UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Borla Performance Industries, Inc.,	**)**	**Docket No. CAA-R9-2020-0044**
	)	
Respondent.	**)**	

[REDACTED VERSION]

BUSINESS CONFIDENTIALITY ASSERTED

The exhibits submitted with Respondent's Initial Prehearing Exchange contain material claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). The material claimed as CBI are Respondent's Exhibits RX 1, 2, 3, 5, 6, and 21. These exhibits contain information regarding Borla Performance Industries, Inc.'s ("Respondent" or "Borla") pricing and wholesale and individual customers of vehicle exhaust parts and components at issue in this case, as well as company financial information. RX 21 contains specific product testing information. Respondent has made or is making a claim of CBI over the prices identified in this information and any information that would identify the purchasers or the specific quantity of products sold to such purchaser, any internal company financial information, and specific product testing information. These exhibits are therefore filed under seal pursuant to 40 C.F.R. § 22.5(d).

Respondent's Initial Prehearing Exchange also contains limited references to information contained in the exhibits identified above as CBI specifically relating to internal company financial information and product testing information. Therefore, Respondent has made targeted and

limited redactions on pages 28, 30, 31, and 33 of its Initial Prehearing Exchange to remove those confidential references. The redacted version is being filed in the public record consistent with 40 C.F.R. § 22.5(d). Also consistent with 40 C.F.R. § 22.5(d), in the unredacted version, Respondent is highlighting the information subject to redaction in yellow in order to clearly identify the information that is claimed as CBI.

In addition, Exhibits RX 4, 11, and 24 consist of potential witnesses' resumes and contain personally identifiable information ("PII"), some of which may be sensitive PII. To safeguard these potential witnesses' privacy in keeping with the Privacy Act of 1974 (codified at 5 U.S.C. § 552a), these exhibits are also filed under seal.

A complete set of all the exhibits and the unredacted Initial Prehearing Exchange, and a set with the redacted Initial Prehearing Exchange and in which the exhibits containing CBI and PII are omitted, have been filed with the Office of Administrative Law Judges. If you have any questions, please contact Kent Mayo at (202) 255-3753, or at kent.mayo@bakerbotts.com.

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RESPONDENT'S INITIAL PREHEARING EXCHANGE

Borla Performance Industries, Inc. ("Borla" or "Respondent"), through counsel, files this Initial Prehearing Exchange, consistent with section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), and with the Prehearing Order issued by the Presiding Officer on October 19, 2020. Respondent may amend or supplement this Prehearing Exchange as provided by sections 22.19(f) and 22.22(a)(1) of the Consolidated Rules.

The heading numbers below correspond to those set forth in Judge Biro's Prehearing Order dated October 19, 2020.

1.A. Potential Witnesses

Respondent may call any or all of the following witnesses at the evidentiary hearing in this matter. Respondent may supplement this list, upon adequate notice to the Presiding Officer and to Complainant, should Complainant's Rebuttal Prehearing Exchange or other information reveal the need for additional or alternative witnesses.

1. David Borla, Vice President of Sales and Marketing, Borla Performance Industries, Inc. Mr. Borla's responsibilities include international and domestic business development, wholesale and retail sales, marketing, customer service, new product development and design. He also manages the facility in the company's Oxnard, California location. Prior to joining the company, Mr. Borla was a professional musician and uses these skills to assist development of parts with enhanced acoustic performance. Mr. Borla may testify regarding Respondent's development, marketing and sales of aftermarket parts, including racing parts, and the company's interaction with the racing community. Mr. Borla also may testify regarding the alleged violations in this matter, Respondent's good faith efforts to protect against potentially non-compliant uses, and the company's actions in response to the EPA investigation.

2. Ted Wofford, R&D Manager, Borla Performance Industries, Inc. Mr. Wofford has been employed by Respondent for almost 25 years, with more than 20 years working in or leading the research and development program for the company. Mr. Wofford also has hands-on experience working on the pit crew for a professional racing team on the SCCA circuit. Mr. Wofford may testify regarding Respondent's R&D process for designing, building, and testing racing parts, including acquisition of test cars, Respondent's work with racing teams, and the characteristics of the racing parts at issue in this matter.

3. Thomas Deery, Independent Motorsports Consultant. Mr. Deery is an independent consultant focused on the motorsports business and event management with more than 45 years of leadership in the motorsports community and broad experience in motorsports events, series and operational administration. Mr. Deery has served as President and COO of World Racing Group, which includes the World of Outlaws Series, and the DIRTcar sanctioning body, in addition to racetrack ownership and event promotion. Mr. Deery also served as the Vice President, Weekly Racing and Regional Touring Series for NASCAR responsible for 100 sanctioned tracks and 10 regional touring series holding 2000 sanctioned events a year. Mr. Deery is a graduate of the University of Wisconsin - Platteville where he earned a Bachelor of Science degree in Business and Economics. Mr. Deery may be qualified as an expert to provide testimony regarding the size and scope of the racing industry and the relationship with the associated market for aftermarket racing parts. Mr. Deery is expected to provide testimony describing the multiple types of racing conducted across the United States and discussing various related metrics including number of racing tracks, sanctioning bodies, races, racing participants, and vehicles involved in racing and associated financial and economic impacts. Mr. Deery's resume is included within Respondent's exhibits and is marked as RX 24.

