Rel: December 14, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170528

State of Alabama

v.

Volkswagen AG

Appeal from Jefferson Circuit Court
(CV-16-903390)

WISE, Justice.

The State of Alabama, the plaintiff below, appeals from the Jefferson Circuit Court's order that, among other things,

dismissed its claims against Volkswagen AG ("VWAG").[1] We affirm.

Facts and Procedural History

On September 15, 2016, the State filed a complaint in the Jefferson Circuit Court ("the trial court"), in which it asserted "tampering" claims and sought penalties against VWAG and other defendants pursuant to the Alabama Environmental Management Act ("the AEMA"), § 22-22A-1 et seq., Ala. Code 1975, and the Alabama Air Pollution Control Act of 1971 ("the AAPCA"), § 22-28-1 et seq., Ala. Code 1975.

The trial court summarized the factual allegations from the State's complaint as follows:

> "[The State] alleges that starting in 2009, Defendants installed and maintained in its new motor vehicles certain software which was designed to alter emissions readings on certain diesel engines installed in Audi, Porsche, and Volkswagen motor vehicles, which software was known as 'defeat devices'.
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> "[The State] alleges that in the 1990s, Defendants developed a diesel turbocharged direct injection engine ('TDI') for marketing in the U.S.,

[1]In addition, the State asserted claims against Audi AG, Volkswagen Group of America, Inc., Audi of America, LLC, Dr. Ing.h.c.F. Porsche AG, and Porsche Cars North America, Inc., and the claims against those defendants were also dismissed. However, in this appeal, the State challenges only the dismissal of Count 2 of its complaint against VWAG.

> including the State of Alabama. [The State] alleges that the said engines evolved over time, but that the emissions control system remained constant in that all engines were equipped with a diesel particulate filter ('DPF') and an exhaust gas recirculation system ('EGR'). The EGR reduced nitrous oxide emissions (NOX) and the DPF reduced soot emissions.
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> "Both systems, [the State] alleges, stressed the TDI engines and that Defendants chose to solve the engineering problems presented by installing defeat devices in the onboard computer software. [The State] alleges that Defendants developed, over the years, several generations of such defeat devices which became more and more sophisticated in defeating the emissions control devices, except when the said vehicles were being tested.
>
> "For example, in 2006, [the State] alleges, Defendant Volkswagen developed the 'Acoustic Function' defeat device software which could detect when the vehicle was in street use as opposed to being operated on a dynamometer ('dyno') or a stationary testing device. When on the testing device, the Acoustic Function defeat device would allow the emission control devices on the vehicle to operate so that the vehicle could pass its emissions standards; when the vehicle was in street use, the said defeat device would override the emissions equipment so as to relieve stress on the engine."

The complaint alleged that the defendants had tampered with the emission-control systems or ordered third parties to tamper with the emission-control systems of vehicles that were licensed and registered in the State of Alabama. Specifically, the State alleged:

> "81. The State has reason to believe that Defendants tampered with used Vehicles in Alabama on multiple occasions, including, but not limited to the two instances detailed below.
>
> "82. The first instance concerns the installation of the 'steering wheel recognition function' on used vehicles in Alabama. In or about 2012, used Subject Vehicles began to develop hardware failures. [VWAG] engineers determined that the failures were a result of Subject Vehicles starting in 'dyno' testing mode, meaning that the emissions control system was turned on. [VWAG] and [Volkswagen Group of America, Inc. ('VWGOA'),] employees decided to add a 'steering wheel recognition function' to new and used Subject Vehicles to allow those vehicles to start in 'street' mode, meaning that the vehicle now started with the emissions control system turned off. [VWAG] and/or VWGOA then ordered mechanics at Volkswagen-branded dealerships in Alabama to install the new software function on used vehicles in Alabama.
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> "....
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> "84. The second instance concerns fraudulent recalls of used vehicles in 2014 and 2015. As detailed further in ¶ 88, Defendants' scheme first came to light in March 2014. In the months that followed, [VWAG] and/or VWGOA sent recall notices to used car owners in Alabama, requesting those owners to bring their used vehicles to Volkswagen-branded dealerships for repairs to emissions-related software. While Volkswagen told used car owners that the recall was to improve their vehicles' emissions management software, the true reason for the recall was to install defeat device software that helped cover the Defendants' tracks."

In its complaint, the State alleged that the AEMA vests the Alabama Department of Environmental Management ("ADEM")

with the authority to administer and enforce the AAPCA and the authority to establish rules and regulations governing emission-control systems for vehicles; that ADEM has established rules and regulations governing such emission-control systems in Chapter 335-3-9 of the Alabama Administrative Code; and that the defendants had violated Regulation 335-3-9-.06 (ADEM), Ala. Admin. Code. Regulation 335-3-9-.06, provides, in pertinent part:

> "In addition to the other strictures contained in this Chapter, no person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of a positive crankcase ventilator, exhaust emission control system, or evaporative loss control system which has been installed on a motor vehicle; nor shall any person defeat the design purpose of any such motor vehicle pollution control device by installing therein or thereto any part or component which is not a comparable replacement part or component of the device. Provided that:
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> "(a) The components or parts of emission control systems on motor vehicles may be disassembled or reassembled for the purpose of repair and maintenance in proper working order.
>
> "(b) Components and parts of emission control systems may be removed and replaced with like components and parts intended by the manufacturer for such replacement."

In its complaint, the State alleged:

> "By installing the defeat device on a subject vehicle, Defendants and/or persons acting on behalf

> of Defendants caused or allowed the disconnection or disabling of the exhaust emission control system(s) on that subject vehicle each and every time the subject vehicle was operating outside of dyno testing conditions."

