IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* Dave Yost, Ohio Attorney General,	:	
Plaintiff-Appellee,	:	Case No. 2020-0092
v.	:	
Volkswagen Aktiengesellschaft d/b/a Volkswagen Group and/or Volkswagen AG; Audi AG; Volkswagen Group of America, Inc. d/b/a Volkswagen of America, Inc. or Audi of America, Inc.; Volkswagen of America, Inc.; Audi of America, LLC; Dr. Ing. H.C. F. Porsche AG d/b/a/ Porsche AG; and Porsche Cars North America, Inc.,	:	On Appeal from Franklin County Court of Appeals, Tenth Appellate District
Defendants-Appellants.	:	

DEFENDANTS-APPELLANTS' UNOPPOSED MOTION TO STAY MANDATE

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INTRODUCTION

Pursuant to Supreme Court Rule of Practice 4.01, Defendants respectfully move to stay the issuance of the mandate in this appeal pending Defendants' forthcoming petition for a writ of *certiorari* to the U.S. Supreme Court, which Defendants intend to file expeditiously, and a decision on that petition. Defendants have consulted with counsel for the State of Ohio, who does not object to the requested stay. The circumstances here weigh strongly in favor of staying the mandate because (1) this case presents substantial questions that warrant review by the U.S. Supreme Court; and (2) staying the mandate will conserve judicial and party resources and cause no prejudice to Ohio.

First, this case presents a strong candidate for review by the U.S. Supreme Court. In its opinion, this Court joined with a recent decision from the U.S. Court of Appeals for the Ninth Circuit holding that the federal Clean Air Act ("CAA") does not preempt states and localities from regulating nationwide, post-sale changes that auto manufacturers make to their cars' emissions systems. *State ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, Slip Opinion No. 2021-Ohio-2121, ¶ 21; *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation*, 959 F.3d 1201 (9th Cir.2020) ("*Counties*"). Volkswagen has already filed a petition seeking U.S. Supreme Court review of *Counties*, which was strong enough that the U.S. Supreme Court has requested the views of the U.S. Solicitor General in connection with that petition. *See Volkswagen Group of Am., Inc.* v. *The Envt'l Protection Comm. of Hillsborough Cty., Fla.*, No. 20-994 (U.S. Apr. 26, 2021). This Court's decision split with the Alabama Supreme Court, courts of appeals in Minnesota and Tennessee, and trial courts in Missouri and Illinois. And this issue is critical to the authority of the U.S. Environmental Protection Agency ("EPA"), which for 50 years has exclusively regulated manufacturers' design of, or changes to, vehicle emissions systems.

The Supreme Court frequently grants *certiorari* to review cases that present important federal preemption questions,[1] especially where there is a split in authority on the issue. Plaintiff the State of Ohio has already acknowledged that this case presents a "substantial question of federal preemption" that merited this Court's discretionary review. (Ohio. Mem. In Resp. to Juris. 1, 6.) This Court's decision, if adopted broadly in conjunction with the *Counties* decision, will upend the way in which auto manufacturers are regulated. Manufacturers frequently update emission control software post sale, and, as the dissent acknowledged, this Court's decision could result in substantial liability for manufacturers faced with claims relating to such updates. Indeed, Defendants' petition in *Counties* has received an outpouring of support from organizations representing the U.S. and global auto industry and former senior EPA, Department of Justice, and California Air Resources Board officials, confirming the importance of the (identical) preemption issue here.[2]

Second, staying further proceedings in this action while the U.S. Supreme Court reviews Defendants' forthcoming petition will promote judicial efficiency and avoid wasting party resources while causing no harm to Ohio. This case involves a dispositive, threshold legal issue, and a U.S. Supreme Court ruling in Defendants' favor will end the litigation. Engaging in

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[1] *See, e.g.*, *Kansas* v. *Garcia*, 140 S.Ct. 791, 797, 206 L.Ed.2d 146 (2020) (addressing preemption of Kansas statutes under the Immigration Reform and Control Act of 1986); *Virginia Uranium, Inc.* v. *Warren*, 139 S.Ct. 1894, 1900, 204 L.Ed.2d 377 (2019) (addressing preemption of Virginia statute under the Atomic Energy Act); *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S.Ct. 1421, 1427, 197 L.Ed.2d 806 (2017) (concluding the Federal Arbitration Act preempted Kentucky Supreme Court rule disfavoring arbitration agreements); *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S.Ct. 1190, 1194, 197 L.Ed.2d 572 (2017) (concluding Federal Employees Health Benefits Act of 1959 preempted state law).

