (Feb. 18, 1987) (approving Utah's I&M anti-tampering program for Utah County); 51 Fed. Reg. 34669 (Sept. 30, 1986) (approving Oklahoma's anti-tampering program for Oklahoma County); 50 Fed. Reg. 30960 (July 31, 1985) (approving Indiana anti-tempering regulation); 50 Fed. Reg. 5630 (Feb. 11, 1985) (approving Missouri's I&M anti-tampering inspection for St. Louis); 49 Fed. Reg. 31086 (Aug. 3, 1984) (approving Texas's anti-tampering regulations for Harris County); 37 Fed. Reg. 10842 (May 31, 1972) (approving anti-tampering regulations or I&M programs of various states, including Alabama and Wyoming).

[55] *See Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 510 (9th Cir. 2015) (the EPA's approval of a state SIP provision is effectively a legal determination that federal law does not prohibit the regulation).

[56] *See, e.g.*, 63 Fed. Reg. 6651 (Feb. 10, 1998) (disapproving Texas's proposed anti-tampering provisions and exemptions as inconsistent with the CAA and the EPA's anti-tampering enforcement policy).

[57] 51 Fed. Reg. 10198, 10206 (Mar. 25, 1986).

has further recognized that, in spite of the EPA's enforcement authority, "many states do have [anti-tampering] rules and use them successfully as enforcement tools for," among other things, "deterrence of tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations."[58] In short, for decades the EPA has approved of and encouraged states and their political subdivisions to enforce anti-tampering laws alongside the EPA.

The current administration has re-emphasized states' primary role in enforcing the CAA within their borders. The EPA Administrator appointed in 2017 told Congress that "federalism matters" and that, "to achieve good outcomes as a Nation for air . . . quality, we need the partnership of the States," since it is "our State regulators who oftentimes best understand the local needs and the uniqueness of our environmental challenges" and who "possess the resources and expertise to enforce our environmental laws."[59] Consequently, the Administrator recognized the need to respect the authority granted to the States under SIPs.[60] Consistent with the administration's agenda, the President's FY2018 budget called for a 31% decrease for the EPA, funded in part by avoiding "duplication by concentrating EPA's enforcement of environmental protection violations on

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58 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998).
59 ER at 164.
60 *See id.* at 164, 166, 167-68.

programs that are not delegated to States, while providing oversight to maintain consistency and assistance across State, local, and tribal programs."[61]

C. The Counties' Claims Are Not Expressly Preempted by the CAA.

As the party arguing for preemption, the Defendants had the burden below to show that immunizing vehicle manufacturers like them from state and local anti-tampering rules was the "clear and manifest purpose of Congress."[62] They failed to meet that burden. The Counties' claims are not expressly preempted.[63]

In "identify[ing] the domain expressly pre-empted," the court must give the "precise language" of the act a "fair but narrow reading."[64] The CAA's express preemption provision, section 209(a), only preempts states and political subdivisions 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 subject to this part."[65] The challenged regulations do nothing of the sort.

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61 AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 41.

62 *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations omitted).

63 The district court agreed with respect to the Counties' attempts to regulate the Defendants' post-sale changes to their defeat devices. *See* ER at 14.

64 *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 523 (1992) (internal quotation marks and citations omitted).

65 *See* 42 U.S.C. § 7543(a). It further prohibits any state from requiring "certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." *Id.*

Section 209(a) was not meant "to hamstring localities in their fight against air pollution but to prevent . . . burden[s] on interstate commerce" that would result if, "instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars."[66] For section 209(a) to preempt a state or political subdivision's regulation, the regulation must (1) adopt or attempt to enforce a "standard," (2) that relates to the control of emissions, (3) from "new" motor vehicles subject to Part A of Subchapter II (dealing with motor vehicle emission and fuel standards). The reason for giving the EPA (and California)[67] exclusive control over establishing emissions standards is to avoid forcing manufacturers to design a "third vehicle," that is, a vehicle that meets an emission standard different from those established by the EPA and California. Anti-tampering regulations do not require any manufacturer to design a "third vehicle"; they just prohibit tampering with whatever emission control device the manufacturer adopts to meet federal

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[66] *Allway Taxi, Inc. v. City of N.Y.*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

[67] Congress granted California an exemption from preemption under § 209(a). *See* 42 U.S.C. § 7543(b)(1). California was the only state that qualified for this exemption. *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 & n.9 (D.C. Cir. 1996). California has adopted its own vehicle emissions standards, and other states may choose to adopt California's standards rather than the EPA's, under section 177 of the CAA, 42 U.S.C. § 7507. But states may not take any action that has the effect of creating a "third vehicle." 42 U.S.C. § 7507. Neither Florida nor Utah has adopted California's standards.

standards. At all times Volkswagen had the choice over the design and manufacture of its vehicles and the engines installed in them. It is when it chose to turn off the vehicles' emission controls that the Defendants crossed the line.

The CAA's preemption provision was meant to prevent compliant companies from facing fifty different state requirements. There is no policy reason to allow companies (like Volkswagen) that have thwarted the regulatory programs of the CAA through deception to take advantage of its preemption provision. The CAA was meant to protect against a requirement that a manufacturer construct a vehicle other than one that met either the EPA standard or the California standard. It was not intended to protect a manufacturer who hid the fact that its vehicles met neither standard.

In any event, under the plain language of section 209(a), the statutes and regulations at issue in this case are not preempted by the CAA.