On October 14, 2016, the defendants removed this action to the United States District Court for the Northern District of Alabama. The action, among others, was ultimately assigned to the United States District Court for the Northern District of California ("the MDL court"), which was handling various actions that were part of multidistrict litigation arising from the defendants' actions with regard to the installation of the defeat-device software. On May 23, 2017, the MDL court entered an order granting the motions to remand filed by various states, including Alabama.

The United States Department of Justice, on behalf of the Environmental Protection Agency ("the EPA"), filed criminal and civil actions against VWAG to enforce the federal Clean Air Act ("the CAA"). On March 14, 2017, VWAG pleaded guilty to three criminal felony counts and settled the civil charges.

On August 31, 2017, the MDL court released its decision in In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, 264 F. Supp. 3d

1040 (N.D. Cal. 2017). That case involved a complaint the State of Wyoming had filed against VWAG; Volkswagen Group of America, Inc.; Audi AG; Audi of America, LLC; and Porsche Cars North America, Inc. (hereinafter collectively referred to as "Volkswagen"), in the United States District Court for the District of Wyoming. That case was subsequently transferred to the MDL court. In its complaint, Wyoming asserted that every time one of the vehicles with defeat-device software was driven in that state, Volkswagen violated two provisions of Wyoming's Clean Air Act state-implementation plan. Volkswagen filed a motion to dismiss the claims against it on the ground that the claims were preempted by the CAA. The MDL court ultimately held that Wyoming's continuous-tampering claim was preempted by the CAA.[2]

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[2]Wyoming alleged that Volkswagen "'continued to tamper with pollution controls through a software recall for vehicles already sold to consumers.'" 264 F. Supp. at 1057 n. 8. The MDL court rejected this argument, stating:

> "But as Volkswagen notes, its updates as part of the recall brought emissions down relative to the original software. (See Compl. ¶ 152.) The updates therefore did not violate Wyoming's concealment provision (because the updates brought on-road emissions closer to dynamometer testing emissions), or Wyoming's tampering provision (because the updates did not 'render ineffective or inoperative' the emission control systems)."

On August 1, 2017, the State filed its first amended complaint. On September 18, 2017, the defendants filed a motion to dismiss the first amended complaint. In their motion to dismiss, the defendants argued that the State's claims were preempted by the CAA.

On October 12, 2017, the State filed its second amended complaint, seeking penalties under the AEMA and the AAPCA. The second amended complaint alleged, in part:

> "1. The [AAPCA] forbids any person or business from causing or allowing the disconnection or disabling of a vehicle's exhaust emissions control system. Defendants intentionally violated the AAPCA for nearly a decade.
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> "2. Starting with model year 2009, Defendants installed and maintained software designed to cheat emissions standards in certain Audi, Porsche, and Volkswagen diesel engines vehicles ('subject vehicles'). This software, known as a 'defeat device,' disabled a subject vehicle's exhaust emissions control system each time the vehicle was driven on roads and highways.
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> "3. Defendants have admitted the requisite facts. In a June 2016 Settlement Agreement with the State regarding their liability for deceptive advertising, Defendants admitted that the defeat device software that they installed and maintained on subject vehicles in Alabama 'renders certain emission control systems in the vehicles inoperative

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Id.

> when the [engine-control module] detects the vehicles are not undergoing Federal Test Procedures."[3]

The complaint went on state:

> "This complaint does not enforce, adopt, or attempt to create 'any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.' 42 U.S.C. § 7543(a). All claims herein are based upon, and shall be construed only to encompass, the State's regulation of 'registered or licensed motor vehicles.' 42 U.S.C. § 7543(d)."

Count 1 of the second amended complaint alleged:

> "114. Defendants and/or persons acting on behalf of Defendants caused or allowed the disconnection or disabling of the exhaust emission control system installed on a motor vehicle each and every time Defendants' defeat device detected that a registered or licensed subject vehicle was not undergoing test procedures.
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> "115. Defendants have admitted that their defeat device software 'renders certain emission control systems in the vehicles inoperative when the engine control module detects the vehicles are not undergoing Federal Test Procedures.'
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> "116. Defendants have admitted that they installed their defeat device software on vehicles that are licensed and registered in Alabama, both before the sale of the vehicles and after the sale

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[3]The State also asserted that the defendants' actions constituted multiple violations of Alabama's Deceptive Trade Practices Act ("the DTPA"), § 8-19-1 et seq., Ala. Code 1975; that the State and the defendants had settled the State's claims under the DTPA without litigation; and that, as part of that settlement, the defendants had agreed that the State had reserved the right to litigate its state-law tampering claims.

> of the vehicles 'through software updates during maintenance."

Count 2 of the second amended complaint alleged:

> "126. Defendants and/or persons acting on behalf of Defendants caused or allowed the disconnection or disabling of the exhaust emission control system installed on a motor vehicle each and every time Defendants or someone acting on Defendants' behalf installed, updated, or otherwise maintained defeat device software on a vehicle that was licensed or registered in Alabama.
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> "127. Put another way, Count 2 alleges that the installation or modification of software on used vehicles violates Alabama law. Count 2 does not allege that Defendants violated Alabama law by installing software on a new vehicle.
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> "128. Defendants have admitted that their defeat device software 'renders certain emission control systems in the vehicles inoperative when the engine control module detects the vehicles are not undergoing Federal Test Procedures.'
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> "129. Defendants have admitted that they installed defeat device software and/or ordered the installation of defeat device software on vehicles that were licensed and registered in Alabama."