[2] *See* Brief for Former Environmental Protection Agency Officials, *et al.* as *amicus curiae*, Brief for Alliance for Automotive Innovation *et ano.* as *amicus curaie*, Brief for International Organization of Motor Vehicle Manufacturers *et al.* as *amicus curiae*, and Brief for Product Liability Advisory Council, Inc. *et ano.* as *amicus curiae*, *Volkswagen Group of Am., Inc.* v. *The Envt'l Protection Comm. of Hillsborough Cty., Fla.*, No. 20-994.

discovery—which will likely involve reviewing and producing millions of pages of documents, taking dozens of fact and expert depositions, and court intervention to resolve discovery disputes—will all be wasted if the U.S. Supreme Court rules in Defendants' favor. Other courts have already recognized that a stay of identical litigation is appropriate. For example, facing this very issue, the Ninth Circuit granted Defendants' request for a stay of its mandate. *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litigation*, 9th Cir. No. 18-15937, Dkt. No. 85 (Sept. 3, 2020). Likewise, the Illinois Appellate Court *sua sponte* stayed an appeal involving the same preemption question pending resolution of the *Counties* petition. Order, *People* v. *Volkswagen Aktiengesellschaft*, Ill. App. Ct. Appeal No. 1-18-1382 (Mar. 16, 2021). Ohio will suffer no prejudice from a stay (indeed, it does not object to a stay).

ARGUMENT

This Court has previously stayed mandates of its decisions pending appeal to the U.S. Supreme Court. *See Saturday* v. *Cleveland Bd. of Rev.*, 143 Ohio St. 3d 1462, 2015-Ohio-3733, 37 N.E.3d 1248; *State* v. *Warner*, 55 Ohio St. 3d 718, 564 N.E.2d 501 (1990). This Court should stay its mandate pending resolution of Defendants' forthcoming petition for *certiorari* because (1) this case presents substantial federal questions warranting U.S. Supreme Court review and (2) there is good cause for a stay.

I. This Case Presents Substantial Questions Warranting U.S. Supreme Court Review.

The U.S. Supreme Court reviews decisions in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10(b). Defendants' forthcoming petition presents a question of exceptional importance that has split courts across the country.

A. This Court's Decision Conflicts with Final Decisions of Multiple State Courts.

This Court's decision deepens a square split among multiple federal and state courts over whether the CAA preempts states and localities from regulating manufacturers' nationwide, post-sale updates. In final decisions, the Alabama Supreme Court, intermediate courts of appeals in Minnesota and Tennessee, and a trial court in Missouri confronted the identical issue, involving the same defendants and the same conduct, and came to the opposite conclusion, holding that the CAA preempts such state and local claims.[3] Accounting for non-final decisions, 16 of the 33 judges and justices to rule on this issue have found that the CAA preempts such claims. Indeed, even this Court was split—four Justices joined the majority opinion, two Justices concurred in the judgment only, and Justice Donnelly dissented.

B. This Case Presents an Issue of Exceptional Importance.

Federal preemption is a subject that the U.S. Supreme Court frequently addresses, and it is particularly important in the highly regulated industry of auto manufacturing. The U.S. Supreme Court also regularly takes cases construing the scope of EPA enforcement authority under the CAA, "the principal federal statute designed to 'protect and enhance the quality of the Nation's air resources.'" *Nat'l Parks Conservation Ass'n* v. *U.S. Dep't of Interior*, 794 F.Supp.2d 39, 41 (D.D.C.2011), quoting 42 U.S.C. 7401(b)(1). Confirming the importance of this issue, numerous *amici*—seven industry organizations and four former senior EPA, DOJ, and California Air Resources Board officials—filed briefs urging the U.S. Supreme Court to grant the *Counties* petition (the U.S. Supreme Court has requested the views of the U.S. Solicitor General).

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[3] *State* v. *Volkswagen AG*, 279 So.3d 1109 (Ala. 2018); *State of Tenn. v. Volkswagen Aktiengesellschaft*, Tenn.App. No. M2018-00791-COA-R9-CV, 2019 WL 1220836 (Mar. 13, 2019); *Minnesota* v. *Volkswagen Aktiengesellschaft*, Minn.App. No. A18-0544, 2018 WL 6273103 (Dec. 3, 2018); *State* v. *Volkswagen Aktiengesellschaft*, Mo.Cir. No. 1622-CC10852-01, 2018 WL 3349094 (June 26, 2018).

Defendants' forthcoming petition for *certiorari* will raise critical questions as to the scope of EPA's exclusive authority. As Congress recognized when enacting Title II, "[t]he ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance." H.R.Rep. No. 90-728, at 1957, *as reprinted in* 1967 U.S.C.C.A.N. 1938, 1957-1958. To avoid regulatory chaos, Congress entrusted EPA alone to regulate auto manufacturers' emissions compliance throughout the useful lives of their vehicles.