1. The Anti-Tampering Regulations Do Not Adopt and the Counties Are Not Trying to Enforce Any Emissions Standards.

The laws on which the Counties' claims are based do not involve any emissions standard. For a criterion to be a "standard,"

> the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of "standard" throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical

> emission levels with which vehicles or engines must comply or emission-control technology with which they must be equipped.[68]

The "standards" that states and political subdivisions are prohibited from attempting to enforce are those set out in section 202 of the CAA, 42 U.S.C. § 7521 ("Emission standards for new motor vehicles or new motor vehicle engines").[69] The Counties' anti-tampering regulations do not adopt any standards,[70] nor do they attempt to enforce any emissions standard; in fact, the regulations do not even require the existence of an emissions standard. They do not mandate emissions control systems; they just prohibit anyone from tampering with or disabling such systems. A manufacturer can install a superior emissions control device, a passable device, or no device at all. But neither the manufacturer nor anyone else may tamper with or disable such a system once it has been installed. Moreover, as the district court recognized, the "triggering acts" subject to anti-tampering regulations could be performed by anyone, not just a manufacturer.[71] The regulations merely prohibit anyone from disabling whatever

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[68] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist. ["EMA"]*, 541 U.S. 246, 253 (2004) (citations omitted).

[69] *EMA*, 541 U.S. at 253.

[70] *See Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1308 (2d Cir. 1996) (requiring strict adherence to standards does not itself *create* a standard).

[71] *See* ER at 179 ("the act triggering liability [under anti-tampering laws] could, for example, be performed by someone using their hands to physically disconnect a vehicle's emission control system").

system is installed, whether it is disabled at the time of manufacturing or later, after the vehicle has been sold and is being operated on the road.[72] Because the laws do not involve any "standard," they are not preempted under section 209(a).[73]

2. The Counties Are Not Trying to Enforce Any Standard "Relating to" the Control of Emissions.

The regulations at issue also do not attempt to enforce any standard "relating to" the control of emissions within the meaning of section 209(a):

> Although the Supreme Court has recognized that "relating to," as used in other federal statutes, suggests "a broad pre-emptive purpose," . . . the plain language of the CAA's preemption provision does not foreclose all state common law actions involving alleged defects in engines manufactured and sold to comply with applicable emissions standards.[74]

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[72] *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444-45 (2005) (a claim for breach of express warranty was not preempted by a statute prohibiting states from imposing labeling requirements different from federal law because it did not require the manufacturer to make an express warranty or to say anything in particular; it just required the manufacturer to make good on the contractual commitment it voluntarily undertook when it placed its warranty on its product).

[73] *Cf. Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 538 n.6 (5th Cir. 2013) (because the state law in question was not a "standard" under section 209(a), the court did not have to reach other issues).

[74] *In re Caterpillar, Inc.*, No. 1:14-cv-3722 (JBS-JS), 2015 WL 4591236, at *10 (D.N.J. July 29, 2015) (citation omitted). *See also Altria Grp. v. Good*, 555 U.S. 70, 77 (2008) ("When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.") (internal quotation marks and citations omitted); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere' . . . . But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against

Volkswagen's tampering with the emissions control systems on the vehicles it sold caused the emissions control systems to stop operating when the vehicles were driven. But whether or not the tampering had any effect on the control of emissions is irrelevant. A vehicle does not have to exceed emission standards for a tampering violation to occur; a violation occurs whenever there is "the act of removing or rendering inoperative any emission control device or element of design."[75] Thus, the regulations are not an attempt to enforce any emissions standard. They do not impose any new requirements on manufacturers (such as the necessity of creating a "third vehicle") that are not imposed generally on everyone else, nor do they interfere with the EPA's standards for emissions control.

3. The Counties' Claims Regulate "in Use" Vehicles and Are Therefore Not Preempted.

Even if the other requirements for preemption under section 209(a) were met, only claims relating to "new motor vehicles" would be preempted. A "new motor vehicle" is one for which "the equitable or legal title . . . has never been

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pre-emption out of the law whenever Congress speaks to the matter with generality."); *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 941 (9th Cir. 2011) (a "broad reading of the 'relating to' clause" in the CAA would "eviscerate" the term "standard" and "render inconsequential" the Supreme Court's construction of "standard" in *EMA)* (*see supra* notes 68 & 69 and accompanying text).

[75] 46 Fed. Reg. 8982, 8983 (Jan. 27, 1981).

transferred to an ultimate purchaser."[76] While the defeat devices were initially installed on new motor vehicles, they did not tamper with the vehicles' emissions control systems until the vehicles were put in use on county roads. The vehicles were designed to start in "dyno" or "test" mode and only switched to "road" mode when they were driven on county roads.

Anti-tampering regulations like those at issue here are generally applicable rules that necessarily apply to events *after* the initial sale of a vehicle. The Counties have alleged that the defeat devices continued to tamper with the vehicles' emissions control systems long after the vehicles had been sold, left the showroom, and been inspected and through multiple owners and registration cycles. Thus, the tampering for which the Counties seek redress continued long after the vehicles ceased to be "new."

Unlike *Wyoming v. Volkswagen Group of America, Inc.*,[77] upon which Volkswagen largely relied below,[78] the Counties' claims are not preempted because the effects of Volkswagen's tampering occurred long after the initial sale

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76 42 U.S.C. § 7550(3).

77 ER at 133.

78 *See* doc. 4583 at 2-18. Volkswagen also relied heavily on *Alabama v. Volkswagen AG*, CV-2016-903390.00, dkt. no. 195 (Ala. Cir. Ct. Dec. 19, 2017), a non-binding state court case from Alabama, which essentially followed the district court's *Wyoming* decision and which the Counties respectfully assert incorrectly interpreted the CAA. The Alabama case is now on appeal to the Alabama Supreme Court. *See supra* note 31.

of the vehicle, and Volkswagen continued to tamper with the emission control systems of many of the vehicles through its recalls and service updates. The anti-tampering regulations at issue here do not affect the manufacture, sale, or purchase of new vehicles. They only provide that, once a vehicle has been certified and placed "in use," its emissions control device not be altered or disabled.[79]

The district court correctly held that the Counties' claims based on the Defendants' post-marketing tampering with emissions control devices were not expressly preempted.[80] The fact that Volkswagen's initial installation of the defeat device software occurred before the vehicles were sold and put in use is irrelevant where, as here, the software tampered with the vehicles' emissions controls *after* the vehicles were put in use. Simply because it was technologically feasible to install the defeat device software before the initial sale, which turned off the emissions controls when the vehicle was operated on the road, does not excuse Volkswagen from tampering with the emissions control devices after sale. That would be like saying that a manufacturer could be liable for detonating a bomb in the engine if it placed the bomb after it sold the car but not if it equipped the car

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[79] *Cf. Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, No. CV F 07-0820 LJO DLB, 2008 WL 4330449, at *16 (E.D. Cal. Sept. 19, 2008) (quoting with approval the defendants' argument that "the CAA does not 'interfere with local regulation of the use or movement of motor vehicles after they have reached the ultimate purchaser'") (citations omitted), *aff'd*, 627 F.3d 730 (9th Cir. 2010).

