Nos. 23-1648, 23-1696, 23-1697, 23-1698

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREI FENNER, ET AL.,
Plaintiffs;

PHILLIP BURNS, ET AL. (23-1648); NANCY ANDERTON, ET AL. (23-1696); MIKE BULAON, ET AL. (23-1697);
TAYLOR PANTEL, ET AL. (23-1698);

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, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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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 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 region of the country. An important function of the Chamber is to

[1] 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.

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.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.87 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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 ("CAA") 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 the Environmental Protection Agency's ("EPA's") regulation of motor vehicles and engines.

SUMMARY OF ARGUMENT

General Motors LLC's ("GM's") petition explains why the Court should grant rehearing en banc. Auto Innovators, the Chamber, and the NAM submit this amicus brief to offer the automobile industry's perspective about the urgent need to remedy the conflict the panel's opinion creates with this Court's recent decision in *In re Ford Motor Co. F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, 65 F.4th 851 (6th Cir. 2023).

As Judge Kethledge's dissent from the panel opinion correctly observes, the "through-thread of all [Plaintiffs'] claims and 'theories'" is that GM allegedly failed to disclose to consumers that its trucks were equipped with an auxiliary emission control device ("AECD") that constitutes a prohibited "defeat device." Op. 27. Those are regulatory terms created, defined, and implemented by EPA. Because the factual record is devoid of any assertion that GM misled consumers about

emissions independent of the federal standards, Plaintiffs necessarily seek to relitigate EPA's determination that GM's AECDs are not prohibited defeat devices.

The EPA vehicle emissions regulatory regime that Plaintiffs attempt to question in this case offers at least as strong a rationale for preemption as the one the Court found preemptive in *Ford*. Among other things, EPA carefully scrutinizes each vehicle's AECDs—design features (typically software) that temporarily modify 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—and requires manufacturers to identify and provide a detailed justification for each one, lest EPA deem them prohibited "defeat devices."

Given the breadth and depth of EPA's review process, state-law claims second-guessing the program would not only compel manufacturers to "submit a deluge of information" and overburden EPA, *Ford*, 65 F.4th at 864, but also 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.

Under the CAA, it is EPA's responsibility to regulate vehicle emissions and enforce 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, just as this Court found with respect to fuel

economy estimates in *Ford*. *See Ford*, 65 F.4th at 863 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)). By limiting *Ford* to its facts and allowing plaintiffs to question EPA's emissions certification decisions, the panel's decision threatens to impair manufacturers' ability to design and deliver vehicles that reliably balance durability, performance, and safety. Accordingly, en banc review is warranted.

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 annually obtain a "certificate of conformity," which ensures that the vehicle complies with applicable emissions standards. *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). The requirements for obtaining a certificate of conformity are expansive, typically necessitating hundreds of pages of written submissions and substantive dialogue between manufacturers and EPA. A decision by EPA to issue a

certificate of conformity thus ensures for consumers that the vehicle, and each component of its emissions control system, has been heavily scrutinized for compliance with federal law.

As part of this review, EPA scrutinizes AECDs to ensure that they are not "defeat devices"—*i.e.*, AECDs (elements of design) that "reduce[] 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. 40 C.F.R. § 86.1803-01. 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).

Importantly, the regulatory line between whether an AECD is or is not justified is often unclear. Rather than a question of intentional cheating, EPA and automakers can debate in good faith whether a particular AECD is justified as necessary to protect against damage, or whether other solutions exist that impact emissions less. The analysis

requires not only knowledge of the physics and engineering considerations that bear on the need for an AECD and the risks of operating an engine without it, but also familiarity with the technology deployed throughout the industry to address the same operating conditions that present challenges in real-world driving. The analysis also can implicate policy choices, such as where an AECD increases one type of emissions and decreases another.

