No. 23-1648

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREI FENNER; PHILLIP BURNS; JAMES T. CRUNKLETON, III; ANTHONY GADECKI; MATTHEW HENDERSON; JOSHUA HERMAN; CARRIE LYNNE MIZELL; MICHAEL REICHART; KURT ROBERTS; GEORGE STANLEY; AND GREGORY WILLIAMS,

Plaintiffs-Appellants,

v.

GENERAL MOTORS LLC; ROBERT BOSCH GMBH; AND ROBERT BOSCH LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District Of Michigan, No. 1:17-cv-11661,
Hon. Thomas L. Ludington

BRIEF OF *AMICI CURIAE* ALLIANCE FOR AUTOMOTIVE INNOVATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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November 2, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1648 Case Name: Andrei Fenner, et al. v. General Motors

Name of counsel: Jonathan S. Martel

Pursuant to 6th Cir. R. 26.1, The Alliance for Automotive Innovation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 2, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jonathan S. Martel
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Alliance for Automotive Innovation ("Auto Innovators") is a collective trade organization representing the voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 98 percent of cars and light trucks sold in the United States. Auto Innovators is directly involved in regulatory and policy matters affecting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

[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 entity or person, other than amici, their members, or their counsel, contributed money intended to fund the preparation or submission of this brief.

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Amici have a strong interest in the proper resolution of this case. Amici's members depend on a stable, predictable, and nationally uniform system for regulating emissions from motor vehicles. Their members rely on the regulatory certainty provided by the Clean Air Act, as well as the Environmental Protection Agency's implementing regulations and adjudicatory actions, to design and obtain approval for the complex emissions control systems required for modern diesel engines and vehicles. These important interests will be jeopardized if private plaintiffs are permitted to second-guess EPA's regulation of motor vehicles and engines.

SUMMARY OF ARGUMENT

General Motors LLC's brief explains why the Court should affirm the judgment below and hold that Plaintiffs' state-law claims are preempted by the Clean Air Act ("CAA"). Auto Innovators and the

Chamber submit this amicus brief to offer the automobile industry's perspective about why the extensive federal regime in which EPA regulates emissions and polices against defeat devices strongly supports preemption here.

First, the emissions regulation regime that Plaintiffs attempt to question in this case is rigorous and demanding. Under the CAA, each manufacturer must annually apply for and obtain an EPA certificate of conformity for every vehicle model, confirming that each vehicle complies with applicable emissions standards on laboratory test cycles. The process requires extensive testing and voluminous written explanations for EPA review. In its analysis, EPA carefully scrutinizes each vehicle's auxiliary emission control devices ("AECDs"), which are electronic systems that change emissions controls in response to various operating conditions that are not replicated in laboratory test cycles. To ensure that these controls serve legitimate functions (such as engine protection or safety) and are not meant to circumvent emissions controls for unjustified performance benefits, EPA requires manufacturers to identify and provide a detailed justification for each AECD, defining and prohibiting unjustifiable AECDs as "defeat devices."

Second, this regulatory regime offers at least as strong a rationale for preemption as the one this Court recently found preemptive in *In re: Ford Motor Company F-150 & Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, 65 F.4th 851 (6th Cir. 2023). Given the breadth and depth of EPA's certification and AECD/defeat device review process, state-law claims second-guessing the EPA program would compel manufacturers to "submit a deluge of information" and overburden the Agency. *Ford*, 65 F.4th at 864. More significantly, it would seriously threaten a broader destabilization of the entire vehicle approval process. The risk of state tort liability and a patchwork of conflicting federal and state requirements would undermine manufacturers' confidence in the sufficiency of their AECD justifications and, in turn, in those systems' underlying designs. That would undercut EPA's own determinations in implementing and enforcing the CAA and would permit juries to impermissibly "rebalance" the congressional "objectives" set forth in that statute. *Id.* at 863.

Allowing private plaintiffs to second-guess EPA's judgment in evaluating AECDs and determining whether they constitute defeat devices would upend the orderly, congressionally mandated regime and

impair manufacturers' ability to produce and market vehicles to meet consumer demand. Under the CAA, it is EPA's responsibility to manage emissions standards and enforce manufacturer compliance. For the benefit of manufacturers and consumers alike, EPA must retain unimpeded authority to balance Congress's statutory objectives and administer a unitary and consistent regulatory scheme for vehicles sold in the national market.