[80] *See* ER at 14.

with a ticking time bomb before the car was sold but timed to blow up after the car was driven away. It is analogous to a tech-savvy bank robber who installs theft software on a bank manager's computer. The theft does not occur when the software is installed but each time it transfers money from the bank to the robber's account. Volkswagen created an engine capable of complying with emissions standards. It then created and embedded software that repeatedly disabled (i.e., tampered with) the engine's emissions controls after the vehicles were placed in use. Volkswagen may have planted the ticking bomb in the vehicles before their initial sale, but the bomb deployed and caused its damage (air pollution) while the vehicles were "in use" within the Counties. Section 209(d) of the CAA expressly preserves the right of states and political subdivisions "otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."[81]

At a minimum, this so-called "in use" provision applies to the Counties' claims as they relate to vehicles that received *new* software or software updates *after* the vehicles had been sold and were in use on county roads, as the district court acknowledged.[82] But it should also apply to the Counties' claims for the pollution caused by the devices installed at the time of manufacture but which did

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81 42 U.S.C. § 7543(d).

82 *See* ER at 14.

not tamper with the emissions controls and cause pollution until they were put in use on county roads.

4. The Counties Are Not Preempted from Regulating Manufacturers' Conduct.

Volkswagen suggested below that section 209(d) only permits regulation of vehicle owners, not manufacturers.[83] The district court, however, recognized that states and local governments can regulate vehicle manufacturers at least under some circumstances.[84] Section 209(d) was meant to protect "a state's 'longstanding authority to adopt in use regulations intended to control mobile source emissions,'" and "no comprehensive listing 'limits the authority of states and local government as to the types of measures that constitute in use regulations.'"[85] That Volkswagen engaged in conduct that the CAA and the

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[83] *See* doc. 4583, at 5-6 (citing *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996) (section 209(d) permits "in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles")). Of course, the "use of the language 'such as' is descriptive rather than exclusive." *Abenante v. Fulflex, Inc.*, 701 F. Supp. 296, 301 (D.R.I. 1988).

[84] *See* ER at 21 ("This is not to say that there is no conceivable scenario, consistent with the Clean Air Act, in which states and local governments could regulate a vehicle manufacturer's compliance with emission standards. If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clear Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders."). *See also* ER at 179.

[85] *Nat'l Ass'n of Home Builders*, 2008 WL 4330449, at *16 (quoting with approval the defendants' arguments in that case).

district court recognized state and local governments can regulate—namely, tamper with an in-use vehicle during vehicle maintenance—but did it many times to many vehicles should not immunize the Defendants from liability.

D. The Counties' Claims Are Not Impliedly Preempted by the CAA.

Volkswagen also claimed below, and the district court agreed, that the Counties' claims are impliedly preempted. This argument also fails.

"[A]ny understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose."[86] Out of respect for state sovereignty, preemption analysis always starts with "the basic assumption that Congress did not intend to displace state law."[87] Thus, in determining congressional purpose, courts are guided by a presumption against preemption, especially in areas traditionally regulated by the states.[88] Controlling air pollution is a traditional exercise of a state's police power.[89] This presumption applies both

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86 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

87 *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

88 *E.g., Medtronic, Inc.*, 518 U.S. at 485 ("In all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citation and internal quotation marks omitted).

89 *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the

to the question of whether Congress intended any preemption and to the scope of any intended preemption.[90] The presumption is especially appropriate where the exercise of local authority furthers the purposes of the federal act.[91] Congress expressly reserved to states and their political subdivisions power over "in use" regulations.[92] Courts can infer that "an express pre-emption clause forecloses implied pre-emption."[93] If state or local anti-tampering laws fall within the protection of section 209(d), and the regulations at issue here do, for the reasons explained above, there is no argument for implied preemption.[94] What Congress has allowed expressly cannot be put asunder by implication.

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states and their instrumentalities may act, in many areas of interstate commerce . . . concurrently with the federal government.") (citations omitted).

90 *Medtronic*, 518 U.S. at 485.

91 *Allway Taxi, Inc. v. City of N.Y.*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) (citation omitted), *aff'd*, 468 F.2d 624 (2d Cir. 1972). *See also Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 939 (9th Cir. 2011) ("preemption language" in the CAA "is to be narrowly and strictly construed") (internal quotation marks and citations omitted).

92 *See* 42 U.S.C. § 7543(d).

93 *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995). *See also, e.g.*, *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253 (11th Cir. 2003) ("where a legislative enactment contains an express pre-emption provision, we typically do not consider the issue of implied pre-emption; our primary task is only to determine whether the state law in question falls within the scope of the statute expressly promulgated by Congress").

94 *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1107 n.19 (D.C. Cir. 1979) ("Subsection (d) makes clear that the preemption provision is not intended to preempt state regulation other than as expressed in subsection (a).").