EPA's exclusive authority is crucial to its ability to fulfill its congressional mandate to efficiently oversee manufacturers' post-sale compliance and swiftly remedy any violations. Absent preemption, 50 states and thousands of counties may second-guess EPA's expert judgment when it comes to manufacturers' nationwide, post-sale updates—updates that are complex, highly technical, and often involve tradeoffs that states and localities do not have the expertise to assess. It is thus far from certain that every state and local government will agree with EPA about the wisdom or legality of a post-sale update. Thus, the threat of liability from potential state and local claims may discourage manufacturers from making beneficial updates, to the detriment of consumers, EPA's objectives, and the environment.

Likewise, as the dissent recognized, *State ex rel. Yost* v. *Volkswagen Aktiengesellschaft*, Slip Op. No. 2021-Ohio-2121, ¶ 49-50, preemption safeguards EPA's enforcement authority. Under the majority's analysis, EPA will be unable to fulfill its statutory mandate to quantify appropriate penalties for CAA violations because it cannot possibly predict penalties from innumerable state and local pile-on actions.

This issue is likely to arise repeatedly in the future. After the Ninth Circuit issued its decision, Hillsborough County, Florida, sued Daimler, seeking massive penalties and injunctive

relief for Daimler's alleged installation of defeat devices and post-sale tampering, citing the Ninth Circuit's decision as authorizing its suit.[4] Hillsborough has also stated that it may bring similar claims against Fiat Chrysler Automobiles, General Motors, and potentially other manufacturers. Manufacturers issue post-sale, nationwide updates to emissions software with increasing frequency, affecting millions of vehicles every year.[5] There is a real concern that if this Court's decision is adopted broadly, manufacturers will face a flood of lawsuits. U.S. Supreme Court review is thus necessary to clarify federal law and resolve the split among the courts.

Finally, Defendants believe that the U.S. Supreme Court should uphold EPA's fifty years of exclusive authority over manufacturers' emissions compliance. As noted above, multiple courts have considered the identical issue and concluded that the CAA preempts similar claims brought by states and localities. Justice Donnelly's dissent further confirms that there is significant disagreement over the CAA's preemptive scope, and the U.S. Supreme Court should step in to resolve this pressing conflict. Respectfully, this Court should stay its mandate while the U.S. Supreme Court considers whether to do so.

II. There Is Good Cause for a Stay.

A stay will preserve judicial and party resources while imposing no harm on Ohio, which does not object to staying the mandate. By contrast, Defendants will suffer irreparable harm if proceedings continue in the trial court while this appeal has not yet concluded. Absent a stay, the parties will incur the substantial costs associated with fact and expert discovery and pretrial motions in this complex, high-stakes case—a waste of time and resources if the U.S. Supreme

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[4] Hillsborough Cty. Env. Protection Comm'n, Comm'n Agenda, at 15 (Sept. 24, 2020), https://tinyurl.com/HillsboroughCtyAgenda (requesting "authorization for future related actions * * * (e.g. -Fiat Chrysler Automobiles, GM, etc.)").

[5] *Id.*

Court grants *certiorari* and reverses. The parties should not have to undergo costly litigation and discovery for claims that may be dismissed by the U.S. Supreme Court on the threshold question of preemption. *See United States ex rel. Chandler* v. *Cook County*, 282 F.3d 448, 451 (7th Cir.2002) (Ripple, J., in chambers) (staying mandate and noting "injury that [defendant] could suffer if it is required to prepare for trial before the Supreme Court takes action"); *Pena* v. *Taylor Farms Pac., Inc.*, E.D.Cal. No. 2:13–cv–01282, 2015 WL 5103157, at *5 (Aug. 31, 2015) ("[M]any courts have found the costs of pretrial litigation, incurred unnecessarily, would constitute irreparable harm."). The trial court will likewise need to devote substantial resources to resolving discovery disputes and deciding pre-trial motions that could be unnecessary if the U.S. Supreme Court grants *certiorari* and reverses.

By contrast, Ohio would suffer no prejudice from staying the mandate. A stay would maintain the status quo that has been in place since the trial court granted Defendants' motion to dismiss on December 7, 2018. Continuing to pause the proceedings for a relatively brief additional period in this long-running case to allow for the U.S. Supreme Court to determine whether to grant *certiorari* is thus entirely reasonable. Indeed, other courts have recognized that a stay of identical litigation is appropriate pending the *Counties* petition. *See supra* at 3. As the State itself recognized, the "substantial question" of federal preemption should be fully resolved before this case is litigated in the trial court. (Ohio. Mem. In Resp. to Juris. 1, 6.)

CONCLUSION

Defendants respectfully request that this Court stay the issuance of its mandate pending resolution of Defendants' forthcoming petition for a writ of *certiorari*.

Respectfully,

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CERTIFICATE OF SERVICE

I, Jackie M. Jewell, hereby certify that, pursuant to S.Ct.Prac.R. 3.11(C)(1), a true copy of the foregoing Defendants-Appellants' Upnopposed Motion to Stay Mandate was served upon all Counsel via email this 8th day of July 2021.

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