ARGUMENT

The CAA directs EPA to balance competing aims in regulating vehicle emissions, including vehicle safety, performance, and reliability, as well as emission control. EPA's program implementing those directives is rigorous, expansive, and demanding, especially with regard to AECDs. Because Plaintiffs' claims here "second-guess" EPA's decisionmaking, purport to "rebalance" Congress's objectives, and risk broader destabilization of the vehicle approval regime, those claims are impliedly preempted. *See Ford*, 65 F.4th at 863 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)).

I. EPA's Vehicle Certification Regime Ensures Proper Emissions Control and Prohibits Unjustified AECDs

The CAA directs EPA to regulate vehicle emissions by "prescrib[ing] … 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). Before an engine or vehicle may be sold, the manufacturer must apply for and obtain a "certificate of conformity" from EPA, which ensures that the vehicle complies with applicable emissions standards during its "useful life." *See* 42 U.S.C. §§ 7522(a)(1), 7525(a), 7541(a)(1) & (b)(2); 40 C.F.R. §§ 86.1848-01(e), 86.1854-12(a)(1).[2] A certificate of conformity covers only a single model year; a manufacturer must apply for and obtain a new certificate for each succeeding model year, even if the vehicle configuration has not changed. *See* 42 U.S.C. § 7525(a)(1).

To implement the CAA's directives, EPA has prescribed a highly detailed regulatory regime. Manufacturers start by gathering emissions

[2] EPA emissions regulations are numbered to indicate the vehicle model year of initial applicability. 40 C.F.R. § 86.1802-01(a). For example, 40 C.F.R. § 86.1809-12 initially applied for vehicles produced for model year 2012. *Cf.* 40 C.F.R. §§ 86.1809-01 (same regulation initially applicable for model year 2001), 86.1809-10 (initially applicable in 2010).

data through rigorous EPA-prescribed laboratory tests designed to represent various real-world driving conditions, including durability demonstration testing to ensure compliance throughout the vehicle's useful life. *See, e.g.*, 42 U.S.C. § 7525(a); 40 C.F.R. §§ 86.1811-17, 86.1823-08. The manufacturer then must provide very extensive information to explain and justify any differences in how the emissions control systems function in response to real-world operating conditions compared to laboratory test cycles. *See* 40 C.F.R. § 86.1844-01.

Overall, the current requirements for obtaining a certificate of conformity are expansive, typically necessitating hundreds of pages of written submissions and frequent substantive dialogue between the manufacturers and EPA. A decision by EPA to issue a certificate of conformity ensures for consumers that the vehicle, and each component of its emissions control systems, has been heavily scrutinized for compliance with federal law.

A. EPA Requires Extensive Emissions Testing and Submission of Information for Certification

EPA's emissions testing and disclosure regime has evolved as engine technology has grown more complex. To achieve compliance with increasingly stringent emissions standards, most modern diesel engines

use a combination of several emission control systems that are designed with software calibrated precisely for that vehicle's attributes and able to respond to different operating conditions (such as engine speed and load, altitude, and temperature).[3]

Each of these systems has physical limitations that EPA recognizes; not all of them are effective in every mode of vehicle operation. As a result, they must be carefully modulated together to maintain compliance with EPA emissions standards both during laboratory testing

[3] These controls include: (a) electronic management of the timing and amount of fuel injection into the piston's combustion chamber to balance formation of harmful particulates and nitrogen oxides, together with optimizing fuel economy, which corresponds to formation of carbon dioxide ("CO_2"), the most ubiquitous greenhouse gas; (b) exhaust gas recirculation ("EGR"), which recirculates a portion of the engine's exhaust back into the intake air and combustion chamber to reduce emissions of nitrogen oxides ("NOx") from the engine; (c) a diesel particulate filter that must be electronically managed periodically to undergo "regeneration cycles" to burn off the accumulated particulates; (d) an oxidation catalyst exhaust aftertreatment system to reduce carbon monoxide and hydrocarbon emissions from the engine; and (e) an electronically managed selective catalytic reduction ("SCR") exhaust aftertreatment system. As noted, each of these systems has grown in complexity as emissions standards have become more demanding. For instance, EGR technology was first introduced on diesel truck engines in 2002 and SCR systems were introduced on those engines in 2010. *See* Hannu Jääskeläinen & Magdi K. Khair, *Exhaust Gas Recirculation*, https://www.dieselnet.com/tech/engine_egr.php (last visited Nov. 2, 2023); W. Addy Majewski, *Diesel Catalysts*, https://www.dieselnet.com/tech/cat_diesel.php (last visited Nov. 2, 2023).

