IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel*. DAVE YOST, OHIO ATTORNEY GENERAL, *Plaintiff/Appellee,* v. VOLKSWAGEN AKTIENGESELLSCHAFT D/B/A VOLKSWAGEN GROUP AND/OR VOLKSWAGEN AG; AUDI AG; VOLKSWAGEN GROUP OF AMERICA, INC. D/B/A VOLKSWAGEN OF AMERICA, INC. OR AUDI OF AMERICA, INC.; VOLKSWAGEN OF AMERICA, INC.; AUDI OF AMERICA, LLC; DR. ING. H.C. F. PORSCHE AG D/B/A/ PORSCHE AG; and PORSCHE CARS NORTH AMERICA, INC., *Defendants/Appellants.*	Case No. 20-0092 On Appeal from the Court of Appeals of Ohio, Tenth Appellate District, Franklin County Case No. 19AP-7

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, OHIO CHAMBER OF COMMERCE, AND ALLIANCE FOR AUTOMOTIVE INNOVATION

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The Chamber of Commerce of the United States of America, the Ohio Chamber of Commerce, and the Alliance for Automotive Innovation respectfully submit this jurisdictional memorandum as *amici curiae* in support of Defendants-Appellants Volkswagen Aktiengesellschaft et al. ("Volkswagen").

THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

This case has sweeping implications for the automobile industry—and, in turn, the vehicle-buying public. The Court of Common Pleas correctly recognized that the federal Clean Air Act ("CAA") preempts state and local efforts to regulate both (i) the design of new motor vehicles and (ii) subsequent design changes and software updates that manufacturers make on a nationwide, model-wide basis to vehicles that have already been sold. On appeal, however, the Court of Appeals for the Tenth District agreed with Ohio that the CAA does *not* preempt state and local regulation of post-sale, model-wide design changes and software updates. That decision creates a conflict with the six other state and federal courts that have issued reasoned opinions on this exact question. Those courts have uniformly held that Congress gave the U.S. Environmental Protection Agency ("EPA") exclusive jurisdiction to regulate manufacturers' model-wide changes and that state and local efforts to penalize the same conduct are preempted under the Supremacy Clause.[1]

The Tenth District's outlier decision rests on an artificial distinction—between vehicles before and after they leave the dealer's lot—that is divorced from the way manufacturers design, produce and update their vehicles in practice. Manufacturers routinely update the software design

[1] *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); *State v. Volkswagen Aktiengesellschaft*, 2018 WL 3349094 (Mo. Cir. Ct. June 26, 2018); *People ex rel. Madigan v. Volkswagen Aktiengesellschaft*, 2018 WL 3384883 (Ill. Cir. Ct. June 5, 2018) (appeal pending); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018) (appeal pending).

and calibration of their engines and emission control technology, both to resolve problems identified in the field and, as new technologies and programs emerge, to improve their vehicles' overall performance, reliability, driveability, safety, and emission control. These changes are currently governed by EPA regulations and guidance documents, which establish a uniform, orderly process for making changes to both new vehicles and vehicles that have already been sold. Since the 1970s, EPA has provided guidance to manufacturers to allow them to undertake those changes without violating the CAA's prohibition on tampering.

The Tenth District's decision, however, paves the way for states and localities to apply their own tampering prohibitions and penalties to model-wide changes—even where EPA has either already assured the manufacturer that a particular change does *not* constitute tampering, or taken whatever other steps EPA deems appropriate. Allowing every state and local government to police model-wide, in-use changes would result in "an anarchic patchwork of federal and state regulatory programs." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) ("*EMA*") (internal quotation marks and citation omitted). That would "create nightmares for the manufacturers," *id.*, and the automotive industry more broadly. The health of this industry is critical to this State's economy, supporting over 300,000 jobs in Ohio and generating $2.4 billion in state tax revenue in 2017.[2] It would also harm consumers and potentially the environment by inhibiting manufacturers' ability to make important and beneficial updates to their vehicles.

To be clear, *amici* are not suggesting that manufacturers should be able to evade responsibility for engaging in unlawful tampering, either at the factory or to vehicles that have already been sold. *Amici* write to underscore that there is already a comprehensive and orderly

[2] *See* Alliance of Automobile Manufacturers, *State Facts: Autos Drive Ohio Forward*, https://autoalliance.org/in-your-state/OH (last visited Jan. 24, 2020).

process for federal regulatory oversight of model-wide design changes introduced in the field. That sensible nationwide framework would be disrupted if states and localities could regulate and penalize manufacturers' post-sale, model-wide changes and updates. This Court should accept jurisdiction to consider the Tenth District's outlier decision on this important question of constitutional law. *See* S. Ct. Prac. R. 5.02(A)(1), (3) (permitting Court to review appeals that "involve[] a substantial constitutional question" or "a question of public or great general interest").

