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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0544

State of Minnesota,
by its Attorney General, Lori Swanson, et al.,
Respondents,

vs.

Volkswagen Aktiengesellschaft d/b/a Volkswagen Group
and/or Volkswagen AG; et al.,
Appellants,

Audi AG; et al.,
Defendants.

Filed December 3, 2018
Affirmed in part and reversed in part
Reilly, Judge
Concurring in part, dissenting in part, Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-16-17753

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Considered and decided by Tracy M. Smith, Presiding Judge; Reilly, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant car manufacturer Volkswagen Aktiengesellschaft d/b/a Volkswagen Group and/or Volkswagen AG (Volkswagen), challenges a district court decision partially denying a motion to dismiss the State of Minnesota's environmental-protection claims. Volkswagen asserts that (1) the state lacks specific personal jurisdiction over the company, and (2) the state's claims are preempted by federal law. We determine that the state has personal jurisdiction over Volkswagen. However, because the state's claims are preempted by federal law, we reverse.

FACTS

This appeal concerns the use of "defeat devices" designed and controlled by Volkswagen and installed in vehicles driven throughout the United States, including within the state of Minnesota. In May 2006, Volkswagen developed for sale in the United States a line of environmentally friendly diesel-engine vehicles delivering fuel efficiency, high performance, and low emissions of nitrogen oxides (NOx). *See generally In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 264 F. Supp. 3d 1040, 1042-44 (N.D. Cal. 2017) (*Wyoming*) (providing relevant factual background in federal action initiated by states, including Wyoming, on Volkswagen's use of software in certain diesel engine vehicles to mask true emission levels in violation of federal law). NOx is a generic term for a group of nitrogen-based compounds produced by the combustion engines of motor vehicles, among other sources. Exposure to NOx has been linked with health and environmental dangers. The emission of high levels of NOx is recognized as a particular

problem for diesel engines, prompting Volkswagen to design a line of environmentally friendly diesel vehicles.

During the design process, Volkswagen faced numerous challenges in attempting to engineer diesel engines that did not generate excessive NOx and soot. But instead of altering the design of its vehicles, Volkswagen developed technology that activates the vehicle's air pollution control systems when it detects that the vehicle is being tested during emissions testing, making it appear that the vehicle complies with federal emission standards. This technology is known as a "defeat device" and is defined as an auxiliary emission control device (AECD) "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use." *Wyoming*, 264 F. Supp. 3d at 1042-43 (quoting 40 C.F.R. § 86.1803-01). Defeat devices are prohibited in all new passenger vehicles under federal law. *Id*. at 1043. The defeat device activates or increases the effectiveness of the vehicle's emissions controls when the device detects that the vehicle is being tested under laboratory conditions, but deactivates the vehicle's air pollution control systems when the vehicle is operated under normal driving conditions.

In September 2015, Volkswagen publicly admitted using illegal technology to tamper with the air pollution control systems in certain vehicles sold in the United States from 2008 to 2015. A number of states filed state-court actions against Volkswagen based on the operation of the "clean diesel" vehicles in their respective jurisdictions. *Id.* at 1042. In addition, counties in Florida and in Utah filed tampering claims against Volkswagen in federal court alleging that Volkswagen "perhaps even added new defeat devices, through

software updates during vehicle maintenance and post-sale recalls." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 310 F. Supp. 3d 1030, 1032 (N.D. Cal. 2018) (*Counties*). The federal-court cases against Volkswagen were consolidated in the United States District Court for the Northern District of California as part of a multidistrict litigation (the MDL) before United States District Judge Charles Breyer. *Wyoming*, 264 F. Supp. 3d at 1044. The State of Minnesota is not a party to the MDL.

In December 2016, Minnesota initiated this environmental-protection action in state court against Volkswagen for violations of Minnesota's motor vehicle air pollution control systems law, Minn. Stat. § 325E.0951 (2014), and the Minnesota Pollution Control Agency's air pollution control systems restrictions rule, Minn. R. 7023.0120 (2014). The complaint alleged that Volkswagen "knowingly designed and installed the illegal devices, known as 'defeat devices,' in all of its 2.0- and 3.0-liter [vehicles] sold and leased in the United States, including in Minnesota, from 2008 through 2015." Volkswagen removed the matter to the MDL, but the case was remanded back to state court on the ground that the state's claims did not necessarily raise a substantial and disputed federal question. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., MDL No. 2672 CRB (JSC)*, 2017 WL 2258757, at *1 (N.D. Cal. May 23, 2017). Minnesota filed a first amended complaint in June 2017, and a second amended complaint in September 2017, asserting that Volkswagen's post-sale tampering software violated Minnesota's tampering laws under Minn. Stat. § 325E.0951, subd. 2(a), and Minn. R. 7023.0120.