On October 26, 2017, the defendants filed a motion to dismiss the second amended complaint. In their motion to dismiss, the defendants again argued that the State's claims were preempted by the CAA. They also alleged that, even if the claims were not preempted, the conduct alleged in this case did not fall within the purview of Regulation 335-3-9-

.06. The State filed its opposition to the defendants' motion to dismiss, and the defendants filed a reply in support of their motion to dismiss the second amended complaint.

On December 14, 2017, the trial court conducted a hearing on the defendants' motion dismiss. On December 19, 2017, the trial court entered an order granting the defendants' motion to dismiss. This appeal followed, in which the State challenges only the dismissal of Count 2 as to VWAG. See note 1, supra.

Standard of Review

> "'"A ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299."
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> "'[Newman v. Savas,] 878 So. 2d [1147,] 1148-49 [(Ala. 2003)].'
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> "Hall v. Environmental Litig. Grp., P.C., 157 So. 3d 876, 879 (Ala. 2014)."

Harrison v. PCI Gaming Auth., 251 So. 3d 24, 25 (Ala. 2017).

Discussion

The State argues that the trial court erroneously granted VWAG's motion to dismiss. Specifically, the State argues that its tampering claim in Count 2 of the second amended complaint was not preempted by the CAA.

Section 209 of the CAA, which is codified at 42 U.S.C. § 7543, provides, in pertinent part:

> "(a) Prohibition
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> "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.
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> "....
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> "(d) Control, regulation, or restrictions on registered or licensed motor vehicles
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> "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."

In regard to federal preemption, this Court has stated:

> "Preemption rests upon the supremacy clause of the Federal Constitution, United States Constitution, Art. VI, Cl. 2, and deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complementary to, or opposes the federal congressional expression. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234 [(1947)]."

Radio Broad. Technicians Local Union No. 1264 v. Jemcon Broad. Co., 281 Ala. 515, 522, 205 So. 2d 595, 600 (1967).

> "In this case ... appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985). When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)."

California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).

> "Our Constitution provides Congress with the power to preempt state law, see U.S. Const. art. VI cl. 2, and that preemption may be express or implied. Although preemption law cannot always be neatly categorized, we generally recognize three classes of preemption. See [Florida State Conference of the Nat'l Ass'n for the Advancement of Colored People v.]Browning, 522 F.3d [1153,] 1167 [(11th Cir. 2008)](recognizing the doctrines of express, field, and conflict preemption). The first, express preemption, arises when the text of a federal statute explicitly manifests Congress's intent to displace state law. Id. The second, field

preemption, 'occurs when a congressional legislative scheme is "so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it."' Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947)). To determine the boundaries that Congress sought to occupy within the field, we look to '"the federal statute itself, read in the light of its constitutional setting and its legislative history."' De Canas v. Bica, 424 U.S. 351, 360 n. 8, 96 S. Ct. 933, 938, 47 L. Ed. 2d 43 (1976) (quoting Hines v. Davidowitz, 312 U.S. 52, 78–79, 61 S. Ct. 399, 410, 85 L. Ed. 581 (1941) (Stone, J., dissenting)).

"The third, conflict preemption, may arise in two ways. First, conflict preemption can occur 'when it is physically impossible to comply with both the federal and the state laws.' Browning, 522 F.3d at 1167. Conflict preemption may also arise 'when the state law stands as an obstacle to the objective of the federal law.' Id. We use our judgment to determine what constitutes an unconstitutional obstacle to federal law, and this judgment is 'informed by examining the federal statute as a whole and identifying its purpose and intended effects.' Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352 (2000).

"In determining the extent to which federal statutes preempt state law, we are 'guided by two cornerstones.' Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009). First, '"the purpose of Congress is the ultimate touchstone in every pre-emption case."' Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996)). Second, we assume 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' Id. at 565, 129 S. Ct. 1187

> (internal quotation marks and alterations omitted); see also Arizona[v. United States, 567 U.S. 387, 399-400], 132 S. Ct. [2492,] 2501 [(2012)]."

United States v. Alabama, 691 F.3d 1269, 1281–82 (11th Cir. 2012).

> "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. Gibbons v. Ogden, 9 Wheat. 1 [(1824)]; Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 [(1851)]; The Steamboat New York v. Rea, 18 How. 223 [(1855)]; Morgan v. Louisiana, 118 U.S. 455 [(1886)]; The Minnesota Rate Cases, 230 U.S. 352 [(1935)]; Wilmington Transp. Co. v. California Railroad Comm., 236 U.S. 151 [(1915)]; Vandalia R. Co. v. Public Service Comm., 242 U.S. 255 [(1916)]; Stewart & Co. v. Rivara, 274 U.S. 614 [(1927)]; Welch Co. v. State of New Hampshire, 306 U.S. 79 [(1939)].
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> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action, Erie R. Co. v. New York, 233 U.S. 671 [(1914)]; Oregon-Washington Co. v. Washington, 270 U.S. 87 [(1926)]; Napier v. Atlantic Coast Line, 272 U.S. 605 [(1926)]; Missouri Pacific Co. v. Porter, 273 U.S. 341 [(1927)]; Service Transfer Co. v. Virginia, 359 U.S. 171 [(1959)], or unduly burdensome on maritime activities or interstate commerce, Minnesota v.

Barber, 136 U.S. 313 [(1890)]; Morgan v. Virginia, 328 U.S. 373 [(1946)]; Bibb v. Navajo Freight Lines, 359 U.S. 520 [(1959)].

"In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' Savage v. Jones, 225 U.S. 501, 533 [(1912]. See also Reid v. Colorado, 187 U.S. 137 [(1902)]; Asbell v. Kansas, 209 U.S. 251 [(1908)]; Welch Co. v. New Hampshire, 306 U.S. 79 [(1939)]; Maurer v. Hamilton, 309 U.S. 598 [(1940)].

