6th Circuit Case No. 22-1245

In The

United States Court of Appeals

for the

Sixth Circuit

IN RE: FORD MOTOR COMPANY F-150 AND RANGER TRUCK FUEL ECONOMY MARKETING AND SALES PRACTICES LITIGATION

MARSHALL B. LLOYD; TRACEY TRAVIS; DUSTIN DAWSON and RICK SHAWLEY, on behalf of themselves and all others similarly situated; MICHAEL SMITH; EVAN ALLEN, AL BALLS, BRIAN LEGA, STEPHEN MATTSON, JOHN SAUTTER, RANDY TRANSUE, and RICK SHURTLIFF; RONALD J. DISMUKES, JEFFERY FOSHEE, and ACCURATE CONSTRUCTION CORPORATION; STEVE BEAVERS; DAVID BREWER, RYAN COMBS, VICTOR PEREZ, HAROLD BROWER, KYLE MANNION, NICHOLAS LEONARDI, DEAN KRINER, JAMES WILLIAMS, MATTHEW COMBS, DUSTIN WALDEN, STEVEN HULL, KENNETH BERNARD, MARK HILL, CODY SMITH, DANIEL GARDNER, ROBERT GOOLSBY, JOHN JUNG, MATTHEW SMITH, and JOSH BRUMBAUGH; RYAN HUBERT, individually and on behalf of all others similarly situated; WILLIAM DON COOK, individually and on behalf of all others similarly situated; HILARY GOODFRIEND, KATHRYN HUMMEL, and SCOTT FORMAN, individually and on behalf of others similarly situated; DILLON DRAKE; RAMIN SARTIP, DARREN HONEYCUTT, and AHMED ABDI, on behalf of themselves and all others similarly situated; JAMAR HAYNES, SCOTT WHITEHILL, MATTHEW BROWNLEE, BENJAMIN BISCHOFF, STEPHEN LESZCZYNSKI, CASSANDRA MORRISON, ROBERT RANEY, and DAVID POLLEY; MARK NAPIER, individually and on behalf of all others similarly situated; KEITH FENCL, individually and on behalf of all others similarly situated; MARK ARENDT, on behalf of himself and all others similarly situated; HARVEY ANDERSON; ROSALYNDA GARZA and JEFFREY QUIZHPI, individually and on behalf of others similarly situated; JEFFREY KALOUSTIAN, individually and on behalf of others similarly situated; RONALD CEREMELLO, RANDALL

MAINGOT, GEORGE ANDREW RAYNE, ROBERT LOVELL, and SAMUEL HUFFMAN,

Plaintiffs-Appellants

v.

FORD MOTOR COMPANY,

Defendant-Appellee

On Appeal from the
United States District Court for the Eastern District of Michigan, Hon Sean F. Cox, Originating Case Nos. : 2:19-md-02901 : 2:19-cv-11319 : 2:19-cv-11639 : 2:19-cv-11728 : 2:19-cv-11993 : 2:19-cv-12015 : 2:19-cv-12035 : 2:19-cv-12080 : 2:19-cv-12135 : 2:19-cv-12310 : 2:19-cv-12309 : 2:19-cv-12377 : 2:19-cv-12375 : 2:19-cv-12373 : 2:19-cv-12427 : 2:19-cv-12437 : 2:19-cv-12438 : 2:19-cv-12436 : 2:19-cv-12554 : 2:19-cv-12895 : 2:19-cv-13197 : 2:20-cv-12272

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August 22, 2022

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Defendant-Appellee Ford Motor Company ("Ford") certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Ford states further that no other publicly owned corporation has a substantial financial interest in the outcome of this litigation.

Dated: August 22, 2022

By: /s/ *Jill M. Wheaton*

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COUNTER-STATEMENT REGARDING ORAL ARGUMENT

Ford does not believe oral argument in this matter is necessary, but will of course participate in oral argument if it is scheduled by the Court.

COUNTER-STATEMENT OF JURISDICTION

Ford agrees that this Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, as it is from a District Court Opinion that resulted in a final judgment. Ford maintains, however, that the District Court correctly determined that the EPA has primary jurisdiction over allegations like Plaintiffs', which go to the accuracy of EPA-mandated fuel economy estimates, and that it properly dismissed Plaintiffs' claims on that and other grounds. (Opinion at 30-32, R. 95, PageID #4893-4895.)

COUNTER-STATEMENT OF ISSUES PRESENTED

I. 49 U.S.C. § 32919(b) only permits "a State law or regulation on disclosure of fuel economy . . . if the law or regulation is identical to" the EPA's own requirements. Did the District Court err in holding that Plaintiffs' claims—which included over 311 causes of action under the laws of all 50 states, and which, if successful, would require Ford to use fuel economy figures that are different from the estimates "determined by the [EPA] Administrator"—were expressly preempted because they are not "identical to" the EPA's regulations?

II. Implied conflict preemption exists "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Did the District Court err in holding that Plaintiffs' claims are impliedly preempted because allowing Plaintiffs to proceed on state law causes of action, which would require Ford to use fuel economy figures that are different from the EPA's figures, would pose an obstacle to Ford's compliance with EPA and FTC requirements that the fuel economy figure "determined by the Administrator" be used on stickers and in advertisements?

III. Courts typically defer to an "agency's primary jurisdiction" either "to ensure needed uniformity in an area or when the agency has 'special competence' over the issue." *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 452 (6th Cir. 2019). Did the District Court abuse its discretion in deferring to the EPA as to the accuracy of fuel economy estimates when: (1) a central purpose of the EPA's fuel economy estimates is to provide "consumers with a basis on which to compare the fuel economy of different vehicles" through a "controlled and repeatable" testing process; and (2) the EPA is in the best position to enforce and investigate compliance with its own regulations?

IV. Did the District Court err in holding that, even if not preempted or barred by the primary jurisdiction doctrine, Plaintiffs' misrepresentation and omission claims were subject to dismissal for independent reasons?

INTRODUCTION

This consolidated multidistrict litigation[1] was a transparent attempt to sue over the accuracy of EPA-regulated fuel economy estimates that the EPA has already reviewed, re-investigated, and approved. The District Court correctly saw right through it.

Essentially, Plaintiffs alleged that Ford failed to comply with the EPA's comprehensive fuel economy testing regulations, which led to inflated fuel economy calculations in 2019 and 2020 Ford Rangers and 2018, 2019, and 2020 F-150s. Thus, Plaintiffs argued, when Ford publicized the allegedly-inaccurate fuel economy figures—as it is *required* to do under federal law—it committed fraud and violated various consumer protection statutes. Rather than use the EPA-approved fuel economy figures, Plaintiffs' Complaint alleged no less than 193 times that Ford should have provided consumers with what Plaintiffs call the "true fuel economy."

The factual premise underlying the Complaint has been disproven. Since the Complaint was filed, the EPA—which promulgates the complex and technical regulations governing fuel economy testing, and which is tasked with enforcing violations of those testing protocols—fully investigated these allegations, closed its

[1] References to the District Court docket are to the consolidated MDL docket in E.D. Mich. Case No. 2:19-md-02901-SFC.

investigation, and notified Ford that it did "not intend to take any further action"—which it would have been required to do had it found any wrongdoing. That notwithstanding, Plaintiffs ask this Court to reverse so that, ultimately, a jury can substitute its opinions as to Ford's fuel economy testing for that of the EPA's, and determine the "correct" or "true fuel economy" Ford should have disclosed to the public—regardless of what the EPA found and federal law required Ford to disclose.

The District Court correctly rejected that argument on several grounds. *First*, federal law only permits "a State law or regulation on disclosure of fuel economy . . . if the law or regulation is identical to" the EPA's own requirements. 49 U.S.C. § 32919(b). The court recognized that Plaintiffs' proposed causes of actions would impose obligations on Ford that are not "identical to" the EPA's requirements and, therefore, held that Plaintiffs' claims were expressly preempted. *Second*, the court held that Plaintiffs' claims were impliedly preempted because—contrary to the EPA's and FTC's requirements that EPA-approved fuel economy figures be used in consumer disclosures—the relief requested by Plaintiffs would require Ford to use different figures calculated by a jury, posing an obstacle to Ford's compliance with EPA and FTC requirements. *Third*, the court held that Plaintiffs' claims were barred by the primary jurisdiction doctrine, as the EPA was in the best position to enforce and investigate compliance with its own regulations. Each one of these holdings provides an independent ground to dismiss the claims in the entirety, and if this Court

agrees with any one of them (and it should agree with all of them), it will affirm. But the district court went on to also correctly find that the misrepresentation claims were subject to dismissal on "alternative or additional" grounds, as well.[2]

On appeal, Plaintiffs shy away from the Complaint's request for Ford to provide the "correct" and "true fuel economy" figures, hinting that the real issue is that the "EPA relied on Ford's fraudulent testing in calculating the average fuel economy rating." (Appellants' Br. at 17.) They now "seek to hold Ford responsible for its violation of state law for its fraudulent misrepresentations and omissions *in its testing*[.]" (*Id.* (emphasis added).) But that revised theory fares no better. As the Supreme Court and this Court have recognized, claims that hinge on a finding of fraud on an agency are preempted as well. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961 (6th Cir. 2004). No matter how Plaintiffs try to frame their Complaint, it failed to state a claim. This Court should affirm the dismissal of all claims.

[2] The court also dismissed many of Plaintiffs' other claims on myriad grounds, which have not been appealed. (Appellants' Br. at 3 n.1)

COUNTER-STATEMENT OF THE CASE

I. Mandatory Federal Standards for Fuel Economy Estimates.

Through the Energy Policy and Conservation Act of 1975 ("EPCA" or the "Act"), Congress developed a comprehensive federal regulatory scheme governing the testing and disclosure of estimated fuel economy for new vehicles sold in the United States. The Act aimed to "improve[] energy efficiency of motor vehicles" and "provide a means for verification of energy data to assure the reliability of energy data." 42 U.S.C. §§ 6201(5), (7).