4. Alexander Borla, co-founder and CEO of Borla Performance Industries, Inc. Mr. Borla has been involved in the automotive industry his entire 50+-year career. He owned and operated several businesses in the automotive field before co-founding Borla Performance Industries, Inc. in 1978. Mr. Borla is a member of the Society of Automotive Engineers ("SAE") and holds many U.S. patents including one related to use of catalytic converters; BORLA XR-1® Raceline Exhaust has been recognized for years in the winner's circle at diverse racing venues internationally with more racing wins than all other exhaust

companies combined. Mr. Borla also has substantial experience as a race driver and race car owner, including test driving for Porsche and running the 24 Hours of Le Mans. Mr. Borla may testify about Respondent's business operations and involvement with the racing community; the alleged violations in this action; and conversion of street cars to competition vehicles.

5. Allen Stoner, Chief Financial Officer, Borla Performance Industries, Inc. Mr. Stoner has served as the CFO of Respondent for the past 12 years, with responsibility for all financial management functions including Accounts Receivable, Accounts Payable, Financial Reporting, Cost Accounting, and General Ledger. During his more than 35-year career, Mr. Stoner has managed all aspects of cost accounting in dynamic manufacturing environments across a range of businesses. Mr. Stoner has a B.S. in Economics from Alleghany College and an M.B.A. with a concentration in finance from the University of Pittsburgh. Mr. Stoner is expected to testify regarding the accounting and financial recordkeeping functions of Respondent, the tracking of units sold to both U.S. and international customers and the associated revenues, costs and margins. Mr. Stoner may also be qualified as an expert witness to address various aspects of cost accounting and financial analysis associated with the evaluation of potential economic benefit associated with the alleged non-compliant parts identified by EPA. Mr. Stoner is expected to provide testimony regarding his net profit analysis and his lost opportunity cost analysis for the relevant parts, which are included within Respondent's exhibits at RX 5 and 6. Mr. Stoner's resume is included within Respondent's exhibits and is marked as RX 4.

6. Ian Manson, President, Manson Environmental Corporation. Mr. Manson holds a degree in Chemical Engineering from Birkenhead College of Technology and has conducted post-graduate studies in turbulent fluid flow and mass transfer at University College London and in non-isothermal thermodynamics at University of Manchester Institute of Science and Technology. For more than 25 years, Mr. Manson's work has focused on catalysts and catalyst systems with an emphasis on emission control from both stationary and mobile sources. Mr. Manson is the founder and President of Manson Environmental Corporation, which consults on and designs and develops catalysts and catalyst systems. Mr. Manson may be qualified as an expert to provide testimony regarding emissions control systems on gasoline and diesel vehicles, potential modification to those systems, and relative potential effects of such modification. Mr. Manson is expected to testify regarding differences in anticipated effects associated with partial versus complete modification of catalytic converters and emissions systems and differences in relative emissions between gasoline and diesel vehicles with emissions system modifications. Mr. Manson's resume is included within Respondent's exhibits and is marked as RX 11.

1.B List of Exhibits

Pursuant to section 22.19(a)(2)(i) of the Consolidated Rules and the Prehearing Order, Respondent is producing at RX 0, titled "Respondent's Initial Prehearing Exchange Exhibits," a list of exhibits that Respondent may introduce at hearing. Copies of the exhibits are being

produced with this Initial Prehearing Exchange. Each exhibit is labeled as prescribed by the Prehearing Order, and the pages of each exhibit are numbered in the manner prescribed by the Prehearing Order. The listed exhibits (1) support Respondent's denials as described in its Answer; (2) support any asserted defenses; and (3) support Respondent's position regarding reduction or elimination of a potential penalty.

Respondent may supplement this list, upon adequate notice to the Presiding Officer and to Complainant, should Complainant's Rebuttal Prehearing Exchange or other information reveal the need for additional or alternative witnesses.

1.C Estimate of Time Needed to Present Direct Case

Respondent estimates that the amount of time needed to present its direct case is approximately three (3) days. Respondent does not require the services of an interpreter.

3.A. Documents in Support of Denials Made in Answer

Documents supporting Respondent's denials made in its Answer are described in Section 1.B above.

3.B. Explanation of Affirmative Defenses

Pursuant to the Prehearing Order, Respondent is submitting an explanation of the arguments in support of the defenses asserted in its Answer, submitted on September 28, 2020. The pleading of the defenses identified in the Answer and described below shall not be construed as an undertaking by Respondent of any burden that would otherwise be the responsibility of the Complainant. Respondent has not waived any defenses and reserves its right to amend or supplement these defenses or to delete or withdraw such defenses as may become necessary as the matter progresses. Documents supporting Respondent's defenses are described in Section 1.B. above.

* * * *

The defenses raised in the Answer to the Amended Complaint involve a variety of substantive, procedural, and structural problems with this enforcement action that render it an erroneous exercise of EPA's power against Borla.