In addition to the civil lawsuits filed by various states and counties, the United States Department of Justice (the DOJ) filed a criminal indictment against Volkswagen. *Wyoming*, 264 F. Supp. 3d at 1044. In January 2017, Volkswagen executed a partial consent decree with the DOJ, admitting that software in certain of its vehicles "enables the vehicles' engine control modules to detect when the vehicles are being driven on the road, rather than undergoing Federal Test procedures, and that this software renders certain emission control systems in the vehicles inoperative . . . when the vehicles are driven on the road." Volkswagen admitted installing this software in both new and *used* vehicles. Volkswagen entered a plea of guilty to three felony counts in March 2017, including conspiracy to defraud the United States and to violate the Clean Air Act (the CAA) by making false statements and representations to the Environmental Protection Agency (the EPA) in violation of federal law. *Id.* The agreement resolved the federal government's claims that Volkswagen knowingly installed software functions in the vehicles *after* they had been sold to the end-user. As part of the plea agreement and the EPA consent decree, Volkswagen agreed to pay $4.3 billion in civil and criminal penalties, invest in zero-emission vehicle technology, recall or repair affected vehicles, and contribute to an emissions mitigation trust. *Id*. The trust is "expected to fully mitigate the environmental harm caused by Volkswagen's emissions scheme." *Id*.

In August 2017, the MDL court issued a ruling granting Volkswagen's motion to dismiss Wyoming's claims as preempted by the CAA and dismissed the complaint. *Id.* at 1057. The court concluded that Wyoming's attempt to "enforce [a] standard relating to the

control of emissions from new motor vehicles" was expressly preempted by section 209(a) of the CAA. *Id*. at 1052, 1054, 1057 (citing 42 U.S.C. § 7543(a)).

Following this decision in the MDL, Volkswagen moved to dismiss this action on the grounds that the claims are expressly and impliedly preempted under the CAA, and that the state lacks personal jurisdiction over the company. The district court partially granted relief in March 2018. The district court (1) granted Volkswagen's motion to dismiss the state's claim related to the installation of defeat devices in new vehicles, (2) denied Volkswagen's motion to dismiss the claim related to the installation of "improved" defeat technology in "in use" vehicles during maintenance, (3) dismissed claims against Audi Ag, Dr. Ing. H.C.F. Porsche Ag D/B/A Porsche Ag, and Porsche Cars North America, Inc., and (4) denied Volkswagen's motion to dismiss for lack of jurisdiction. Relying on *Wyoming*, the district court determined that federal law preempted the state's claims related to the installation of defeat devices in new vehicles, but did not preclude the state's claim related to the installation of defeat devices in used vehicles. The district court also ruled that Volkswagen was subject to personal jurisdiction because it oversaw sales and marketing efforts in Minnesota, transacted business through ten Volkswagen-specific dealerships in Minnesota, and instructed its Minnesota-based affiliates to install new defeat devices in used vehicles brought in for maintenance.

Approximately one month later, the MDL court issued a ruling on the tampering claims brought by the Florida and Utah counties regarding the post-sale modification of software in used vehicles. *Counties*, 310 F. Supp. 3d at 1030. The federal court ruled that

the counties' tampering claims regarding software updates to used vehicles were preempted by federal law, and dismissed the case. *Id*. at 1047, 1049-50.

Volkswagen now appeals the March 2018 decision in this action denying its motion to dismiss the state's claim related to the installation of defeat devices in used vehicles.

D E C I S I O N

I. Volkswagen Is Subject to Specific Personal Jurisdiction in Minnesota.

As a preliminary matter, Volkswagen challenges the state's exercise of personal jurisdiction over the company. Personal jurisdiction is a question of law subject to de novo review. *Juelich v. Yamazaki Mazak Optonics Corp*., 682 N.W.2d 565, 569 (Minn. 2004).

Minnesota courts can exercise personal jurisdiction over a foreign corporation when Minnesota's long-arm statute, Minn. Stat. § 543.19 (2016), authorizes it and the exercise of such jurisdiction does not violate the due-process requirements of the United States Constitution. *Domtar, Inc. v. Niagara Fire Ins. Co*., 533 N.W.2d 25, 29 (Minn. 1995). "Because Minnesota's long-arm statute is coextensive with the constitutional limits of due process, the inquiry necessarily focuses on the personal-jurisdiction requirements of the federal constitution." *Lorix v. Crompton Corp*., 680 N.W.2d 574, 577 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004); *see also Valspar Corp. v. Lukken Color Corp*., 495 N.W.2d 408, 411 (Minn. 1992) ("If the personal jurisdiction requirements of the federal constitution are met, the requirements of [Minnesota's] long-arm statute will necessarily be met also.").

To satisfy due-process requirements, the defendant must have "purposefully established 'minimum contacts' with a forum state such that maintaining jurisdiction there

does not offend 'traditional notions of fair play and substantial justice.'" *Bandemer v. Ford Motor Co.*, 913 N.W.2d 710, 714 (Minn. App. 2018) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945); *Marshall v. Inn of Madeline Island*, 610 N.W.2d 670, 673-74 (Minn. App. 2000)), *review granted* (July 17, 2018). "The minimum-contacts requirement may be satisfied through general personal jurisdiction or specific personal jurisdiction." *Bandemer*, 913 N.W.2d at 714. "General personal jurisdiction exists when a nonresident defendant's contacts with the forum state are 'continuous and systematic,'" while specific personal jurisdiction exists "when the defendant's contacts with the forum state are limited, yet connected with the plaintiff's claim such that the claim arises out of or relates to the defendant's contacts with the forum." *Id*. (quotation omitted).