Vehicle manufacturers must include "Monroney" labels on the window of all new vehicles. 49 U.S.C. § 32908(b); 76 Fed. Reg. 39478, 39489 (July 6, 2011). The Monroney label lists, among other things, the vehicle's fuel economy estimate, which is calculated according to stringent and exacting EPA regulations.

These EPA fuel economy estimates "serve two purposes": first, they "provide consumers with a basis on which to compare the fuel economy of different vehicles[.]" 71 Fed. Reg. 77872, 77873 (Dec. 27, 2006). Second, they "provide consumers with a reasonable *estimate* of the fuel economy they can expect to achieve." *Id.* (emphasis added); *see also* 76 Fed. Reg. 39505 (adopting a redesigned fuel economy label, but "continuing a tradition of having a statement on the label informing the buyer that the values on the label are not guaranteed").

Consistent with these purposes, the EPA has "emphasize[d]" that "fuel economy varies from driver to driver for a wide variety of reasons, such as different driving styles, climates, traffic patterns, use of accessories, loads, weather, and vehicle maintenance." 71 Fed. Reg. 77874. "Even different drivers of the same vehicle will experience different fuel economy as these and other factors vary." *Id.* "Therefore, it is impossible to design a 'perfect' fuel economy test that will provide accurate real-world fuel economy estimates for every consumer." *Id.* For that reason, the EPA has stressed to consumers that, while its fuel economy ratings "are a useful tool for comparing the fuel economies of different vehicles," they "may not accurately predict the average [miles per gallon] *you* will get." EPA, *Your Mileage Will Vary*, available at https://www.fueleconomy.gov/feg/why_differ.shtml (last visited August 22, 2022) (emphasis in original).[3] "There will always be consumers that achieve real-world fuel economy both better or worse than a given estimate." 71 Fed. Reg. 77879.

Put simply, the EPA's estimates are "meant to be a general guideline for consumers." 71 Fed. Reg. 77874. Because the EPA's testing methodology "is controlled and repeatable, an EPA fuel economy estimate can be used for

[3] As Plaintiffs note, this Court can take judicial notice of the EPA's statements on its website. (Appellants' Br. at 29 n.11)

comparison of different vehicle models and types," allowing the EPA to "preserve the ability to confirm the manufacturers' testing"—something it could not do absent its "highly repeatable test or set of tests." *Id.*

Conversely, the EPA has cautioned that the use of non-EPA regulated fuel economy estimates may "vary significantly from EPA's estimates" as they differ in testing conditions, "test methods, driving cycles, sampling of vehicles, and methods of measuring fuel economy." 71 Fed. Reg. 77879. That is, tests not conducted under the EPA's oversight or standards, and which are instead based on purported "real-world driving . . . introduce[] a wide number of often uncontrollable variables—different drivers, driving patterns, weather conditions, temperatures, etc.—that make repeatable tests impossible." *Id.* at 77874.

As set forth below, the EPCA and its accompanying regulations provide a detailed framework governing fuel economy testing methodology and the form and content of consumer disclosures. Enforcement mechanisms are also codified to penalize violations of these standards.

A. The EPA's Fuel Economy Testing Requirements.

As Plaintiffs acknowledge, "federal law requires automotive manufacturers to follow a specific testing methodology set by the [EPA]" when measuring fuel economy. (Appellants' Br. at 5; *id.* at 22 ("Crucially, federal law requires that 'fuel economy' be measured 'under testing and calculation procedures prescribed by the

[EPA] Administrator.'").) This mandatory testing framework is—as Plaintiffs put it—"complex." (Compl. ¶ 450 n.30, R. 78, PageID #2178.)

1. Vehicles Are Placed On a Dynamometer, Where the "Road-Load" is Calculated Using EPA-Mandated Coastdown Tests.

Initially, "[a]uto manufacturers are responsible for testing vehicles in their laboratories according to EPA test specifications and reporting fuel economy values to EPA." EPA, *Fuel Economy Testing and Labeling Questions and Answers* at 5 (Apr. 2014) (last visited August 22, 2022).[4] To do so, the vehicle's drive wheels are placed on a "dynamometer," which "simulates the driving environment much like an exercise bike simulates cycling." EPA, *How Vehicles are Tested*, available at https://www.fueleconomy.gov/feg/how_tested.shtml (last visited August 22, 2022).

As a threshold step, "[v]ehicle testing on a chassis dynamometer involves simulating the road-load force, which is the sum of forces acting on a vehicle from

[4]https://nepis.epa.gov/Exe/ZyNET.exe/P100IENB.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2011+Thru+2015&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C11thru15%5CTxt%5C00000010%5CP100IENB.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL.

aerodynamic drag, tire rolling resistance, driveline losses, and other effects of friction." 40 C.F.R. § 1066.301. The road-load force is "calculated using vehicle-specific coefficients and response characteristics." *Id.* at § 1066.210(a). "The general procedure for determining road-load force is performing coastdown tests and calculating road-load coefficients" as "described in SAE J1263 and SAE J2263."[5] *Id.* at § 1066.301(b).

Importantly, however, EPA regulations governing coastdown tests "specif[y] certain deviations from those [SAE] procedures for certain applications." *Id.* In some instances, EPA regulations allow manufacturers to "use other methods that are equivalent to SAE J2263, such as equivalent test procedures or analytical modeling, to characterize road load using good engineering judgment." 40 C.F.R. § 1066.305(a); *id.* § 1066.301(c) (manufacturers must "[u]se good engineering judgment for all aspects of road-load determination"). And for certain vehicles, the road grade of the test track can vary from SAE standards, *id.* § 1066.310(b)(1)(ii), as can the length of the test runs, *id.* § 1066.310(b)(4).

[5] "SAE" refers to the Society of Automotive Engineers, which is a "global association of more than 128,000 engineers and related technical experts in the aerospace, automotive, and commercial-vehicle industries." *About SAE International*, available at https://www.sae.org/about (last visited Aug. 22, 2022).

Manufacturers have an "obligation to report truthful and complete information" concerning these testing procedures. 40 C.F.R. § 1066.2(b). There are significant "consequences of failing to" do so. *Id.* If the EPA finds that a manufacturer "intentionally submitted false, incomplete, or misleading information" concerning coastdown testing, it "may void the certificates for all engine families." *Id.* § 1066.2(c).[6] Criminal penalties and fines may also apply. *Id.* § 1066.2(b) (citing 18 U.S.C. § 1001, 42 U.S.C. § 7413(c)(2)).

2. Once the Road-Load is Calculated, Manufacturers Conduct EPA-Mandated Testing Cycles to Determine Fuel Economy Estimates.

As mentioned, the road-load calculation is used to "[d]etermine dynamometer settings" and is one part of the EPA's larger framework for conducting fuel economy testing. 40 C.F.R. § 1066.305(a). Once the settings are established, vehicles are put "through a series of . . . cycles or schedules, that specify vehicle speed for each point in time during the laboratory tests." EPA, *Detailed Test Information*, available at

[6] Consistent with this, the EPA's website explains that, "[i]n cases where EPA has determine[d] that manufacturers have provided inaccurate, incomplete, or falsified certification information" the EPA has "authority to void certificates and, in some cases, pursue other civil and legal remedies." EPA, *Actions to Void Certificates for Vehicle and Engines*, available at https://19january2021snapshot.epa.gov/recalls/actions-void-certificates-vehicle-and-engines_.html (last visited August 22, 2022). As of August 22, 2022, the EPA's website listed 169 instances of "certificates that were voided." *Id.*

https://www.fueleconomy.gov/feg/fe_test_schedules.shtml (last visited August 22, 2022).

As with the road-load testing process, the fuel economy testing cycles are also heavily regulated by the EPA. *See* 42 U.S.C. § 32904(c) (the EPA "shall measure fuel economy for each model and calculate average fuel economy for a manufacturer under testing and calculation procedures prescribed by the Administrator."). These regulations are "codified at 40 CFR part 600." 71 Fed. Reg. 77915.

They allow fuel economy figures to "be determined by one of two methods." 40 C.F.R. § 600.210-12(a). *First*, manufacturers can directly test vehicle prototypes using a "5-cycle method." 71 Fed. Reg. 77875-76; 40 C.F.R. § 600.210-12. This method "is based on vehicle-specific model-type 5-cycle data as determined in § 600.209-12(b)" and "is available for all vehicles[.]" 40 C.F.R. § 600.210-12(a). Those five test cycles include: (1) a city test with no heating, ventilation, and air condition (HVAC) operating; (2) a highway test with no HVAC operation; (3) a more aggressive/high speed test with no HVAC operation; (4) a hot test at 95 degrees Fahrenheit, with HVAC operating; and (5) a cold test at 20 degrees Fahrenheit, with HVAC set to specific settings for heat and defrost. EPA, *Testing at the National Vehicle and Fuel Emissions Laboratory*,

https://www.epa.gov/greenvehicles/testing-national-vehicle-and-fuel-emissions-laboratory (last visited August 22, 2022).