EPA has not hesitated to enforce against alleged violations of the AECD disclosure and justification requirements. *See* EPA, *Clean Air Act Vehicle and Engine Enforcement Case Resolutions* (last updated June 6, 2024), https://bit.ly/40fBEWM. On the other hand, when AECDs are comprehensively disclosed and justified and EPA grants 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 technological and legal regime.

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

This Court recently held in *Ford* 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 [medical device] 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.

Judge Kethledge's dissent from the panel opinion here cogently explains that the key logic of *Buckman*, as elucidated in *Ford*, applies just as strongly to emissions regulations. Op. 27-28 (citing *Ford*, 65 F.4th at 863). 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. And because "[t]his case invites lay jurors to strike [the] balance" between "increased emissions" and the justification for an AECD, it impermissibly "disrupt[s] the expert balance underlying the federal scheme." *Id.* at 28 (quoting *Ford*, 65 F.4th at 853).

While that reasoning is sufficient to find preemption, the additional rationales underlying *Buckman* and *Ford* apply here as well. For one, "state-law claims would skew the disclosures that manufacturers need to make to the EPA." *Ford*, 65 F.4th at 864. Under the EPCA regulations at issue in *Ford*, manufacturers were required to submit fuel economy data and documentation. *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." *Id.* (alterations in original). "This 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 mentioned, the amount of information that manufacturers must submit to obtain certificates of conformity is extensive and exceeds the 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 AECD approvals could not only motivate manufacturers to "submit a

deluge of information" and overburden EPA, but could also hinder manufacturers' ability to produce and market vehicles to meet consumer demand and to make necessary updates that provide important benefits for consumers and the environment. *Ford*, 65 F.4th at 863-64.

Perhaps more importantly, it could also 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 by Congress and the EPA." *Counts v. Gen. Motors, LLC*, 681 F. Supp. 3d 778, 787 (E.D. Mich. 2023) (resolving the same preemption issue as these cases), *appeal filed*, No. 24-1139 (6th Cir.); *see* Letter, No. 24-1139 (6th Cir. Sept. 24, 2024) (announcing appeal will decided without argument). Put simply, state-law interference would create uncertainty as to what information a manufacturer should include in an AECD justification to avoid second-guessing by a future jury. As a result, manufacturers could never have full confidence in the sufficiency of their explanations. *See Buckman*, 531 U.S. at 350 (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 emissions control systems are sufficient to avoid liability. Manufacturers rely on the regulatory certainty provided by federal certification, including approval of AECDs, as well as EPA's institutional knowledge and technical expertise developed over years of dialogue. The meaning and certainty 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.

State-jury interference in emissions certifications and AECD review would thus impermissibly force EPA to "rebalance" its implementation of Congress's "statutory objectives" in the CAA. *Ford*, 65 F.4th at 863. That concern is especially serious for AECDs because they involve (by definition) tradeoffs between limiting emissions and ensuring vehicles' operational integrity and safety in certain conditions. Without preemption, plaintiffs could challenge and undercut EPA's deeply informed determinations about what level of damage or safety risk warrants strategies to modify the emissions control systems.

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 directives 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. It makes little sense to grant private plaintiffs authority to pursue supposed omissions in EPA-approved applications when only the agency has access to the body of knowledge and context before it at the time. Plaintiffs may sue agencies under the Administrative Procedure Act to challenge an agency's rules, but state-law tort suits targeting manufacturers are little more than forbidden collateral attacks on agency decisions that risk imposing enormous uncertainty and costs on manufacturers, with implications for consumers as well.

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 standards). 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) (citation omitted).

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 regulate vehicle emissions and supervise and enforce manufacturer compliance with Congress's design. *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 that risks destabilizing the federally regulated market.

CONCLUSION

The Court should grant the petition for en banc review.

September 25, 2024

Respectfully submitted,

s/ Jonathan S. Martel

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4), 29(b)(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)(4) because this brief contains 2,590 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*
Jonathan S. Martel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on September 25, 2024 and will, therefore, be served electronically upon all counsel.

s/ *Jonathan S. Martel*
Jonathan S. Martel