No. 21-312

In the Supreme Court of the United States

VOLKSWAGEN AKTIENGESELLSCHAFT, ET AL.

Petitioners,

v.

OHIO EX REL. ATTORNEY GENERAL DAVE YOST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Clean Air Act preempt state laws that prohibit tampering with emission-control systems in already-in-use vehicles?

LIST OF PARTIES

The Petitions' list of parties is complete and correct.

LIST OF DIRECTLY RELATED PROCEEDINGS

The Petition's list of related proceedings is complete and correct.

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INTRODUCTION

This case presents precisely the same question as the case that Volkswagen calls "*Counties*." *See Volkswagen Group of America, Inc. v. The Environmental Protection Commission of Hillsborough County, Florida*, No. 20-994. In that case, the Ninth Circuit held that the Clean Air Act does not preempt state laws that forbid tampering with emission-control systems after a vehicle's sale. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.* ("*Counties*"), 959 F.3d 1201, 1205 (9th Cir. 2020) (per Ikuta, J.). In this case, the Supreme Court of Ohio reached the same conclusion. *See* Pet.App.16a. The issues presented in *Counties* are not worthy of review. *See* Br. for United States as *Amicus Curiae* in *Volkswagen v. Environmental Protection Commission.* No. 20-994 (Sept. 27, 2021). So, neither are the issues in this case.

Further, this is a far worse vehicle than *Counties* for addressing the question presented. The reason is that this appeal comes from a state-court case that is not yet final. As such, this Court lacks jurisdiction to decide the matter. 28 U.S.C. §1257. At the very least, there are significant doubts surrounding the Court's jurisdiction. That alone counsels against granting Volkswagen's petition for a writ of *certiorari*.

STATEMENT

1. Environmental regulation is primarily a state responsibility. *Solid Waste Agency of Northern Cook Cty. (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Congress has made sure it stays that way. The Clean Water Act, for example, leaves the States with "substantial responsi-

bility and autonomy" to regulate groundwater pollution. *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020). Along the same lines, the Clean Air Act assigns "primary responsibility" for controlling air pollution to the States. 42 U.S.C. §7401(a)(3).

There is, however, one important issue on which the federal government takes the lead: it bears primary responsibility for regulating emissions by new cars. Under the Clean Air Act, the federal government sets pollutant-concentration standards that new cars must satisfy. *See, e.g.*, 42 U.S.C. §§7522(a)(1), 7521(b). The Act also requires that vehicles be sold with a "certificate of conformity." That certificate attests to compliance with regulations including emission limits. *See* §7525(a)(1). Separately, the Act forbids "any person" from "remov[ing] or render[ing] inoperative any device" that reduces air pollution. §7522(a)(3)(A).

While the federal government takes the lead in regulating emissions from *new* cars, the States play a substantial role in regulating pollution from *used* cars. Consider Ohio. The Buckeye State regulates car emissions in two ways relevant here. First, it carries out an inspection-and-maintenance program known as E-Check. Ohio Rev. Code §3704.14; Ohio Admin. Code §3745-26-01 *et seq.*; *see also* Ohio EPA E-check, https://perma.cc/8HZL-ZNSG. Under this program, residents of seven northeast Ohio counties must test their cars' emissions biennially and make any necessary repairs. Ohio Admin. Code §3745-26-12(A)(3), (D)(4), (D)(7); 40 C.F.R. §§51.351, 51.361. Second, the State's Anti-Tampering Law prevents the disabling of emission controls on in-use cars.

Ohio Rev. Code §3704.16(C)(3). It provides: "No person shall knowingly … [t]amper with any emission control system installed on or in a motor vehicle *after* sale, lease, or rental and delivery of the vehicle." *Id.* §3704.16(C) & (C)(3) (emphasis added). "'Tamper with' means to remove permanently, bypass, defeat, or render inoperative, in whole or part, any emission control system that is installed on or in a motor vehicle." *Id.* §3704.16(A)(1). As the italicized text shows, this law complements the federal regulation of emissions. While federal law ensures that new cars meet emission standards, the Anti-Tampering Law ensures that emission-control devices are not tampered with "*after* sale" so as to evade emission standards.

