No. 18-15937

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA; SALT LAKE COUNTY, UTAH,
Plaintiffs-Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH, LLC; ROBERT BOSCH GMBH,
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)

BRIEF OF THE ALLIANCE FOR AUTOMOTIVE INNOVATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Jonathan S. Martel
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Jonathan.Martel@arnoldporter.com
(202) 942-5000
(202) 942-5999 (fax)

S. Zachary Fayne
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center, 10th Fl.
San Francisco, CA 94111
Zachary.Fayne@arnoldporter.com
(415) 471-3114
(415) 471-3400 (fax)

Counsel for Amici Curiae

(additional counsel listed on inside cover)

August 10, 2020

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state the following:

The Alliance for Automotive Innovation ("Auto Innovators") certifies that it is a nonprofit trade association. Auto Innovators has no parent company, and no publicly held company has a 10% or greater ownership interest in Auto Innovators.

The Chamber of Commerce of the United States of America ("Chamber") certifies that it is a nonprofit trade association. The Chamber has no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Chamber.

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INTEREST OF *AMICI CURIAE*[1]

The Alliance for Automotive Innovation ("Auto Innovators") is a nonprofit trade association representing the manufacturers and suppliers that produce nearly 99 percent of all cars and light-duty trucks sold in the United States. Auto Innovators was formed by the combination of the nation's two largest automobile associations, the Association of Global Automakers and the Alliance of Automobile Manufacturers.[2] Its mission is to protect and promote the legal and policy interests of its members that design, manufacture, and sell motor vehicles throughout the United States. Auto Innovators' members rely on the regulatory certainty provided by the Clean Air Act to implement routine, model-wide updates to vehicles in production and in the field. Their ability to do so would be severely jeopardized if every state and locality could regulate and penalize those changes, potentially in a way that conflicts with the judgment of the U.S. Environmental Protection Agency

[1] All parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici* and their members, contributed money to the preparation or submission of this brief.

[2] Auto Innovators' automaker members include BMW Group, FCA US, Ferrari North America, Ford Motor Co., General Motors Co., American Honda Motor Co., Hyundai Motor America, Isuzu Motors America, Jaguar Land Rover, Karma Automotive, Kia Motors America, Maserati North America, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Nissan North America, Inc., Porsche Cars N.A., Subaru of America, Suzuki Motor of America, Toyota Motor North America, Volkswagen Group of America, and Volvo Car USA.

("EPA") about whether a change constitutes prohibited tampering with emission controls.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent these interests in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber's members depend on a stable, predictable, and nationally uniform system for regulating emissions from motor vehicles. Accordingly, the Chamber has a significant interest in ensuring that states and localities cannot impose their own regulatory burdens on manufacturers' routine, model-wide changes to vehicles that have already been sold.

ARGUMENT

Absent reversal, the Ninth Circuit's decision will dramatically impact the automotive industry—and, in turn, the vehicle-buying public. The district court correctly recognized that the Clean Air Act ("CAA") gives EPA exclusive authority to regulate the design changes and software updates that manufacturers regularly make to their vehicles on a model-wide basis. The Act broadly preempts all state and local regulation "relating to the control of emissions from new motor vehicles,"

42 U.S.C. § 7543(a), and establishes a comprehensive regulatory regime to govern manufacturers' model-wide changes to vehicles before and after they are sold. On appeal, the panel correctly concluded that the Act preempts state and local tampering claims arising from pre-sale conduct. Add. 6. But it then held, contrary to the decisions of multiple state appellate courts,[3] that the Act does not preempt similar efforts to regulate manufacturers' post-sale, model-wide changes. Add. 7.

The panel decision has upended the orderly, congressionally mandated regime that has governed manufacturers' post-sale conduct for decades. By permitting *any* state or local government to apply its own prohibition on tampering to post-sale, model-wide changes, the decision has created regulatory chaos. As *amici* explained to the panel, manufacturers routinely update the software design and calibration of their engines and emission control technology. *See* Br. of *Amici Curiae* Alliance of Automobile Manufacturers et al. 8-21 (Dec. 13, 2018), ECF No. 34. These post-sale changes affect millions of cars each year,[4] and provide important benefits for

[3] *See State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. Mar. 13, 2019); *State v. Volkswagen AG*, 279 So. 3d 1109 (Ala. 2018); *State v. Volkswagen Aktiengesellschaft*, 2018 Minn. App. Unpub. LEXIS 995 (Dec. 3, 2018).