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, ... never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' Sherlock v. Alling, 93 U.S. 99, 103 [(1876)]; Austin v. Tennessee, 179 U.S. 343 [(1900)]; Louisville & Nashville R. Co. v. Kentucky, 183 U.S. 503 [(1902)]; The Minnesota Rate Cases, 230 U.S. 352 [(1913)]; Boston & Maine R. Co. v. Armburg, 285 U.S. 234 [(1932)]; Collins v. American Buslines, Inc., 350 U.S. 528 [(1956)]. But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. Hall v. DeCuir, 95 U.S. 485 [(1877)]; Southern Pacific Co. v. Arizona, 325 U.S. 761

> [(1945)]; Bibb v. Navajo Freight Lines, 359 U.S. 520 [(1959]."

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-44 (1960) (emphasis added).

The State argues that the CAA expressly preserves the States' power to regulate registered or licensed vehicles; that the tampering claim in Count 2 of the second amended complaint applies only to the updated defeat-device software that was installed on registered and licensed motor vehicles; and that, pursuant to the plain language of the CAA, the tampering claim in Count 2 of the second amended complaint was not preempted by the CAA. The State also argues that, because it "limited its claim to instances where VWAG tampered with 'registered or licensed motor vehicles,'" Count 2 falls withing the CAA's savings clause set forth in 42 U.S.C. § 7543(d). (State's brief at p. 21.)

Count 2 does not attempt to enforce any standard that relates to the control of emissions from a new motor vehicle. Count 2 is specifically limited to the installation of updates to the defeat-device software on used vehicles that were licensed and registered in this state. Thus, the State is correct that Count 2 is not expressly preempted by the CAA.

The next question is whether the doctrine of implied preemption bars Count 2 of the second amended complaint. In its brief to this Court, the State asserts:

> "Courts must also infer that 'an express preemption clause forecloses implied preemption.' Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995) (clarifying Cippolene v. Liggett Group, Inc., 505 U.S. 504 (1992)). Here, Congress limited the CAA's express preemption clause to 'new motor vehicles,' 42 U.S.C. § 7543(a), meaning that the Court must infer that a claim limited to used vehicles is not preempted -- particularly when Congress added a savings clause for used cars (§ 7543(d))."

(State's brief at p. 23.) However, in Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 352 (2001), the United States Supreme Court rejected a similar argument, stating:

> "Respondent also suggests that we should be reluctant to find a pre-emptive conflict here because Congress included an express pre-emption provision in the [Medical Device Amendments to the Food, Drug, and Cosmetic Act]. See Brief for Respondent at 37. To the extent respondent posits that anything other than our ordinary pre-emption principles apply under these circumstances, that contention must fail in light of our conclusion last Term in Geier v. American Honda Motor Co., 529 U.S. 861 (2000), that neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.' Id. at 869."

(Emphasis added.) Thus, the State's argument that this Court must infer that the express-preemption clause of the CAA forecloses implied preemption is without merit.

> "According to the preemption doctrine, any time the law of Alabama is in conflict with federal law, or with the administration of a federal program, the federal law must take precedence. Fillinger v. Foster, 448 So. 2d 321 (Ala. 1984). Preemption may occur from explicit preemptive language in a statute, from implied congressional intent, or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Tectonics, Inc., of Florida v. Castle Construction Co., 753 F.2d 957 (11th Cir. 1985). Congressional intent to supersede state law may be inferred either because: (1) federal law is so pervasive that Congress left no room for the states to supplement it; (2) the field the federal law touches is one where the federal interests are dominant; or (3) the object the federal law seeks to obtain and the character of the obligations imposed by it reveal a strong federal purpose. Id. at 961.
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> "....
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> "The general principles of the doctrine of preemption of state law by federal law have been stated by the United States Supreme Court in Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), as follows:
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> > "'The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2 requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language

> or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 [97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604] (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 [67 S. Ct. 1146, 1152, 91 L. Ed. 1447] (1947).
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> "'Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 [83 S. Ct. 1210, 1217-18, 10 L. Ed. 2d 248] (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", Hines v. Davidowitz, 312 U.S. 52, 67 [61 S. Ct. 399, 404, 85 L. Ed. 581] (1941).'

"458 U.S. at 152-53, 102 S. Ct. at 3022-23 (emphasis added). See also, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)."

Metropolitan Life Ins. Co. v. Potter, 533 So. 2d 589, 591-92 (Ala. 1988).

To determine whether field preemption applies, this Court must determine whether the federal law in the area of motor-vehicle emissions and air pollution is so pervasive that Congress has left no room for the States to supplement it. In General Motors Corp. v. United States, 496 U.S. 530 (1990), the United States Supreme Court stated that the CAA "made the States and the Federal Government partners in the struggle against air pollution." 496 U.S. at 532. In fact, the plain language of § 209 of the CAA specifically recognizes the States' "right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). Thus, the State is correct in its assertion that Congress has not completely displaced state regulation and enforcement in this regard. Accordingly, Count 2 of the complaint is not preempted under the doctrine of field preemption.

The next question is whether the State's enforcement of Regulation 335-3-9-.06 in this case conflicts with the CAA. There is no real dispute that compliance with both federal and

state anti-tampering rules is a not a physical impossibility. Thus, the first ground of conflict does not exist in this case. However, that does not end our inquiry. Rather, this Court must determine whether the State's action in this case "'"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" Metropolitan Life Ins., 533 So. 2d 592 (emphasis omitted).