1. The Counties' Claims Are Not Preempted by Field Preemption.

There are two types of implied preemption—field preemption and conflict preemption.[95] Field preemption applies only where "Congress intended federal law to occupy a field exclusively . . . ."[96] Although the district court does not expressly identify the type of preemption it found, it presumably found conflict preemption,[97] since the field—the maintenance of air quality by regulating vehicle emissions—is "traditionally one occupied by states."[98]

In enacting section 209, Congress defined the "field" that it intended to preempt: "new motor vehicles or new motor vehicle engines subject to this part."[99] It also identified the field within which states and political subdivisions could control or regulate, namely, "the use, operation, or movement of registered or licensed motor vehicles."[100] As detailed above, in enacting the CAA, Congress expressly preserved the states' enforcement power for both stationary and mobile

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95 *E.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

96 *Freightliner Corp.*,, 514 U.S. at 287 (citation omitted).

97 *See* ER at 24 (referring to the conflicts that the Counties' claims allegedly create with federal policy).

98 *Cf. Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

99 42 U.S.C. § 7543(a).

100 *Id.* § 7543(d).

sources.[101] Congress thus did not intend to "occupy the field exclusively," and field-preemption does not bar the Counties' claims.[102]

2. The Counties' Claims Are Not Barred by Conflict Preemption.

A claim is conflict preempted only if it is impossible to comply with both federal and state law or if a state law is "an obstacle to the accomplishment and execution of the full purposes and objective" of Congress.[103] It is not impossible to comply with both federal and state law; Volkswagen only had to design an engine with a functioning emission system (the province of federal law) and later avoid tampering with that system (the province of state and local law). The sole question before the district court, then, was whether state law stood as an obstacle to the accomplishment of Congress's purposes.

"The purpose of Congress is the ultimate touchstone in every pre-emption case."[104] Courts have to approach this interpretive task cautiously to avoid a "free wheeling judicial inquiry into whether a state [law] is in tension with federal

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101 *See id.* §§ 7416 & 7543(d).

102 If Congress had intended the EPA to occupy the field of vehicle emissions, the MDL court would not have remanded, as it did (*see* ER at 170), states' actions against Volkswagen for lack of federal jurisdiction because they would have presented a federal question. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (if an area of state law "has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim").

103 *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (citation omitted).

104 *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

objectives," which "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law."[105]

The district court held that Congress intended the federal government (the EPA) to enforce emissions standards at the model level (i.e., the manufacturer level) and for states and local governments to enforce emissions standards at the individual vehicle level.[106] The court further held that the Defendants' conduct, not only in installing the defeat devices in new vehicles but also in making post-sale software changes, were the type of conduct that Congress intended the EPA to regulate.[107] The district court's conclusion that Congress must have intended uniform federal regulation of all manufacturer conduct, regardless of its nature, finds no support in the purpose, text, or agency applications of the CAA.

a. The Counties' Claims Do Not Conflict with the Purpose of the CAA.

The purpose of Congress in enacting the CAA was not to protect manufacturers—particularly manufacturers who flout the law—but to protect, first and foremost, the environment and consequently public health,[108] and, second,

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105 *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

106 *See* ER at 16-21.

107 *Id.* at 21.

108 *See* 42 U.S.C. § 7401(b)(1) (the purposes of the CAA are (1) "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population": (2) to accelerate

interstate commerce and the free flow of vehicles across state borders.[109] The anti-tampering rules the Counties are seeking to enforce are meant to protect the environment and public health and do not interfere with the free flow of vehicles across state lines. They are therefore consistent with the purposes of the CAA.

Volkswagen does not dispute that state anti-tampering rules do not conflict with the purposes of the CAA as applied to consumers, dealers, mechanics, or auto shops but claimed that those same rules cannot apply to manufacturers. In other words, Volkswagen asked the court to create an exception for manufacturers. In essence, Volkswagen was seeking judicial legislation. The Defendants confused preemption of a specific area of regulation based on subject matter (emissions

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national research and development to prevent and control air pollution; (3) "to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs"; and (4) to encourage the development and operation of regional air pollution prevention programs).

[109] *E.g.*, *Jensen*, 644 F.3d at 940 (regulations that "do not impose any requirements on manufacturers, nor . . . threaten 'an anarchic patchwork of federal and state regulatory programs'" are "likely outside the scope of the state law Congress sought to preempt"); *Allway Taxi, Inc. v. City of N.Y.*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) (§ 209 "was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars"), *aff'd*, 468 F.2d 624 (2d Cir. 1972); 59 Fed. Reg. 36969, 36973, 36974 (July 20, 1994) ("the legality of particular regulatory controls that a state may impose . . . will depend upon the burden that such controls place on interstate commerce" and whether the state rules are "effectively regulations on the design of new engines rather than on the use of 'in-use' engines").

standards for new motor vehicles) with a wide-ranging grant of immunity based on the identity of the actor (auto manufacturers). Nothing in the purpose of the CAA supports the idea that manufacturers are immune from state and local in-use regulations.

The Counties are trying to hold Volkswagen responsible for tampering with emissions control devices while the vehicles were "in use," not to interfere with the initial sale of federally approved vehicles or to enforce federal certification of vehicles. If a manufacturer acts on a model-wide basis to tamper with its used vehicles once they are on the road, any "burden" from the neutral enforcement of state and local anti-tampering rules falls only on the wrongdoing manufacturer—not on interstate commerce. Because anti-tampering regulations are limited to vehicles that are already registered and in use in the state or county, they do not attempt to "impose any requirements on manufacturers, nor . . . threaten 'an anarchic patchwork of federal and state regulatory programs'"[110] and thus can be properly applied to manufacturers.

The district court did not identify any "federal objective" with which the Counties' anti-tampering regulations interfere. In fact, it recognized that the federal scheme "reveals overlap between federal, state, and local enforcement

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110 *See Jensen*, 644 F.3d at 940 (citations omitted).

authority of emissions standards"[111] and that there could be situations where states and local governments could regulate a vehicle manufacturer's compliance with emission standards, such as where a manufacturer tampers with a vehicle emissions system when the user brings the vehicle in for maintenance.[112]

Volkswagen itself acknowledged, in its argument on its motion to dismiss Wyoming's complaint, that, "if this were a situation where we tampered with the vehicle['s]" emissions-control system after the vehicle was put in service, a state or local government "might have something, because under Section 209(d) it says states can, quote, *control, regulate, or restrict the use, operation, or movement of registered and licensed vehicles.*"[113] Volkswagen's subsequent tampering is just such a case. Volkswagen tampered with vehicles' emissions systems when the vehicles were brought in for maintenance in the Counties, after they had been sold and been in operation on county roads for some time.