"Minnesota courts employ a five-factor test to determine whether the exercise of personal jurisdiction over a nonresident defendant satisfies federal due-process requirements." *Id.* (citing *Juelich*, 682 N.W.2d at 570). Under this test, we assess (1) the quantity of contacts with Minnesota, (2) the nature and quality of those contacts, (3) the connection of the cause of action with the contacts, (4) Minnesota's interest in providing a forum, and (5) the convenience of the parties. *Juelich*, 682 N.W.2d at 570. "The first three factors determine whether minimum contacts exist and the last two factors determine whether the exercise of jurisdiction is reasonable according to traditional notions of fair play and substantial justice." *Id*. "Although the key inquiry is whether minimum contacts have been established, a strong showing on the reasonableness factors may 'serve to fortify a borderline showing' of minimum-contacts factors." *Rilley v. MoneyMutual, LLC*, 884

N.W.2d 321, 328 (Minn. 2016) (citing *Juelich*, 682 N.W.2d at 570-71), *cert. denied*, 137 S. Ct. 1331 (2017).

Here, the issue presented is whether Volkswagen is subject to specific personal jurisdiction. The district court determined that personal jurisdiction is proper because Volkswagen directed its activities at Minnesota and purposefully availed itself of the privilege of conducting business within Minnesota. While Volkswagen does not separately address the five factors on appeal, it argues that minimum contacts do not exist because the state failed to demonstrate that the company purposefully directed its activities to Minnesota in particular, rather than to the United States generally.

We disagree. With respect to the first two factors, we determine that the quantity, nature, and quality of the contacts are sufficient for the state to exercise jurisdiction. The state alleges—and we accept as true—that Volkswagen acted with and through its United States affiliates to obtain legal certification to sell its vehicles in the United States, including those registered and operated in Minnesota. *See Juelich*, 682 N.W.2d at 570 (taking plaintiff's allegations in the complaint and supporting evidence as true at pretrial stage). Volkswagen transacted business through at least ten Volkswagen-specific dealerships located in Minnesota. Between 2008 and 2015, the state asserts that Volkswagen sold and leased more than 11,500 tampered vehicles in Minnesota. Further, Volkswagen's United States affiliates in Minnesota, at Volkswagen's direction, installed defeat devices in used vehicles registered in Minnesota. We conclude that the quantity, nature, and quality of Volkswagen's contacts support the exercise of jurisdiction because

Volkswagen "purposefully availed itself of the benefits and protection of Minnesota law." *TRWL Fin. Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573, 576 (Minn. App. 1995).

The connection of the contacts with the cause of action also supports our exercise of jurisdiction. "In Minnesota, marketing that specifically targets Minnesota residents and is related to the cause of action can satisfy the third factor." *Bandemer*, 913 N.W.2d at 714. Even a defendant's email solicitation and web-based advertising campaign targeting Minnesota residents is sufficient to establish minimum contacts. *See Rilley*, 884 N.W.2d at 337-38 (holding that emails and Google AdWords advertising campaign, targeting Minnesota consumers, satisfied third factor). Volkswagen's marketing efforts in Minnesota are alleged to be even stronger. The state alleges that Volkswagen oversaw the sales and marketing efforts of its vehicles to Minnesota residents. Volkswagen marketed its vehicles in Minnesota as new "clean diesel" vehicles that were quiet, fuel-efficient, and high-performing. Volkswagen's marketing activities specifically targeted Minnesota residents.

Analysis of the final two factors supports a determination that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Juelich*, 682 N.W.2d at 570. When a case involves an alleged injury to a Minnesota resident, both the resident and the state have an interest in resolving the dispute here. *C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc*., 772 N.W.2d 528, 538 (Minn. App. 2009), *review denied* (Minn. Nov. 24, 2009). Regarding the convenience of the parties, we recognize that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the

long arm of personal jurisdiction over national borders." *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 114, 107 S. Ct. 1026, 1033 (1987). But "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id*. While resolving the dispute in Minnesota may be inconvenient to Volkswagen, the state has established that minimum contacts exist and Volkswagen should "reasonably anticipate" being haled into our courts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980).

Volkswagen argues that jurisdiction is improper because it did not target Minnesota in particular, but instead targeted the United States generally. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886, 131 S. Ct. 2780, 2790 (2011) (noting that it is a manufacturer's "purposeful contacts with [a given state], not with the United States, that alone are relevant") (plurality opinion); *see also Rilley*, 884 N.W.2d at 334 ("*Nicastro* provides a guiding principle that efforts to target the national market of the United States do not equate to contacts with a particular state simply because that state is a part of the national market."). We are not persuaded. Volkswagen does not dispute that it advertised and marketed its products in Minnesota and, acting through its affiliates, *itself* installed defeat devices in used vehicles in Minnesota. Volkswagen's activities were purposefully directed at Minnesota consumers and *Nicastro* is thus inapposite.

At this stage, we are mindful that we must view the evidence in the light most favorable to the plaintiff, *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 820 (8th Cir. 2014), and, in a close case, resolve any doubts in favor of retaining jurisdiction, *Hardrives*,

Inc. v. City of LaCrosse, 240 N.W.2d 814, 818 (Minn. 1976). The state has made a prima facie showing that Minnesota courts have specific personal jurisdiction over Volkswagen under the five-factor test.