On the substantive side, EPA incorrectly charges Borla with violating the defeat device provision of Section 203 (a)(3)(B) of the Clean Air Act ("CAA"), 42 U.S.C. § 7522(a)(3)(B), which prohibits sale of certain parts "intended for use with, or as part of, any motor vehicle or motor vehicle engine" where the principal effect of such part is to bypass or defeat an element of design on a motor vehicle by which it complies with regulatory emissions standards. EPA, however, reads the phrase "motor vehicle" well beyond its statutory and regulatory definition to include racing cars that are designed and "used solely for competition," 42 U.S.C. § 7550(2), (10)-(11), rather than for "transporting persons or property on a street or highway." The parts sold by Borla were expressly designed and intended for racing use only, were so labeled, and accordingly were not intended for "motor vehicles" but instead for vehicles "used solely for competition." EPA has made no allegation that the parts charged as violations in the complaint were sold for or used on vehicles other than those used solely for competition and thus have not stated a claim. And because the defeat device provisions also can form the basis of criminal conspiracy charges under the CAA, EPA is entitled to no deference for its broader view that cars *converted* from street vehicles to competition-only vehicles remain included in the covered category of "motor vehicles." Rather, such statutory provisions must be interpreted according to the rule of lenity to the extent there is any ambiguity. And any such ambiguity would raise other due process problems regarding fair notice and the substantive defense of Borla's good faith in attempting to comply with the law as it understood it.

On the procedural side, many of the anticipated aspects of this enforcement proceeding violate various due process or related administrative guidance, particularly if EPA seeks penalties that exceed a reasonable compensatory amount and instead stray into amounts designed to punish Borla or to deter others who are not parties to this proceeding. In such circumstances the proceeding would exhibit characteristics of a criminal rather than a civil action and should be treated accordingly. But even as a civil action, it would lack important procedural protections. Thus, the use of administrative fact-finding by employees of the charging agency rather than a jury raises substantial questions under the Constitution, regardless how the proceeding was viewed. Deference to such fact-finding at the judicial level would be inappropriate. Similarly, to the extent EPA seeks non-compensatory penalties not proportionally related to genuine harms, it would violate the Excessive Fines Clause of the Eighth Amendment as well as basic administrative law principles and guidance. And the potential shifting of burdens of proof and the lack of discovery would raise significant constitutional questions if the enforcement action is punitive in nature, but also even if it is limited to solely compensatory penalties.

Finally, on the structural side, several aspects of EPA's administrative enforcement regime are structured contrary to the Constitution. EPA administrative law judges ("ALJ"), for example, were not originally appointed consistent with the Appointments Clause for officers of the United States, and, unless that was cured in the wake of the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and its progeny, this proceeding is structurally defective. Similarly,

members of the Environmental Appeals Board ("EAB") were likewise not appointed in the manner required for officers and, if they are viewed as "principal officers," they were not nominated by the President and confirmed by the Senate, thus making any administrative appeal from the initial proceeding structurally defective. Similar structural problems arise from EPA's exercise of any delegated discretion and from deference to its fact-finding and legal interpretations, both of which raise significant separation of powers and anti-delegation concerns. Overall, such structural defects heighten the procedural concerns in this case and make this enforcement action an inappropriate exercise of EPA's power.

1. EPA Lacks Statutory Authority

A central element of EPA's claims is that Borla's racing parts are "intended for use with, or as part of, any motor vehicle or motor vehicle engine" and have a principal effect of bypassing, defeating, or rendering inoperative any device or element of design of that motor vehicle.[1] If the parts are intended for use with a car that is not categorized as a "motor vehicle" under the CAA, then EPA lacks enforcement authority under this provision and has failed to state a violation.

The CAA contemplates three categories of vehicles: motor vehicles, nonroad vehicles, and vehicles used solely for competition.[2] A "motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." EPA's primary argument is that "[m]otor vehicles are defined by their attributes and design, and not by how they are used. CAA § 216(2), 42 U.S.C. § 7550(2); 40 C.F.R § 85.1703." EPA Initial Prehearing Exchange at 7.

That argument, however, is inconsistent with the definitions in the statute and wrongly assumes that the "attributes and design" of a car are static and can never be changed after the initial sale or importation of a new motor vehicle.

Regarding the definitions of the different statutory categories, the one at issue here expressly turns on how a vehicle is "used," describing three categories of vehicles, including "a vehicle *used* solely for competition." CAA § 216(11), 42 U.S.C. § 7550(11). While the initial definition of motor vehicle includes "design," when read in context with the definition of nonroad vehicle, which excludes motor vehicles and "vehicle used solely for competition," a vehicle could originally be *designed* in such a manner as to make it a motor vehicle, but when subsequently *used* solely for competition, it is no longer a motor vehicle. While the various attributes of a car may inform whether the vehicle is used "solely" for competition, for example by making it unlikely that it is used on streets or highways, 40 C.F.R § 85.1703,[3] the excluded category of racing vehicles indeed turns on competition being the sole "use" of a vehicle.

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[1] CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

[2] CAA § 216 (2), (10), (11), 42 U.S.C. § 7550(2), (10), (11) (identifying three categories of vehicles: motor vehicle, nonroad vehicle, and vehicle used solely for competition).