If Volkswagen can be liable if it physically disconnected one vehicle's emission control system, and both the district court and Volkswagen thought it could,[114] it should not escape liability by installing software that essentially does

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111 ER at 19.

112 *Id.*

113 ER at 158:8-14 (emphasis in original). *See also id.* at 159:6-8 (§ 209(d) "actually does give" states and local governments "the ability" to do something "if someone does tamper with the device in the state after the car's been registered").

114 *See* ER at 179.

the same thing on many vehicles. If states and local governments can enforce anti-tampering rules with respect to "a single in-use vehicle,"[115] as the district court found, they can also prohibit manufacturers from tampering with multiple vehicles. The only difference between the district court's hypothetical and this case is that Volkswagen repeated its tampering hundreds if not thousands of times. But the number of tampering violations—and whether they target an individual vehicle or an entire model year—should not alter the preemption analysis. If one violation by the Defendants is not preempted, neither should multiple violations be. Thus, the Counties' claims are "outside the scope of the state law Congress sought to preempt,"[116] and the district court's finding of preemption for "model-wide" tampering has no basis in the purpose of the CAA.

b. The Counties' Claims Do Not Conflict with the Text of the CAA.

The CAA only preempts state regulation of "new motor vehicles" and "new motor vehicle engines";[117] it expressly preserves state and local authority to regulate both the "use" and "operation" of registered or licensed motor vehicles.[118] In enacting the CAA, Congress differentiated between "new" and "used" vehicles, not between "model-wide" or "manufacturer" conduct and other tampering. Had

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115 ER at 21.
116 *Jensen*, 644 F.3d at 940.
117 42 U.S.C. § 7543(a).
118 *Id.* § 7543(d).

Congress intended to exclude states and local governments from any "model-wide" regulation of vehicles once they had been placed in use, it certainly knew how to say so. "Its silence on the issue . . . is powerful evidence that Congress did not intend" the EPA to have exclusive authority in this area.[119]

The only statutory support the court cited for its distinction between model-wide tampering and individual tampering was a single line from the CAA that provides that "no new motor vehicle manufacturer . . . may be required [by state regulation] to conduct [emissions] testing" after the date of the original sale.[120] A federal statute exempting manufacturers from post-sale emissions testing does not manifest a congressional intent to exempt manufacturers from state regulation of post-sale tampering. Nor can it be said that the EPA's right to regulate post-sale tampering creates a conflict, as nothing in the CAA shows any intent to limit this area of enforcement explicitly to the EPA.[121] If that were the case, then section 203(a)(3)(A)--which prohibits "any person," be it an individual or manufacturer, from removing or rendering inoperative an emissions control device either before

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119 *Cf. Wyeth v. Levine*, 555 U.S. 555, 575 (2009).

120 *See* ER at 19 (citing 42 U.S.C. § 7541(h)(2)).

121 *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442 (2005) ("The imposition of state sanctions for violating state rules that . . . duplicate federal requirements" was not necessarily preempted).

or after sale to the ultimate purchaser[122]—would preempt all state tampering laws. That interpretation would swallow up section 209(d)'s savings clause.

Congress "specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers."[123] As the Supreme Court has recognized, "[b]ecause federal motor vehicle emission control standards apply *only to new motor vehicles*, States . . . retain broad residual power over used motor vehicles. Moreover, citizens, States, and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights."[124] State rules that do "no more than insure the installation and *upkeep* of federally required devices" on vehicles that are already "in use" are not preempted.[125]

"The case for federal pre-emption is particularly weak where [as here] Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'"[126] This is such a case.

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122 *See* 42 U.S.C. § 7522(a)(3)(A).

123 *Allway Taxi*, 340 F. Supp. at 1124.

124 *Wash. v. Gen. Motors Corp.*, 406 U.S. 109, 115 n.4 (1972) (emphasis added).

125 *Allway Taxi*, 340 F. Supp. at 1124 n.7 (emphasis added).

126 *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

Congress not only tolerates but explicitly affirms the co-existence of state and federal law in the area of pollution control.[127] The CAA provides that

> [e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan [a so-called SIP] for such State which will specify the manner in which national . . . ambient air quality standards will be achieved and maintained within each air quality control region in such State.[128]

c. The Counties' Claims Do Not Conflict with the EPA's Understanding of the CAA.

The EPA has approved SIPs that include anti-tampering regulations.[129] The EPA's approval of a state SIP provision is effectively a legal determination that federal law does not prohibit the regulation.[130]

Indeed, the EPA acknowledges that, even though state anti-tampering rules "are not required by" the CAA and "there is a federal [anti-tampering] law which provides for EPA enforcement," "many states" use anti-tampering rules "successfully as enforcement tools" for, among other things, "deterrence of

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127 *See, e.g.*, 42 U.S.C. § 7401(a)(3).

128 *Id.* § 7407(a).

129 *See supra* note 54.

130 *Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 510 (9th Cir. 2015).

tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations."[131]

The EPA has said that the CAA's preemption provisions "should be construed narrowly in order to protect states' rights, particularly in an area such as public health in which states traditionally exercise control."[132]

Congress has never seen fit to overrule the EPA's understanding of the CAA and its "cooperative federalism."