II. The State of Minnesota's Claims Are Preempted by Federal Law.

a. Standard of Review

Volkswagen argues that the state's action is preempted by federal law. Statutory interpretation and federal preemption are questions of law, *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 428 (Minn. 2014), and an appellate court reviews de novo a district court's preemption ruling, *Pharm. Care Mgmt. Ass'n v. Rutledge*, 891 F.3d 1109, 1112 (8th Cir. 2018).

b. Preemption Doctrine

The Supremacy Clause of the United States Constitution instructs that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. "The Supremacy Clause enables Congress, in the exercise of its legislative authority, to preempt state law." *All. Ins. Co. v. Wilson*, 384 F.3d 547, 551 (8th Cir. 2004) (citation omitted); *Angell v. Angell*, 791 N.W.2d 530, 534 (Minn. 2010) (stating that "a federal law prevails over a conflicting state law"). The Supremacy Clause applies with equal force to federal regulations promulgated pursuant to an agency's statutory authority. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 139, 153, 102 S. Ct. 3014, 3022 (1982).

Federal law supersedes state law where (1) Congress is empowered to preempt state law pursuant to express language (express preemption); (2) "the scheme of federal

regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (field preemption); or (3) state law actually conflicts with federal law (conflict preemption). *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81, 107 S. Ct. 683, 689 (1987) (citations omitted); *Hous. & Redevelopment Auth. of Duluth v. Lee*, 852 N.W.2d 683, 687 (Minn. 2014).

c. Statutory Framework

The purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). "Congress enacted the Clean Air Amendments of the CAA in 1970 as 'a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution.'" *Nucor Steel-Arkansas v. Big River Steel, LLC*, 825 F.3d 444, 447 (8th Cir. 2016) (citing *General Motors Corp. v. United States*, 496 U.S. 530, 532, 110 S. Ct. 2528, 2530 (1990)). "The amendments require [the EPA] administrator to promulgate national ambient air quality standards [(NAAQS)], and each state develops its own state implementation plan [(SIP)] to enforce the NAAQS within the state." *Id*. (citing *General Motors Corp*., 496 U.S. at 532, 110 S. Ct. at 2530); *see also* 42 U.S.C. §§ 7408-7410.

The CAA vested the EPA with "significant authority to set and enforce vehicle emission standards" and, in so doing, "t[ook] away similar authority from the States." *Wyoming*, 264 F. Supp. 3d at 1049. Accordingly, "[t]he sovereign prerogatives to force reductions in greenhouse gas emissions . . . and (in some circumstances) to exercise the police power to reduce motor-vehicle emissions are now lodged in the Federal

Government." *Massachusetts v. E.P.A.*, 549 U.S. 497, 498, 127 S. Ct. 1438, 1441-42 (2007). The rationale behind this regulatory framework is "explained in part by the difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states." *Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1079 (D.C. Cir. 1996). The assertion of federal control in this area thus avoids "the possibility of 50 different state regulatory regimes." *Id.*; *see also Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (recognizing that possibility of different state regulatory regimes created a "spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers"), *cert. denied*, 446 U.S. 952 (1980).

The EPA, acting under the authority conferred by the CAA, sets and enforces motor-vehicle-emission standards. *Wyoming*, 264 F. Supp. 3d at 1042 (citing 42 U.S.C. § 7521(a)). The EPA also sets emission limits for NOx and for diesel particulate matter. *Id.* (citing 40 C.F.R. § 86.1811-04). The EPA is tasked with "setting emission limits for new vehicles introduced into commerce," "setting standards governing the use of emission-control devices in those vehicles," "running a certification and testing program to ensure that new vehicles meet these standards," and "enforcing these standards by refusing to certify vehicles that do not meet all regulatory requirements and by bringing civil enforcement actions against violators." *Counties*, 310 F. Supp. 3d at 1038 (citing 42 U.S.C. §§ 7521(a), 7521(a)(4)(A), 7521(m), 7525, 7522(a), 7524, 7525(a)). The EPA also regulates manufacturer use of AECDs installed in motor vehicles. *Wyoming*, 264 F. Supp. 3d at 1042 (citing 40 C.F.R. § 86.1844–01(d)(11)). The EPA's authority in this arena

extends to both new and post-sale motor vehicles. *Counties*, 310 F. Supp. 3d at 1044 ("[The] EPA [is] better positioned than [plaintiff counties] to regulate Volkswagen's post-sale software changes."); *Wyoming*, 264 F. Supp. 3d at 1043 ("[The] EPA prohibits the installation of defeat devices in all new passenger vehicles.").

d. Preemption Under the Clean Air Act

The issue presented on appeal is whether Congress, through the federal provisions for regulating vehicle emissions systems under the CAA, preempted the state's claims of tampering with respect to vehicles after sale. Volkswagen argues that the state's causes of action are precluded by both express preemption and conflict preemption. We do not agree that express preemption applies. We are persuaded by the *Counties* decision that section 209(a) does not "expressly bar" attempts to regulate post-sale software changes because the affected vehicles have already been sold to consumers and are in use. 310 F. Supp. 3d at 1040.

The same reasoning applies here. We conclude that only conflict preemption is implicated in the present case. Conflict preemption is found to exist "when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme." *Gist v. Atlas Staffing, Inc.*, 910 N.W.2d 24, 33 (Minn. 2018) (quotation omitted). We begin our analysis with a review of section 209(a) of the CAA. This section provides that:

> 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.