and in differing real-world conditions. Exhaust gas recirculation technology, for example, reduces emissions of nitrogen oxides but increases particulates (soot), fuel consumption (and thus CO_2 emissions), and engine wear. And selective catalytic reduction technology—an exhaust aftertreatment system—is limited in effect until the catalyst temperature is warmed up but must not be so hot as to burn off the fluid the system sprays onto the catalyst before it can react effectively with the emissions.

1. Testing is Required According to Prescribed Laboratory Cycles Designed to Represent Different Types of Real-World Driving

To ensure that these technologies are achieving the intended emissions reductions before vehicles reach the market, EPA requires manufacturers to perform and document the results of several laboratory "test cycles" that are designed to represent emissions from the engines in actual operation. Each laboratory test provides a highly consistent procedure in which emissions—which vary widely in normal operation—can be held to a specific quantified limit. *See* 40 C.F.R. § 86.1811-17(b)(ii). In general, this testing involves "measuring emissions and miles travelled while operating the vehicle on a chassis dynamometer,"

id. § 1066.15(c)(1), a treadmill-like device that "recreate[s] the mechanical inertia and frictional forces that a vehicle exerts on road surfaces (known as 'road load')," *id.* § 1066.210(a).

Multiple tests are required. The primary test is the Federal Test Procedure ("FTP" or "FTP75"), which EPA designed to represent a range of normal driving including idle, accelerations, and highway driving, in both cold-start and warmed-up conditions. 40 C.F.R. §§ 1066.801(c)(1), 1066.815(a), (d). Manufacturers must also perform the Highway Fuel Economy Test ("HwFET"), which involves a normal highway speed driving cycle and measurement of emissions. 40 C.F.R § 1066.801(c)(3); *see id.* § 1066.840.

A vehicle must meet the emissions standards for each regulated pollutant specified for each of the test cycles performed in the laboratory to qualify for an EPA certificate of conformity. *See* 40 C.F.R. §§ 86.1811-17(b) & (c), 86.1841-01(b)-(d).[4]

[4] In addition to pre-launch testing to qualify for certification, manufacturers must also routinely test post-sale vehicles in use by consumers to confirm compliance with emissions requirements. 40 C.F.R. §§ 86.1844-01(h), 86.1845-04, 86.1846-01, 86.1847-01.

2. Exhaustive Information Beyond the Test Data is Required, Particularly Regarding AECDs

To obtain a certificate of conformity, manufacturers must submit an application containing detailed results and analyses of the testing data. But that is only the beginning of the extensive, multi-part application. *See* 40 C.F.R. §§ 86.1843-01, 86.1844-01. For test groups of vehicles (as defined by the manufacturer, *see id.* § 86.1803-01), a manufacturer must file a separate application for certification that contains twenty-four categories of information across two separately submitted parts. *Id.* § 86.1844-01(d), (e). Much of the additional information concerns AECDs, to address the potential for discrepancies between the control of emissions as measured on the prescribed test cycles and controls and resulting emissions expected to occur in real-world driving, and to ensure that any such expected discrepancies are explained and justified as appropriate and the AECDs are not prohibited defeat devices. *See infra* section I.B.