[3] EPA's regulation states that the definition of motor vehicle does not include certain types of vehicles, including where: "(2) The vehicle lacks features customarily associated with safe and practical street or highway use, such features including, but not being limited to, a reverse gear (except in the case of motorcycles), a differential, or safety features required by state and/or federal law; or (3) The vehicle

Even assuming that attributes and design controlled *both* the initial categorization of a car as a "motor vehicle" and whether it fell within the exclusion for vehicles used solely for competition, EPA's fundamental error is in assuming that the "design" of any given vehicle is fixed at the point an original equipment manufacturer ("OEM") applies for and obtains a certificate of conformity ("COC") and can never thereafter change. That position has no support in the statute or regulations and it seems self-evident that a vehicle can be redesigned and made into a vehicle used solely for competition. Indeed, the steps required to convert a street-legal vehicle into a racing vehicle involve extensive modification of many aspects of the car's structure and design and render it wholly unsuited for street use as the evidence and testimony will reflect.[4]

EPA's reliance on its requirement of a COC for any "new motor vehicle" introduced into commerce largely misses the point and begs the question in this case. Certainly, a vehicle introduced, designed, and intended to be used on the streets and highways is a motor vehicle at the point of introduction and sale for such purpose, but those provisions say nothing about whether such vehicles forever remain "motor vehicles" if they are later redesigned and dedicated to a different function. The COC is nothing more than a condition precedent for the introduction and sale of a "new motor vehicle" and a measuring standard as to whether a "motor vehicle" complies with the relevant regulatory requirements for motor vehicles. But it does not define a motor vehicle, does not provide that a motor vehicle can never be converted into something else not covered at all by the CAA and regulatory requirements, and thus does not answer the question whether a car thoroughly redesigned to be "used solely for competition" continues to be a "motor vehicle" following such redesign.[5]

Further, EPA's own importation regulations and guidance recognize "racing vehicles" as a subset of motor vehicles based on physical attributes and use. For example, 40 C.F.R. § 85.1511(e) defines racing vehicle as a vehicle meeting one or more of the exclusion criteria described in 40 C.F.R. § 85.1703. The exclusion criteria in § 85.1703 relate to physical attributes of the vehicle, but nowhere does the regulatory criteria indicate that the vehicle must have been designed or originally manufactured with such physical attributes. Accordingly, a motor vehicle could be modified to exhibit such physical characteristics and it would no longer be a motor

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exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely, such features including, but not being limited to, tracked road contact means, an inordinate size, or features ordinarily associated with military combat or tactical vehicles such as armor and/or weaponry." 40 C.F.R. § 85.1703(a)(2)-(3).

[4] The notion that one cannot remove an element of pollution control design from a motor vehicle also begs the question about when and how a redesign is accomplished. If the seats and all safety devices are ripped out, the body redesigned, etc., that vehicle has ceased to be a motor vehicle at that point and removing the exhaust system would not be removing a part on a motor vehicle any more than removing the exhaust system from a car in a junk-yard likewise would be tampering.

[5] Of course, a car so redesigned would not be legal to drive on the streets or highways if key safety and emissions features of the vehicle had been removed in such redesign. Which is one reason such vehicles are taken to and from races in trailers. (Other reasons being that casual use of such vehicles would degrade expensive parts and performance and waste expensive consumables not to mention the drivability impacts of such redesign (e.g., sound, odor).)

vehicle. This is further supported in EPA's Overview of EPA *Import Requirements for Vehicles and Engines* (March 2011) ("*EPA Import Overview*"), *see* RX 73, and *Procedures for Importing Vehicles and Engines into the United States* (July 2010) ("*EPA Import Procedures*") *see* RX 72. In *EPA Import Overview,* at 13 (emphasis added), EPA explains the following:

> **Section 3: Exclusions**
>
> Some vehicles are excluded from the motor vehicle emission requirements of the Clean Air Act. Reasons for exclusion include vehicle age (i.e., manufactured prior to the regulations), fuel type, maximum speed, exclusive use for competition or racing, or lack of features associated with practical street or highway use. Please note that some vehicles excluded from the motor vehicle requirements may be subject to non-road vehicle and emission standards which have become effective in recent years.

EPA's requirements for approval for importation further support a conclusion that EPA contemplates motor vehicles, or street vehicles, converted to racing vehicles. EPA approval must be granted for importation of a racing vehicle and EPA requires specific documentation including the following: "4. A list of *street* features that are lacking (features *that have been removed* or have never been installed that would permit safe driving on streets or highways)." RX 73, *EPA Import Overview,* at 14 (emphasis added).

EPA further considers motor vehicles that are converted to racing vehicles in the *EPA Import Procedures* where "vehicle" is broadly defined as: "a convenient abbreviation for the collection of all categories of motor vehicles and motor vehicle engines." Additional definitions of "excluded vehicle" ("Excluded vehicles or engines have been excluded from the emission requirements of the Clean Air Act. Reasons for exclusion include . . . competition or racing features, or lack of features associated with practical street or highway use.") and "racing vehicle" ("A vehicle that has in general been extensively modified for racing, and is incapable of safe and practical street or highway use because it lacks features associated with this *type of use*.") refer back to vehicle being a motor vehicle. *See* RX 72, *EPA Import Procedures,* at B-2, B-4. Accordingly, EPA characterizes a racing vehicle by both its physical attributes and its use and clearly contemplates that a motor vehicle may have particular features removed in accordance with its racing needs/requirements and such attributes make the vehicle a racing vehicle/vehicle used solely for competition.