All of this aligns with provisions in the Clean Air Act that help delineate federal and state responsibility in this field. The first is the "Preemption Clause." It says: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from *new*" cars or "*new* … engines." 42 U.S.C. §7543(a) (emphasis added). The second is the "Savings Provision," which says: "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*" cars. *Id.* §7543(d) (emphasis added). These provisions—like the Clean Air Act more broadly—leave the EPA to impose standards on new-car emissions while reserving to the States the authority to regulate air pollution from in-use cars. *Accord* Correspondence from Automobile Mfrs. Ass'n to Elliot L. Richardson, Aug. 27, 1970, *reprinted in* 1 A Legislative History of the Clean Air Act Amendments of 1970, at 726 (Jan. 1974).

2. Enter Volkswagen. As consumers increasingly sought environmentally friendly products, Volkswagen marketed what it called "clean diesel" vehicles. *See, e.g.*, *Counties*, 959 F.3d at 1208. But that campaign hid a dirty truth. Volkswagen had installed software to cheat emission controls on various models for years 2009 through 2016. *Id.* at 1207–08. For the affected models, the emission-control systems could meet environmental regulations during brief stints of testing. But the same cars would emit "up to 35 times higher than" the allowable pollutant levels while being driven on the street. *Id.* at 1207.

The scheme worked like this. Volkswagen installed software on new cars that would switch the cars between a test mode and a drive mode. *Id.* Once installed, the software detected whether a car was undergoing emission testing in a controlled setting or being driven on the open road. *Id.* The software defaulted to test mode, which activated emission controls and allowed the car to pass inspection. *Id.* When the software detected normal driving, it would deactivate the emission controls. *Id.* This improved the cars' performance, but released illegal amounts of pollution into the air. *Id.* Volkswagen installed the cheating software on more than 580,000 cars nationwide. *Id.* at 1208.

But the cheat had a glitch. Some cars with the cheat software suffered engine failure on the open road. *Id.* The software's default to test mode was to blame—it did not always detect on-road driving. *Id.* Volkswagen solved the problem by cheating again. Volkswagen issued recalls for what it told the cars' owners was routine maintenance. *Id.* But

Volkswagen instructed mechanics to install software that would flip the default setting from test mode (the clean mode) to drive mode (the dirty mode). *Id.* Volkswagen also instructed mechanics to install new software that could detect the steering-wheel angle, which allowed the software to switch the car into test mode when the car was on a testing apparatus instead of on the open road. *Id.*

Volkswagen admitted to all of this in a plea agreement in federal court. *United States v. Volkswagen AG*, No. 16-cr-20394-SFC-APP-8, R.68 (E.D. Mich. Mar. 10, 2017). The plea deal did not give Volkswagen "any protection" against prosecutions for the same conduct by States or local governments. *Id.* at PageID#1403; *Counties*, 959 F. 3d at 1209. Volkswagen also settled its civil Clean Air Act liabilities to the federal government. Every State other than California, however, "reserved [the] ability to sue Volkswagen for damages." *Counties,* 959 F.3d at 1209.

3. Enter Ohio. The Attorney General sued Volkswagen to vindicate Ohio's air-pollution laws—and, more importantly, the health and environmental interests those laws protect. Ohio's complaint targeted Volkswagen's discrete cheating acts in separate counts. The only ones still relevant relate to Volkswagen's post-sale cheating. Those counts seek to hold Volkswagen responsible for violating the State's Anti-Tampering Law. In other words, Ohio alleged that Volkswagen violated state law by tampering with the emission-control systems on already-in-use cars. These counts *did not* seek to hold Volkswagen liable for anything relating to its pre-sale activities with respect to new cars.

Volkswagen moved to dismiss. It argued that the Clean Air Act preempted Ohio's claims. The common-pleas court agreed. *State, ex rel. DeWine v. Volkswagen Aktiengesellschaft*, No. 16CV10-10206, 2018 WL 8951077, at *6–9 (Ohio Ct. Com. Pl. Dec. 07, 2018). But the Tenth District Court of Appeals reversed. *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, 137 N.E.3d 1267 (Ohio Ct. App. 2019). And the Supreme Court of Ohio affirmed the Tenth District: it held that the Clean Air Act *did not* preempt Ohio's claims. Pet.App.1a-2a, 16a.