The exhaustive written submissions do not stand alone. Rather, the applications are typically the culmination of an extended process in which manufacturers meet with EPA officials repeatedly to explain design choices and answer questions before filing final submissions. If

EPA is satisfied after review of the submitted application that a vehicle test group meets the requirements of the CAA and EPA's implementing emissions regulations, EPA will issue a certificate of conformity. The certificate lasts for one year and may include any terms and conditions EPA deems necessary or appropriate to ensure compliance. *Id.* § 86.1848-01(a)(1), (b).[5]

Even after the certificate is issued, manufacturers have extensive ongoing disclosure and reporting obligations to EPA. If the manufacturer wishes to change the emissions controls during production, it must apply to EPA to amend the certificate of conformity for that model year, called a "running change." *Id.* § 86.1803-01. These changes can include updates to AECDs and are extremely common. *See id.* § 86.1842-01.[6] Vehicles in the field may encounter certain operating conditions that require the manufacturer to update the software design and calibration of their

[5] All certificates are conditional upon ongoing compliance by manufacturers with numerous detailed requirements. 40 C.F.R. § 86.1848-01(c).

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

engines and emission control technology. These changes can provide important benefits for consumers and for the environment, as the changes often resolve problems and improve vehicles' overall performance and emission control.

Importantly, however, these changes often involve complex technical justifications and tradeoffs, and can necessitate changes to AECDs that alter how the software responds to operating conditions. Manufacturers must submit notifications of all running changes at the time the changes are incorporated into production. *Id.* § 86.1844-01(f). Submissions must describe the nature and reasons for the change, the portion of the product line affected, the effect the change will have on emissions, any test data necessary to demonstrate compliance with applicable emissions standards including updates to AECD justifications, and a summary report for each test group providing an overview of all running changes incorporated since certification. *Id.*

Moreover, manufacturers must submit updates to their certification applications by January 1 of the applicable model year to incorporate any running changes and corrections that occurred after certification, followed by a final update by May 1 after the end of the

model year to incorporate any applicable running changes or corrections that subsequently occurred. *Id.* § 86.1843-01(f); *see also id.* § 86.1842-01(b).

EPA also has expansive authority to require further information from manufacturers at any time before or after granting a certificate of conformity. *Id.* § 86.1844-01(g); *see* 42 U.S.C. § 7542(a) (CAA authority for EPA to require manufacturers to provide information EPA may reasonably require to determine compliance). EPA may request that manufacturers expand on any statements in an application or a running change submission, and may also order submission of several other enumerated categories of information, such as explanations of tests and further explanations concerning AECDs. 40 C.F.R. § 86.1844-01(g).

EPA may also suspend or revoke a certificate of conformity—halting production—if the agency finds the manufacturer committed a "substantial" violation of the certification requirements, including submission of false or incomplete information, refusal to permit EPA officials to conduct inspections, or failure to comply with any condition under which a certificate was granted. *Id.* § 86.1850-01(b); *see also id.* § 86.1851-01(d)(1). If EPA determines that a manufacturer's alleged

violation was knowingly committed or that the manufacturer knowingly committed a fraudulent act that resulted in issuance of a certificate, EPA may deem the certificate void retroactively. Such a determination not only stops production but also renders sales made pursuant to the fraudulently obtained certification violations of the CAA and subject to penalties, recalls, and other injunctive relief. *Id.* § 86.1850-01(d); *see* 42 U.S.C. § 7413. EPA may also pursue criminal prosecution. 42 U.S.C. § 7413(a)(3)(D), (c); *see* 18 U.S.C. § 1001.

B. EPA Scrutiny of AECDs

EPA's objective in requiring compliance with prescribed laboratory test cycles is the expectation of emissions control when the vehicles operate in the real world. But in-use emissions vary depending on the driving conditions, even for compliant vehicles. Driving on a hot summer day in the city produces different emissions than a freezing cold day on the highway. And so on. To the extent that laboratory test cycles do not mirror real-world conditions, real-world emissions will not match the laboratory results. Over time, EPA has recognized this and added test cycles to ensure improved results.

But laboratory test cycles are still imperfect, because they cannot represent every conceivable driving condition. In certain conditions not encountered in the laboratory setting, manufacturers must vary emissions controls—using AECDs—in order to prevent damage such as overheating and engine failures, sometimes despite increases in emissions. Broadly speaking, AECDs are design features (typically software) that modulate—*i.e.*, change—a vehicle's emission controls in response to real-world parameters such as temperature, vehicle speed, and altitude. *See* 40 C.F.R. § 86.1803-01 (defining AECD as an "element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system").