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Alliance for Automotive Innovation ("Auto Innovators") is a nonprofit trade association representing the manufacturers, tier one suppliers, and value chain partners that produce nearly 99 percent of all cars and light-duty trucks sold in the United States. Auto Innovators was formed in January 2020 by the combination of the nation's two largest automobile associations, the Association of Global Automakers and the Alliance of Automobile Manufacturers.[3] Auto Innovators' 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. As described above, Auto Innovators' members need the flexibility 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 EPA's judgment about whether a change amounts to tampering.

[3] Auto Innovators' members include APTIV, Aston Martin Lagonda of North America, BMW Group, Robert Bosch, GmbH, BYTON, Cruise Automation, Denso, 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, Local Motors, Maserati North America, Mazda, McLaren Automotive, Mercedes-Benz USA, Mitsubishi Motors, Nissan North America, Inc., NXP, Panasonic, Porsche Cars N.A., PSA North America, Sirius XM, Subaru of America, Suzuki Motor of America, Texas Instruments, Toyota Motor North America, Volkswagen Group of America, and Volvo Car USA.

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. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ, while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, it is a respected participant in the public policy arena.

The members of both the Chamber and the Ohio Chamber depend on a stable, predictable, and nationally uniform system for regulating emissions from motor vehicles. Accordingly, they have a significant interest in ensuring that state and local regulators cannot impose their own regulatory burdens on manufacturers' model-wide changes to vehicles that have already been sold.

STATEMENT OF THE CASE AND FACTS

Amici point to the statement of the case and facts set forth in Volkswagen's memorandum.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The Clean Air Act preempts state-law claims against motor vehicle manufacturers arising from model-wide changes to in-use vehicles.

Volkswagen's memorandum persuasively demonstrates why the CAA preempts Ohio's claims under well-settled preemption principles. *Amici* write to provide their perspective on the significant practical impact the Tenth District's contrary decision will have on the automotive

industry by disrupting the Congressional plan for nationwide regulation of automobile manufacturers concerning emissions. EPA regulations currently provide an orderly framework under which manufacturers can carry out model-wide changes to in-use vehicles. These changes often result in significant benefits for consumers and the environment, such as improved vehicle performance and improved emissions control. Allowing state and local governments to insert themselves into the existing, federally regulated process for implementing model-wide changes would create considerable uncertainty for manufacturers and hinder their ability to make important design changes and software updates to in-use vehicles.

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

Manufacturers regularly confront the need to modify their vehicles on a model-wide basis. These changes often address a performance or emission-related problem that the manufacturer or EPA has identified in vehicles operating in the field. Manufacturers invest significant resources to investigate the cause of the problem, identify opportunities for improvement, and engineer a solution to be implemented on the production line. *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"). These changes to production vehicles, known as "running changes," are made for "a variety of reasons," including, among others, "improvements to driveability, improvements to fuel economy, [and] reductions in emissions." *Id.* at 11-12.

Manufacturers often then seek to make these same (or similar) changes to vehicles of the same model type that have already left the production line—*i.e.*, "in-use" vehicles.[4] By doing so, manufacturers preserve consistency across a vehicle model population and ensure that all vehicles of that model type receive the benefits of the design change, regardless of when they were produced. Similarly, manufacturers may seek to implement the design change on vehicles from *prior* model years that are no longer in production. Because emission control technologies often carry over across multiple model years, production vehicles may use emission control technologies that are identical or very similar to the technologies used on prior-model-year vehicles. In such cases, it is also common industry practice for a manufacturer that improves the design or configuration of the emission controls on its production vehicles to seek to implement those same changes on prior-model-year, in-use vehicles that use the same or similar underlying technologies.[5]

Manufacturers often use "field fixes" to achieve these conforming changes to in-use vehicles. A "field fix" is defined by EPA as "[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 typically

[4] Indeed, the software updates at issue in this case were initially installed as a "new software function in *new* [vehicles] being sold in the United States, and *later* installed [] in *existing* [vehicles] through software updates during maintenance." Rule 11 Plea Agreement, Ex. 2 ¶ 50, *United States v. Volkswagen AG*, No. 16-CR-20394 (E.D. Mich. Mar. 10, 2017) (emphasis added).