In In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation, 310 F. Supp. 3d 1030 (N.D. Cal. 2018), two counties, Hillsborough County, Florida, and Salt Lake County, Utah, brought tampering claims against VWAG and other entities, including a claim that was similar to that raised in Count 2 of second amended complaint in this case. The defendants filed motions to dismiss in which they argued that the counties' tampering claims were preempted by the CAA. In response, the counties argued that their attempt to regulate post-sale software changes was not expressly preempted by the CAA. After holding that the counties' claims were not expressly preempted by § 209(a) of the CAA, the MDL court stated:

> "That Section 209(a) does not expressly bar the Counties' attempts to regulate Defendants' post-sale

software changes does not end the preemption analysis, however. This is because 'neither an express pre-emption provision nor a saving clause "bar the ordinary working of conflict pre-emption principles."' Buckman Co. v. Pls.' Legal Comm., 531 U.S. 341, 352, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)). The Court must therefore also consider whether, 'under the circumstances of [this] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Atay v. Cty. of Maui, 842 F.3d 688, 699 (9th Cir. 2016) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)). Where a statute 'regulates a field traditionally occupied by states, such as health, safety, and land use,' courts 'assume that a federal law does not preempt the states' police power absent a "clear and manifest purpose of Congress."' Id. (quoting Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)).

"A

"The Counties allege that Volkswagen and Bosch made the post-sale software changes at issue on a model-wide basis in thousands of vehicles nationwide. As a consequence, the congressional objective that the Court must identify is how Congress intended for model-wide tampering by vehicle manufacturers and parts suppliers to be regulated. The Counties view Section 209 of the Clean Air Act as answering that question: When vehicles are tampered with when they are new, they contend that Section 209(a) prohibits states and local governments from attempting to regulate that conduct; but when vehicles are tampered with when they are in use, they contend that Section 209(d) allows states and local governments to regulate that conduct, regardless of the magnitude of the

tampering offense or the identity of the offender, without interfering with the federal regulatory scheme.

"The Clean Air Act does not draw such a clear line. For one thing, the Act requires vehicles to meet EPA's emission standards during their 'useful life.' 42 U.S.C. § 7521(a)(1). The federal regulation of vehicle emissions therefore does not stop after vehicles are sold to end users. And although Congress has looked to both EPA and the states and local governments to enforce these useful life standards, the enforcement roles of these entities do not entirely overlap. Instead, it is evident from the statutory scheme and legislative history that Congress intended for EPA and the states and local governments to serve specific and separate functions in regulating emissions from in-use vehicles.

"EPA's primary role after vehicles are put in use is to ensure that entire classes or models of vehicles remain in compliance with the agency's emission standards. Similar to during the new vehicle certification process, EPA works with vehicle manufacturers to accomplish this. For example, pursuant to 42 U.S.C. § 7541(b), EPA has established '[m]anufacturer in-use verification testing requirements.' 40 C.F.R. § 86.1845-04. To comply, vehicle manufacturers must procure and test a specific number of vehicles in each test group (categorized by, among other things, engine type) that have been driven at least 10,000 miles (low-mileage testing) and 50,000 miles (high-mileage testing). See id. §§ 86.1827-01; 86.1845-04(b), (c). If a manufacturer's vehicles do not pass these in-use tests, or if EPA otherwise determines that 'a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed,' EPA has authority to recall those vehicles. 42 U.S.C. § 7541(c)(1). Either before or

after vehicles are sold to end users, EPA may also inspect vehicle manufacturers' records related to emissions testing, and may observe activities at the manufacturers' plants. 42 U.S.C. § 7542. EPA also requires manufacturers to report to the agency emission related defects discovered in used vehicles if the defects affect at least 25 vehicles of the same model year. 40 C.F.R. § 85.1903(a). Emission related defects include defective 'software ... which must function properly to ensure continued compliance with emission standards.' Id. § 85.1902(b)(2).

"While Congress has tasked EPA with enforcing useful life emission standards on a model-wide basis, other provisions in the Clean Air Act, and the Act's legislative history, reveal Congress' intent to have states and local governments enforce these standards by inspecting individual vehicles for compliance. Since Congress first adopted the modern vehicle emissions scheme, in 1967, it has intended that 'States responsibility would be to assume responsibility for inspection of pollution control systems as an integral part of safety inspection programs....' S. Rep. 90-403, at 35 (1967). To encourage states to adopt such programs, Congress included a provision in the Air Quality Act of 1967 that authorizes EPA to 'make grants to appropriate State air pollution control agencies in an amount up to two-thirds of the cost of developing meaningful uniform motor vehicle emission device inspection and emission testing programs.' Pub. L. 90-148, § 209, 81 Stat. 502 (1967) (codified as amended at 42 U.S.C. § 7544). In commenting on minor amendments to this provision as part of the Clean Air Act Amendments of 1970, Congress also noted that 'Effective State emission testing and inspection programs [are] essential ... to assur[e] that vehicles, once delivered to the ultimate and subsequent purchasers, continue to conform to the standards for which they were certified.' S. Rep. 91-1196, at 31 (1970).