EPA polices AECDs to ensure that they are justifiable, and not defeat devices that either are overcautious in an effort to avoid engine damage or intentionally sacrifice emissions for other vehicle performance criteria, like improved acceleration. To that end, EPA requires that a manufacturer's certification application include a list and full explanation of all AECDs used in the relevant vehicles. *Id.* § 86.1844-

01(d)(11). The application must specifically (1) identify each AECD and the parameters it senses and controls, explaining how it works; and (2) provide a "detailed justification" for the AECD and the "rationale for why it is not a defeat device." *Id.*

A "defeat device" is an AECD that "reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use" without manufacturer justification. *Id.* § 86.1803-01. An AECD is not a defeat device, for example, if it "does not go beyond the requirements of engine starting" or if the "need for the AECD is justified in terms of protecting the vehicle against damage or accident" in particular field conditions, such as high altitude, hot or cold air temperatures, or sudden increases in engine load that can cause mechanical harm or failure. *Id.*

Defeat devices are prohibited, *id.* § 86.1809-12(a), and EPA treats engines or vehicles with defeat devices as uncertified and thus barred from the market, *id.* § 86.1854-12(a)(1); *see* 42 U.S.C. §§ 7522(a)(1), 7524(a). A manufacturer's "detailed justification[s]" for a vehicle's AECDs are therefore critically important. 40 C.F.R. § 86.1844-01(d)(11). AECD justification submissions often run hundreds of pages in order to

provide complete explanations and analysis of the emissions control software programs and their interactions with an engine's numerous electronic systems.

EPA's review of these justifications requires expertise in both the relevant software and hardware technologies. Importantly, the line between whether an AECD is justified or is not justified is often unclear. Rather than a question of intentional cheating, EPA and company engineers can debate in good faith whether a particular AECD is justified as truly necessary to protect against damage, or whether there are other solutions that impact emissions less, in which case the AECD would be unjustified and thus constitute a defeat device. The analysis requires knowledge of the physics and the mechanical and chemical engineering considerations that bear on the need for an AECD and the risks of operating a given engine without them. It also requires familiarity with the technology deployed throughout the industry to address the same operating conditions that present challenges in real-world driving. And it also requires policy determinations, such as where a manufacturer might ask EPA to approve an AECD as justified (and thus classify it not a defeat device) to address an immediate risk of engine damage despite

emissions increases. EPA might approve the AECD as justified for a limited time period if it believes that the manufacturer can eventually develop a solution without the need for the AECD, after which that AECD might no longer be justified (and thus EPA might classify it as a defeat device).

Manufacturers work closely with EPA to balance these considerations in the certification process, often through multiple rounds of submission and review. EPA may require manufacturers to submit further information on AECDs after an initial application, including "[d]etailed technical descriptions of emission-related components and AECDs, including schematic diagrams and hose and wire routings which describe the fundamental operating characteristics of each emission control system"; "[d]etailed calibration specifications for all emission-related components and AECDs"; and "[a]ny information necessary to demonstrate that no defeat devices are present on any vehicles covered by a certificate." 40 C.F.R. § 86.1844-01(g)(3)-(5).

In addition, EPA may require testing of vehicles at any time to investigate a "potential defeat device," using drive cycles and conditions defined by the agency. *Id.* § 86.1809-12(b). Through such testing, the

manufacturer "must show to the satisfaction" of the agency that the vehicle design does not incorporate an AECD that "unnecessarily reduce[s] emission control effectiveness exhibited" during various mandatory test cycles. *Id.* § 86.1809-12(d)(1). Alongside testing, EPA may also direct the manufacturer to produce "an explanation containing detailed information regarding test programs, engineering evaluations, design specifications, calibrations, on-board computer algorithms, and design strategies incorporated for operation both during and outside of the Federal emission test procedures." *Id.* § 86.1809-12(d)(2). And EPA may also itself test the vehicles, including using portable emissions measurement equipment to evaluate emissions in real-world driving. *Id.* § 86.1809-12(b).