The Supreme Court began by observing: "Congress has told us exactly what it meant to include within the scope of the Clean Air Act's express-preemption provision." Pet.App.8a. The Court noted that the Preemption Clause forbids States from regulating "'the control of emissions from new'" cars and "'new … engines.'" *Id.* (quoting 42 U.S.C. §7543(a)). That language, the Court reasoned, makes clear that the Preemption Clause "no longer applies" once a new car is sold. Pet.App.9a. Because Ohio's Anti-Tampering Law regulates tampering with cars *after* sale, and because its suit sought to hold Volkswagen accountable for *post-sale* tampering, neither the law nor the suit was expressly preempted. *Id.*

The Court also rejected Volkswagen's argument that the Clean Air Act impliedly preempted the Anti-Tampering Law. It reasoned that a finding of implied preemption must be grounded in statutory text. Pet.App.12a. The Court saw nothing in federal law that would block Ohio's lawsuit. Instead, the Court said, Ohio law and federal law were *consistent* with one another: both forbade similar conduct. Pet.App.12a–13a. Indeed, after reviewing the rele-

vant Ohio statute, the Court concluded that Volkswagen faces liability under Ohio law only because the company had "circumvent[ed]" federal law. Pet.App.13a.

As it had rejected all of Volkswagen's arguments against applying Ohio law, the Ohio Supreme Court remanded the case for trial.

REASONS FOR DENYING THE PETITION

Volkswagen appeals a non-final remand implicating a shallow, dissipating split that matters only to those who plan to violate the Clean Air Act. The Court should deny the company's petition for a writ of *certiorari*.

I. Under 28 U.S.C. §1257(a), the Court lacks jurisdiction to hear this case.

A. This Court has jurisdiction to review only "final judgment[s]" from state courts. 28 U.S.C. §1257(a). "To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). Because a remand for trial is not final in either sense, state-court decisions remanding for a trial are not generally regarded as "final" for purposes of §1257. *See, e.g., id.* at 82; *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (*per curiam*); *S. Pac. Co. v. Gileo*, 351 U.S. 493, 496 (1956).

There are, to be sure, exceptions to this strict final-judgment rule. This Court has recognized four:

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479 (1975). This occurs, for example, when the defendant's only defense to liability implicates the federal issue. *Mills v. Alabama*, 384 U.S. 214, 217 (1966).

"Second, there are cases … in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480.

"In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481.

"Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482–483. "In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court

has entertained and decided the federal issue, which itself has been finally determined by the state courts for the purposes of the state litigation." *Id.* at 483.

B. The Court lacks jurisdiction to decide this case. Volkswagen asks this Court to review a decision remanding Ohio's claims for trial. Absent some exception, that remand order is not "final" for jurisdictional purposes. *See Jefferson*, 522 U.S. at 81. And none of the just-discussed exceptions apply.

First, this is not a case in which "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. Ohio has not understood Volkswagen to argue that, aside from preemption, it "has no defense in the [Ohio] trial court." *Mills*, 384 U.S. at 217. Volkswagen has not, for example, argued that remand would lead "inexorably towards" judgment against it. *Id.*

Second, and relatedly, the federal issue in this case is not certain to "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. To the contrary, if Volkswagen wins at trial following a remand for some reason other than the preemption issue, the federal issue will evaporate.

Third, remand does not foreclose the possibility of this Court's resolving the federal issue. *Id.* at 481. If Ohio prevails at trial, Volkswagen can come back to this Court to seek review of the preemption question.

Finally, refusal to review the case immediately will not "seriously erode federal policy." *Id.* at 483. *Even if* Volkswagen is right on the merits of the preemption issue, the federal interests served by preemption of state laws will not be frustrated simp-

ly by making Volkswagen go to trial—where it might prevail—before seeking relief in this Court. If Volkswagen is right that federal law preempts Ohio law, that federal policy can be vindicated, in this Court if necessary, in a posture when the Court unquestionably has jurisdiction.

Because none of the *Cox* exceptions apply, the Court lacks jurisdiction to resolve this case. At the very least, none of the *Cox* exceptions *clearly* applies, making this is a poor vehicle for addressing the question presented.