42 U.S.C. § 7543(a).

The state argues that its claims against Volkswagen are authorized by the CAA's "in-use" provision. 42 U.S.C. § 7543(d). This provision states that "[n]othing 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." *Id*. This savings clause "preserves States' inherent authority to police conduct within their borders, and also enables them to develop additional tools to meet the EPA-established NAAQS." *Wyoming*, 264 F. Supp. 3d at 1050-51. "In use" regulations include state programs requiring vehicle testing, transportation planning regulations such as "carpool lanes, restrictions on car use in downtown areas, and programs to control the extended idling of vehicles," or tampering and concealment laws "prohibiting the disabling of emission-control systems and the use of devices that conceal on-road emissions." *Id.* at 1051 (citations omitted); *see also Counties*, 310 F. Supp. 3d at 1047 (citing *Engine Mfrs. Ass'n*, 88 F.3d at 1094).

Acting under this authority, the Minnesota Legislature adopted anti-tampering laws articulated in Minnesota Statutes section 325E.0951, and the Minnesota Pollution Control Agency promulgated Minnesota Rules part 7023.0120 pursuant to these laws. The statute provides that "[a] person may not knowingly tamper with, adjust, alter, change, or

disconnect any air pollution control system on a motor vehicle or on a motor vehicle engine." Minn. Stat. § 325E.0951, subd. 2(a). The rule provides that "[n]o person shall operate a motor vehicle unless all air pollution control systems are in place and in operating condition," and that "[n]o person shall rent, lease, offer for sale, or in any manner transfer ownership of a motor vehicle unless all air pollution control systems are in place and in operating condition." Minn. R. 7023.0120. The complaint alleges that Volkswagen violated Minnesota's environmental-protection laws by installing post-sale tampering technology (defeat devices) into used vehicles. The state claims that the CAA's section 209(a) does not preempt the state from exercising its police powers in this area. The district court agreed with the state and denied Volkswagen's motion to dismiss the claims related to the installation of defeat devices in used vehicles.

On appeal, Volkswagen urges this court to follow the MDL court's decision in *Counties*, which addresses similar facts. 310 F. Supp. 3d at 1049-50. We agree that the *Counties* decision is instructive and persuasive. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003) (recognizing that federal caselaw, while not binding, may be persuasive and should be awarded "due deference"). In that case, the counties asserted that Volkswagen installed defeat devices in new vehicles at the factory and in used vehicles through software updates during vehicle maintenance and post-sale recalls. 310 F. Supp. 3d at 1032. The MDL court determined that the counties' state-based tampering claims were preempted by the CAA and dismissed the suit. *Id*. at 1049-50. In dismissing claims in *Counties*, the MDL court reasoned that the claims, "based on post-sale software changes to the affected vehicles by Volkswagen

… are an attempt to enforce vehicle emission standards on a model-wide basis" in "thousands of vehicles nationwide." *Id*. at 1040, 1047. The court determined that while section 209(a)'s savings clause did not "expressly bar" the counties' attempt to regulate Volkswagen's conduct, the challenged state law nevertheless "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 1040 (quotations and citations omitted). The federal court noted that "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." *Id*. at 1044. *Counties* concluded that "[b]ecause Congress intended for only EPA to regulate such conduct," the petitioners' claims "stand as an obstacle to Congress' purpose and are preempted by the Clean Air Act." *Id*. at 1047. Applying the reasoning articulated in *Counties* to the facts of this case, and given that the *Counties* case involved the same alleged conduct by the same defendant, we agree that the State of Minnesota's tampering claims related to post-sale software updates to used cars are conflict preempted by the CAA.

Further, the MDL court recognized that if individual states or counties were permitted to regulate tampering claims, "the size of the potential tampering penalties could significantly interfere with Congress' regulatory scheme." *Id.* at 1044-45. This is because "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." *Id*. at 1045 (quotations omitted); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 121 S. Ct. 1012, 1017 (2001) (noting that the exercise of federal authority works to

"achieve a somewhat delicate balance of statutory objectives," which can be "skewed by allowing [fraud] claims under state tort law"); *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 287, 91 S. Ct. 1909, 1918 (1971) ("Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."). Thus, even the State of Minnesota's effort to impose civil penalties under our pollution control laws for installing defeat devices in used vehicles "cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247, 79 S. Ct. 773, 780 (1959). To permit the state to pursue such a remedy would effectively allow "two law-making sources to govern." *Id*. at 247, 79 S. Ct. at 781. To allow the state's claims to proceed would frustrate the purpose of the CAA and interfere with the federal government's ability to reach a settlement with Volkswagen.

The state distinguishes *Counties* by arguing that it is neither binding nor persuasive authority for three primary reasons. We address each argument in turn.

First, the state notes that the plaintiffs in *Counties* filed an appeal to the Ninth Circuit, which is still pending. The enforcement of the *Counties* decision has not been stayed pending appeal and it continues to carry persuasive force.

Second, the state contends that *Counties* is not binding on this court. The state is correct that we are only "bound by supreme court precedent and the published opinions of the court of appeals." *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). And "[w]hen interpreting a federal statute, this court is bound by the opinions of the United States Supreme Court and the opinions of the

Minnesota Supreme Court that interpret and apply federal law." *In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 519 (Minn. App. 2015), *aff'd*, 883 N.W.2d 778 (Minn. 2016). Here, whether the CAA preempts state action is a matter of first impression in Minnesota. Thus, we look to the decisions of courts from other jurisdictions addressing similar claims. *See Lorix v. Crompton Corp*., 736 N.W.2d 619, 629 (Minn. 2007) (stating that caselaw from other states may provide "guidance when our own jurisprudence is undefined"); *cf. Mahowald v. Minn. Gas Co*., 344 N.W.2d 856, 861 (Minn. 1984) (recognizing that decisions from foreign jurisdictions are not binding but may be persuasive authority). While we agree that *Counties* is not binding, we nevertheless find it compelling and well-reasoned.