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[131] 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998). *See also* U.S. EPA, EPA 420-F-93-003, MECHANICS: AN IMPORTANT LAW THAT AFFECTS YOU 3 (Sept. 1993) (while the CAA prohibits tampering by anyone and imposes fines for tampering, "[m]any states also impose additional fines"), *available at* https://nepis.epa.gov/Exe/ZyNET.exe/9400062R.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1991+Thru+1994&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C91thru94%5CTxt%5C00000033%5C9400062R.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL; U.S. EPA, Fact Sheet: Exhaust System Repair Guidelines 1 (Mar. 13, 1991) ("In addition to federal law, forty-five out of the fifty States also have statutes or regulations which prohibit tampering with the pollution control equipment on motor vehicles"), *available at* https://www.epa.gov/sites/production/files/documents/exhsysrepair.pdf.

[132] 59 Fed. Reg. 36969, 36973 (July 20, 1994). The particular provision at issue in that case involved nonroad engines, but the EPA has noted that "Congress intended the preemption provisions of section 209, as applied to nonroad engines, to be analogous to the preemption provisions as applied to motor vehicles . . . ." 59 Fed. Reg. 31,330 (June 17, 1994).

d. The Potential Penalties for the Defendants' Conduct Do Not Support Preemption.

At the core of the district court's opinion is its concern that the Defendants could be held liable for significant additional penalties if state and local governments were allowed to sue for violations of their anti-tampering rules. But this says more about the exceptional and egregious nature of the Defendants' conduct than it does about conflict preemption. The unprecedented scope of their tampering is not a principled ground for preemption. Under the district court's reasoning, individual vehicle owners and local businesses (such as dealers and garage owners) who tampered with their vehicles' emissions systems would be subject to both state and federal penalties, but manufacturers would only be subject to federal penalties for the same offenses. Why should manufacturers be entitled to financial protections that are not available to their local dealers, local garage owners, or private citizens? They do not need more protection.[133]

The potential magnitude of state-law penalties is not grounds for preemption for another reason. The Supreme Court has recognized that manufacturers can be subject to "parallel requirements" under federal and state law. Unless expressly stated, federal statutes do not deny states the right to provide damages remedies for

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[133] Volkswagen's parent company, for example, earned a net profit of €13.8 billion in 2017. *See* Statista, "Volkswagen's Operating Profit from FY 2006 to FY 2017," https://www.statista.com/statistics/272053/operating-profit-of-volkswagen-since-2006/.

violations of state-law duties that parallel federal requirements.[134] Such "parallel requirements" do not create an anarchic patchwork of different requirements, as the district court feared.[135] Rather, they give manufacturers "an additional cause to comply."[136]

Finally, the district court's concern that the Defendants not be subjected to multiple suits and potentially multiple sanctions for "uniform conduct that happened nationwide"[137] is neither factually correct nor relevant. The Defendants did not undertake a single act that had national repercussions. Rather, they engaged in tampering on thousands of occasions, both before and after their cars were sold, the latter acts occurring car by car (not "model-wide," as the district

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134 *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442, 447 (2005) (nothing in the text of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) would prevent a state from making the violation of a federal requirement a state offense or adopting state rules that duplicate federal requirements and imposing its own sanctions on such conduct); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (nothing in the Medical Device Amendments (MDA) to the FDCA Act denies a state the right to provide a traditional damages remedy for violations of common-law duties that parallel federal requirements). *See also Medtronic*, 518 U.S. at 513 (the MDA's preemption provision, which prohibited states from establishing any requirement different from or in addition to federal requirements, "does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements")* (O'Connor, J., concurring in part and dissenting in part) (emphasis in original).

135 *See Bates*, 544 U.S. at 448 ("parallel requirements" do not establish "a crazy-quilt of" requirements different from those intended by Congress).

136 *Medtronic*, 518 U.S. at 513 (O'Connor, J., concurring in part and dissenting inpart).

137 ER at 24.

court thought) in dealerships all over the country. Their tampering should not be excused simply because the Defendants had the technology to implement their fraudulent plan nationwide.

Similarly, concerns over the extent of the Defendants' potential liability are premature. To say that the Counties' claims are preempted because they *might* cost the Defendants a lot of money puts the cart before the horse. The majority of the money Volkswagen has agreed to pay in settlements (the 2.0-liter and 3.0-liter settlements) is merely meant to put the owners of the affected vehicles in the position they would have been in but for the Defendants' wrongdoing. Volkswagen has also agreed to pay a $1.45 billion civil penalty for its alleged civil violations of the CAA. This is for some 590,000 affected vehicles covering eight model years (2009-2016), for a total of less than $2,500 per vehicle for the entire time the vehicles were on the road polluting the air. The maximum penalty under federal law for Volkswagen's violations was $27,500 per day per vehicle.[138] The federal settlement may have vindicated the interests of the United States and the EPA, but it did not adequately account for the interests of the Counties. The Counties have determined that tampering with emissions control devices is so serious and causes so much harm to the public health that a fine of up to $5,000 per day is appropriate. The Defendants are paying less than half a day's penalty under

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[138] *See* 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4, table 1.

the Counties' laws per vehicle and less than 10% of the federal penalty, for eight years' worth of pollution, a cost it can easily absorb as a cost of doing business.

The mere fact that the Defendants are subject to a federal regulatory scheme (and have been penalized for violating it) is not a basis to preempt state law:

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as [the one in this case], does not by itself imply pre-emption of state remedies. The Court has observed: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for special features warranting pre-emption."[139]

No such special features exist here.

In any event, the fact that a wrongdoer has admitted liability after being caught red-handed and has agreed to pay a nominal penalty for its wrongdoing is no defense to an anti-tampering law. It is not up to the wrongdoer to decide its penalty. Any concern about the magnitude of the Defendants' potential liability is not well founded. Both the Hillsborough County and Utah regulations the Defendants have violated provide for a penalty of *not more than* $5,000 for each offense. The trier of fact is certainly capable of taking into account the Defendants' contrition and other penalties in determining an appropriate amount that they should pay for their wrongdoing in the Counties that will deter future

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[139] *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990) (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)).

wrongdoing. And courts are certainly capable of controlling and remitting excessive verdicts.[140] The mere possibility of an excessive verdict is not grounds to deny the Counties' claims.