II. The split is shallow and dissipating.

Volkswagen's leading argument for *certiorari* is what it calls a "deepening" split on the question whether the Clean Air Act preempts state anti-tampering laws. Pet.16. Volkswagen is correct that there is a split of authority. But for two reasons, the split is not significant.

First, the split has never been all that deep. No appellate court has ever accepted Volkswagen's arguments about express preemption: as far as Ohio is aware, every appellate court to address the issue has held that the Preemption Clause does not expressly preempts laws like Ohio's. *See Counties,* 959 F.3d at 1219; *State v. Volkswagen AG*, 279 So. 3d 1109, 1119 (Ala. 2018); *State ex rel. Slatery v. Volkswagen Aktiengesellschaft*, No. M2018-00791-COA-R9-CV, 2019 WL 1220836, at *10 (Tenn. Ct. App. Mar. 13, 2019); *State v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *6 (Minn. Ct. App. Dec. 3, 2018). Any split deals only with Volkswagen's claim that federal law *impliedly*

preempts laws regulating tampering with emission controls post-sale.

But the split pertaining to implied preemption is dissipating, not deepening. The Ninth Circuit and the Supreme Court of Ohio have issued the last two opinions addressing the matter. And both rejected Volkswagen's arguments. The cases on the other side of the split all relied on the federal-district-court decision that the Ninth Circuit reversed in *Counties*. Consider the Alabama Supreme Court's opinion. Its analysis of the implied-preemption argument consists of twenty-four paragraphs copied from that now-overruled opinion. *State v. Volkswagen AG*, 279 So. 3d at 1121–29 (citing *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litig.*, 310 F. Supp. 3d 1030, 1040–47 (N.D. Cal. 2018), *rev'd in relevant part by Counties*, 959 F.3d 1201). Beyond the Alabama Supreme Court's cut-and-paste opinion, Volkswagen identifies only two unpublished opinions from intermediate courts in Tennessee and Minnesota. Both also relied on *Counties*. *See* Pet.16 (citing *State ex rel. Slatery*, 2019 WL 1220836; *State v. Volkswagen Aktiengesellschaft*, 2018 WL 6273103). So the momentum is all in one direction—the split is not deepening.

At present, it appears the split among the courts will resolve itself. There is no reason for this Court to get involved.

III. The decision below is correct

With a fading split, Volkswagen is left to press its merits case as a reason for review. It comes up short: the Clean Air Act does not expressly or impliedly preempt Ohio's Anti-Tampering Law.

A. Volkswagen's express-preemption argument is meritless.

Recall the text of the Preemption Clause: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new" cars or "new … engines." 42 U.S.C. §7543(a). Here, it is undisputed that Ohio seeks relief for actions Volkswagen took post-sale, not for actions Volkswagen took on "new" cars or engines. That ought to end the express-preemption argument. But Volkswagen persists. It argues that the conduct Ohio targets "relates to" the originally manufactured cars, and thus violates the Act's prohibition on States' adopting or enforcing standards "relating to" new cars and new engines. Pet.24. Volkswagen supports this theory with four arguments. None has any merit.

1. First, Volkswagen stresses that "relating to" is a broad phrase, meaning "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. TWA*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). And it notes that liability for actions taken post-sale *can* "relat[e] to" "the control of emissions from new" cars. 42 U.S.C. §7543(a); *accord* 59 Fed. Reg. 31306, 31313, 31331 (cited at Pet.26). Therefore, Volkswagen argues, Ohio's Anti-Tampering Law is preempted.

The problem with this argument is that its conclusion does not follow from its premises. Volkswagen is right that "relating to" has a broad meaning. And it is correct that laws nominally targeting post-sale conduct can "relate to" emission-control systems on new cars—imagine, for example, a

law forbidding any citizen from refueling a vehicle that emits pollutants at a federally approved level. The problem for Volkswagen is that Ohio's Anti-Tampering Law, in its application to already-in-use vehicles, does not set standards that relate—directly or indirectly—to "the control of emissions from new motor vehicles." Indeed, the Anti-Tampering Law is *completely indifferent* to how the emission-control system worked when the car was sold. It simply prohibits "[t]amper[ing] with any emission control system installed on or in a motor vehicle *after* sale, lease, or rental and delivery of the vehicle." Ohio Rev. Code §3704.16(C)(3) (emphasis added). The phrase "relating to" is broad. But it is not so broad that a state law that regulates work on *in-use* cars *without regard* to their original condition can be described as "relating to" new cars.