[4] *See, e.g.*, Compliance Div., Office of Transportation and Air Quality, EPA, *2014-2017 Progress Report: Vehicle and Engine Compliance Activities* 7 (Apr. 2019) (noting that between 2014 and 2017, manufacturer recalls affected the emission control systems in over 24 million vehicles), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100WKFC.pdf.

consumers and for the environment; the changes often resolve problems identified in the field and improve vehicles' overall performance, reliability, driveability, safety, and emission control.

Importantly, post-sale changes often involve complex technical justifications and tradeoffs—for example, reducing some types of emissions while increasing others, or accepting emissions increases under certain defined operating conditions to redress the potential for engine or vehicle damage or accident or to ensure proper start-up. Contrary to the panel's apparent assumption, it can be complicated to determine whether a given post-sale design change or update amounts to "tampering." Add. 39-40 n.22; *see infra* pp. 11-13, 17. Although one regulator might consider a post-sale change to an emission control device to be an improvement or justified to protect against damage or accident, another regulator might disagree and conclude that it constitutes prohibited "tampering."

The CAA avoids this uncertainty by giving a *single* agency, EPA, the responsibility to collect testing data from manufacturers on post-sale emissions and to supervise post-sale, model-wide changes to emission systems.[5] To be clear,

[5] The CAA also permits California to promulgate its own emission standards with EPA approval. Other states may adopt California's standards, but they may not adopt their own unique standards that might require manufacturers to create a "third vehicle." 42 U.S.C. §§ 7507, 7543(b). California has adopted regulations that parallel many of the EPA regulations described in this brief. Because the Counties do not purport to enforce California's standards, however, this brief focuses on the federal regulatory framework.

manufacturers have been prohibited from engaging in unlawful tampering, both at the factory and for vehicles that have already been sold, for decades. Just as with vehicles prior to sale, however, EPA has already established a comprehensive and orderly regime for oversight of model-wide design changes introduced to post-sale vehicles. Since the 1970s, EPA has provided guidance to manufacturers to allow them to undertake those changes without violating the federal tampering prohibition. By contrast, to *amici*'s knowledge, no state or local government had ever before even attempted to regulate model-wide changes under their tampering provisions. The panel decision, however, paves the way for state and local governments to do just that—even where a manufacturer has followed EPA procedures to ensure compliance with the federal rules. If manufacturers can no longer rely on EPA's determination when making post-sale, model-wide changes to emission control systems, they face the risk of inconsistent directions and substantial liability from state or local regulators. The effect would be to discourage *all* post-sale changes, including those that benefit consumers and the environment. This is clearly not what Congress intended.

The panel decision failed to address any of these concerns, instead focusing narrowly on Volkswagen's allegedly "aberrant" and "unprecedented" conduct. Add. 7, 8, 47. That misses the broader ramifications of the decision. Each year, dozens of manufacturers make routine, model-wide changes to their post-sale vehicles. If

every state and locality can independently regulate those changes, it will inevitably produce "an anarchic patchwork of federal and state regulatory programs," "creat[ing] nightmares for the manufacturers." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (internal quotation marks and citation omitted). This decision puts at risk the health of the auto industry, which is responsible for nearly ten million jobs in the United States and thus critical to the nation's economy.[6]

The Court should therefore vacate the decision and grant panel rehearing or rehearing en banc to consider this exceptionally important question of law.

I. The Panel's Preemption Analysis Misapprehends the CAA and Its Application to Manufacturers' Conduct

As the panel acknowledged, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Add. 19 (internal quotation marks omitted). Numerous provisions in the CAA express Congress's clear intent that EPA have exclusive authority to regulate manufacturers' model-wide changes to the emission control systems of post-sale vehicles over the course of their "useful life." The panel reached a contrary conclusion only by overlooking the prevalence of manufacturers' routine, model-wide changes and manufacturers' long history of relying on EPA's implementation of the CAA through regulations and guidance to ensure that such changes do not constitute tampering.