In short, the district court's rationale is not a sound application of conflict preemption rules but a repudiation of the constitutional principle of dual sovereignty. A single act can give rise to distinct offenses and thus subject a person to successive prosecutions and separate punishments "if it violates the laws of separate sovereigns."[141] Given that principle, the mere prospect of multiple civil penalties for the same misconduct does not violate the Supremacy Clause. Volkswagen has paid only a small fraction of its potential penalty exposure under the CAA, so it cannot say that any additional penalties imposed for violations of state and local law would be inconsistent with the purposes and objectives of Congress, at least up to the total amount that could have been imposed under the CAA. On the contrary, Congress indicated that any penalty within the range allowed by the CAA would accomplish its purposes. If the Defendants were to be assessed multiple daily penalties (which remains to be seen), it would be their

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[140] *See, e.g., Curtis Pub. Co. v. Butts*, 388 U.S. 130, 160 (1967) (judicial control over excessive jury verdicts is sufficient to protect a party's constitutional rights).

[141] *Puerto Rico v. Sanchez Valle*, 579 U.S. ----, 136 S. Ct. 1863, 1867-68 (2016).

"own delay in compliance [that] resulted in the continued accrual of civil penalties."[142]

CONCLUSION

The district court erred in holding that the Counties' claims were preempted by the CAA.

The Counties' claims are not expressly preempted under the CAA's preemption provision because the Counties are not adopting or attempting to enforce any particular standard relating to the control of emissions of air pollutants. They are simply trying to prevent post-sale tampering with whatever emissions control device the vehicles have.

Moreover, the state and local laws the Counties rely on are not impliedly preempted. They do not conflict with the purposes and objectives of Congress in enacting the CAA. Instead, they are consistent with Congress's intent and recognition that the federal government and state and local governments are all responsible for protecting public health by ensuring the quality of air in their respective jurisdictions.

This Court long ago recognized that the

> text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution. The Supreme Court has given substantial weight in preemption analysis to

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142 *See State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018).

> evidence that Congress intended to preserve the states[’] regulatory authority: “Just as courts may not find measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States’ coordinate regulatory role in our federal scheme.”[143]

The evidence here shows that Congress sought to preserve the coordinate regulatory role of state and local governments in preserving our nation’s air quality. Court should therefore reverse the district court’s order dismissing the amended complaints of the Environmental Protection Commission of Hillsborough County and Salt Lake County and remand these cases for further proceedings.

Date: October 4, 2018

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143 *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000) (quoting *Cal. v. FERC*, 495 U.S. 490, 497 (1990)).

STATEMENT OF RELATED CASES

The following cases are pending in the Ninth Circuit and arise out of the cases consolidated in the MDL in the district court. They all arise out of the Defendants' scheme to sell vehicles equipped with a so-called defeat device to evade emissions testing. But none of the cases were brought by a state or local government, and none raise the same issues raised in this appeal. The first three appeals are from the district court's order granting a motion for attorneys' fees and costs related to the 2.0-liter action settlement. The other appeals are from the district court's order denying non-class counsel's motions for attorneys' fees.

Appellate Docket No.	**Case Name**
17-15632	*In re Jason Hill et al. v. Volkswagen AG et al.*
17-15742	*In re Jason Hill et al. v. Volkswagen AG et al.*
17-15835	*In re Jason Hill et al. v. Volkswagen AG et al.*
17-16020	*In re Bishop, Heenan & Davies v. Volkswagen Grp. of Am. et al.*
17-16065	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16066	*In re Autoport, LLC v. Volkswagen Grp. of Am. et al.*
17-16067	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16068	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16082	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16083	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16089	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16092	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16099	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16123	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16124	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16130	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*

17-16132	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16156	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16158	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16172	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*
17-16180	*In re Jason Hill et al. v. Volkswagen Grp. of Am. et al.*

Date: October 4, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,487 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Date: October 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 4, 2018

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ADDENDUM

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42 U.S.C. § 7543(a):

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(d):

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

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

Hillsborough Cnty. Envtl. Prot. Comm'n R. 1-8:

RULES OF THE
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY
CHAPTER 1-8
MOBILE SOURCE

1-8.01 STATEMENT OF INTENT:
The Commission promulgates this rule for the purpose of implementing the intent of the Florida Legislature as declared in the Environmental Protection Act of Hillsborough County, to insure the atmospheric purity and freedom of the air in Hillsborough County from contaminants or synergistic agents resulting from the improper use and combustion of fuels in motor vehicles, or any other air contaminants released by the improper operation or servicing of motor vehicles. The Commission intends that staff work with all appropriate State and Federal agencies in the area of Mobile source control.
Section History – amended 8/9/12 and effective 8/20/12.

1-8.03 DEFINITIONS:
(1) Definitions contained in the Act apply to this rule.
(2) The following specific definitions shall apply to this rule:
a. "Director" means the Executive Director of the Commission or his authorized staff.
b. "Emission control system" means the devices and mechanisms installed as original equipment at the time of manufacture or those equivalent devices and mechanisms later installed during repair or replacement of original equipment, or

during vehicle modification or retrofit as required by law, for the purpose of reducing or aiding in the control of emissions including, but not limited to, the following components: catalytic converter, fuel inlet restrictor, unvented fuel cap, positive crankcase ventilation system, exhaust gas recirculation system, thermostatic air cleaner, air pump and/or air injection system, oxygen sensor, fuel evaporative emission control, and all vacuum lines, electrical lines, and sensors or switches associated with these devices.
c. "Inoperable emission control system" means any emission control system or component thereof whose operation or efficiency has been circumvented, defeated, or deleteriously affected by improper maintenance, improper up-keep, wear and tear, misfueling, or tampering.
d. "Mobile source" means any mechanical source of air pollution that is characterized by the ability to propel itself.
e. (Reserved)
f. "Motor vehicle" means any self-propelled vehicle designed for transporting persons or property on a street or highway.
g. "Smoke" means any small gasborne and airborne particles, exclusive of water vapor, from a process of combustion, in sufficient number to be visible.
h. "Tampering" means the intentional inactivation, disconnection, removal or other modification of a component or components of the emission control system resulting in it being inoperable.
i. "Tampered motor vehicle" means any motor vehicle in which the emission control system is inoperable because of tampering.