"The results of these tests are then combined and weighted to estimate average use, which results in official MPG values." *Id.* As the EPA has explained, results under the 5-cycle method "are still estimates, and even with the improved fuel economy test methods . . . some consumers will continue to get fuel economy that is higher or lower than the new estimates." 71 Fed. Reg. 77876. "No single test or set of tests can ever account for the wide variety of conditions experienced by every driver." *Id.*

Second, vehicles that meet certain criteria can be tested under the "derived 5-cycle method." 40 C.F.R. § 600.210-12(a)(2). Under this method, label values "are determined according to the following" formula:

$$\text{Derived 5-cycle City Fuel Economy} = \frac{1}{\left(\{\text{City Intercept}\} + \frac{\{\text{City Slope}\}}{\text{MT FTP FE}}\right)}$$

40 C.F.R. § 600.210-12(a)(2)(i)(A). These regulations include requirements for calculating city intercept, city slope, and the model type federal test procedure-based city fuel economy ("MT FTP FE"). *Id.*

3. The EPA Then Conducts Its Own Testing or Analyzes the Testing Conducted by Manufacturers Before Adopting the Fuel Economy Values.

During this testing process, "[m]anufacturers test their own vehicles—usually pre-production prototypes—and report the results to EPA." EPA, *How Vehicles are Tested*, https://www.fueleconomy.gov/feg/how_tested.shtml (last accessed August 22, 2022). Manufacturers must submit these results and their voluminous underlying data to the EPA after testing is completed. 40 C.F.R. § 600.006(b)(1) (outlining information manufacturers must submit for each fuel economy data vehicle). Manufacturers must also comply with detailed recordkeeping requirements and allow the EPA to inspect those records or access the testing facilities to verify their accuracy. *Id.* § 600.005.

Upon receipt and review of the manufacturer's submission, the EPA has three options. It can conduct its own "confirmatory testing"; require the manufacturers to conduct additional confirmatory testing; or, if it is satisfied with the manufacturer's submission, accept the results.

The EPA generally "confirms about 15%-20% … through their own tests at the National Vehicles and Fuel Emissions Laboratory." EPA, *How Vehicles are Tested*, https://www.fueleconomy.gov/feg/how_tested.shtml (last accessed August 22, 2022); 40 C.F.R. § 600.008(a) (explaining that the Administrator may conduct fuel vehicles economy tests and setting forth parameters for such testing). When the

EPA conducts "confirmatory" fuel testing, the Administrator compares the manufacturer's testing results with the agency's testing results. *Id.* § 600.008(a)(2). If, based on the testing and review of fuel economy data, "the Administrator determines that an unacceptable level of correlation exists between fuel economy data generated by a manufacturer and fuel economy data generated by the Administrator," the Administrator may "reject all fuel economy data submitted by the manufacturer until the cause of the discrepancy is determined and the validity of the data is established by the manufacturer." *Id.* § 600.008(d).

If the EPA does not itself conduct confirmatory fuel testing, manufacturers must still "conduct a confirmatory test at their facility after submitting the original test data" if certain "conditions exist"— including if the "fuel economy for the" federal test procedure ("FTP") or highway fuel economy test ("HFET") "is higher than expected based on procedures approved by the Administrator," or if the "fuel economy value for the FTP or highway is a potential fuel economy leader for a class of vehicles based on cut points provided by the Administrator." *Id.* § 600.008(b). The results of the confirmatory testing are "evaluated by the Administrator for reasonableness and representativeness." *Id.* § 600.008(c)(3).

For all vehicles, before a manufacturer's results are accepted as the EPA's own figure, the "[f]uel economy data must be judged reasonable and representative by the Administrator[.]" 40 C.F.R. § 600.008(c)(1). If, based on an inspection "or

any other information", the Administrator "has reason to believe that the manufacturer has not followed proper testing procedures or that the testing equipment is faulty or improperly calibrated, or if records do not exist that will enable him to make a finding of proper testing," the EPA can order an inspection or conduct additional testing. *Id.* § 600.008(e). If the Administrator then determines that "the manufacturer's fuel economy average was unrepresentative, the Administrator may recalculate the manufacturer's fuel economy average based on fuel economy data that he/she deems representative." *Id.* § 600.008(e)(3).

If, on the other hand, the EPA is satisfied with the fuel economy figure—whether based on its own testing, the manufacturer's confirmatory testing, or its review of the manufacturer's initial submission—then the EPA will use that figure as the *official* fuel economy figure. 49 U.S.C. § 32901(a)(11) (defining "fuel economy" as the figure "*determined by the Administrator* under section 32904(c) of this title") (emphasis added); *id.* § 32904(c) ("*The Administrator shall measure fuel economy* for each model and calculate average fuel economy for a manufacturer under testing and calculation procedures prescribed by the Administrator.") (emphasis added); 40 C.F.R. § 600.302-12(b)(4) (fuel economy figures on Monroney labels must be the "appropriate values *established by EPA*") (emphasis added).

At bottom, the EPA has both expertise and authority to either test the fuel economy values itself, or to review and investigate the manufacturer's fuel economy testing. "If testing reveals that fuel economy labels are inaccurate, EPA will require manufacturers to update the MPG values to provide consumers with the most accurate information available." EPA, *Fuel Economy Updates*, epa.gov/recalls/fuel-economy-label-updates (last visited August 22, 2022); see also 40 C.F.R. § 600.312-08; EPA, *Data on Cars used for Testing Fuel Economy*, available at https://www.epa.gov/compliance-and-fuel-economy-data/data-cars-used-testing-fuel-economy (last visited August 22, 2022) ("EPA requires auto manufacturers to change or update their MPG . . . values on fuel economy labels (window stickers) if information comes to light that show that the values are too high.").

B. The EPA and FTC Consumer Disclosure and Advertising Requirements.

Once the fuel economy ratings are calculated and adopted as the official EPA figure, both the EPA and the Federal Trade Commission ("FTC") govern how those fuel economy ratings can be disclosed or advertised.

1. The EPA Requires That Fuel Economy Values Calculated Under Its Regulations Be Included on Monroney Labels.

Again, the EPA estimates required on the Monroney sticker "are meant to be a general guideline for consumers, particularly to compare the relative fuel economy of one vehicle to another." 71 Fed. Reg. 77874. The precise form and content of

Monroney labels is fixed in exacting detail by federal law and EPA regulations. *See* 49 U.S.C. § 32908(b); 40 C.F.R. § 600.311-12. As relevant here, the labels must include "the fuel economy of the automobile" as it is "determined by the Administrator". 49 U.S.C. §§ 32901(a)(11), 32908(b)(1). Accompanying the EPA-approved fuel economy value, manufacturers must also include a disclaimer that "[a]ctual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle." 40 C.F.R. § 600.302-12(b)(4).

The EPA must notify the manufacturer if, at any time, it is determined that the label values were not "calculated according to the procedures required" by the EPA. 40 C.F.R. § 600.312-08(a)(5)(i). The notice must "specify the correct label values which constitute the EPA Fuel Economy Estimates" or, if that information is not available, the EPA "shall request . . . additional information and a recalculation." *Id.* § 600.312-08(a)(5)(ii), (iii). The "manufacturer shall affix the revised labels to all affected new vehicles which are unsold beginning no later than 15 calendar days after the date of notification." *Id.* § 600.312-08(a)(6).

The EPA has full administrative and regulatory authority to enforce a manufacturer's obligations under these regulations. 49 U.S.C. § 32910(a)(1)(C), (b) (power to subpoena witnesses and bring civil enforcement actions relating to alleged deficiencies in manufacturer submissions); 49 U.S.C. § 32911, 32912 (Secretary of

Transportation's authority to conduct proceedings to determine manufacturer's compliance and to impose significant financial penalties for non-compliance).

2. The FTC Regulates Fuel Economy Estimate Advertising.

While the EPA regulates the calculation of estimated fuel economy and the content of Monroney stickers, the FTC regulates the advertisement of fuel economy estimates to consumers through its "Guide Concerning Fuel Economy Advertising for New Vehicles" (the "Fuel Guide"). *See* 71 Fed. Reg. 77916. "The Fuel Guide advises vehicle manufacturers and dealers how to disclose the established fuel economy of a vehicle, as determined by the [EPA's] rules . . . in advertisements that make representations regarding the fuel economy of a new vehicle." *Id.*

"Given consumers' exposure to EPA estimated fuel economy values over the last several decades," the FTC has explained that "fuel economy and driving range estimates derived from non-EPA tests can lead to deception . . ." 16 C.F.R. § 259.4(l)(1). Thus, it urges advertisers to "avoid such claims" involving other fuel economy estimates, and to "disclose the EPA fuel economy or driving range estimates." *Id.*; 16 C.F.R. § 259.3 (advertisers "should avoid making inconsistent statements . . . that could undercut or contradict the disclosure").

If an advertisement does "include[] a claim about a vehicle's fuel economy or driving range based on a non-EPA estimate," then to avoid confusion or deception, the advertiser must "disclose the EPA estimate . . . with substantially more

prominence than the non-EPA estimate." *Id.* Either way, the EPA estimate must be disclosed to consumers to avoid deception. "Practices inconsistent with" the FTC regulations "may result in corrective action by the Commission . . . if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute." 16 C.F.R. § 259.1.

II. Ford Voluntarily and Proactively Informed EPA of Possible Testing Issues.

In February 2019, the *New York Times* reported that Ford was "investigating how it tested the emissions and fuel efficiency of its vehicles after employees reported possible flaws with the company's computer models." (Article, R. 78-3, PageID #3034.) As the article explained, "the investigation had not indicated . . . that the company reported incorrect data to consumers or regulators," and there had been "no determination that this affected fuel economy labels or emissions certification." (*Id.*) Still, Ford "notified the [EPA] about the issue," "hired a law firm . . . to investigate specifications used in the testing," and was "hiring an independent lab to conduct further testing." (*Id.*) At that time, the EPA stated its "investigation [was] ongoing" and that it was "following up with the company to fully understand the circumstances behind this disclosure." (*Id.* at 4, PageID #3035.)

Because of Ford's voluntary and proactive disclosure, the Department of Justice and California Air Resources Board ("CARB") also opened investigations

into the fuel economy testing. (Appellants' Br. at 8 (noting "Ford's initial self-reporting . . . spawned" the investigation); *see also* Compl. ¶ 430, PageID #2166).)