EPA has raised the argument that the illegality of converting a covered "motor vehicle" into a non-covered "vehicle used solely for competition" can be inferred from the separate statutory authority discussing conversion of a motor vehicle from conventional fuel to clean fuel. That limited express authorization, and exception to anti-tampering provisions, so the argument goes, implies that all other modifications of a motor vehicle indeed constitute tampering and are not comparably authorized. The problem with this argument is that in the clean-fuel conversion scenarios, the relevant car expressly and intentionally remains a motor vehicle both before and after conversion, will continue to be used on the streets and highways and to require a certificate of conformity, but will not, in fact comply with the certificate originally issued for that vehicle. This was necessary to provide a mechanism either for a new certificate to be issued or to make an

exception to the tampering rules so that the motor vehicle would remain legal for use on the streets and highways. With conversion to a racing vehicle, by contrast, the end product is not a "motor vehicle" at all. Purpose-built competition-only vehicles are not subject to CAA emissions requirements, do not require a COC, and are not subject to any defeat device or tampering requirements. That a vehicle that started life as a covered motor vehicle but was converted to a competition-only vehicle having the exact same racing characteristics and parts as a purpose-built vehicle does not differentiate it in any legally relevant way from a purpose-built racing vehicle, and thus it does not need a modified COC given that it is exempt from the various emissions requirements of the CAA.[6]

Finally, the legislative history of the 1970 amendments, *see* RX 71, confirms that Congress intended for the definition of motor vehicles to exclude racing vehicles.[7] Since that initial assurance in Congress that the definition of motor vehicle was not intended to reach this far, EPA has repeatedly taken the position that it has no interest in racing vehicles, including those converted from cars that started life as street vehicles. *See infra* at Defense No. 7 (discussing EPA past positions). Indeed, when EPA tried to change that view in proposed regulations in 2015, the push-back was so swift and vehement that it abandoned that proposed regulation and reaffirmed its lack of interest in converted racing vehicles. To imagine that such position was a mere matter of regulatory grace in not enforcing otherwise plain prohibitions under the CAA strains credulity.

2. *EPA's interpretation of the statutory provisions on which it bases its allegations is incorrect as a matter of law and is not entitled to any deference*.

For the reasons discussed above, the parts at issue in this case were not intended for use in "motor vehicles," properly defined, and thus EPA has not alleged a violation of the CAA. But even assuming the statutory terms were uncertain or ambiguous, EPA's broad interpretation would not control. Because the anti-tampering provisions can be used in criminal, as well as enforcement, proceedings, they must be interpreted without *Chevron* deference and under the rule of lenity to resolve ambiguity in the law.

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[6] Many purpose-built racing vehicles are built from the same frames and use many of the same parts as vehicles destined for the motor vehicle consumer market. That the frame and engine for a Ford Mustang are used from the outset to make a racing vehicle, versus are used in a race car modified from a former motor vehicle, changes nothing about the "design and attributes" of the end product, which is not a motor vehicle in either case.

[7] U.S. Senate, *A Legislative History of the Clean Air Act Amendments of 1970 Together with a Section-by-section Index Prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress for the Committee on Public Works, U.S. Senate, Vol. 1* at p. 117 (Jan. 1974) ("[Mr. Nichols:] I would ask the distinguished chairman if I am correct in stating that the terms "vehicle" and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, *modified for or utilized in organized motorized racing events* which, of course, are held very infrequently but which utilized *all types of vehicles and vehicle engines*? Mr. Staggers. … I would say to the gentleman they would not come under the provisions of this act, because *the act deals only with automobiles used on our roads in everyday use*. The act would not cover the types of racing vehicles to which the gentleman referred, and present law does not cover them either.") (emphases added).

The rule of lenity is one of "the most venerable and venerated of interpretive principles," *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring), and is deeply "rooted in a constitutional principle," Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000). As Chief Justice Marshall observed, the rule of lenity "is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

Narrow construction of ambiguous criminal laws is especially important in the administrative context. Because agencies have a natural tendency to broadly interpret the statutes they administer, deference in the criminal context "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

One central purpose of lenity is to *avoid* improper delegation of lawmaking authority in the criminal realm. Sunstein, *supra*, at 332 ("One function of the lenity principle is to ensure against delegations."). The rule of lenity "is *not* a rule of administration," but "a rule of statutory construction whose purpose is to help *give* authoritative meaning to statutory language." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992). Lenity is an interpretive rule that resolves ambiguity in favor of potential defendants and is part of the traditional toolkit for determining the meaning of statutory language. "Rules of interpretation bind all interpreters, administrative agencies included. That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Lenity thus comes *before* applying any questionable inference that Congress intentionally delegated legislative authority to executive agencies through ambiguous drafting.

"If you believe that *Chevron* has two steps, you would say that the relevant interpretive rule—the rule of lenity—operates during step one. Once the rule resolves an uncertainty at this step, 'there [remains], for *Chevron* purposes, no ambiguity * * * for an agency to resolve.'" *Id.* at 731 (Sutton, J., concurring) (alteration in original) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 320 n. 45 (2001)). That *Chevron* deference depends on such inferred delegation is all the more reason to apply other rules of construction first. "Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I." *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

In this case, EPA has asserted a broad reading of the statutory phrase "motor vehicle" that is contrary to the language and structure of the statute and not reflected in any EPA regulation. Thus, even if the statute were ambiguous it should be read narrowly. Even the various cases giving some deference to agency interpretations of dual-use statutes reflected in notice-and-comment rulemaking under express delegations of such power would not apply here given the absence (indeed, the abandonment) of such rulemaking to support EPA's broad interpretation, but such cases are in error in any event.