Third, the state argues that this court should decline to follow *Counties* because its conflict-preemption analysis is wrongly-decided. The state faults the federal court's decision for (1) inventing new congressional intent; (2) incorrectly determining that state penalties conflicted with the CAA; (3) "drastically lower[ing] the bar for conflict preemption" by finding that the EPA was in a "better position" than the state to regulate the manufacturer's conduct; and (4) "ignores that EPA and states may concurrently regulate activities occurring within a state's borders."

We disagree. A conflict-preemption determination is appropriate in this case because the EPA has "substantial authority" to regulate a manufacturer's conduct in motor vehicles used nationwide, even after the vehicles are sold to the end-user. The state argues that sections 209(a) and (d), read together, direct that the federal government regulates "new" motor vehicles, while states retain their authority to regulate "in use" motor vehicles.

Counties rejected a similar argument, reasoning that the CAA "does not draw such a clear line." 310 F. Supp. 3d at 1041; *see also Wyoming*, 264 F. Supp. 3d at 1051 (stating that the dividing line between sections 209(a) and (d) can be "difficult to decipher"). *Counties* recognized that the CAA "requires vehicles to meet EPA's emission standards during their 'useful life.'" 310 F. Supp. 3d at 1041 (citing 42 U.S.C. § 7521(a)(1)); *see also* 42 U.S.C. § 7521(d) (stating that unless specified otherwise, the useful life of light-duty vehicles is five years or fifty thousand miles)[1].

Given the CAA's language, *Counties* determined that "[t]he federal regulation of vehicle emissions therefore does not stop after vehicles are sold to end users." 310 F. Supp. 3d at 1041. Instead, the EPA *continues* to have the right to regulate emissions in post-sale vehicles, and states do not have "carte blanche" to regulate conduct after the initial vehicle sale. *Id*. at 1046. Indeed, in an action by taxicab owners against the enforcement of city ordinances regulating exhaust emissions, a federal court stated:

> We do not say that a state or locality is free to impose its own emission control standards the moment after a new car is bought and registered. That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce."

Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

[1] The CAA was amended in 1990 and increased the "useful life" of a car to 10 years or 100,000 miles. *Id*., subd. (d)(1).

Moreover, to the extent that the State of Minnesota is authorized to regulate conduct, the CAA limits such regulation to "in use" activities such as state programs regarding vehicle testing, carpool lanes, restrictions on downtown car use, anti-idling programs, and tampering and concealment laws for emission-control systems. *See Engine Mfrs. Ass'n*, 88 F.3d at 1094; 42 U.S.C. § 7543(a), (d). But this division of regulatory authority "does not give states and local governments carte blanche to regulate *any* conduct that affects emissions from vehicles that are in use." *Counties*, 310 F. Supp. 3d at 1046 (emphasis added); 42 U.S.C. § 7543(d). Rather, a state government's 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." *Id.* Federal courts recognize that the CAA's preemption section does not preclude a state from imposing certain types of standards on motor vehicle use within the state—such as exhaust emission control standards upon the resale of a vehicle or licensing of commercial vehicles—because such regulations cause "only minimal interference with interstate commerce" and are "directed primarily to intrastate activities." *Allway Taxi, Inc.*, 340 F. Supp. at 1124. Additionally, the burden of complying with these sorts of regulations falls on the individual car owner rather than on manufacturers and distributors. *Id*. The CAA's 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." *Counties*, 310 F. Supp. 3d at 1047 (italics in original). This federal caselaw further buttresses our decision that the state's attempt to impose

additional penalties on Volkswagen conflicts with the purpose of the CAA as reflected in its statutory scheme.

We also reject the state's argument that *Counties* adopted a new standard for conflict preemption. The decision reasoned that the "model-wide nature" of Volkswagen's post-sale software changes distinguished the case from "the type of conduct that Congress intended for state and local governments to regulate." *Id.* at 1044. State and local tampering laws may be used by a state to regulate vehicle use within the state's borders, such as when "a mechanic removes or alters a vehicle's emission control system during routine maintenance." *Id.* However, when the tampering involves "thousands of vehicles," and the changes are made through software updates instituted on a nation-wide basis, *Counties* held that the federal government "is in a better position to regulate that conduct." *Id.* We disagree with the state that the *Counties* decision created a "better position" standard to be applied in preemption cases. Instead, the decision recognized that the CAA divides authority between the EPA, which enforces useful-life vehicle emission standards on a model-wide basis at the manufacturer level, and the state, which enforces the same standards on an individual vehicle basis at the end-user level. *Id.* at 1043. The *Counties* court characterized this division as "sensible," because it recognized that the federal government 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," while state governments are "in a better position than [the] EPA to enforce standards at the individual user level." *Id.* A review of the decision

reveals that the *Counties* court was summarizing existing law rather than creating a new standard.

Lastly, we disagree that the *Counties* decision ignored the principle that both the EPA and the states are interested in regulating in-use motor vehicle tampering. *Counties* acknowledged that states have an interest in regulating emission standards, but reasoned that only the EPA could regulate and enforce post-sale software changes on a model-wide basis throughout the United States. *Id.* at 1040-41. *Counties* does not stand for the proposition that states are left with no role in pollution-control matters.