III. Plaintiffs' Almost 1000-Page Complaint Alleging Ford "Cheated" On Its Fuel Economy Testing Based on Ford's Voluntary Disclosure to EPA.

Shortly thereafter, Plaintiffs filed various putative class actions challenging Ford's fuel economy estimates for certain vehicles. (Opinion at 2, R. 95, PageID #4865.) The Judicial Panel on Multidistrict Litigation consolidated the cases before the Honorable Sean Cox in the Eastern District of Michigan (Transfer Order, R. 1), who directed Plaintiffs to submit a consolidated master complaint (Joint Case Management Order, R. 60). Plaintiffs filed a 990-page Amended Consolidated Class Action Complaint (the "Complaint") (R. 78) which asserted 311 causes of action spanning the laws of every state.

The crux of the Complaint was that Ford failed to disclose the vehicles' "true fuel economy," but instead provided flawed fuel economy figures to consumers. (*Id.* ¶ 404, PageID #2152; *see also* Pls.' Resp. to Mot. to Dismiss at 33-34, R. 85, PageID #3336-37 (arguing Ford had "a duty under state law to disclose the true fuel economy in addition to the Monroney sticker"). Plaintiffs contended that Ford "cheated on its fuel economy testing" for 2019 and 2020 Ford Rangers and 2018, 2019, and 2020 F-150s. (*Id.* ¶¶ 2, 4, PageID #2055-2056.) They claimed this "test-related cheating center[ed] on the 'Coastdown' testing and 'Road Load' calculations." (*Id.* ¶ 397,

PageID #2150.) Plaintiffs alleged Ford "miscalculated 'Road Load'" because its "internal lab tests did not account for" certain factors. (*Id.* ¶ 402, PageID #2151.) And Plaintiffs alleged this miscalculation led "to better—and entirely inaccurate—fuel economy projections." (*Id.* ¶ 403.)

The Complaint cited to the *New York Times* article—which, again, stated that Ford's "investigation had not indicated . . . that the company reported incorrect data to consumers or regulators"—for the proposition that Ford "admit[ted]" to "improper coastdown testing on the 2019 Ranger." (Compl. ¶ 410, PageID #2157 (citing Article, R. 78-3).) Plaintiffs also referred to an article from "blogger Andre Smirnov of TheFastLaneTruck.com." (Compl. ¶ 412, PageID #2157.) This blogger drove a 2019 Ranger for 1,000 miles and stated it was "'nowhere close' to the EPA rated MPG." (Compl. ¶ 412; Smirnov Blog, R. 78-6.) Similarly, Plaintiffs pointed to unidentified testing that was conducted by unidentified individuals "to independently verify the model inputs used to calculate the fuel economy" of Ford F-150 and Ranger trucks. (Compl. ¶¶ 438-456, PageID #2171-2180.)

The Complaint alleged 311 causes of action which can be distilled to common law fraud and statutory consumer protection claims under various state laws. In 193 separate paragraphs, Plaintiffs alleged that Ford failed to disclose the vehicles' "true fuel economy." As relief, Plaintiffs requested, among other things, that the court declare Ford's conduct "unlawful, unfair, and deceptive," require that "all Class

members be notified about the lower fuel economy ratings and higher emissions at Ford's expense," and that Ford provide "correct fuel economy and emission ratings" to Class members. (Compl. at 960, 961, R. 78, PageID #3014-15.)

IV. Governmental Entities Conclude Their Investigations And Do Not Find Any Wrongdoing.

As discussed above, at the time the Complaint was filed, Plaintiffs relied heavily on the fact that the EPA, Department of Justice, and CARB were conducting investigations into Ford's fuel economy testing. But as the case progressed, so did the investigations. By the time Ford moved to dismiss Plaintiffs' Complaint, Plaintiffs acknowledged that "the DOJ and CARB . . . investigations have closed" and the Department of Justice had made a "decision not to criminally indict." (Pls.' Resp. to Mot. to Dismiss at 8, R. 85, PageID #3311.) Plaintiffs noted that, as of that date, only "the EPA investigation [was] ongoing." (*Id.*)

In February 2022, Ford filed its 10-K securities filing, which stated that Ford "voluntarily disclosed this matter to the [EPA] and [CARB]" and "cooperated fully with these government agencies. We received notifications from EPA, CARB, and DOJ that these agencies have closed their inquiries into the matter and do not intend to take any further action". (2021 10-K Report, R. 94-1, PageID #4682.)

V. The District Court Dismissed All Claims, Which Plaintiffs Continued to Pursue Despite the Closure of Government Investigations.

The District Court issued a 44-page Opinion dismissing Plaintiffs' Complaint with prejudice. (Opinion, R. 95.) Pointing to Plaintiffs' extensive citations in their Complaint, the Court noted that "Plaintiffs assert that Ford should have to disclose the 'true fuel economy' figures for their vehicles." (*Id.* at 28 n.2, PageID #4891.) The court further summarized the "nearly a thousand page[]" Complaint as alleging that Ford "cheated on its fuel economy testing" and then "used its inaccurate fuel economy ratings on the window stickers" and in advertisements, while taking "no action to correct the problems nor to alert customers that their test methods were flawed and that consumers would not get the promised fuel economy." (*Id.* at 3, 6-10, PageID #4866, 4869-4873.)

The District Court first considered express preemption under 49 U.S.C. § 32908(b), which provides that "a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs . . . only if the law or regulation is identical to that requirement." *Id.* The court thoroughly analyzed the "comprehensive federal regulatory scheme created by the [EPCA] and enforced by the [FTC] and [EPA]." (Opinion at 14-16, PageID #4877-4879.) And it determined that Plaintiffs' claims—which go to the heart of the EPA estimates that were calculated by Ford, reviewed and adopted by the EPA,

investigated by the EPA, required to be placed on Monroney stickers, and generally required to be used in fuel economy advertising by the FTC—were expressly preempted. To grant the state law relief requested by Plaintiffs, including requiring Ford to provide what Plaintiffs deem "correct fuel economy and emission ratings" to Class members, would impose obligations on Ford that are not "identical to" the obligations imposed by the EPA. (*Id.* at 16-25, PageID #4879-4888.)

Next, the court held that Plaintiffs' claims were also barred by implied conflict preemption, which occurs when "compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at 26, PageID #4889.) Plaintiffs argued below that Ford had "a duty under state law to disclose the true fuel economy in addition to the Monroney sticker." (Resp. to Mot. to Dismiss at 33-34, R. 85, PageID #3336-37.) But the District Court recognized that the entire purpose of the EPA's regulations is to provide a uniform process. "If Ford were required to provide 'true fuel economy' figures for their vehicles, that would directly conflict with the federally-mandated language on the Monroney Stickers that '[a]ctual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle.'" (Opinion at 28 n.2, PageID #4891.)

Third, the court found that the central issue in this case—whether Ford falsified its fuel economy figures or provided figures different from the "true fuel

economy"—falls under the EPA's and FTC's primary jurisdiction. "Claims challenging the accuracy of Ford's EPA fuel economy estimates and Ford's disclosure of them . . . . directly implicates the methods devised by the EPA, and the disclosure requirements devised by the FTC," and "fall within the competence, and mandate, of the EPA and FTC." (Opinion at 31-32, PageID #4894-4895.) And, even setting that aside, the court found that Plaintiffs' fraud and consumer protection claims would fail anyway because they amount to not actionable puffery and generalized statements. (*Id.* at 32-37, PageID #4895-4899.)

Plaintiffs have now appealed the above portions of the District Court's ruling.

SUMMARY OF ARGUMENT

To prevail on their claims that Ford "falsified" its fuel economy testing data and provided inaccurate fuel economy figures to consumers, Plaintiffs must make the threshold showing that the EPA-approved fuel economy figures were incorrect. And to obtain the relief Plaintiffs seek and quantify any damages, a jury would have to determine what the "correct" or "true" fuel economy actually was. As the District Court recognized, these issues cannot be resolved without: (1) imposing obligations on Ford that go beyond (and contradict) the EPA's requirements, (2) undermining the EPA's regulatory framework, and (3) requiring a jury of laypersons to engage in a technical analysis of Ford's fuel economy calculation that is best left to the EPA. The court therefore correctly held that Plaintiffs' claims were expressly and

impliedly preempted. The District Court also acted within its discretion in holding that, even if the claims were not preempted, the determination of whether Ford complied with the EPA's complex fuel economy standards is a determination that falls under the EPA's primary jurisdiction.

As to express preemption, 49 U.S.C. § 32919(b) only permits "a State law or regulation on disclosure of fuel economy . . . if the law or regulation is identical to" the EPA's own requirements. As several courts have already held when addressing this statute, claims like Plaintiffs'—which hinge on a finding that a fuel economy figure other than the figure approved by the EPA is the "correct" or "true" fuel economy—are expressly preempted. The EPA does not require manufacturers to "independently test and disclose the fuel economy of [a vehicle] to determine its 'actual performance.'" *In re Ford Fusion & C-MAX Fuel Econ. Litig.*, No. 13-md-2450, 2015 U.S. Dist. LEXIS 155383 (S.D.N.Y. Nov. 12, 2015) ("*C-MAX 1*"). To hold a manufacturer liable if a jury determines that the EPA mistakenly approved fuel economy testing data would "impose a regime above and beyond that required by [EPA and FTC] regulations." *Id.* at *75.