As these provisions demonstrate, disclosure and justification of AECDs is essential for manufacturers' ability to market vehicles. Manufacturers not only are required to disclose the existence of AECDs to EPA but also to comprehensively explain their operations, justify their purposes in the context of the complex electronic emissions controls used in modern engines, and work with EPA on additional testing and information requests to confirm compliance. Notably, EPA has not

hesitated to exercise its significant enforcement authority in pursuit of alleged violations of the AECD disclosure and justification requirements. *See* EPA, *Clean Air Act Vehicle and Engine Enforcement Case Resolutions* (last updated Jan. 31, 2023), https://bit.ly/40fBEWM. On the other hand, when AECDs are comprehensively disclosed and justified and EPA proceeds to grant a certificate of conformity without pursuing enforcement, consumers may rely on the EPA certification that the vehicles at issue have satisfied the emissions requirements of an exacting regime of technological and legal scrutiny.

In short, manufacturers communicate extensively with EPA before, during, and after certification, and EPA has developed substantial technical expertise through managing these procedures for over five decades. The EPA regime provides manufacturers and consumers with confidence that vehicles available for sale are compliant with the emissions limits set by federal law.

II. Rationales for Preemption Apply Just as Strongly for Emissions Regulations as for Fuel Economy Standards

This Court recently held in *In re: Ford Motor Company F-150 & Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, 65 F.4th 851 (6th Cir. 2023), that state-law claims alleging that Ford gave

EPA false fuel economy test results were impliedly preempted by the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201 *et seq.* 65 F.4th at 854. The Court in *Ford* reasoned that the plaintiffs' allegations constituted "fraud-on-agency claims" that are barred under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). *Id.* at 860. Just as "the federal scheme" in *Buckman* "empowered the FDA to punish and deter fraud, and the agency used that authority to balance several statutory objectives [that] state-law fraud-on-the-agency claims would skew," *Ford* held that EPCA empowers EPA to punish and deter fuel economy fraud, and the agency's balancing of statutory objectives would be skewed by state-law claims treading on the same regulatory turf. *Id.* at 861-67.

The District Court held that those doctrinal principles squarely apply to preempt Plaintiffs' claims in this case. *In re Duramax Diesel Litig.*, --- F. Supp. 3d ---, No. 1:17-cv-11661, 2023 WL 4493595, at *7 (E.D. Mich. July 12, 2023). And rightly so. The rationales underlying *Buckman* apply just as strongly to emissions regulations. The breadth and depth of the emissions certification process is at least as great as the

regulatory process for medical devices or fuel economy testing requirements.

Among the key issues this Court identified in *Ford* was that "state-law claims would skew the disclosures that manufacturers need to make to the EPA." *Ford*, 65 F.4th at 864. Under EPCA regulations, manufacturers must submit fuel economy data and documentation to EPA, which the agency then evaluates. *Id.* (citing 40 C.F.R. § 600.008(e)(1)). "[I]f a state-law claim were to proceed," however, "a jury may find this documentation inadequate even if the EPA had previously determined otherwise." *Id.* "Thus, as was noted in *Buckman*, '[a]pplicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the [EPA's] evaluation' of the manufacturer's fuel economy data." *Id.* (alterations in original). The Court concluded that "[t]his would burden the agency's approval process and obstruct its goal of provid[ing] consumers with a basis on which to compare the fuel economy of different vehicles." *Id.* (citation omitted). So too here.

As detailed above, the amount of information and explanatory material that manufacturers must already produce to obtain certificates

of conformity is staggering, particularly with respect to AECD justifications. *See supra* section I.B. The volume and detail required for these submissions exceeds the expansive scope of fuel economy reporting required under EPCA. *See generally* 40 C.F.R. §§ 600.006, 600.008. "[A]llowing juries to second-guess" EPA approvals could not only motivate manufacturers to "submit a deluge of information" and overburden the evaluation process, but could also hinder manufacturers' ability to produce and market vehicles to meet consumer demand and to make necessary updates. *Ford*, 65 F.4th at 863-64. Perhaps more importantly, as the District Court recently recognized in a parallel case, it could have a broader destabilizing effect on the vehicle approval process: "Allowing plaintiffs and juries to override the[] judgments [of EPA] could give rise to a shadow regulatory system—one led by lawyers and experts, rather than Congress and the EPA." *Counts v. Gen. Motors, LLC*, --- F. Supp. 3d ---, No. 1:16-cv-12541, 2023 WL 4494336, at *6 (E.D. Mich. July 12, 2023).