[6] *See* Alliance of Automobile Manufacturers, *Autos Drive America Forward*, https://autoalliance.org/in-your-state (last visited Aug. 10, 2020).

A. Model-Wide Changes by Manufacturers to In-Use Vehicles Are Necessary and Increasingly Common

As *amici* explained to the panel, manufacturers routinely need to modify the emission systems of post-sale vehicles on a model-wide basis to address performance- or emission-related problems identified through experience once vehicles are operating in the field. Manufacturers invest significant resources to investigate the cause of a problem and to engineer solutions. Typically, after investigating, engineering, and testing, a manufacturer implements the change on the production line—*i.e.*, to vehicles that have not yet been sold. *See* EPA, *Technical Report: History and Description of the EPA Motor Vehicle Fuel Economy Program* (EPA-AA-CPSB-82-02), at 11 (Sept. 1982) (recognizing that "[m]ost manufacturers make changes to their product lines during the model year," which may include "design or specification changes to existing models").

Manufacturers then typically seek to make the same (or a similar) change to vehicles of the same model type that have already left the production line—*i.e.*, post-sale vehicles. By doing so, manufacturers preserve consistency across a vehicle model population and ensure that all vehicles of the same model type receive the benefits of the design change, regardless of when they were produced. Indeed, manufacturers typically maintain a single "latest and greatest" software package for a vehicle model, so that when a vehicle in the field comes in for service, it is updated to the latest software installed on new vehicles. Similarly, manufacturers may seek

to implement the design change on vehicles from *prior* model years with the same or similar technologies.

Manufacturers accomplish model-wide changes to in-use vehicles in two ways: field fixes and recalls. A field fix is "[a] modification, removal or replacement of an emission-control related component by a manufacturer or dealer" or a "revision by a manufacturer … to specifications or maintenance practices for emission-control related components on vehicles that have left the assembly line." EPA, Advisory Circular No. 2B, *Field Fixes Related to Emission Control-Related Components*, at 1 (Mar. 17, 1975) ("Field Fix Guidance"). Field fixes apply model-wide but are implemented on a vehicle-by-vehicle basis as vehicles are taken in for service. Recalls, by contrast, allow manufacturers to implement changes on all affected vehicles. EPA may order a recall if it determines that a defect causes a "substantial number" of vehicles not to comply with emission standards. 40 C.F.R. § 85.1802(a). Alternatively, the manufacturer may pursue a voluntary recall governed by EPA regulations. *Id.* § 85.1904(a).

Importantly, model-wide changes to vehicles on the production line and in the field have become more common and more critical over time, for two principal reasons. *First*, as emission standards have become more stringent, emission control technology has become increasingly complex. Most engines today use a combination of various emission control systems, which are electronically

controlled and calibrated to respond to different operating conditions (such as engine speed and load, altitude, and temperature). Unsurprisingly, the increasing complexity and computerization of emission controls has resulted in an increased need for software updates after vehicles are sold. *Second*, EPA has adopted monitoring and testing requirements for in-use vehicles that make it easier to detect—and correct—failures in the field. For example, starting in the 1990s, EPA required onboard diagnostic systems to monitor and generate feedback on the in-use performance of emission control components. *See* 40 C.F.R. § 86.1806-17; *see also id.* § 86.1845-04 (requiring manufacturer testing of in-use vehicles procured from customers). As a result of these developments, model-wide changes to post-sale vehicles are more common today than in the 1970s, and that trend will only continue.

B. For Decades, EPA Has Comprehensively Regulated Manufacturers' Model-Wide Changes to Vehicles in Production and in the Field

In the CAA, Congress directed EPA not only to prescribe emission standards that motor vehicles must meet at the point of initial sale, but also to apply those emission standards to motor vehicles for their entire "useful life." 42 U.S.C. § 7521(a)(1). To ensure manufacturer compliance, EPA must require testing of "any new motor vehicle or new motor vehicle engine submitted by a manufacturer." *Id.* § 7525(a)(1); *see also id.* §§ 7522(a)(1), 7541(a)(1), (b)(2). This includes "durability" testing, which assesses whether the vehicle will comply with emission

standards throughout its entire useful life. 40 C.F.R. §§ 86.1823-08, 86.1824-08, 86.1825-08, 86.1805-17.