Implied conflict preemption exists "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. Allowing claims like Plaintiffs' to go forward would both make it

impossible for Ford to comply with federal law, and pose an obstacle to Congress's fuel economy testing objectives. As to impossibility, to comply with the EPA's and FTC's regulations, Ford must use the fuel economy figure that is "determined by the [EPA] Administrator." If a jury's determination of the "correct" or "true" fuel economy was substituted for the EPA's determination, Ford would be placed in the untenable position of having to list the EPA-approved figure to comply with federal law, while at the same time facing state law liability for doing just that. Moreover, permitting independent factfinders to calculate fuel economy frustrates the EPA's entire regulatory framework, which serves to "provide consumers with a basis on which to compare the fuel economy of different vehicles." 71 Fed. Reg. 77873. As the EPA's regulations make clear, the only way to provide a meaningful comparison is to use the "controlled and repeatable" testing process that is regulated and overseen by the EPA. The court did not err in finding that Plaintiffs' claims were precluded under both the express and implied preemption doctrines.

Even if this Court were to disagree with the District Court on preemption, the District Court also invoked the doctrine of primary jurisdiction, and found that the determination of whether Ford complied with the EPA's fuel economy testing regulations should be decided by the EPA in the first instance. The court was well within its discretion, and did not err, in doing so, as the EPA has stressed the need for uniformity in the testing process, and has the special expertise to provide that

uniformity. And notably, the EPA investigated Ford's fuel economy testing, closed its investigation, and notified Ford it did "not intend to take any further action." Had the EPA found that Ford miscalculated its fuel economy figures, as Plaintiffs alleged, the EPA would have been *required* to correct those calculations and take other corrective action. 40 C.F.R. § 600.312-08(a)(5) (*requiring* the Administrator to take corrective actions if "any label values are determined not to be calculated according to the procedures specified in" the EPA's regulations); EPA, *Fuel Economy Updates*, epa.gov/recalls/fuel-economy-label-updates (last visited August 22, 2022) ("If testing reveals that fuel economy labels are inaccurate, *EPA will require* manufacturers to update the MPG values to provide consumers with the most accurate information available.") (emphasis added).

Finally, even if Plaintiffs' claims were not preempted, and even if the EPA had not already cleared Ford of the alleged wrongdoing of which Plaintiffs complain, Plaintiffs' misrepresentation and omission-based claims were still properly dismissed. As the District Court recognized, the statements Plaintiffs complain of are generalized statements that amount to mere puffery. This Court should affirm the dismissal of all claims.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Ford agrees with Plaintiffs that the District Court's rulings on preemption and Plaintiffs' misrepresentation and omissions claims are reviewed *de novo*. As

explained in detail below, however, this Court has reviewed trial courts' decisions to defer to an agency under the primary jurisdiction doctrine under both a *de novo* and abuse of discretion standard. In this case, the District Court's ruling on that ground should be reviewed for abuse of discretion.

ARGUMENT

I. The District Court Did Not Err In Holding That Express Preemption Bars Plaintiffs' Claims.

Express preemption "occurs when Congress enacts legislation with a preemption clause, thereby explicitly declaring the preeminence of federal law in a given regulatory area." *Dewald v. Wrigglesworth*, 748 F.3d 29, 306 (6th Cir. 2014) (Cole, J., dissenting). Here, that legislation provides:

> A State or political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908[7] *only if the law or regulation is identical* to that requirement.

49 U.S.C. § 32919(b) (emphasis added).

When determining a statute's preemptive scope, the "Congressional purpose is the 'ultimate touchstone' of [the] inquiry.'"[8] *Lorillard Tobacco Co. v. Reilly*, 533

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[7] The District Court found, and Plaintiffs have not disputed, that the vehicles at issue are "covered by section 32908." (Opinion at 17, PageID #4880.)

[8] Plaintiffs argued in the District Court that a presumption against preemption should apply. (Resp. to Mot. to Dismiss at 3, R. 85, PageID #3306.) As the District Court noted, however, the Supreme Court recognized in 2016 that when "as here, the

U.S. 525, 541 (2001) (quoting *Cippolone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). State "laws of general applicability" may be expressly preempted even if the statute does not explicitly say so. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). Indeed, it would "creat[e] an utterly irrational loophole" if "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.*

Plaintiffs claim that Ford "cheated" on fuel economy testing and produced fuel economy estimates that were *per se* deceptive. The relief requested by Plaintiffs would require Ford to "correct" those estimates by providing the "true fuel economy." (Compl. ¶ 2; *id.* at 960, PageID #3014-15.) To obtain that relief, Plaintiffs raised over 300 causes of action under the laws of every state.[9]

Plaintiffs argue that the lower court erred in applying express preemption because their claims "are based on state-law duties that are identical to duties that

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'statute contains an express preemption clause,' the Court should 'not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" (Opinion at 16-17, R. 95, PageID #4879-4880 (quoting *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016)). Plaintiffs do not challenge that finding on appeal.

[9] On appeal, Plaintiffs include only claims under the laws of the 28 states where the more than 50 named plaintiffs reside or were injured. (Appellants' Br. at 3 n.1.)

federal law imposes on auto manufacturers." (Appellants' Br., p. 21.) They offer no specifics of what duties exist under any state's law, let alone those laws of the 28 states that will be at issue should this Court reverse. Nor do they delineate what else those states' laws require to prevail under their respective common law fraud doctrines or consumer protection statutes. Instead Plaintiffs sweepingly claim that "the fraudulent testing and advertising constitutes common-law fraud and violates all of the statutory consumer protection laws at issue." (*Id.*) And, Plaintiffs conclude, because the EPA's regulations also prohibit "cheating on tests, providing false fuel economy figures, and omitting the true fuel economy," claims under each states' laws must be "identical to" the EPA's requirements. (*Id.* at 22.)

That is incorrect. It is undisputed that Ford disclosed the fuel economy figures accepted by the EPA Administrator, as required by EPA (and FTC) regulations. Plaintiffs' claims that, by using these figures, Ford disclosed "false fuel economy figures" are by definition not "identical to" the EPA's and FTC's requirements that Ford disclose the EPA's figures. By advancing claims that are untethered from the standards and procedures that the EPA has prescribed *and applied* for estimating and disclosing Ford's fuel economy figures (*see, e.g.*, Compl. ¶¶ 25, 31), Plaintiffs introduced an inherent conflict with the words and intentions of Congress in violation of the Supremacy Clause. *See* U.S. Const. art. VI, CL. 2; *Maryland v.*

Louisiana, 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state provisions be without effect.").

Plaintiffs fare no better by framing their claims as seeking to hold Ford liable for "omit[ting]" "actual" fuel economy figures. (Compl. ¶¶ 31, 41, 961; PageID #2064, 2066, 3015; Resp. to Mot. to Dismiss, at 33-34, PageID #3304, 3336-3337 ("Ford had a duty under state law to disclose the true fuel economy" of class vehicles).) As the District Court correctly recognized, the production of such figures is not required by the EPCA or any other federal law.

In a case similar to this, the United States District Court for the Southern District of New York found state law claims preempted to the extent they directly attacked Ford's use of EPA estimates in connection with the sale of vehicles. *See C-MAX I*, 2015 U.S. Dist. LEXIS 155383. As that court explained, federal law does not require a manufacturer to "independently test and disclose the fuel economy of [a vehicle] to determine its 'actual performance.'" *Id.* at *74-75. Thus, permitting state law claims that require vehicle manufacturers to determine and distribute "actual" fuel economy figures would impermissibly "impose a regime above and beyond that required by [EPA and FTC] regulations." *Id.* at *75.

Indeed, Plaintiffs go far beyond the EPA's requirements by referencing a so-called "true" and "correct fuel economy" 193 times in their Complaint, and requesting that Ford "provid[e] correct fuel economy" figures, even though no such

figure exists. (Compl. at 961, PageID #3015.) Federal regulators have explained why no such requirement exists: "it is impossible to design a 'perfect fuel economy test that will provide accurate, real-world fuel economy estimates for every consumer." 71 Fed. Reg. 77874. The EPCA thus requires only that Ford publish the estimates "determined by the [EPA] Administrator" on Monroney labels and in the manner dictated by the FTC.

Finally, Plaintiffs cannot avoid preemption by reframing the Complaint to contend that, although Ford disclosed the EPA's approved estimates as required by federal law, Ford cheated on the EPA's tests and submitted false information *to the EPA* (Appellants' Br. at 17), making the EPA's approved estimates inaccurate and Ford's use of them fraudulent under the various state laws.[10] Where, as here, plaintiffs challenge the accuracy, use, and distribution of EPA-approved fuel economy estimates and EPA-mandated Monroney labels, their claims are preempted. *See Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1468, n.9 (Cal. App. 2009) ("[Plaintiff's] concern . . . is related to the accuracy of the EPA mileage sticker and that Honda chooses to advertise, rather than to any possible defect in his particular vehicle. But as [plaintiff] clearly recognizes, he may not directly challenge the EPA estimates by way of state law causes of action."); *cf.*

[10] As discussed below, this argument is also barred by implied conflict preemption.

Gilles v. Ford Motor Co., 24 F. Supp. 3d 1039, 1046 (D. Colo. 2014) (finding fuel economy advertising claims not preempted specifically because, unlike here, they did not directly challenge the accuracy of EPA estimate figures).

Plaintiffs have no response to these authorities that specifically relate to the EPA's fuel economy requirements. Rather than point to the "ultimate touchstone" of Congressional purpose under 49 U.S.C. § 32919(b), their brief focuses on express preemption cases that contain different language, and that apply to different industries in different contexts. (Appellants' Br. at 22-25.) Because Plaintiffs' claims went far beyond the fuel economy requirements imposed by the EPCA and accompanying regulations, the District Court correctly dismissed them on express preemption grounds and this Court should affirm.