2. Volkswagen next argues that Ohio's claims "necessarily relate back to the original design" of Volkswagen's vehicles. Pet.26 (internal quotation omitted; alteration accepted). Why? Because, according to Volkswagen, Ohio's claims pertain to tampering that "did not fully remedy" the problems with the initial design. *Id.* According to Volkswagen, "the only basis for penalizing the updates" Volkswagen installed "is that they did not fully remedy the excess emissions caused by the factory-installed software." *Id.*

No. Ohio's claims have nothing to do with problems pertaining to "factory-installed software." Whether that software was flawed or flawless makes absolutely no difference to the State's claims. Ohio is simply alleging that Volkswagen "tampered with" the car's emission system—that it "remove[d] per-

manently, bypass[ed], defeat[ed], or render[ed] inoperative, in whole or part," the "emission control system … installed on or in" Volkswagen's cars. Ohio Rev. Code §3704.16(A)(1). Contrary to Volkswagen, it does not matter whether the company's new vehicles, "*as manufactured*," violated the Clean Air Act's "new-vehicle emission standards." Pet.26.

3. Volkswagen next accuses the Ohio Supreme Court of having ignored this Court's "instruction" to "examine how EPA enforces the [Clean Air Act's] new-vehicle standards to identify the 'standard-enforcement efforts that are proscribed by'" the Preemption Clause. Pet.26–27 (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004)). Even if that were what the Court said, it is hardly relevant to this case: nothing about the EPA's enforcement of new-vehicle standards suggests that Ohio's Anti-Tampering Law is the sort of "standard-enforcement effort[]" that the Clean Air Act proscribes. In any event, Volkswagen rips the quote from context. Here is the full passage:

> Manufacturers (or purchasers) can be made responsible for ensuring that vehicles *comply* with emission standards, but the standards themselves are separate from those enforcement techniques. While standards target vehicles or engines, standard-enforcement efforts that are proscribed by [the Preemption Clause] can be directed to manufacturers or purchasers.

South Coast, 541 U.S. at 253. This cannot plausibly be read, as Volkswagen suggests, to mean that the

Preemption Clause's scope ebbs and flows based on the EPA's current enforcement approach.

4. Volkswagen concludes its express-preemption argument with a puzzle Volkswagen has never been able to solve. Volkswagen says that Ohio *may* regulate a consumer or a mechanic who does the exact same thing as Volkswagen. But Ohio may not regulate Volkswagen, the manufacturer. Pet.29. Why not? Other than vague handwaving about the EPA's role, Volkswagen never connects this "manufacturer" exception to the text. And that gives away the game: if the Preemption Clause permits Ohio to forbid post-sale tampering, it may apply that law to big companies and independent mechanics alike. This Court does "not 'interpret' statutes by gerrymandering them with a list of exceptions that happen to describe a party's case." *United States v. Apel*, 571 U.S. 359, 372 (2014).

B. Volkswagen's implied-preemption argument has no textual grounding.

Volkswagen next turns to an argument that one district court adopted and that a few other courts followed. (The district-court decision has since been reversed. *See Counties,* 959 F.3d 1201.) Volkswagen's implied-preemption argument takes many forms. But the gist is this: the many provisions empowering the EPA to regulate *new cars* emanate penumbras that give the EPA exclusive authority to regulate manufacturers' tampering with emission systems on *in-use* cars.

"That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's

will." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality). It carries none today. Volkswagen invokes obstacle preemption—the version of preemption under which state laws are unenforceable if they "stand[] as an obstacle to" the accomplishment and execution of the full purposes and objectives of Congress. *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). But these purposes and objectives must derive from the statute itself. "[A]ll preemption arguments," the Court recently reiterated, "must be grounded" in statutory text. *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020). And nothing in the Clean Air Act's text suggests that state laws regulating post-sale tampering with emission-control devices thwart the Act's objective of allowing the EPA alone to regulate new-car emissions.