3. *EPA has not demonstrated the subject sales violate Section 203(a)(3)(B).*

"[I]n an enforcement proceeding under the Clean Air Act, the burden of establishing a violation of the applicable regulations is on the government." *United States v. SCM Corp.*, 667 F. Supp. 1110, 1124 (D. Md. 1987). Thus, under the applicable statutory language here, EPA must prove that Borla intended the challenged parts to be used on a motor vehicle (not a racing vehicle) or that they were so used. EPA has made no such allegation or proof. EPA likewise has not demonstrated that Borla knew or should have known that such parts would be used for purposes contrary to the express limits on their marketing and intended use. This failing is particularly acute under a properly narrow definition of "motor vehicle" that excludes cars converted to racing-only use, as EPA has not even alleged that the parts were intended for or used on street-vehicles or were ever used on the streets or highways. But even under EPA's more expansive definition, it still concedes that purpose-built racing vehicles based on stock platforms but never produced or imported under a COC, do not constitute motor vehicles and the parts at issue would not violate the CAA if installed on such vehicles. Given that the challenged parts can be used on such purpose-built vehicles based on the same models of car, it would be EPA's burden to prove that any challenged parts were used on motor vehicles rather than purpose-built racers. EPA is not entitled to any type of presumption on these issues, as that approach would inappropriately shift the burden to defendants to prove they did not commit a violation.

4. *EPA's actions in assessing a penalty are inconsistent with Executive Order 13924*.

Under Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery*, May 19, 2020, EPA issued implementing guidance (Susan Bodine, *Memorandum re Implementation of Executive Order 13924*, November 25, 2020), providing that enforcement proceedings must comply with various practices designed to ensure due process, fairness, and lenity. In this case, EPA's application of its broad definition of "motor vehicle" to penalize Borla, its potential request for excessive damages, and its seeming failure to take into account Borla's good faith efforts both as to compliance with available rules (including those from California) and its prompt cessation of sales of parts which EPA challenged, all contradict the principles and particulars of such guidance.[8] Wholly apart from constitutional or statutory commands, therefore, EPA's administrative rules and guidance require the same sort of lenity regarding construction, enforcement, and penalties.

5. *Statute of Limitations*.

The statute of limitations for enforcement actions in this case is 5 years as extended by the tolling agreement executed by the parties in this case. To the extent that any of the alleged violations are determined to fall outside of that period, including due to defects in the filing of the initial Complaint, EPA may not seek penalties for alleged violations falling outside of the limitations period.

[8] Though Executive Order 13294 was revoked by the new Administration on February 24, 2021, EPA's guidance is still in place.

6. *Violation of Separation of Powers*.

The Constitution grants certain enumerated legislative powers to Congress. U.S. Cost. Art. I, § 1. Congress is forbidden from delegating "legislative power" to another branch of government. *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001). Thus, at a minimum, Congress must provide the Executive Branch and its agents an "intelligible principle" to guide the use of any delegated authority. *Gundy*, 139 S. Ct. at 2123 (plurality opinion of Kagan, J.). Thus, a "nondelegation inquiry always begins (and often always ends) with statutory interpretation." *Id*.

To the extent EPA claims it was delegated the power to expansively interpret the words "motor vehicle" or to adopt a penalty policy setting punitive penalties for violations with little or no demonstrated harm, such delegation would not have contained an intelligible principle that makes the fundamentally legislative policy choices inherent in those determinations. Furthermore, even if there were a broad, but sufficiently intelligible principle to guide EPA's exercise of any delegated power as relevant here, the entire nondelegation framework deviates from the Constitution's structure and should be rejected. Borla thus challenges the "intelligible principle" jurisprudence, if and as necessary to the resolution of this case.

7. *EPA's newly formed interpretation of the CAA lacks adequate notice*.

It is a basic component of due process that liability may not be imposed by EPA where a law or regulation "is not sufficiently clear to warn a party about what is expected of it." *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995). Even where an agency's interpretation of such law or regulation is reasonable, if there was insufficient fair notice to the party of the agency's interpretation, liability should not attach to that party's conduct. The relevant standard for such fair notice is "whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Id.* at 1329 (citation omitted). Relevant to the D.C. Circuit's consideration were the fact that the regulations did not clearly bar the penalized conduct and, in fact, allowed it in other relevant regulations, and the fact that EPA was proposing new regulations that would clarify the regulatory provision at issue. *Id*. at 1331-32. Other courts have considered a variety of factors as reflecting the lack of fair notice. *See Lake Building Products, Inc. v. Secretary of Labor*, 958 F.3d 501, 505 (6th Cir. 2020) ("adequate notice" of OSHA regulatory interpretation must consider "whether the regulation is 'inartful[ly]' drafted; 'common understanding' of the regulation and 'commercial practice'; and the 'pattern of administrative enforcement.'") (citation omitted); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224-25 (4th Cir. 1997) (in determining whether there was fair notice, "we must examine the relevant facts of each case"; "we look at the factors as they appear to the party entitled to notice, not to the agency"; a regulation that allows for monetary penalties "must give . . . fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.'") (citations omitted).[9] In the *Hoechst Celanese* case, the court concluded that the penalized party did not have fair notice of

[9] *Id.* (citations omitted).

EPA's interpretation during the period before EPA contacted the facility owner directly and penalties could not be assessed for the time period prior to such direct communication.

EPA's decades-long practice of allowing conduct like that alleged in the Amended Complaint affirmatively misled Borla and the public making this enforcement action for pre-fair-notice conduct a violation of due process under the Fifth Amendment. The conversion of motor vehicles into racing vehicles has been a growing pastime for decades and is a practice that was contemplated under the 1970 amendments to the CAA. *See* RX 74. EPA has long been aware of this hobby and its vast following but, until recently, has never taken action to stop it or even to publicize an opinion as to its legality. Moreover, the evidence will show that the industry has long understood the existence of a racing exclusion, including for motor vehicles converted to racing vehicles, and has long applied disclaimers to warn end users of restrictions on aftermarket part uses.