II. The District Court Did Not Err In Holding That Implied Preemption Bars Plaintiffs' Claims.

Implied conflict preemption exists "to the extent that [state law] actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. When "'the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress.'" *Chrysler Grp., LLC v. Fox*

Hills Motor Sales, Inc., 776 F.3d 411, 424 (6th Cir. 2015) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).[11]

A. Requiring Ford to Comply With a Jury's Calculation of "True Fuel Economy" Would Make it Impossible for Ford to Comply with the EPA and FTC Regulations and Would Stand as an Obstacle to Accomplishing the Objectives of Congress.

Granting the relief Plaintiffs seek, and providing a state law cause of action for inaccurate or "falsified" fuel economy testing, would make it impossible for Ford to comply with the EPA's and FTC's regulations, and "stand[] as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. As the District Court explained, Plaintiffs' Complaint repeatedly emphasized that Ford was required to disclose a vehicle's "true fuel economy." (Opinion at 27, PageID #4890; *see also.*, Compl. ¶¶ 31, 35, 39, 43, 504, 510.) Plaintiffs further requested that Ford provide "correct fuel economy and emission ratings" to Class members. (Opinion at 11, PageID #4874; Compl. at 961, PageID #3015.)

To prevail on these claims, Plaintiffs would need to make the threshold showing that Ford's fuel economy calculations were different from the "true" fuel

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[11] Ford has not asserted field preemption and therefore does not know why Appellants mention it. (*Compare* Appellants' Br. at 27-28 ("field preemption does not apply") with (Opinion at 27, PageID #4890 "Ford's brief is clear . . . that it asserts that *conflict preemption* applies." (emphasis in original).)

economy.[12] A jury would therefore need to determine what the "true" fuel economy is. Allowing a factfinder to calculate what it deems to be the "true fuel economy," and then find that Ford should have used that figure instead of the EPA's approved and official figure, would make it impossible for Ford to comply with the EPA's and FTC's regulations. The EPA regulations *require* Ford to place the exact fuel economy figure "as determined by the [EPA] Administrator" on the Monroney sticker. 49 U.S.C. §§ 32901(a)(11), 32908(b)(1)(A); 40 C.F.R § 600.302-12(b)(4) (sticker must include "the appropriate values established by EPA"). They also require Ford to include a disclaimer that "[a]ctual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle." 40 C.F.R. §§ 600.301, 600.302(b)(4), 600.311-12.

Likewise, the FTC's regulations *require* Ford "to disclose the established fuel economy of a vehicle, *as determined by the Environmental Protection Agency's rules* . . . in advertisements that make representations regarding the fuel economy of a new vehicle." 71 Fed. Reg. 77917 (emphasis added); 16 C.F.R. §§ 259.3, 259.4(l)(1) (manufacturers must "disclose the EPA fuel economy"). Plaintiffs' claims, if revived, would result in substituting an inexperienced factfinder's

[12] This, despite the EPA's repeated warnings that "[t]here will always be consumers that achieve real-world fuel economy both better or worse than a given estimate." 71 Fed. Reg. 77879.

judgment for the EPA's experienced and mandated determination, and would require Ford to inform consumers of a different fuel economy estimate than that "determined by the Administrator"—all in direct violation of the EPA's and FTC's regulations.

In addition, allowing a factfinder to determine the "true fuel economy," and imposing liability on a manufacturer if that figure is different than the approved figure, would frustrate the purpose of the EPA's regulations. The fuel economy estimates aim to "provide consumers with a basis on which to compare the fuel economy of different vehicles." 71 Fed. Reg. 77873. As the EPA and FTC have recognized, the only way to compare is through consistent testing and oversight by the EPA.

Because "fuel economy and driving range estimates derived from non-EPA tests can lead to deception," manufacturers "must "disclose the EPA fuel economy" estimates. 16 C.F.R. § 259.4(l)(1). Absent the EPA's "controlled and repeatable" testing process, consumers have no basis to meaningfully compare vehicles given the potential for different "test methods, driving cycles, sampling of vehicles, and methods of measuring fuel economy" that lead to results which "vary significantly from EPA's estimates." 71 Fed. Reg. 77879. Put simply, allowing independent factfinders with no expertise to come to their own fuel economy estimates using a testing process *not reviewed or approved by the EPA*, causes the entire purpose and framework of the EPA's oversight and standardized testing to fall apart.

Plaintiffs contend that Ford's "implied preemption argument is erroneous because the EPA does *not* test the vast majority of vehicles (including those at issue here)." (Appellants' Br. at 29.) Plaintiffs note that the EPA conducts "independent testing on about 15% of vehicle models each year" and, argue that percentage somehow makes this case similar to *Wyeth v. Levine*, 555 U.S. 555 (2009), where the Supreme Court rejected an implied preemption argument.

Once again, Plaintiffs are mistaken, both on the facts and the law. The EPA's own vehicle testing on 15-20% of vehicles is just one of "a variety of ways" the EPA exercises its regulatory oversight. For other vehicles, the EPA requires manufacturers to submit "confirmatory testing," which the EPA's highly-trained staff then evaluates "for reasonableness and representativeness." 40 C.F.R. § 600.008(b), (c)(3). And even for vehicles that are not subject to confirmatory testing, the "[f]uel economy data must" still "be judged reasonable and representative by the Administrator in order for the test results to be used . . ." *Id.* § 600.008(c)(1). Ultimately, based on the records submitted to the EPA, and the EPA's expertise in fuel economy testing, it is the EPA that determines what the fuel economy figure should be, and manufacturers are legally required to use that figure on Monroney stickers and in advertisements.

This case is not like *Wyeth*. There, the plaintiffs raised failure-to-warn claims based on the allegedly-deficient labeling of a drug. The manufacturer argued the

claims were impliedly preempted because their label "had been deemed sufficient by the federal Food and Drug Administration." 555 U.S. at 558. After examining the FDA's labeling regulations, the Supreme Court disagreed both as to impossibility and obstacle preemption.

First, the Court found the state law cause of action would not render it impossible for the manufacturer to comply with FDA regulations, because "an FDA regulation . . . permits a manufacturer to make certain changes to its label before receiving the agency's approval." *Id.* at 568. The manufacturer was free to revise its label to include the warning without violating the FDA's regulations. In fact, it had a duty to do so. *See id.* at 568-71. Because the FDA regulation "permitted Wyeth to unilaterally strengthen its warning," *id.* at 573, the manufacturer could have provided the warning contemplated by the plaintiffs without running afoul of FDA regulations.

Second, the Court examined the history of the applicable FDA regulations and determined that allowing a state law cause of action would not impede the FDA's goals. The FDA had "traditionally regarded state law as a complementary form of drug regulation," 555 U.S. at 578, and had "cast federal labeling standards as a floor upon which States could build and repeatedly disclaimed any attempt to pre-empt failure-to-warn claims" as of the time the drug was labeled. *Id.* at 577-78, 581. Thus, preemption would be inconsistent with Congressional intent. Indeed, although

Congress enacted "an express pre-emption provision for medical devices," it opted not to for prescription drugs. *Id.* at 574. Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* at 575.

Here, in contrast, manufacturers cannot unilaterally deviate from the fuel economy figures that have been accepted and reviewed by the EPA. They are required to use those figures, and only those figures, on the Monroney label. Nor have Plaintiffs pointed to a shred of legislative history or statutory text indicating that Congress "regarded state law as a complementary form of [fuel economy] regulation." *Id.* at 578. Indeed, the existence of an express preemption provision established by Congress, the legislative history, and regulatory text all indicate the exact opposite.

B. Plaintiffs' Arguments Implicate *Buckman* Conflict Preemption.

Although Plaintiffs' Complaint sought to impose a "true fuel economy" requirement on manufacturers that may differ from the fuel economy the EPA has approved, they appear to have abandoned that demand, noting in passing that they "have not admitted that Ford had to conduct an 'additional' fuel-economy test." (Appellants' Br. at 30.) Instead, Plaintiffs now argue they intend to prove the "EPA relied on Ford's fraudulent testing in calculating the average fuel economy rating."

(*Id.* at 17.) And they claim "Ford cannot escape liability" by arguing it "was required to list the EPA estimates at issue" because Ford was, in fact, "required to disclose *accurate* EPA estimates." (*Id.* at 36 (emphasis in original).) Plaintiffs thus "seek to hold Ford responsible for its violation of state for its fraudulent misrepresentations and omissions *in its testing*." (*Id.* at 17 (emphasis added).) This theory—that the state law cause of action should provide a remedy for Ford's alleged misrepresentations *to the EPA* in its testing—runs headlong into a separate problem, that also ends in dismissal.

In *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Supreme Court examined allegations that a manufacturer "made fraudulent representations to the [FDA] in the course of obtaining approval to market" a new medical device. *Id.* at 343. The plaintiffs alleged that, "[h]ad the representations not been made, the FDA would not have approved the devices, and plaintiffs would not have been injured." *Id.* at 346-47.

The Court recognized that the "relationship between a federal agency and the entity it regulates is inherently federal in nature." *Id.* at 347. The allegedly-fraudulent statements were "prompted by the [Medical Devices Act], and the very subject matter of petitioner's statements were dictated by that statute's provisions." *Id.* at 347-48. The Court found that the FDA had authority to "punish and deter fraud" to "achieve a somewhat delicate balance of statutory objectives," and this

ability would be "skewed by allowing fraud-on-the-FDA claims under state tort law." *Id.* at 348. Permitting "[s]tate law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud." *Id.* at 350. These claims "exist solely by virtue of the [FDA's] disclosure requirements" and, "were plaintiffs to maintain" the claims, "they would not be relying on traditional state tort law." *Id.* at 353. Instead, "the existence of the[] federal enactments is a critical element in their case" and "is therefore pre-empted by that scheme." *Id.* This Court soon reached the same conclusion. *See Garcia*, 385 F.3d at 966 (6th Cir. 2004) (claims that rest "on the basis of state court findings of fraud on the FDA" and "remedies requiring proof of fraud committed against" the agency are preempted).