Manufacturers can market a new vehicle only upon obtaining a "certificate of conformity" from EPA confirming that the vehicle complies with applicable emission standards. 42 U.S.C. § 7525(a)(1); *see also* 40 C.F.R. §§ 86.1848-01(c)(2), 86.1805-04, 86.1805-12(a), 86.1805-17. If the manufacturer later seeks to make a change to production vehicles, it must apply to EPA for an amendment to the certificate of conformity for a specific model year vehicle, called a "running change." *Id.* § 86.1842-01(b)(1). EPA can then require additional testing to ensure that the vehicles will continue to meet applicable emission standards throughout their useful life. *Id.* § 86.1842-01(b)(2).

EPA also continues to exercise authority over *post-sale* vehicles already in the field. EPA must, for example, "establish … methods and procedures" to test "whether, when in actual use," vehicles "compl[y] with … emission standards." 42 U.S.C. § 7541(b). EPA also requires manufacturers to report emission-related defects in post-sale vehicles, including software malfunctions that interfere with the vehicles' continued compliance with emission standards. 40 C.F.R. § 85.1902(b)(2); *id.* §§ 85.1903, 1068.501.

As particularly relevant here, EPA regulates the model-wide changes that manufacturers propose to make to post-sale vehicles. Among other things, EPA

enforces the CAA's tampering prohibition. The panel assumed that Congress "could not have … anticipated" manufacturers' "intentional tampering with post-sale vehicles." Add. 47. But that was mistaken: As enacted in 1970, the CAA's tampering prohibition was targeted specifically at manufacturers' post-sale conduct; it made it unlawful "for any manufacturer or dealer knowingly to remove or render inoperative" any emission control device or design "after such sale or delivery to the ultimate purchaser." Pub. L. No. 91-604, § 7(a)(3), 84 Stat. 1676, 1693 (1970). Congress was thus well aware not only that manufacturers would make post-sale changes, but also that such changes could amount to unlawful tampering. Then, as today, Congress gave EPA the responsibility to penalize that conduct.[7]

Importantly, and again contrary to the panel's suggestion (Add. 39-40 n.22), evaluating whether a particular post-sale design or calibration change constitutes "tampering" sometimes requires judgment and significant expertise, and different regulators could reach different conclusions. EPA regulations allow designs that reduce the effectiveness of a vehicle's emission controls where necessary to protect the vehicle against damage or accident in particular field conditions, such as hot or cold conditions or high altitude, and evaluating such justifications is often

[7] Today, the provision applies more broadly to "any person" who knowingly "remove[s] or render[s] inoperative" any emission control device or design "after [its] sale and delivery to the ultimate purchaser." 42 U.S.C. § 7522(a)(3)(A); *id.* § 7522(a)(3)(B) (making it unlawful for any person to manufacture, sell, or install a defeat device).

technically complex, requiring balancing of competing considerations. *See, e.g.*, 40 C.F.R. §§ 86.1804-01, 86.1809-12. Further, many in-use changes to emission control software may increase emissions of one pollutant while decreasing emissions of others, without affecting the vehicles' compliance with applicable emission standards. As just one example, measures to reduce a diesel vehicle's emissions of nitrogen oxides ("NOx") tend to increase emissions of carbon dioxide ("CO_2") and particulates.

EPA plays a critical role in helping manufacturers to differentiate justified design changes that comply with emission regulations from those that constitute unlawful "tampering" or "defeat devices." Over forty years ago, EPA issued a guidance document to "advise manufacturers on the issue of how [the tampering prohibition] potentially affects field fixes, and to set forth a procedure by which manufacturers can assure themselves that EPA will not consider a field fix to be a violation" of that provision. Field Fix Guidance at 1. For example, the guidance establishes, among other things, that "a change to a certified vehicle … that is identical in all respects to a running change [to new vehicles being produced and] that is approved for incorporation in new vehicles by the manufacturer" does not constitute prohibited tampering. *Id.* at 2-3. The guidance also confirms that EPA retains jurisdiction to review all model-wide changes to in-use vehicles. *Id.* at 3.

This oversight process provides needed certainty and uniformity for manufacturers making updates to vehicles before and after sale on a model-wide basis.

C. The CAA Expressly and Impliedly Preempts State and Local Regulation of Manufacturers' Model-Wide, Post-Sale Changes

The comprehensive authority delegated to EPA, standing alone, supports a finding that Congress intended to preempt state and local tampering claims arising from manufacturers' post-sale, model-wide changes. But the CAA also includes a broad express preemption provision in Section 209(a), which bars state and local governments from "adopt[ing] or attempt[ing] to enforce *any* standard *relating to* the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a) (emphases added). It is well-settled that state and local regulation of manufacturers' post-sale conduct can be preempted under this provision. *See, e.g.*, *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) ("an obvious circumvention of the [CAA]" would result if "a state or locality is free to impose its own emission control standards" after vehicles were sold); 59 Fed. Reg. 31,306, 31,313 (June 17, 1994) (EPA stating that "certain state regulations that may be characterized as 'in-use' regulations may be preempted" if they "amount to a standard relating back to the original design of the engine").

Indeed, another CAA provision, 42 U.S.C. § 7541(h), removes any doubt that the preemption provision reaches post-sale conduct. That section provides: "Nothing in [the preemption provision] shall be construed to prohibit a State from

testing, or requiring testing of, a motor vehicle *after the date of sale of such vehicle to the ultimate purchaser*." *Id.* § 7541(h)(2) (emphasis added). If the panel were correct that the preemption provision covers only state and local regulation of *pre-sale* conduct, then it would have been wholly unnecessary for Congress to specify in § 7541(h) what states may and may not do with respect to post-sale vehicles. That alone undermines the panel's interpretation of Section 209(a). *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts are "reluctan[t] to treat statutory terms as surplusage" (internal quotation marks omitted)). Furthermore, § 7541(h) draws an important distinction, stating that although Section 209(a) generally may not be construed to preclude states from requiring testing of vehicles after sale, that construction does not allow states to require *manufacturers* (as opposed to individual car owners) to conduct testing of vehicles at all, whether new or after sale. 42 U.S.C. § 7541(h)(2). Congress thus explicitly understood that preemption under Section 209(a) extends to requirements regarding vehicles after sale, and it explicitly barred states from regulating manufacturers by requiring them to conduct testing on new or in-use vehicles.

The panel nonetheless rejected a finding of preemption. The panel relied heavily on the CAA's savings clause, which reserves for state and local governments the authority "otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." *Id.* § 7543(d). That provision,

however, does not give states and localities jurisdiction to regulate manufacturers, including model-wide changes to their vehicles. Instead, as other courts have held and consistent with § 7541(h), the provision allows states and localities to enact regulations that place "the burden of compliance … on individual [vehicle] owners and not on manufacturers and distributors." *Allway Taxi*, 340 F. Supp. at 1124; *see, e.g.*, *Motor Vehicles Mfrs. Ass'n of U.S. v. N.Y. State Dep't of Envt'l Conserv.*, 79 F.3d 1298, 1303 (2d Cir. 1996) (state vehicle inspection and maintenance programs). In that vein, states and localities have adopted their own tampering prohibitions. Until now, however, these prohibitions have never been applied to manufacturers' model-wide corrections and updates. Instead, such measures have been applied to prevent individual vehicle owners and operators from implementing their own modifications, such that the vehicles no longer conform to the manufacturer's design. The CAA does not preempt these measures, which support the goal of promoting uniform emission controls across a vehicle model population.

II. The Panel Decision Creates Tremendous Uncertainty for Manufacturers and Undermines Congress's Plan for Nationwide Regulation of Vehicle Emissions

EPA's exclusive, nationwide jurisdiction over manufacturers' post-sale changes is critical to assuring uniformity of regulation and a functional regulatory system for vehicles. EPA has substantial information about vehicle emissions and the nuances of emission control technology, stemming from its deep involvement in

the testing, monitoring, and certification processes. And EPA has the technical expertise necessary to evaluate post-sale, model-wide changes in a manner that balances performance, emissions, and other considerations. Allowing the Counties and other state and local regulators to insert themselves into this federal process would greatly interfere with the congressional plan for nationwide regulation of vehicle emissions.