1. Volkswagen begins by insisting that "Congress granted EPA alone the tools to regulate manufacturers' conduct both pre- and post-sale." Pet.29. But Congress said exactly the opposite when it *preserved* the States' "right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed" cars. 42 U.S.C. §7543(d). Volkswagen admits that this language lets the States regulate mechanics or consumers who tamper with emission controls. Pet.29. Volkswagen has not plausibly explained how the same language exempts fraudsters who happen also to make the cars with which they later tamper.

2. Volkswagen shifts attention to the Ohio Supreme Court. It insists the Court erred by stating that, "as long as Volkswagen complies with, rather than circumvents, federal law it will have nothing to

worry about in Ohio." Pet.29 (quoting Pet.App.13a)). Whatever one makes of this statement, it is irrelevant to Volkswagen's petition for a writ of *certiorari*. For one thing, this court reviews judgments, not *dicta* in opinions. *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). For another, because Volkswagen's tampering *violated* federal law, *see* Br. for United States as *Amicus* in No. 20-994, at 7, 19–20 (Sept. 27, 2021), this case does not present the question whether it would have been liable had it complied with federal law.

3. Volkswagen next claims that, if States and the federal government alike can punish environmental-law violations, then the EPA will find it "impossible" to quantify penalties for breaking those laws. Pet.31. That is a *non sequitur*. The Clean Air Act nowhere makes the federal EPA the lone decisionmaker about what a lawbreaker should pay for its lawbreaking. That silence aligns with the default power of the States and the federal government to punish the "same act." *Gamble v. United States*, 139 S. Ct. 1960, 1966 (2019). Time and again, this Court has decided that States may impose sanctions alongside or on top of federal sanctions. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989); *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 257 (1984). And nothing in the Clean Air Act says otherwise. State sovereignty does not bow to the "priorities or preferences of federal officers," *Garcia*, 140 S. Ct. at 807, or the "unenacted approvals, beliefs, and desires" of Congress, *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). In the end, whatever "tension" may arise from state and federal overlap is a question for Congress. If Congress is

willing to "tolerate" that tension, a court "can do no less." *Silkwood*, 464 U.S. at 256.

In any event, Volkswagen is wrong to invoke possible *future* penalties to block the process of establishing its liability under Ohio law *now*. For now, it is speculation to worry about excess penalties, and any truly excessive penalties can be corrected *if* they are ever imposed. A court generally has discretion to "mitigate any hardship or injustice when" it applies a "statute's penalty provision." *Cty. of Maui*, 140 S. Ct. at 1477. Under the Clean Air Act, federal courts imposing penalties must consider the "size of the violator's business" and "the effect of the penalty on the violator's ability to continue in business," and "such other matters as justice may require." 42 U.S.C. §7524(b). Volkswagen has not identified anything in Ohio law that would bar courts from similarly calibrating their own penalties. Indeed, any penalties imposed at trial could be reviewed on appeal for an abuse of discretion. *See, e.g., State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 158 (1982); *see also id.* at 158–59 (Holmes, J., dissenting) (opining that amount of fine was excessive).

4. Speculating some more, Volkswagen says that, if the States are allowed to regulate post-sale fraud, car manufacturers will be reluctant to settle with the EPA. Volkswagen says settlement would then expose the companies to tag-along state penalties. Pet.32. In this case, that is water over the dam, as Volkswagen has settled the federal claims. Regardless, federal enforcement priorities are no reason to preempt Ohio's enforcement. This Court quite recently explained that "the possibility that federal enforcement priorities might be upset is not enough to

provide a basis for preemption." *Garcia*, 140 S. Ct. at 807. The States have enforcement priorities too.

5. Finally, Volkswagen floats the idea that blocking Ohio's enforcement action is needed to preserve federal authority to police fraud on the EPA. Pet.33–34 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)). To Volkswagen, Ohio's enforcement action is analogous to state-law suits that try to police fraud against a federal agency. *Id.* But once again, this misunderstands the nature of Ohio's suit: Ohio is suing Volkswagen *not* because it defrauded the EPA, but rather because it tampered with emission-control systems post-sale in violation of Ohio law.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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