[5] As Volkswagen has explained, state and local attempts to regulate changes that are intended to conform in-use vehicles to the design of *new* production vehicles fall within the scope of the CAA's express preemption provision, 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); *see* Defendants-Appellants' Joint Mem. in Support of Jurisdiction 15.

are designed to apply to all vehicles of a particular model nationwide, and are implemented on a vehicle-by-vehicle basis as vehicles are taken in for service.

Manufacturers can also accomplish model-wide changes to in-use vehicles through a recall of affected vehicles.[6] EPA regulations require manufacturers to report emission-related defects, including software malfunctions that interfere with the vehicle's continued compliance with emission standards. 40 C.F.R. § 85.1902(b)(2); *id.* §§ 85.1903, 1068.501 (governing reporting of emission-related defects). If EPA determines that the defect causes a "substantial number" of vehicles not to comply with emission standards, EPA may order a recall to require the manufacturer to remedy the defect on a model-wide basis. *Id.* § 85.1802(a). Alternatively, the manufacturer may pursue a voluntary recall campaign. EPA regulations contemplate that manufacturers will initiate voluntary recalls to implement "modifications, alterations, repairs, corrections, adjustments, or other changes … to correct the vehicles or engines." *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 motor vehicle emission standards have become more stringent, emission control technology has become increasingly complex. To comply with today's emission standards, most diesel engines use a combination of various emission control systems. One illustrative example is the exhaust gas recirculation ("EGR") system, which recirculates a portion of the engine's exhaust back into the intake air and combustion chamber to reduce emissions of nitrogen oxides ("NOx"), but also tends to increase particulate and carbon dioxide emissions and reduce fuel economy. EGR systems were

[6] The software updates that Ohio seeks to regulate here were installed as part of a voluntary recall. *See, e.g.*, First Am. Compl. ¶ 91, *State of Ohio ex rel. DeWine v. Volkswagen Aktiengesellschaft*, No. 16CV-10206 (Ohio Com. Pl. Sept. 25, 2017) (alleging that "during recalls" the "software update" that forms the basis of Ohio's claims was "installed").

first used in diesel passenger cars in the 1990s and have become more sophisticated over time. Electronically controlled "cooled" EGR systems were introduced in the early 2000s, as more stringent emission standards created higher demands on EGR usage.[7] These modern EGR systems are "active" controls, meaning they do not operate continuously at one hundred percent capacity. Instead, they are electronically controlled and calibrated to respond to different operating conditions (such as engine speed and load, altitude, temperature, and the function of other emissions controls on the vehicle).

Not surprisingly, the increasing complexity and computerization of emission controls has resulted in an increased need for software updates after vehicles are sold. Manufacturers carefully calibrate their emissions systems, and they may adjust the calibrations throughout the model year to optimize emission control, reliability, driveability, safety, and performance. As addressed above, manufacturers apply these design updates to production vehicles through running changes that are approved by EPA. Manufacturers often then disseminate these improvements to vehicles in the field through software updates to conform the entire fleet—including prior-model-year vehicles that use the same underlying technology—to the "latest and greatest" design.

The second factor contributing to the greater incidence of in-use changes is EPA's adoption of monitoring and testing requirements for in-use vehicles. Starting in the 1990s, EPA adopted onboard diagnostic ("OBD") system monitoring requirements. *See* 40 C.F.R. § 86.1806-17. These OBD systems (which are part of the vehicle's onboard computer) monitor emission control components, detect malfunctions, and illuminate an indicator light notifying drivers to seek service in the event of a malfunction. By generating feedback on the in-use performance of emission

[7] *See, e.g.*, H. Jaaskelainen & M. Khair, *Exhaust Gas Recirculation, available at* https://www.dieselnet.com/tech/engine_egr.php.

control components, OBD systems make it easier for manufacturers to identify failures of the emission control systems in actual operating conditions that may require design corrections in the field. The OBD systems themselves involve complex software that may also require corrections. Similarly, EPA has promulgated regulations requiring manufacturers to test in-use vehicles for compliance with emissions standards. *Id.* § 86.1845-04. This testing process also increases manufacturers' ability to detect—and correct—failures in the field.

As a result of these developments, model-wide changes to in-use vehicles are vastly more common today than in the 1970s, when monitoring to detect problems was less sophisticated and modifications would more typically require changes in physical parts. And that trend will only continue, as manufacturers continue to rely on complex, computerized emission controls and monitoring systems and EPA continues to require monitoring and in-use testing.

B. EPA Comprehensively Regulates Model-Wide Changes to Vehicles in Production and in the Field

The Clean Air Act provides for comprehensive federal regulation of the design and configuration of motor vehicles, from initial certification to the end of their useful lives.[8] The CAA authorizes EPA to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7521(a)(1). To ensure compliance with these standards, the CAA directs EPA to require testing of "any new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether such vehicle or engine conforms with [emissions] regulations." *Id.* § 7525(a)(1); *see also*

[8] The CAA 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 section. Because Ohio does not purport to enforce California's standards, however, this brief focuses on the federal regulatory framework.