Section History – amended 8/9/12 and effective 8/20/12.

1-8.04 APPLICABILITY:
(1) With the exception of Sections 1-8.05(8) and (9), this rule is not applicable to the following motor vehicles:
a. Motor vehicles which are designated as model year 1974 or older.
b. Motor vehicles which have net vehicle weights greater than 5,000 pounds or gross vehicle weights greater than 10,000 pounds.
c. Motorcycles, mopeds, scooters, and golf carts, as defined in Section 320.01 F.S.
d. Farm vehicles, as defined in Section 320.51 F.S.
e. Imported nonconforming motor vehicles which are documented to be exempt from federal emission control requirements by the USEPA under 40 CFR 85 Subpart P.
f. Street rods as defined by Section 320.0863 F.S.
g. Ancient motor vehicles as defined by Section 320.086 F.S.
h. Motor vehicles used exclusively in competitive motor sports events.

(2) This rule is applicable to all motor vehicle sales, reassignments and trades within Hillsborough County except for the following:
a. Sales, reassignments, and trades by licensed motor vehicle dealers to licensed motor vehicle dealers.
b. Sales of motor vehicles for salvage purposes only.
c. Sales, reassignments, and trades to licensed motor vehicle dealers, where the dealer elects not to request the certification from the seller or person reassigning title.
d. Sales, reassignments, and trades involving motor vehicles exempted in Section 1-

1-8.05 PROHIBITIONS:
(1) No person shall tamper, cause, or allow the tampering of the emission control system of any motor vehicle.

(2) (Reserved)
(3) (Reserved)
(4) (Reserved)
(5) Except as permitted by Section 1-8.04(2),
no person or motor vehicle dealer shall offer a tampered motor vehicle for private or retail sale, or effect the transfer of title of any tampered motor vehicle.
(6) No person shall manufacture, install, sell or advertise for sale, devices to defeat or render inoperable any component of a motor vehicle's emission control system; nor shall any person sell a device or fuel additive intended to circumvent an accurate emissions test.
(7) (Reserved)
(8) No person shall cause, let, permit, or allow a gasoline powered motor vehicle under his care, custody or control upon public roadways to emit visible smoke from the exhaust pipe for a continuous period of 5 seconds or more.
(9) No person shall cause, let, permit, or allow a diesel powered motor vehicle under his care, custody or control upon public roadways to emit visible smoke from the exhaust pipe for a continuous period of 5 seconds or more, except during engine acceleration, engine lugging, or engine deceleration.

Section History – amended 8/9/12 and effective 8/20/12.
Rule History:
Adopted 9/29/87
Amended 4/24/91
Amended 3/19/98

Amended 8/9/12 and effective 8/20/12

UTAH CODE ANN. § 26A-1-123:

26A-1-123. Unlawful acts -- Criminal and civil liability.

(1) It is unlawful for any person, association, or corporation, and the officers of the association or corporation to:

(a) violate state laws or any lawful notice, order, standard, rule, or regulation issued under state laws or local ordinances regarding public health or sanitation;

(b) violate, disobey, or disregard any notice or order issued by a local health department pursuant to any state or federal law, federal regulation, local ordinance, rule, standard, or regulation relating to public health or sanitation;

(c) fail to make or file reports required by law relating to the existence of disease or other facts and statistics relating to the public health;

(d) willfully and falsely make or alter any certificate or certified copy issued under public health laws;

(e) fail to remove or abate from private property under the control of the person, association, or corporation at their own expense, within a reasonable time not to exceed 30 days after issuance of an order to remove or abate, any nuisance, source of filth, cause of sickness, dead animal, health hazard, or sanitation violation within the boundaries of the local health department whether the person, association, or corporation is the owner, tenant, or occupant of the private property; or

(f) pay, give, present, or otherwise convey to any local health officer or employee of a local health department or any member of a local board of health any gift, remuneration, or other consideration, directly or indirectly, which the officer or employee is prohibited from receiving by this section.

(2) Removal or abatement under Subsection (1)(e) shall be ordered by the local health department and accomplished within a reasonable time determined by the local health department, but not exceeding 30 days after issuance of an order to remove or abate.

(3) It is unlawful for any local health officer or employee of any local health department or member of any local board of health to accept any gift, remuneration, or other consideration, directly or indirectly, for the performance of the duties imposed upon the officer, employee, or member by or on behalf of

the health department or by this part.

(4) It is unlawful for any local health officer or employee of a local health department, during the hours of the officer's or employee's regular employment by the local health department, to perform any work, labor, or services other than duties assigned to the officer or employee by or on behalf of the local health department.

(5) (a) Any person, association, corporation, or the officers of the association or corporation who violates any provision of this section is:

(i) on the first violation guilty of a class B misdemeanor; and

(ii) on a subsequent similar violation within two years, guilty of a class A misdemeanor.

(b) In addition any person, association, corporation, or the officers of the association or corporation, are liable for any expense incurred in removing or abating any nuisance, source of filth, cause of sickness, dead animal, health hazard, or sanitation violation.

(6) Conviction under this section or any other public health law does not relieve the person convicted from civil liability for any act that was also a violation of the public health laws.

(7) Each day of violation of this section is a separate violation.

UTAH ADMIN. CODE R307-201-4

R307-201-4. Automobile Emission Control Devices.

Any person owning or operating any motor vehicle or motor vehicle engine registered or principally operated in the State of Utah on which is installed or incorporated a system or device for the control of crankcase emissions or exhaust emissions in compliance with the Federal motor vehicle rules, shall maintain the system or device in operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated. No person shall remove or make inoperable the system or device or any part thereof, except for the purpose of installing another system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere.