



Andrei FENNER et al., Plaintiff-Appellants

v.

GENERAL MOTORS, LLC; Robert Bosch GmbH;
Robert Bosch LLC, Defendants-Appellees

Nos. 23-1648/1696/1697/1698, Filed August 21, 2024

U.S. Court of Appeals for the Sixth Circuit

Opinion Topic:

Clean Air Act conflict preemption of state consumer fraud claims.

Opinion Summary:

Truck purchasers sued General Motors and the manufacturer of the trucks' engines for fraudulently representing that the engines ran "clean diesel" and reduced Nitrogen Oxide emissions. The federal district court granted summary judgment, finding the state-law claims conflicted with the Clean Air Act and were thus preempted. A divided panel of the Sixth Circuit reversed, reasoning that the plaintiffs' claims focused on misleading advertising, an area addressed by state law that "exists independently of federal regulation."

In his dissent from the majority's holding on federal preemption, Judge Kethledge reasoned that "the benchmark for the named plaintiffs and their expert alike—as to whether these trucks' emissions were 'clean'—was whether they complied with federal emissions standards." Despite the consumer-fraud "labels" plaintiffs utilized in their lawsuit, "in substance this case would relitigate the EPA's regulatory judgment." Judge Kethledge's conclusion that matters as technical as emissions standards belong in the hands of experts at EPA, rather than lay jurors, cogently reflects the rationale behind the doctrine of federal preemption.

Digested Opinion:

KETHLEDGE, Circuit Judge, concurring in the judgment in part and dissenting in part.

Purchasers of full-size diesel pickup trucks typically lack any walking-around sense of what the nitrogen-oxide levels of their trucks' emissions should be. Regulating those levels, rather, falls squarely within the EPA's expertise. Unsurprisingly, then, the named plaintiffs in this case—purchasers and lessors of 2011-16 GM "Duramax" diesel pickup trucks—uniformly testified during their depositions that they understood GM's advertising about "clean diesel" to mean that the trucks' emissions would comply with applicable federal regulations. Indeed none of them identified any other benchmark by which they could possibly assess the cleanliness of their trucks' emissions. Nor did the plaintiffs'

The **Honorable Raymond M. Kethledge** serves on the U.S. Court of Appeals for the Sixth Circuit. *Judge Kethledge had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature.*

emissions expert, Juston Smithers, identify any benchmark other than the EPA's own standards: his report is instead a brief as to why, in his view, the EPA was wrong to conclude that the Duramax trucks met them. For good reasons, then, the district court held that this case was preempted on the ground that it sought to relitigate the EPA's certification that these trucks complied with the EPA's emissions standards. Yet our court now remands this case so that a lay jury can second-guess the EPA's certification. And in doing so, the majority limits to its facts our recent decision in *In re Ford Motor Co. F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation (Ford F-150)*, 65 F.4th 851 (6th Cir. 2023). I would affirm the district court's judgment across the board.

The question presented in this appeal is whether the plaintiffs' claims are subject to conflict preemption on the ground that they present "an obstacle to the accomplishment of the full purposes and objectives" of federal law. *Id.* at 860 (citation omitted). Specifically, the question here—as in *Ford*—is whether the plaintiffs' "claims conflict with the EPA's testing and fraud-policing authority[.]" in this case as to vehicle emissions. *Id.*

As relevant here, the Clean Air Act requires the EPA to set and enforce federal standards for vehicle emissions. *See* 42 U.S.C. §§ 7521(a)-(b), 7525; 40 C.F.R. §§ 86.127-12, 86.135.12. Motor vehicles generally cannot be sold in the United States without a "certification of conformity," which is the EPA's certification that a vehicle complies with all federal emissions standards. *See* 42 U.S.C. § 7521(a); 40 C.F.R. § 86.1848-01(e). As part of the certification process, manufacturers must disclose whether a vehicle has any "auxiliary emission control devices," (AECDs), which for various reasons can increase vehicle emissions under certain operating circumstances. 40 C.F.R. § 86.1844-01(d) (11). When a vehicle is equipped with AECDs, the manufacturer must provide the EPA with "a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and a rationale for why it is not a defeat device." *Id.* A "defeat device," in turn, is an AECD that unjustifiably "reduces the effectiveness of the emissions control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use[.]" 40 C.F.R. § 86.004-2. What a "defeat device" defeats, therefore, is the proper functioning of a vehicle's emissions system, as determined by the EPA; and the EPA may not issue a certificate of compliance as to any vehicle equipped with one. 40 C.F.R. § 86.1809-01(a).

GM went through this whole regulatory process for the Duramax trucks. *** And in May 2010, the EPA issued a certificate of compliance for the emissions systems of the Duramax trucks at issue here.

Yet, after all that disclosure on GM's part and review on the EPA's, the plaintiffs' core factual allegation in this case—the through-thread of all their claims and "theories"—is that the online-dosing system in Duramax trucks was a "defeat device" nonetheless. *See, e.g.,* Pl. Br. at 13; Smithers Rep. at 2. Every one of the plaintiffs' theories—including the three the majority revives today—all include as a premise that the online-dosing system unjustifiably increases the trucks' emissions during "real-world" driving conditions. The plaintiffs complain about no other AECD on these pickup trucks; and they do complain, over and over again, that the "online dosing in Duramax trucks caused excessive NOx emissions during real-world driving[.]" Pl. Br. at 9. But that is *precisely the definition of a defeat device*, 42 C.F.R. § 86.004-2—which would preclude the EPA from certifying these trucks as compliant with its emissions standards. That the EPA certified these trucks as compliant necessarily means that it concluded the online-dosing system was *not* a defeat device. And—in a rational legal order—that was a judgment for the EPA to make before GM sold the vehicles, not for a lay jury to make afterward.

Our decision in *Ford* confirms as much. There too the issue concerned the real-world performance of pickup trucks—specifically the gas mileage of Ford F-150 and Ranger pickups, which (again as here) the plaintiffs said was worse than advertised. Under the regime there, after extensive testing and disclosure, the EPA had adopted Ford’s estimates of the pickups’ gas mileage as its own. The plaintiffs claimed those estimates were wrong, which if true would cause an actual pocketbook injury. (The injury here, by any practical measure, is entirely fictive.) Yet we held that the plaintiffs’ claims were preempted, because they “inescapably and impermissibly put[] a jury into the EPA’s regulatory shoes.” 65 F.4th at 863. Thus, we said, “even though the EPA exercised its statutory duty and found Ford’s testing to be acceptable, a jury would still make its own determination, thus conflicting with the EPA’s authority to set its own fuel-economy figures.” *Id.* The same is true here as to the EPA’s determination that the online-dosing system was not a defeat device.

Relatedly, in *Ford*, we said that “allowing juries to second-guess the EPA’s fuel economy figures would permit them to rebalance the EPA’s objectives.” *Id.* The same is true here: AECDs by definition involve a tradeoff between increased emissions, on the one hand, and the “justification for each AECD” and the “rationale for why it is not a defeat device[.]” on the other. 40 C.F.R. § 86.1844-01(d)(11). This case invites lay jurors to strike that balance differently than the EPA did as to the online-dosing system in Duramax trucks—which “would disrupt the expert balancing underlying the federal scheme.” *Ford*, 65 F.4th at 863.

That is reason enough to show that the plaintiffs’ claims—all of which rest on the premise that the online-dosing system is a defeat device—are preempted. True, in *Ford*, the EPA adopted Ford’s mileage numbers as the agency’s own, whereas here the agency reached a negative conclusion that the online-dosing system was not a defeat device. But that should make no difference as to preemption: in both cases the claims would have a jury revisit the EPA’s regulatory judgment.

Nor should it matter that three of the plaintiffs’ “theories” of liability for the online-dosing system are that the trucks’ “emissions exceeded (i) gasoline counterparts, (ii) a reasonable consumer’s expectations, and (iii) what GM advertised[.]” Maj. Op. at ----. Those theories are just so much semantics: for the factual *reason* why the plaintiffs say the trucks’ emissions exceeded these different benchmarks, such as they are, is that the online-dosing system caused excessive NOx emissions during real-world driving—which again is to say that it was a defeat device. *See, e.g.*, Smithers Rep. p. 2 (“The defeat device here is a technically unjustified use of a strategy called ‘online dosing.’”). And the EPA concluded that the system was not a defeat device. Moreover, as noted above, the benchmark for the named plaintiffs and their expert alike—as to whether these trucks’ emissions were “clean”—was whether they complied with federal emissions standards. *See supra*, n. 1; Smithers Report pp. 1-2. (Also, the idea that any purchaser of a full-size pickup would expect a diesel truck to have cleaner emissions than a gasoline one is implausible on its face.) Labels aside, in substance this case would relitigate the EPA’s regulatory judgment. The district court was right to grant summary judgment to the defendants.

Making complex technical judgments about vehicle emissions is precisely the kind of thing that expert agencies are good at—and lay jurors are not. We lose our legal bearings and misapply binding precedent in concluding otherwise here. I respectfully dissent.