For these reasons, we determine that the federal court's analysis in the MDL is based on a thorough review of federal caselaw and congressional intent and carries persuasive force. Congress, by enacting the CAA, provided that the federal government—rather than state or local governments—regulate the conduct at issue here. Accordingly, the State of Minnesota's environmental-protection claims are conflict-preempted. Because we determine that the district court erroneously held that the state's tampering claims are not preempted by federal law, we reverse.

Affirmed in part and reversed in part.

SMITH, TRACY M., Judge (concurring in part, dissenting in part)

I agree with the majority that Volkswagen is subject to specific personal jurisdiction in this state. I also agree that the Clean Air Act (the CAA) does not expressly preempt the State of Minnesota's tampering claims in this case. However, I respectfully dissent from the majority's conclusion that the state's claims are conflict-preempted by federal law.

Federal preemption of state laws is "generally disfavored." *Gist v. Atlas Staffing, Inc.*, 910 N.W.2d 24, 33 (Minn. 2018) (quotation omitted). 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. *See Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194-95 (2009). Reviewing courts should therefore "start with the assumption that the historic police powers of the states were not superseded by the federal act unless that was the clear and manifest purpose of Congress." *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 432-33 (Minn. 2014) (citing *Wyeth*, 555 U.S. at 565, 129 S. Ct. at 1194-95).

The state's enforcement of its anti-tampering laws is conflict-preempted only if it "stands as an obstacle to the accomplishment and execution of the purpose and objective of Congress." *Id.* at 433. We therefore must identify the purpose and objective of the CAA. The best place to look is the section of the act laying out Congress's findings and declaration of purpose. The first purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Another purpose is to assist states and local governments in "development and execution of their air pollution prevention and

control programs." *Id.*, § 7401(b)(3). The CAA also states that "[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." *Id.*, § 7401(c).

Thus, two key purposes of the CAA are to prevent pollution and to promote state participation in that endeavor. *See Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 691 (6th Cir. 2015) ("Congress set out the Act's purposes and objectives in a section of the Act labeled 'Congressional findings and declaration of purpose,' which provides in part 'that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.'" (quoting 42 U.S.C. § 7401(a)(3)); *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 666, 671 (9th Cir. 2003) ("One of the specific aims of the Clean Air Act is to reduce air pollution by reducing motor vehicle emissions" while also providing "a substantial retention of State authority."); *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532, 110 S. Ct. 2528, 2530 (1990) (observing that the CAA makes the federal government and the states "partners in the struggle against air pollution"). Not only must we assume, under general preemption principles, that the states' historic police powers have not been superseded by a federal act, *see Wyeth*, 555 U.S. at 565, 129 S. Ct. at 1194-95, but, in this particular federal act, Congress actually expressed its intent to promote the states' exercise of their authority in the fight against air pollution.

By seeking to enforce its environmental-protection laws against Volkswagen, the State of Minnesota is seeking to exercise its traditional police power to protect Minnesota's

citizens. Its anti-tampering action is thus harmonious with, and not an obstacle to, Congress's purposes in enacting the CAA.

This harmony of purpose is further reflected in the CAA's express-preemption and savings clauses. The CAA's express-preemption clause in essence gives the federal government exclusive authority over the emissions of new motor vehicles pre-sale. Section 209(a) of the CAA prohibits a state from adopting or attempting to enforce "any standard relating to the control of emissions from *new* motor vehicles or *new* motor vehicle engines." *Id.*, § 7543(a) (emphasis added). A new motor vehicle is defined as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3). In contrast, the CAA's savings clause, section 209(d), expressly permits the states to establish and enforce "in-use" vehicle restrictions. *Id.*, § 7543(d).

Read together, the express-preemption clause and the savings clause instruct that only the federal government may regulate new vehicles, while states retain their authority to regulate used vehicles. *See State v. Boecker*, 893 N.W.2d 348, 351 (Minn. 2017) ("We interpret a statute as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." (quotation omitted). This interpretation respects the CAA's understanding that both the federal and state governments have a role to play in protecting the environment and the public. Here, the state seeks to enforce its anti-tampering law based on Volkswagen's post-sale installation of defeat devices during vehicle-maintenance visits (what the state calls field fixes). Consistent with the CAA's preemption and savings clauses, because the defeat devices were installed in used vehicles, the state may properly regulate Volkswagen's

unlawful conduct in installing those devices. *See Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254 (9th Cir. 2000) ("The text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution. The Supreme Court has given substantial weight in preemption analysis to evidence that Congress intended to preserve the states[']regulatory authority.").

In concluding that the state's claims are conflict-preempted, the majority finds persuasive the federal district court's decision in *In re Volkswagen "Clean Diesel" Mtg., Sales Practices, & Prod. Liab. Litig.*, 310 F. Supp. 3d 1030, 1032 (N.D. Cal. 2018) (*Counties*). I do not, and I disagree that we should follow it. *See In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 519 (Minn. App. 2015) ("We may consider and apply the reasoning and the results of [federal] opinions to the extent that we believe they are persuasive."), *aff'd*, 883 N.W.2d 778 (Minn. 2016). *Counties*, in my view, incorrectly identifies the purpose and objective of the CAA and, because of that, sees an obstacle where there is none.