For one thing, it would create considerable uncertainty for manufacturers, ultimately hindering their ability to make important post-sale design changes and updates. Any particular change could draw scrutiny, inconsistent oversight, and potential liability from any one of thousands of state and local regulators. The manufacturer could attempt to seek assurances of approval from each and every regulator; if one considered an in-use change to be unlawful tampering, the manufacturer would have to redesign the change to address that regulator's concerns and then restart the process of obtaining approval from EPA and other jurisdictions. Even if it were possible to get input from all jurisdictions before introducing an update, the manufacturer might then have to treat vehicles of the same model year differently in different jurisdictions, depending on whether the jurisdiction has approved or disapproved the proposed in-use change. That, however, is both impractical and contrary to Congress's intent to avoid subjecting manufacturers to requirements that vary across States.

The panel gave no weight to this concern about subjecting manufacturers to multiple, potentially conflicting regulatory schemes. In the panel's view, this concern was "inapplicable" because local anti-tampering rules are "identical" to the federal tampering prohibition. Add. 39-40 n.22. That reasoning is flawed. For one thing, Section 209(a) prohibits state and local governments from enforcing "*any* standard relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a) (emphasis added), even "identical" standards. *See Sims v. Fla. Dep't of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989) (CAA preempts state regulation even if it "does not establish new or conflicting emission standards"). Moreover, the panel's reasoning erroneously assumes that there will be a consensus among regulators about whether a particular change constitutes tampering. As explained, that is not always the case, as such changes can raise complex technical questions about whether they are justified and how best to balance tradeoffs among different types of pollutant emissions. *See supra* pp. 11-13. If every state and local regulator were free to evaluate in-use changes under their own criteria, some would inevitably reach different conclusions from EPA.[8]

[8] Here, although the Counties' position generally aligns with EPA's position that Volkswagen installed impermissible defeat devices, the case also illustrates the potential for conflict between EPA and other regulators as to post-sale changes. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1046 n.7 (N.D. Cal. 2018) (discussing EPA-approved post-sale modifications). In any event, if the panel decision is allowed to stand, it is by no

(continued . . .)

In short, allowing state and local governments to regulate model-wide changes to in-use vehicles would create a hopelessly unmanageable patchwork of regulation. The automobile manufacturing industry raised a similar concern in its comments on the 1970 CAA amendments. There, the Automobile Manufacturers Association explained that "[t]he possibility of hundreds of different [emission] standards" was "wholly unrealistic from an economic standpoint" and would give rise to "a myriad of problems." Letter, Automobile Mfrs. Ass'n to Elliot L. Richardson, Aug. 27, 1970, *reprinted in* 1 CAA Legislative History at 724-25. The CAA addresses this concern by granting EPA exclusive authority to regulate manufacturers' model-wide emission conduct and by broadly preempting state and local attempts to regulate in this sphere. Fifty years later, as the complexity of emission regulations and emission control technology has increased significantly, the concern raised by manufacturers carries even greater weight. Allowing state and local regulators to weigh in on which design changes and software updates to in-use vehicles constitute tampering would destabilize EPA's regulatory scheme and inject unwarranted confusion into the orderly process that Congress intended.

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means certain that federal, state, and local authorities will agree on whether a particular change constitutes tampering.

CONCLUSION

Amici respectfully request that the Court grant the petition for panel rehearing or rehearing en banc.

Dated: August 10, 2020

Respectfully submitted,

/s/ S. Zachary Fayne

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

S. Zachary Fayne
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Zachary.Fayne@arnoldporter.com
(415) 471-3114
(415) 471-3400

Jonathan S. Martel
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Jonathan.Martel@arnoldporter.com
(202) 942-5000
(202) 942-5999 (fax)

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 29-2 because the brief contains 4,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

Dated: August 10, 2020

/s/ S. Zachary Fayne

S. Zachary Fayne
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Zachary.Fayne@arnoldporter.com
(415) 471-3114
(415) 471-3400

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I electronically filed the foregoing brief with the Court via the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 10, 2020

/s/ S. Zachary Fayne

S. Zachary Fayne
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Zachary.Fayne@arnoldporter.com
(415) 471-3114
(415) 471-3400

Counsel for Amici Curiae