Put simply, state-law interference would create uncertainty as to what information a future jury might find the manufacturer should have included in an AECD justification. And as a result, manufacturers could

never have full confidence in the sufficiency of their explanations for emissions control systems. *See Buckman*, 531 U.S. at 350 (emphasizing that allowing state-law claims would "dramatically increase the burdens facing potential applicants" in a manner not contemplated by Congress). Nor could manufacturers have certainty that their engines and emissions control systems are sufficient to avoid liability. EPA knows that manufacturers rely on the regulatory certainty provided by federal certification, including approval of AECDs, as well as the institutional knowledge and technical expertise developed over years of dialogue. The value and meaning of an EPA certificate of conformity would be profoundly undermined if agency approval of an AECD and issuance of a certificate of conformity could be challenged by civil litigants, potentially with conflicting and irreconcilable results.

Those impacts would undercut Congress's intent and the statutory regime, because there would be no way to know what plaintiffs might claim is insufficient. State-jury interference in emissions certifications and AECD review would impermissibly force EPA to "rebalance" its implementation of Congress's "statutory objectives" in the CAA. *Ford*, 65 F.4th at 863. That rebalancing concern is especially serious with respect

to AECDs because they involve (by definition) tradeoffs between limiting emissions and ensuring the operational integrity and safety of passenger vehicles in certain conditions. Without preemption, plaintiffs' lawyers could challenge and undercut EPA's deeply informed determinations about what level of damage or safety risk warrants emissions control systems strategies. Only EPA can strike these balanced decisions about regulatory compliance and make judgments that account for the full scope of relevant considerations, including the fact that some AECDs may be imperfect or incomplete solutions to ongoing emissions reduction challenges but nonetheless comply with the CAA. Allowing private plaintiffs and juries to question those decisions would dramatically impair both EPA's ability to implement Congress's purposes and manufacturers' ability to design and deliver vehicles that reliably balance durability, performance, and safety.

It would also interfere with EPA's authority to punish and deter fraud. Just as EPA is uniquely qualified to weigh the relevant factors and history in determining the legitimacy of proposed AECDs, only the agency rationally may conduct enforcement for vehicles after certification. It makes little sense to grant private plaintiffs authority to

pursue supposed omissions in approved applications when only the agency has access to the body of knowledge and context before it at the time of certification. Plaintiffs may sue agencies under the Administrative Procedure Act if they want to challenge an agency's rules, but state-law tort suits targeting manufacturers are little more than forbidden collateral attacks on the agency.

Stated differently, when questions about previously approved vehicles' emissions compliance arise, EPA can reasonably compare the new information to the application and determine whether sanctions are warranted, and if so, to what degree. Allowing private plaintiffs to second-guess those decisions risks imposing enormous costs on manufacturers in jurisdictions across the country, producing potentially myriad outcomes inconsistent both with EPA's own decisions and with each other.

At a more fundamental level, any intrusion into emissions regulation via state-law litigation would fly in the face of Congress's objective in the CAA to create a uniform system for regulating emissions from motor vehicles sold in the national market. 42 U.S.C. § 7543(a) (prohibiting states and political subdivisions from adopting or

attempting to enforce motor vehicle emissions standards); *see id.* § 7507 (limited exception for California). Courts have long recognized that Congress took this step to prevent "an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (quoting *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979)); *see In re: Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1054 (N.D. Cal. 2017) (noting overlap between implied and express preemption analyses in looking to congressional purposes under the CAA).

As a result of Congress's clear mandate, states can no more act on emissions regulation through common law than through enacted legislation. Under basic principles of federalism, it is EPA's prerogative to manage emissions standards and supervise and enforce manufacturer compliance with Congress's design, especially when private state litigation risks destabilizing the federally regulated market. *See Ford*, 65 F.4th at 863; *Buckman*, 531 U.S. at 348. For the benefit of manufacturers and consumers alike, EPA must retain unimpeded

authority to balance Congress's objectives in the CAA, without interference from private plaintiffs asserting preempted state-law claims.

CONCLUSION

The Court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amici curiae* certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Jonathan S. Martel*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on November 2, 2023 and will, therefore, be served electronically upon all counsel.

s/ *Jonathan S. Martel*
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