In seeking to discern the purpose and objective of the CAA, *Counties* does not discuss or cite to 42 U.S.C. § 7410, which expresses Congress's intent in enacting the CAA. *Counties* thus does not consider whether state enforcement actions concerning tampering in used cars will promote or stand as an obstacle to the purposes of preventing air pollution and engaging states in anti-pollution efforts. *See Oxygenated Fuels Ass'n Inc.*, 331 F.3d at 666, 671 (observing that "[o]ne of the specific aims of the Clean Air Act is to reduce air pollution by reducing motor vehicle emissions" and the CAA's savings clause "provides a substantial retention of State authority.").

Instead, *Counties* discerns another purpose of the CAA: to establish a "division of authority" between the federal government and the states, with the federal government having exclusive authority to enforce, "at the manufacturer level" and "on a model-wide basis," emissions standards in used vehicles, and states having authority to regulate only other kinds of used-vehicle-related conduct. *Counties*, 310 F. Supp. 3d at 1043. *Counties* does not discern this purpose from the text of the CAA. Instead, *Counties* finds it in the statutory scheme of the CAA and its legislative history.

I disagree that the statutory scheme and legislative history of the CAA reveal a Congressional purpose to divide authority to give EPA exclusive regulatory authority over the tampering alleged here. With respect to the statutory scheme, as discussed above, and as recognized by the federal district court in *Counties*, the express-preemption clause of the CAA does not expressly preempt states' authority to take action against manufacturers for tampering with emissions controls in used cars. *See id.* at 1039 (noting that section 42 U.S.C. § 7543(a) only expressly preempts state authority over "new motor vehicles"). Moreover, the CAA's savings clause recognizes the right of states to "otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed [i.e., used] motor vehicles." 42 U.S.C. § 7543(d). This framework quite simply delineates the states' authority on the basis of whether vehicles are new or, as here, used.

The remainder of the statutory scheme does not change this framework. In finding federal preemption of used-vehicle tampering claims arising from manufacturers' post-sale, model-wide conduct, *Counties* relies on the Environmental Protection Agency's (the EPA) continuing authority, under the CAA, to monitor emissions compliance and to

require manufacturers to ensure compliance with emission standards for a vehicle's "useful life," including by requiring manufacturers to test used vehicles and recall them if a substantial number do not conform. *Id*. at 1041 (citing 42 U.S.C. §§ 7541(b), (c)(1), 7542). That continuing authority, however, is not persuasive in this case. First, state and federal regulatory frameworks can co-exist without posing a conflict. *See Hous. & Redevelopment Auth. of Duluth v. Lee*, 852 N.W.2d 683, 688 (Minn. 2014) (holding no conflict preemption where "congressional intent to have state regulations exist side-by-side with federal regulations of subsidized housing"). And, second, the state's action here does not pose an obstacle to the EPA's post-sale activities since the state has limited its claims to alleged secret tampering in field fixes that occurred outside of the context of EPA-involved recalls.

The statutory scheme also, as *Counties* recognizes, does not neatly divide enforcement authority between the EPA and the states but rather provides for dual authority over post-sale tampering. *See Counties*, 310 F. Supp. 3d at 1042-43 (citing 42 U.S.C. § 7522(a)(3)(A), which prohibits "any person" from removing or rendering inoperative emission-control devices before or after the vehicles are sold to ultimate purchasers). This sharing of authority between the EPA and the states over post-sale tampering is consistent with the CAA's purpose of engaging both federal and state participation in combatting air pollution.

Counties's reliance on legislative history is likewise not persuasive. *Counties* cites to Senate Reports from 1967 and 1970 to conclude that Congress intended "to have states and local governments enforce" useful-life emission standards on a model-wide basis "by inspecting individual vehicles for compliance." *Counties*, 310 F. Supp. 3d at 1041-42

(citations omitted). But while Congress may well have encouraged state inspection programs, the CAA does not discourage state anti-tampering laws, and, in fact, Minnesota's anti-tampering law is incorporated into its EPA-approved state implementation plan to meet air-quality standards. *See* Minn. R. 7023.0120; 40 C.F.R. §§ 52.1220, 52.1223. *Counties* also concludes that the legislative history of the CAA's savings clause shows Congressional intent to "*lessen* the burden on vehicle manufacturers" because the clause "provid[es] states . . . with the authority to control [the] movement" of commuter traffic and "thereby decrease . . . automobile-related air pollution." *Counties*, 310 F. Supp. 3d at 1047 (quotation omitted). I disagree that, by respecting traditional state police power and seeking to promote state involvement in the fight against air pollution, the CAA intended to lessen manufacturers' liability when they tamper with in-use vehicles.

Finally, *Counties* also decides that the size of potential tampering penalties from multiple jurisdictions "would seriously undermine the congressional calibration of force for tampering by vehicle manufacturers." *Id.* at 1045. Generally, "federal regulation of a subject—even thoroughgoing federal regulation—does not prevent states from adding remedies to the arsenal established by federal law." *Radici v. Assoc. Ins. Cos.*, 217 F.3d 737, 742 (9th Cir. 2000) (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 296 (7th Cir. 1992)). The prospect of penalties from multiple jurisdictions will have a deterrent effect, which will promote, and not frustrate, the central purpose of the CAA to reduce pollution.

In my view, the state's tampering claims in this case do not stand as an obstacle to the accomplishment of the purposes of the CAA. I would therefore affirm the district court's decision that the claims are not conflict-preempted.