Indeed, x-pipes and long tube headers have been sold openly by hundreds of companies for decades with no interference from EPA. It was not until July 2015 that EPA made any mention of its concern over the conversion of motor vehicles into racing vehicles. Before then, the public and regulated industry, and Borla, had repeatedly been told that the CAA did not cover, and that EPA had no enforcement interest in, the racing community, converted race-cars, or manufacturers of parts for such cars. *See* RX 71 at 117 (discussion clarifying that vehicles "modified for or utilized in organized motorized racing events" are not motor vehicles because "the act deals only with automobiles used on our roads in everyday use."); 40 C.F.R. § 85.1511 (adopted Sept. 15, 2011) ("(e) Racing vehicles may be imported by any person provided the vehicles meet one or more of the exclusion criteria specified in § 85.1703. Racing vehicles may not be registered or licensed for use on or operated on public roads and highways in the United States."); RX 73, *EPA Import Overview*, Section 3.3 at 14 (discussing documentation to show exemption for racing-only vehicles, including "4. A list of *street* features that are lacking (*features that have been removed* or have never been installed that would permit safe driving on streets or highways) (emphasis added); RX 72, *EPA Import Procedures*, at B-2, B-4 (reasons for "vehicles or engines" being "excluded from the emission requirements of the Clean Air Act" include "competition or racing features, or lack of features associated with practical street or highway use"; defining "racing vehicle" as one "that has in general been extensively *modified* for racing, and is incapable of safe and practical street or highway use because it lacks features associated with this *type of use*") (emphasis added); RX 74, EPA Presentation to SEMA, *Diesel Aftermarket Parts Discussion, SEMA 2010*, *see* RX 74, (discussing "EPA Racing Vehicle Determinations" and defining "racing vehicle" as "A vehicle, which, in general, has been extensively modified for racing, and is incapable of safe and practical street or highway use because it lacks features associated with safe and practical street or highway use.").

It was not until 2015 that EPA sought to alter its regulations to preclude the conversion of certified motor-vehicles to non-covered competition-only vehicles. *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 80 Fed. Reg., 40565 (July 13, 2015) (proposing new regulation stating that "Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines"). Following vehement backlash to this altered position, however, EPA backpedaled and

reaffirmed its earlier view that vehicles not "used" on public roads, but used solely for competition, were not the object of EPA's concern.[10]

It is only relatively recently, and after the parts at issue in this case were sold, that EPA has taken the position that allowing the conversion of motor vehicles to vehicles used solely for competition was merely a matter of enforcement grace, rather than statutory interpretation. Yet even then, EPA continued to state that it had no interest in enforcing against the racing community or those who supply parts to them. Indeed, it was affirmatively supportive of the racing industry and those who provide parts for racing vehicles, whether purpose-built or converted. *See* RX 79 ("EPA has the twin goals of letting racers race while also keeping tampered, high-polluting vehicles off our streets and highways. Dedicated competition-use only vehicles should be able to operate as they historically have. … As a matter of enforcement discretion, the EPA is not interested in bringing enforcement actions against persons who manufacture, sell, or install parts

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[10] EPA *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles -Phase 2 Response to Comments for Joint Rulemaking*, at 1915 (August 2016) ("The proposal included a clarification related to vehicles used for competition to ensure that the CAA requirements are followed for vehicles *used on public roads*. *This clarification is not being finalized*. EPA supports motorsports and its contributions to the American economy and communities all across the country. *EPA's focus is not (nor has it ever been) on vehicles built or used exclusively for racing*, but on companies that violate the rules by making and selling products that disable pollution controls on motor vehicles used on public roads. …. The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, we have decided to eliminate the proposed language from the final rule. [¶] We will continue to engage with the racing industry and others in its support for racing, while maintaining our focus where it has always been: reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.") (emphasis added)[10]; RX 74, Hearing Transcript, House of Representatives, Subcommittee on Oversight, Committee on Science, Space, and Technology (March 15, 2016) (hearing on EPA's aborted attempt to change the rules, entitled "Racing to Regulate: EPA's Latest Overreach on Amateur Drivers"; Chairman Loudermilk stating that "EPA is attempting to enforce the CAA in a way that Congress never intended, and is doing so in a covert manner."); RX 75, Letter from Fred Upton, Ed Whitfield, and Richard Hudson, House of Representatives to Gina McCarthy, Administrator (April 12, 2016) ("We remain doubtful that this proposed policy change [regarding racing conversions] complies with Congressional intent, which we believe is to exempt racing vehicles from the CAA's provisions."); RX 76, Letter from Janet G. McCabe, Acting Assistant Administrator to Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (May 17, 2016) (EPA response to Upton letter, repeating its statement in connection with its withdrawal of the proposed regulation that "EPA supports motorsports and its contributions to the American economy and communities all across the country. EPA's focus is not on vehicles built or used exclusively for racing, but on … products that disable pollution controls on motor vehicles used on public roads."); RX 77, Letter from Cynthia Giles, Assistant Administrator for Enforcement and Compliance Assurance to Nicholas W. Craw, President & CEO of ACCUS (May 13, 2016) ("EPA and the responsible racing community agree [that] vehicles that are used solely for competition in sanctioned events should be allowed to do so, as they historically have. … Our focus on defeat devices in the enforcement context has recently led to concerns in the racing community that perhaps the EPA seeks to stop the decades-old practice of converting certified production vehicles to competition vehicles that are to be used solely for sanctioned events. To be clear: we are not. ... [J]ust like the purpose-built, dedicated competition vehicles described above, the EPA likewise has no interest in vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to sanctioned competition-use only vehicles.") (emphasis added).