"As Congress has made further amendments to the Clean Air Act, and in particular as it responded to increasing emissions from vehicles in the 1970s and '80s, which resulted from the increasing use of vehicles throughout the nation, it has made some of these state inspection programs mandatory, at least for states with particularly high levels of certain pollutants. See Clean Air Act Amendments of 1977, Pub. L. 95-95 § 172(b)(11)(B), 91 Stat. 685, 747; Clean Air Act Amendments of 1990, Pub. L. 101-549, § 182(b)(4), (c)(3), 104 Stat. 2399, 2426. Under the current Clean Air Act, then, certain states must adopt in-use vehicle inspection programs. See 42 U.S.C. § 7511a(b)(4), (c)(3). And these programs must comply with EPA-established minimum standards with respect to the frequency of inspection, the types of vehicles to be inspected, and the test methods and measures used. See id. § 7511a(a)(2)(B)(i); EPA Inspection/Maintenance Program Requirements Rule, 57 Fed. Reg. 52950 (Nov. 5, 1992). In states that are required to adopt 'enhanced' inspection programs, enforcement through denial of vehicle registration is required. See 42 U.S.C. § 7511a(c)(3)(C)(iv). Many states and local governments, like the Counties in this case, have also adopted tampering laws to bolster state inspection programs, or as standalone provisions. These tampering laws generally 'prohibit the operation of motor vehicles when air pollution devices have been removed, altered, or rendered inoperative.' Arnold W. Reitze Jr., Air Pollution Control Law: Compliance and Enforcement § 10-5(d) (2001); see also 57 Fed. Reg. 24370-01 (June 9, 1992) (EPA's approval of Florida's anti-tampering program); 52 Fed. Reg. 4921-02 (Feb. 18, 1987) (EPA's approval of Utah's inspection and anti-tampering programs).

"By their nature, state inspection programs operate on an individual vehicle basis. This is clear from, among other things, the use of vehicle registration denial as a means of enforcement --

which is a penalty that affects the owners of specific non-compliant vehicles. It is also clear from Section 207(h)(2) of the Clean Air Act. There, Congress has provided that 'Nothing in [Section 209(a)] shall be construed to prohibit a State from testing or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser....' 42 U.S.C. § 7541(h)(2). But the same provision follows with this exception: '(except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).' Through this exception, Congress has manifested its intent that state inspection programs should not interfere with vehicle manufacturers.

"At times, the federal scheme reveals overlap between federal, state, and local enforcement authority of emission standards. As notable for present purposes, Congress has adopted a federal tampering provision, which prohibits 'any person' from removing or rendering inoperative emission control devices either before or after the vehicles in which the devices are installed are sold to ultimate purchasers. See 42 U.S.C. § 7522(a)(3)(A). Until 1990, this provision applied only to manufacturers, dealers, fleet owners, service stations or garage operators, and those in the business of leasing vehicles. See Clean Air Act Amendments of 1977, Pub. L. 95-95 § 219(a), 91 Stat. 685, 761. But in the Clean Air Act Amendments of 1990, Congress expanded the reach of the federal tampering law to also cover individual owners and operators of vehicles. See Pub. L. 101-549, § 228(b), 104. Stat. 2399, 2507 (codified at 42 U.S.C. § 7522(a)(3)(A)). In this respect, EPA, similar to states and local governments, can regulate individual vehicle owners' compliance with emission standards. Although no similar provisions in the Clean Air Act reveal a crossover going the other way, with states and local governments given authority to supplement EPA's enforcement authority over vehicle manufacturers' compliance with emission

standards. Further, the legislative history of the 1990 amendments reveals that Congress amended the federal tampering law only to supplement state efforts to regulate tampering by individual vehicle owners and operators, as tampering by individuals was proving to be problematic in states with and without inspection and tampering programs. See S. Rep. 101-228, at 123 (1989) (citing tampering statistics from a 1988 tampering survey). And while the amendments authorized EPA to regulate tampering by individuals, Congress '[did] not require sweeping new enforcement initiatives to be undertaken by EPA.' (Id. at 124.)

"The division of authority discussed above -- with EPA enforcing useful life vehicle emission standards primarily on a model-wide basis, and at the manufacturer level, and states and local governments enforcing the same standards on an individual vehicle basis at the end-user level -- is sensible, as it best utilizes the comparative advantages of EPA and the states and local governments. EPA, as a federal agency, is best positioned to enforce emission standards on a model-wide basis because model-wide emission problems will almost invariably affect vehicles in states and counties throughout the country. Further, when investigating model-wide emission issues, EPA can also rely on testing data it acquired from manufacturers during the new vehicle certification process, which it can utilize to understand how vehicle models are performing in use as compared to how they were performing during assembly-line testing. Likewise, because the new vehicle certification process requires EPA to work directly with vehicle manufacturers, the agency has preexisting relationships that it can rely on when addressing model-wide emission defects in used vehicles.

"States and local governments, in contrast, are in a better position than EPA to enforce emission

standards at the individual user level. Although Congress could theoretically task EPA with overseeing nationwide vehicle inspection programs -- with the agency running testing centers and requiring vehicle owners to have their vehicles checked on a regular basis -- states and local governments can more efficiently do so because they already oversee vehicle registration and drivers' licensing, and can use state police power to aid enforcement. Indeed, when Congress first sought to motivate states to create vehicle inspection programs, it did so based on the belief that states would adopt such programs 'as an integral part of safety inspection programs.' S. Rep. 90-403, at 35 (1967).

"This is not to say that there is no conceivable scenario, consistent with the Clean Air Act, in which states and local governments could regulate a vehicle manufacturer's compliance with emission standards. If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders. In such a scenario, the manufacturer is not acting on a model-wide basis, and therefore the enforcement advantages that EPA has over the states and local governments are not implicated. But when a manufacturer's actions affect vehicles model wide, the Clean Air Act manifests Congress' intent that EPA, not the states or local governments, will regulate that conduct.