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. Throughout this process, manufacturers interact extensively with EPA technical staff to provide information and address any concerns. Manufacturers can market a new vehicle only upon obtaining a "certificate of conformity" from EPA confirming that the vehicle complies with applicable emission standards.

EPA's regulation of vehicle emissions does not stop once this certification process is complete. As described above, various performance and emissions problems can and do arise in the field. Thus, even after vehicles are sold, EPA continues to exercise authority to ensure that vehicles—on a model-wide basis—remain in compliance with emission standards for their full useful lives. For example, EPA requires manufacturers to conduct in-use testing and to report any emission-related defects. *See supra* pp. 8-9. As one court recognized, "[t]his grant of power to the EPA to continue investigating models of vehicles[,] even after the certification process has been complete, suggests that Congress intended the federal regulation of emission standards to continue even after certification has been granted." *Madigan*, 2018 WL 3384883, at *17.

As particularly relevant here, EPA exercises regulatory authority over model-wide design changes and software updates that manufacturers propose to address problems that arise in the field. For example, when a manufacturer seeks to make running changes to production vehicles, it must apply to EPA for an amendment to the certificate of conformity for a specific model year vehicle. *See* 40 C.F.R. § 86.1842-01(b)(1). EPA can then require additional testing to ensure that the vehicles will continue to meet applicable emissions standards throughout their useful lives. *Id.* § 86.1842-01(b)(2). If EPA determines that the vehicles, as modified, do not meet applicable standards, it can require the manufacturer to recall the vehicles. *Id.* § 86.1842-01(c).

EPA also regulates manufacturers' model-wide design changes to in-use vehicles in the field (*i.e.*, field fixes). Among other things, EPA enforces the CAA's prohibition on tampering, which makes it unlawful for "any person knowingly to remove or render inoperative any … device or element of design [installed on or in a certified motor vehicle] after [its] sale and delivery to the ultimate purchaser." 42 U.S.C. § 7522(a)(3)(A); *see also id.* § 7522(a)(3)(B) (making it unlawful for any person to manufacture, sell, or install "any part or component … where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine").

Importantly, however, it is not always clear whether a particular design or calibration change constitutes "tampering" or a "defeat device." That is because many in-use changes involve modifications to emission control software that may increase emissions of one pollutant while decreasing emissions of others, without affecting the vehicles' compliance with applicable EPA emission standards. As just one example, measures to *reduce* a diesel vehicle's emissions of NOx—which is formed in high-temperature combustion and may be controlled by reducing combustion temperatures through increased use of EGR—tend to *increase* emissions of CO_2 and particulates, due to less efficient combustion and increased fuel consumption. As this example demonstrates, legitimate in-use changes often involve tradeoffs. EPA works closely with manufacturers to differentiate legitimate design changes that comply with federal emission standards from those that constitute unlawful "tampering" or "defeat devices."

Over forty years ago, EPA recognized that manufacturers could legitimately be uncertain as to whether in-use changes involving emission control components violate the CAA's tampering prohibition. EPA accordingly 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. Under the guidance, EPA retains jurisdiction to review *all* model-wide changes to in-use vehicles. *Id.* at 3. EPA's oversight process provides needed certainty and uniformity for manufacturers making updates to vehicles on a model-wide basis.

C. Allowing States and Counties to Regulate Manufacturers' Model-Wide Changes to In-Use Vehicles Undermines the Federal Regulatory Framework

The Tenth District's decision replaces the current orderly federal process with regulatory chaos. Yet the court gave no weight to the concern about subjecting manufacturers to multiple, potentially conflicting regulatory schemes. In the court's view, this concern was "diminished" because the manufacturing conduct at issue "involves tampering with the existing emission control systems to reduce their effectiveness." Tenth District Decision ¶ 32. That reasoning erroneously assumes that there will be a consensus among regulators about whether a particular change constitutes tampering. As explained above, that is not always the case, as such changes commonly result in tradeoffs among different types of pollutant emissions. *See supra* p. 11. If every state and local regulator were free to evaluate in-use changes under their own criteria, some might inevitably reach different conclusions from EPA about the lawfulness of certain changes.[9]

As a result, manufacturers would be placed in a constant state of uncertainty regarding the status of their routine, model-wide changes. Any particular change could draw scrutiny (and potential liability) from any one of thousands of state and local regulators. The manufacturer would have to choose from an array of undesirable or infeasible options. It could seek assurances