As in *Buckman* and *Garcia*, to the extent Plaintiffs now argue that the "EPA relied on Ford's fraudulent testing in calculating the average fuel economy rating" and that Ford made "fraudulent misrepresentations and omissions *in its testing*," they are making "fraud-on-the-EPA" claims. To prevail, they would need to show that Ford submitted "falsified" testing figures to the EPA, and that the "EPA relied" on those figures, ultimately causing Plaintiffs' alleged harm. But like the FDA, the EPA has significant enforcement tools to police any such fraud. In fact, it exercised those tools and declined to take any action against Ford with respect to the very vehicles in Plaintiffs' Complaint. Had the EPA found any wrongdoing in Ford's

testing figures, it would have been required to take corrective action. *See* 40 C.F.R. § 600.312-08(a)(5).

In short, no matter how Plaintiffs' claims are framed—as requiring new fuel economy tests that are distinct from the tests reviewed and approved by the EPA, or as vindicating allegedly fraudulent testing that the EPA "relied" on—they are impliedly preempted.

III. The District Court Did Not Abuse Its Discretion Or Otherwise Err In Applying The Doctrine of Primary Jurisdiction.

A. The District Court's Ruling Should be Reviewed for Abuse of Discretion.

This Court should apply the abuse of discretion standard of review to the District Court's primary jurisdiction ruling. "Circuit courts are split over whether to review decisions about the application of the doctrine of primary jurisdiction for abuse of discretion or without any deference to the district court." *Conservation Law Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 72 (1st Cir. 2021).

This Court, consistent with the Third, Fourth, Tenth, and District of Columbia Circuits,[13] has recognized that the "primary jurisdiction doctrine is a rule of judicial

[13] *See Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1277 (10th Cir. 2018) ("We review a district court's decision to invoke the primary jurisdiction doctrine for abuse of discretion."); *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 431 (4th Cir. 2015) ("We review a district court's primary jurisdiction determination for an abuse of discretion."); *Nat'l Tel. Coop. Ass'n v. Exxon Mobil Corp.*, 244 F.3d

construction which permits a court, *in exercise of its sound discretion*, to defer to an administrative agency for the initial resolution of certain disputes." *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 235 n.30 (6th Cir. 1980) (emphasis added).

But in 1997, the Court addressed a district court's decision to defer jurisdiction to the Secretary of Agriculture as to a claim brought under the Packers and Stockyards Act. *United States v. Haun*, 124 F.3d 745, 746 (6th Cir. 1997). There, the district court required the government to show cause as to why the claims did not belong before the Department of Agriculture. *Id.* at 747. After the trial court declined to accept jurisdiction, this Court had to determine "the standard we should apply in reviewing the district court's peculiar dismissal." *Id.* In what "present[ed] a question of statutory interpretation," the Court found that claims could *only* be brought in federal court, and the Secretary of Agriculture had no authority to adjudicate them. Because this was a pure question of statutory interpretation—whether the agency had authority to hear the claim—the district court's decision was subject to *de novo* review. *Id.* at 747, 750. *Haun* did not address the standard of

153, 156 (D.C. Cir. 2001) (same); *In re: Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993), *cert den.* 510 U.S. 1091 (1994) (same).

review that applies when there is concurrent jurisdiction, and a district court defers to an agency that does have such authority. *See id.*

Still, fifteen years later, in one sentence, a panel of this Court cited *Haun* for the proposition that "[w]e apply de novo review to the district court's decision regarding primary jurisdiction." *U.S. ex rel. Wall v. Circle C. Constr., L.L.C.*, 697 F.3d 345, 351 (6th Cir. 2012). Three years after that, another panel stated, "[t]his court has not articulated a standard of review specific to reviewing district-court rulings regarding primary jurisdiction," while citing *Haun* to note that, "where the issue has arisen, we have reviewed the district court's decision *de novo*." *Consol. Rail Corp. & Norfolk S. Ry. v. Grand Trunk W. R.R.*, 607 F. App'x 484, 491 (6th Cir. 2015).

This Court should apply an abuse of discretion standard here. Unlike *Haun*, this case does not concern the textual question of whether the EPA had jurisdiction to address the question posed by Plaintiffs. Indeed, the EPA has done just that. Instead, the question is whether the District Court erred in deferring to an agency that had (and exercised) concurrent jurisdiction -- a fact-intensive question that must be resolved on a case-by-case basis. *Alltel Tenn. v. Tenn. Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). And there is no "fixed formula" for "applying the doctrine." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). "In every case the question is whether the reasons for the existence of the doctrine are present and

whether the purposes it serves will be aided by its application in the particular litigation." *Id.* Trial courts are in the best position to make those determinations, and this Court should review those determinations for an abuse of discretion.

If this Court interpreted *Haun* more broadly to require *de novo* review of all primary-jurisdiction deferrals, rather than to statutory-interpretation decisions, then *Haun* (and the cases that cite it) would conflict with *Curran*, and *Curran* would bind. *United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 760, 211 L. Ed. 2d 476 (2022).

B. Whether Reviewed for Abuse of Discretion or *De Novo*, the District Court Did Not Err in Applying the Doctrine of Primary Jurisdiction.

Whether reviewed afresh or for abuse of discretion, the District Court's primary jurisdiction ruling should be affirmed. The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *W. Pac.*, 352 U.S. at 63 (1956). It "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* at 64. Although, as stated above, no "fixed formula" exists for applying the doctrine, courts typically defer to an "agency's primary jurisdiction" either "to ensure needed uniformity in an area or

when the agency has 'special competence' over the issue." *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 452 (6th Cir. 2019); *see also Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *Alltel*, 913 F.2d at 309.

The District Court found that the EPA has primary jurisdiction over the accuracy of its own required fuel economy estimates because it has a need to promote uniformity, and the fuel economy calculation is within the EPA's special expertise. (Opinion at 30-31, PageID #4894.) It was right on both counts.

1. The EPA Has Stressed the Need for Uniformity in Fuel Economy Estimates.

The District Court correctly recognized the need for uniformity when it comes to fuel economy estimates. A primary purpose of the EPA's estimates is to provide "consumers with a basis on which to compare the fuel economy of different vehicles." 71 Fed. Reg. 77873. The only way to do this is to use a uniform testing methodology. The EPA's testing requirements are "controlled and repeatable," allowing "an EPA fuel economy estimate [to] be used for comparison of different vehicle models and types," and allowing the EPA to "preserve the ability to confirm the manufacturers' testing." *Id.* at 77874.

This framework would collapse if non-EPA regulated fuel economy tests were used, or if private individuals were permitted to conduct tests that arrive at a supposed "true" fuel economy absent any EPA oversight. Such tests "vary

significantly from EPA's estimates" and differ in testing conditions, "test methods, driving cycles, sampling of vehicles, and methods of measuring fuel economy." *Id.* at 77879. They also bring in "a wide number of often uncontrollable variables—different drivers, driving patterns, weather conditions, temperatures, etc.—that make repeatable tests impossible." *Id.* at 77874.

In short, *the entire point of the EPA's detailed regulations and significant oversight of fuel economy testing is to promote uniformity*. While Plaintiffs state that "whether Ford falsified its testing" is "an individualized, fact-based issue," they are forced to acknowledge that the issue is "based on established regulations." (Appellants' Br. at 31.) The only way to determine whether Ford's fuel economy estimates are "falsified" is to use the process that is heavily regulated and overseen by the EPA. If third-party tests or testers, who do not need EPA approval, are included, consumers would have no basis to compare different fuel economy estimates because they would have no way of comparing the testing conditions.

2. The Accuracy of Fuel Economy Estimates is Within the EPA's Expertise.

Like other courts, the District Court also correctly determined that the accuracy of fuel economy estimates under the EPA's complex regulations is an issue that fits within the EPA's expertise. *See Gilles*, 24 F. Supp. 3d at 1050 (finding it "undoubtedly true" that the "accuracy of EPA mileage estimates" fits within the

EPA's "special competence" and "surely depend[s] on technical information not within the conventional experience of this Court"); *C-MAX I*, 2015 U.S. Dist. LEXIS 155383, at *83 (claims that "directly implicate[] the methods devised by the EPA" are "barred [] by the primary jurisdiction doctrine, as they fall within the competence, and mandate, of the EPA").

As set forth above, the EPA's regulations first set forth complex road-load calculations "using vehicle-specific coefficients and response characteristics." 40 C.F.R. § 1066.210(a). Manufacturers must "report truthful and complete information" concerning these procedures, 40 C.F.R. § 1066.2(b), and face significant consequences if they fail to do so. *Id.* § 1066.2(c). Once the road-load is calculated and dynamometer settings are established, the EPA generally requires manufacturers to perform a complex "5-cycle" fuel efficiency calculation, which combines long-standing city and highway fuel economy test methods with more recent tests that measure the impact of higher speeds, air conditioning use, and colder temperatures on fuel efficiency. 40 C.F.R. § 600.210-12; 71 Fed. Reg. 77876. "Automakers are required to follow very specific test procedures and submit the fuel economy data to EPA for all their models each year." EPA, *Testing at the National Vehicle and Fuel Emissions Laboratory*, available at https://www.epa.gov/greenvehicles/testing-national-vehicle-and-fuel-emissions-laboratory (last visited August 22, 2022).

Plaintiffs make two main arguments as to why this testing process is not within the EPA's expertise. *First*, they contend that the EPA only conducts independent testing of 15% of vehicles each year and that, by delegating "testing to manufacturers" in the first instance, the "EPA plainly believes that private experts . . . are fully capable of complying with SAE standards without *any* involvement by the EPA." (Appellants' Br. at 32.) They cite no authority for the proposition that the EPA must test every vehicle to have special competence when doing so. And they misstate the EPA's role in the testing process more generally.

Manufacturers must submit voluminous fuel economy testing records to the EPA. 40 C.F.R. § 600.006(b)(1). Once these tests are conducted and records are submitted, the EPA has authority to audit the manufacturer's test results to confirm testing practices, and conduct its own testing. EPA, *Testing at the National Vehicle and Fuel Emissions Laboratory*, available at https://www.epa.gov/greenvehicles/testing-national-vehicle-and-fuel-emissions-laboratory (last visited August 22, 2022) (noting that the "EPA . . . audits the data [provided by manufacturers] and performs its own testing . . . to confirm the manufacturers' results."); 49 U.S.C. § 32907(b) (permitting inspection of manufacturer records).

In exercising this authority, the EPA "confirms about 15%-20% of them through their own tests at the National Vehicles and Fuel Emissions Laboratory."

EPA, *How Vehicles are Tested*, available at https://www.fueleconomy.gov/feg/how_tested.shtml (last visited August 22, 2022). This facility is a "state-of-the-art test facility that provides a wide array of analytical testing and engineering services . . . to support the Agency's regulatory goals." EPA, *Vehicle and Fuel Emissions Testing*, available at https://19january2021snapshot.epa.gov/vehicle-and-fuel-emissions-testing_.html (last visited August 22, 2022).

The agency "utilizes highly-trained staff and specialized equipment to accurately measure emissions from a wide range of vehicles and engines," and "adheres to top-tier standards for test data accuracy and quality. Reflecting this value, in 2019, [the facility] received ISO/IEC 17025:2017 accreditation, which is the gold standard for data quality in testing laboratories of this kind." EPA, *Vehicle and Engine Emissions Testing at the National Vehicle and Fuel Emissions Laboratory*, available at https://19january2017snapshot.epa.gov/vehicle-and-fuel-emissions-testing/vehicle-and-engine-emissions-testing-national-vehicle-and-fuel_.html (last visited August 22, 2022). [14]

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[14] *See also About the National Vehicle and Fuel Emissions Laboratory*, available at https://www.epa.gov/aboutepa/about-national-vehicle-and-fuel-emissions-laboratory-nvfel (last visited August 22, 2022) (explaining the facility is used for fuel economy testing and describing staff qualifications.)

For other vehicles, the EPA requires manufacturers to submit "confirmatory testing," which the EPA's highly-trained staff then evaluates "for reasonableness and representativeness." 40 C.F.R. § 600.008(b), (c)(3). Even for those vehicles that are not subject to confirmatory testing by the agency or manufacturer, the "[f]uel economy data must be judged reasonable and representative by the Administrator in order for the test results to be used . . ." *Id.* § 600.008(c)(1). Thus, contrary to Plaintiffs' position, this is not like *In re Edgewell Personal Care Co. Litig.*, No, 16-cv-3371, 2018 U.S. Dist. LEXIS 209023 (E.D.N.Y. Sept. 4, 2018), where the "FDA's involvement with SPF rating labels end[ed] with regulations," as there was no need for the FDA's "review or approval of their labels." *Id.* at *19. The EPA's staff will (and must) reject testing data that is judged unreasonable or non-representative.

Second, Plaintiffs contend that because the EPA has incorporated the SAE's coastdown tests, "there is no reason to defer this matter to the EPA." (Appellants' Br. at 31, 32.) This entirely ignores that the EPA regulations explicitly "specif[y] certain deviations from those [SAE] procedures for certain applications." 40 C.F.R. § 1066.301(b). Even if they did not, the EPA's incorporation of standard organization methods for coastdown testing into its fuel economy testing regime as a whole does not somehow mean the EPA lacks expertise over its own testing processes, which it carefully selected and promulgated through formal rulemaking.

Plaintiffs do not meaningfully argue otherwise (nor did they raise this argument to the District Court). The dismissal of Plaintiffs' claims under the primary jurisdiction doctrine should be affirmed.

IV. The District Court Did Not Err In Dismissing Plaintiffs' Misrepresentation and Omission Claims.

Finally, Plaintiffs argue that the District Court erred in dismissing their "fraudulent misrepresentation and omission claims" relating to statements that "merely contain EPA-mandated fuel-economy estimates," and relating to "representations that the Vehicles are the 'most fuel efficient' and 'best in class' for fuel economy." (Appellants' Br. at 35-39.) For the reasons explained above, these claims are preempted and barred by the doctrine of primary jurisdiction. They also fail as a matter of law. Such claims would first require a finding that Ford reported inaccurate fuel economy estimates to the EPA. But that determination falls squarely within the EPA's province, and the EPA has already investigated the matter and declined to take further action.

A. Ford's Required Disclosure of EPA-Accepted Fuel Economy Estimates Was Not Fraudulent or Deceptive.

The District Court cited a long-line of cases that have dismissed consumer protection act claims that are "based upon materials that merely contain EPA-mandated fuel economy estimates" without making any additional representations. (Opinion at 33-34, PageID #4896-97.) As those courts recognized, statements that

simply repeat the EPA-accepted fuel economy figures are not false or deceptive because they do not mischaracterize what the EPA has accepted and what the EPA and FTC require to be used on Monroney stickers and in advertising.

Plaintiffs argue only that Ford failed to disclose that the results "were in fact the result of fraudulent testing." (Appellants' Br. at 36.) But they omit that the EPA has already found otherwise. And they do not point to any statement Ford made concerning its testing process, or any requirement that Ford make disclosures concerning its EPA-approved testing process. The District Court correctly rejected this argument. *See, e.g.*, *Gray v. Toyota Motor Sales, U.S.A.*, No. 08-1690, 2012 U.S. Dist. LEXIS 15992, at *15-17 (C.D. Cal. Jan, 23, 2012), aff'd 554 F. App'x 608, 609 (9th Cir. 2014) (rejecting similar "partial representation" theory for fuel economy testing).

B. Ford's Statements Regarding "Best in Class" and "Most Fuel Efficient" Vehicles Were Not Fraudulent or Deceptive.

The District Court also held that Plaintiffs could not state a claim based on Ford's statements that the "Class Vehicles were 'most fuel efficient' and 'best in class' for fuel economy" because these statements are non-actionable puffery and generalized statements about comparing the EPA-estimated fuel economy figures among vehicles. (Opinion at 34-36, PageID #4897-99.) Plaintiffs point solely to *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651

(6th Cir. 2005) to argue that, because "Ford based those representations on objective but false testing data," they "are not puffery." (Appellants' Br. at 37-38.)

City of Monroe examined whether certain statements made by tire manufacturers were "fraudulent, material misstatements or omissions" under federal securities law. *Id.* at 668. This Court found that Bridgestone's statements that it sold "the best tires in the world" and that its products demonstrated "global consistent quality" and underwent "rigorous testing under diverse conditions" to "ensure reliable quality" were not actionable. *Id.* at 670-71. That was because these statements "lacked a standard against which a reasonable investor could expect them to be pegged; such statements describing a product in terms of 'quality' or 'best' . . . are too squishy, too untethered to anything measurable" and "are analogous to those deemed immaterial by a broad spectrum of federal courts." *Id.* at 671 (citing, *e.g.*, *Longman v. Food Lion, Inc.*, 197 F.3d 675, 684 n.2 (4th Cir. 1999) (statements that company was "one of the best-managed" and provided "some of the best benefits" were "immaterial puffery")).

The only statement the Court found actionable was a press release stating that "the objective data clearly reinforces our belief that these are high-quality, safe tires." *Id.* at 672. The Court said, "once Firestone elected to make statements such as the statement regarding the 'objective data,' it was required to qualify that

representation with known information undermining (or seemingly undermining) the claim" to remain in compliance with securities laws. *Id.* at 673.

First, this is not a federal securities case. Second, regardless, the analysis there supports Ford's cause. Ford's statements as to its fuel economy being "best in class" and "most fuel efficient" were not guarantees of performance, but were "too untethered to anything measurable" and "analogous to those deemed immaterial by a broad spectrum of federal courts." *City of Monroe*, 399 F.3d at 671. As courts have recognized in this specific context, "statements such as 'leading fuel economy'" are "nonactionable puffery" that is "general and nonquantifiable." *Raymo v. FCA US LLC*, 475 F. Supp. 3d 680, 706 (E.D. Mich. 2020); *In re Ford Fusion & C-Max Fuel Economy Litig.*, No. 13-md-2450, 2017 U.S. Dist. LEXIS 115066, at *33 (E.D. Mich. July 24, 2017) ("*C-MAX II*") (statements that "C-Max [] bests in MPG" and "most-fuel efficient midsize hybrid in America" were not actionable). The claims were properly dismissed.

CONCLUSION AND RELIEF REQUESTED

The District Court's dismissal of Plaintiffs' Complaint should be affirmed.

Dated: August 22, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notice to all registered counsel of record.

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COUNTER-DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

In addition to those documents identified in Appellants' brief, Ford designates the following documents from the District Court's record that are relevant to this appeal:

Record Entry No.	**Docket Text**	**Page ID Nos.**
1	MDL Transfer Order	1-3
60	Joint Case Management Order	1168-1187
78-3	*New York Times Article*	3034-3035
78-6	Andre Smirnov Blog	3042
82	Ford's Motion to Dismiss and Brief in Support	3167-3257
85	Plaintiffs' Response to Ford's Motion to Dismiss	3278-3380
88	Ford's Reply in Support of Motion to Dismiss	4415-4456
90	Transcript of Hearing on Motion to Dismiss	4593-4623
94	Ford's Notice of Government Agency Decision	4646-4647
94-1	Ford's 2021 10-K Report	4648-4863

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