"B

"The model-wide nature of the post-sale software changes alleged here makes them the type of conduct that Congress intended EPA to regulate. And indeed, EPA has regulated this conduct. EPA was instrumental in bringing Volkswagen's emissions fraud to light, as it began an investigation in 2014

to determine why on-road emissions from the affected vehicles significantly exceeded emissions during testing. (See Hillsborough Compl. ¶¶ 82-86; SOF ¶¶ 52-63.) And it was only after EPA threatened not to certify certain model-year 2016 vehicles that Volkswagen finally admitted that it had equipped the affected vehicles with a defeat device. (See Hillsborough Compl. ¶ 90; SOF ¶ 59.) EPA has also brought civil and criminal actions against Volkswagen based not only on the company's initial installation of a defeat device in its vehicles, but also as a result of the company's post-sale software changes. (See SOF ¶¶ 47-51 (detailing Volkswagen's defeat device modifications as part of the factual basis for the company's guilty plea); Volkswagen AG, No. 3:16-CV-00295, Dkt. No. 32-3, EPA Am. Civil Compl. ¶¶ 114-16, 195-97 (detailing Volkswagen's defeat device modifications as conduct that violated the Clean Air Act and EPA regulations).) These criminal and civil actions have resulted in Volkswagen paying penalties and remediation payments totaling $9.23 billion, which is in addition to a $10.033 billion funding pool Volkswagen agreed to establish to buy back its 2.0-liter TDI vehicles and to pay the owners and lessees of those vehicles restitution.

"The model-wide nature of the post-sale software changes also distinguishes them from the type of conduct that Congress intended for states and local governments to regulate. State and local tampering laws are meant to be used as a tool by states and counties to regulate vehicles within their borders. If a mechanic removes or alters a vehicle's emission control system during routine maintenance, for example, states and counties are in the best position to penalize that conduct. But when the tampering at issue involves thousands of vehicles, and the changes are made through software updates instituted on a nationwide basis, EPA is in a better position to regulate that conduct, as it can rely on the tools Congress has given it to police vehicle

manufacturers' compliance with emission standards before and after vehicles are put in use.

"Due to technological advances, manufacturers today also have the ability to impact their vehicles well after sale to end users. Vehicles are increasingly computerized, and similar to the types of a remote updates that consumers may receive on their phones or computers, manufacturers may be able to modify software installed in vehicles just as easily. This is not the type of conduct that states and local governments are in the best position to regulate. Although it may be characterized as conduct that takes place at least in part within their borders, it is conduct on a much broader, national scale. And it is not conduct involving an individual consumer's vehicle; rather, it involves entire vehicle lines, makes, and models. This is the type of conduct that Congress intended EPA to regulate.

"Not only is EPA better positioned than the Counties to regulate Volkswagen's post-sale software changes, but if the Counties were permitted to regulate this conduct, the size of the potential tampering penalties could significantly interfere with Congress' regulatory scheme. 'The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)). This is because '[e]ven if [a] regulated entity can comply with both state and federal sanctions, the mere fact of ... inconsistent sanctions can undermine the federal choice of the degree of pressure to be employed, "undermining the congressional calibration of force."' Compass Airlines LLC v. Mont. Dep't of Labor & Indus., No. CV 12-105-H-CCL, ... (D. Mont. Aug. 12, 2013)

(quoting Crosby, 530 U.S. at 379-80, 120 S. Ct. 2288).

"As relevant here, Congress has set specific penalties for vehicle tampering by manufacturers. See 42 U.S.C. § 7524(a) (up to $25,000 per violation by manufacturers and dealers, and up to $2,500 per violation by any other person). And Volkswagen's tampering has triggered those penalties. The Counties now seek to impose additional, significant sanctions for the same conduct, with a violation of either Hillsborough's or Salt Lake's tampering rule punishable by a civil penalty of up to $5,000 per offense per day of noncompliance. See Hillsborough EPC Enabling Act § 17(2); Utah Code Ann. § 19-1-303. With at least 1,118 affected vehicles allegedly registered in Hillsborough County, and at least 5,000 allegedly registered in Salt Lake County, and with the tampering at issue occurring in or around April 2013, and continuing for over a year until Volkswagen admitted to using a defeat device in the fall of 2015, the potential penalties could reach $30.6 million per day and $11.2 billion per year -- and that is just for two counties. If other counties and states bring similar claims -- and indeed some already have[5] -- the potential penalties could dwarf those paid to EPA, which would seriously undermine the congressional calibration of force for tampering by vehicle manufacturers.[6]

"Even if actual penalties are lower, if tampering claims like the Counties' are allowed to proceed, vehicle manufacturers could be subjected to up to 50 state and approximately 3,000 county regulatory actions based on uniform conduct that happened nationwide. The substantial nature of the potential penalties for the Counties' tampering claims, and the significant regulatory burden that would ensue if manufacturers were subject to tampering claims throughout the United States, further demonstrates the conflict that the Counties' claims create with federal policy. See Crosby, 530

U.S. at 380, 120 S. Ct. 2288 ('"Conflict is imminent" when "two separate remedies are brought to bear on the same activity."' (quoting Wis. Dept. of Indus. v. Gould, Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986))).[7]

"....

"The Clean Air Act's savings clause, Section 209(d), does not alter any of the above analysis. That provision does not give states and local governments carte blanche to regulate any conduct that affects emissions from vehicles that are in use. Rather, the provision provides that 'Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.' 42 U.S.C. § 7543(d) (emphasis added). The use of the term 'otherwise' indicates that state and local government regulation of in-use vehicles is subject to the limitations otherwise imposed by federal law. And those limitations include the division of authority between EPA and the states and local governments discussed above.