[9] Here, Ohio's position happens to align with EPA's, as both maintain that Volkswagen installed impermissible defeat devices. But if the Tenth District's decision is allowed to stand, it will not always be the case that federal, state, and local authorities agree on whether a particular change constitutes tampering. State and local regulators could seek to apply their own particular interpretations of "tampering" (or other regulatory burdens) to various types of in-use changes, resulting in significant regulatory uncertainty.

of approval in advance from each and every regulator; if one regulator considered an in-use change to be unlawful tampering, the manufacturer would have to redesign the change to address its 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 (but for limited exceptions involving California's standards, which are not relevant here). *See* 42 U.S.C. §§ 7507, 7543(b).

In short, allowing state and local governments to regulate model-wide design changes to in-use vehicles would create a hopelessly unmanageable patchwork of regulation. That is precisely the concern that the automobile manufacturing industry raised in its comments on the 1970 amendments to the CAA. There, the Automobile Manufacturers Association explained:

> The possibility of hundreds of different standards would be wholly unrealistic from an economic standpoint …. If the various states, cities, or air quality regions of the U.S. were authorized to establish their own emissions standards applicable to new motor vehicles, a myriad of problems will necessarily arise …. Without knowing the precise emission standards each state might adopt, it is difficult to pinpoint the exact magnitude of this problem. However it is clear that the problem would be critical and of immense proportions.

Letter, Automobile Mfrs. Ass'n to Elliot L. Richardson, Aug. 27, 1970, *reprinted in* 1 CAA Legislative History at 724-25. The Association further emphasized that manufacturers needed to be able to "rely on interpretations made and practices followed by the agency." *Id.* Almost fifty years later, as the complexity of emissions regulations and emissions control technology has increased exponentially, these concerns carry equal if not greater weight. Allowing state and local regulators to weigh in on which design changes and software updates to in-use vehicles constitute

tampering—and which do not—would destabilize EPA's regulatory scheme and would inject unwarranted confusion into the process. Indeed, the potential for state and local regulators to prohibit manufacturer updates as tampering could inhibit resolution of such compliance or enforcement issues with EPA, as the potential for state and local inquiries and enforcement could compound or complicate the consequences of any resolution reached with EPA.

In rejecting a finding of preemption, the Tenth District reasoned that "[a] clear purpose of the CAA is to reduce air pollution" and that Congress intended states to "maintain significant authority in regulating conduct affecting motor vehicle emissions." Tenth District Decision ¶ 24. The Tenth District pointed to 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." 42 U.S.C. § 7543(d). That provision, however, does not give states and localities jurisdiction to regulate manufacturers' *model-wide* changes to their vehicles. Instead, as other courts have held, 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, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972).

Such regulations include transportation measures governing the operation of individual vehicles, "such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles." *EMA*, 88 F.3d at 1094. They also include measures to ensure that individual vehicles (rather than classes or models of vehicles) remain in compliance with emission standards. For example, states and localities have set up vehicle inspection and maintenance programs tied to vehicle registration; those programs can detect whether individual vehicles' emission control systems have failed and, if so, can, at the manufacturer's expense, "require their

owners to undertake repairs." *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). In the same vein, states and localities have adopted their own tampering prohibitions. Traditionally, however, these prohibitions have not been applied to manufacturers' model-wide updates, but rather to prevent after-market participants from modifying *individual* vehicles such that they no longer conform to the manufacturer's design. The CAA does not preempt any of these measures, all of which support—rather than undermine—the goal of promoting uniform emission controls across a vehicle model population.

Importantly, this division of labor among federal, state, and local regulators "best utilizes the comparative advantages of EPA and the states and local governments." *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d at 1041, 1043. State and local regulators are well-positioned to enforce emission standards at the individual level, given their existing role in administering vehicle registration and inspection programs. EPA, however, is far better-positioned to regulate *manufacturers' model-wide* updates to vehicles both in production and in the field. EPA not only has nationwide jurisdiction, which is critical to assuring uniformity of regulation. EPA also 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. Thus, unlike state and local governments, EPA has the technical expertise necessary to evaluate model-wide changes in a manner that balances performance, emissions, and other considerations. Accordingly, EPA (subject to a limited exception for California) has, and should have, exclusive authority to regulate manufacturers' model-wide changes, both in production and in the field.

CONCLUSION

Amici respectfully submit that this Court should accept Volkswagen's appeal.

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I hereby certify that, pursuant to S.Ct.Prac.R.3.11(C)(1), a true copy of the foregoing was served upon all counsel via email this 24th day of January, 2020:

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