"Bolstering this conclusion, the legislative history of Section 209(d) reveals that Congress' intent in enacting this saving clause was to ensure that states and local governments had authority to adopt transportation planning regulations, not to regulate vehicle manufacturers. In the Senate Report for the Air Quality Act of 1967, the Committee on Public Works noted the following with respect to Section 209(d):

> "'This language is of particular importance. While there has been a great deal of concern expressed regarding control of new vehicles little attention has been paid to control of used vehicles, either their emissions or their use. It may be

> that, in some areas, certain conditions at certain times will require control of movement of vehicles. Other areas may require alternative methods of transportation. Unfortunately some of these alternatives have been ignored and the onus of control has been placed solely on the automobile manufacturers.
>
> "'It is clear that, if a pollution-free (or at least minimized) rapid transit system reduced commuter traffic there would be a corresponding decrease in automobile-related air pollution. And any significant advance in control of used vehicles would result in a corresponding reduction in air pollution. These are areas in which the States and local government can be most effective.'

"S. Rep. No. 90-403, at 34 (1967).

"Section 209(d), then, was viewed as providing states and local governments with the authority to 'control [the] movement of vehicles' so that they could 'reduce[] commuter traffic' and thereby 'decrease ... automobile-related air pollution.' Id.; see also [Engine Mfrs. Ass'n v. EPA], 88 F.3d [1075,] 1094 [(D.C. Cir. 1996)] (recognizing that Section 209(d) 'protect[s] the power of states to adopt ... in-use regulations,' such as 'carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles') (citation omitted). These are not the types of measures that affect vehicle manufacturers and parts suppliers. To the contrary, the legislative history reveals that the intent of Section 209(d) was to give states and local governments a tool to lessen the burden on vehicle manufacturers -- as manufacturers are ultimately the ones that must develop and implement the technology

capable of meeting federal vehicle emission standards.

"Courts have 'repeatedly "declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."' Geier, 529 U.S. at 870, 120 S. Ct. 1913 (quoting United States v. Locke, 529 U.S. 89, 106–07, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)). Interpreting Section 209(d) in the manner suggested by the Counties would have just such a destabilizing effect. When the Clean Air Act is considered as a whole, it is clear that Congress intended for EPA to regulate vehicle emission standards on a model-wide basis, while states and local governments would regulate compliance with these standards at the individual vehicle level. Section 209(d) does not modify that framework.

"* * *

"The Counties' tampering claims, based on post-sale software changes to the affected vehicles by Volkswagen and Bosch, are an attempt to enforce vehicle emission standards on a model-wide basis. Because Congress intended for only EPA to regulate such conduct, the Court concludes that these claims stand as an obstacle to Congress' purpose and are preempted by the Clean Air Act.

"_____

"[5]Counsel for Volkswagen has represented that 28 counties in Texas, and at least 8 states have asserted tampering claims against the company that are based on its post-sale software modifications. (See Dkt. No. 4715 at 7 (Feb. 1, 2018 Hr'g Tr.); Dkt. No. 4887 (Notice of Recent Decisions).) The Counties have not contested these representations.

"[6]The penalties sought by the Counties would also be above and beyond the remediation that

> consumers in the Counties have already received by way of the consumer class action settlements, and beyond the payments that the Counties' home states -- Florida and Utah -- have or are expected to receive as beneficiaries to Volkswagen's emissions mitigation trust. As beneficiaries, Florida is expected to receive approximately $166 million, and Utah is expected to receive approximately $35 million. (Dkt. Nos. 2103-1 at 207; 3228-1 at 164.)
>
> "[7]The Counties' tampering claims also threaten to interfere with the injunctive relief obtained by EPA. At the time of the consent decrees, EPA and Volkswagen acknowledged that there were 'no practical engineering solutions that would, without negative impact to vehicle functions and unacceptable delay,' bring the majority of the affected vehicles into compliance with existing emission standards. (Dkt. Nos. 2103-1 at 5 ¶ 2; 3228-1 at 5 ¶ 2.) Yet to 'avoid undue waste and potential environmental harm that would be associated with removing' the affected vehicles from service, EPA agreed to allow Volkswagen to offer emissions modifications to the owners and lessees of the affected vehicles if the modifications 'would substantially reduce NOx emissions.' (Dkt. Nos. 2103-1 at 6 ¶ 4; 3228-1 at 7 ¶ 4.) This approach reflected the type of careful balancing that is required in responding to a nationwide environmental problem like the one at issue here. But the Counties may jeopardize this balance by asserting that vehicles with EPA-approved modifications continue to violate their tampering rules because the modifications do not bring the vehicles into compliance with the originally certified emission standards. This threat of inconsistent sanctions further demonstrates the conflict between the Counties' tampering claims and federal policy."

310 F. Supp. 3d at 1040-47.

Considering the unique factual situation involved in this case, and based on the reasoning set forth by the MDL court, allowing the State to proceed under Count 2 of the second amended complaint would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The State argues that the MDL court erroneously wrote a "'model-wide' exception into Section 7543." (State's brief at p. 41.) Rather than creating an actual exception to § 7543, the MDL court merely evaluated whether allowing individual counties and states to bring tampering actions based on a manufacturer's nationwide conduct that affects various makes and models of vehicles over a period of years would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Therefore, the State's argument in this regard is unavailing. For these reasons, the trial court correctly concluded that Count 2 of the second amended complaint was preempted by the CAA.[4]

Conclusion

[4]Based on this determination, we pretermit discussion of the remaining issues raised by the parties.

For the above-stated reasons, the trial court properly granted VWAG's motion to dismiss Count 2 of the complaint. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Stuart, C.J., and Bolin, Shaw, and Sellers, JJ., concur.