that transform a street-legal vehicle into a race car that is operated only on a race track.. . . Our enforcement focus on aftermarket defeat devices has led some to think that the EPA seeks to stop the tradition of converting EPA-certified motor vehicles to vehicles that are used solely for competition motorsports. That is not the case. The EPA has never taken, and has no intention to take, enforcement action for removing or defeating the emission controls of an EPA-certified motor vehicle for the purpose of permanently converting it to a vehicle used solely for competition motorsports.") (emphases added).

Given such past views and active continued public support for converted competition-only vehicles, Borla did not have fair notice that sales of its parts intended for such use was illegal or could subject it to an enforcement action and massive penalties. Under *General Electric*, the standard for finding fair notice exists is "whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." 53 F.3d at 1329 (citation omitted). Based on the above sources, there was no "ascertainable certainty," at least until the 2015 proposed rulemaking, and even after that there was no expectation that parties would cease to sell parts for converted dedicated racing vehicles. In *Lake Building*, 958 F.3d at 506, the court recognized "common understanding," "commercial practice," and "pattern of administrative enforcement" as factors for determining whether fair notice existed. The public and industry response to the 2015 rulemaking showed that they understood that converting street cars to racing vehicles has long been accepted and allowed by EPA. This, coupled with the industry's longstanding practice of adding disclaimers to racing-specific parts, shows a "common understanding" and "commercial practice" of selling parts into the converted racing vehicle space and informing end users that such parts were only legal for racing purposes. The common understanding that motor vehicles can be converted to racing vehicles, the commercial practice of adding disclaimers to parts intended for such vehicles, and EPA's lack of enforcement did not provide adequate notice to Borla that its conduct was in violation of EPA's legal interpretation.

Because EPA failed to provide adequate notice to Respondent that EPA considered the sale of aftermarket race parts to be a violation of the CAA, this enforcement action violates due process. Even if the Presiding Officer finds that some degree of fair notice existed at some point during the timeframe involved in this matter, penalties should not apply per *Hoechst Celanese* for any pre-notice conduct, and penalties should be dropped or reduced even for any time-period where there might theoretically have been minimal notice given that longstanding practices cannot be expected to change on a dime the moment any sort of question is raised and the industry and the regulators are trying to sort things out.

8. ***Violation of Due Process and Sixth Amendment Rights***

Although EPA has not yet set forth the penalties it seeks, and has recently modified its penalty policy, to the extent EPA seeks penalties that are punitive in nature or designed to deter others rather than compensate for any harms or costs caused by Borla, this case should properly be viewed as a criminal enforcement matter and lacks the procedural safeguards for such matters. Although Borla recognizes that current jurisprudence might not view this as a criminal matter, it intends to challenge such jurisprudence and thus sets forth the basic argument in order to preserve

it and because the general principles at least inform broader notions of due process in how we should approach punitive penalties even in a nominally "civil" context.

The Sixth Amendment guarantees to the accused in all criminal prosecutions, inter alia, "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" and the right to have "compulsory process for obtaining witnesses in his favor." The Fifth Amendment Due Process Clause requires the government to provide the accused all material evidence that would either exculpate him or reduce the level of his penalty. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

Even fines that are nominally civil can be punitive in nature. *Hudson v. United States*, 522 U.S. 93, 101 (1997). To determine if a nominally civil fine is sufficiently punitive, the Supreme Court evaluates the "statute on its face" to determine whether "it provided for what amounted to a criminal sanction." *Id.* A wide range of considerations are all "relevant to the inquiry" whether a nominally civil statute imposes "criminal sanctions. *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–69 (1963) (factors include: "Whether the sanction involves an affirmative disability or restraint,[] whether it has historically been regarded as a punishment,[] whether it comes into play only on a finding of scienter,[] whether its operation will promote the traditional aims of punishment—retribution and deterrence,[] whether the behavior to which it applies is already a crime,[] whether an alternative purpose to which it may rationally be connected is assignable for it,[] and whether it appears excessive in relation to the alternative purpose assigned.[]") (footnotes omitted).

EPA's action against Borla is punitive in several key respects. First, it involves an affirmative restraint—moving forward, Borla will no longer be able to sell the affected parts under fear of punishment. Second, CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2) instructs the EPA to consider the "gravity of the violation" in determining the amount of the fine. In so doing, it seeks to promote one of the traditional aims of punishment—retribution—by requiring the EPA to increase the size of the fine's amount for more egregious violators. Third, there is no nonpunitive purpose for imposing a fine as enormous and excessive as the fine the EPA previously had sought before this enforcement action was filed. For these reasons, if EPA continues to seek such a large penalty, the action against Borla would be punitive in nature, and the Sixth Amendment and Due Process Clause of the Fifth Amendment should apply here. The absence of a properly instructed jury, compulsory process, and the right to all exculpatory evidence, among other things, would then violate the Sixth Amendment and the Due Process Clause.

9. ***Violation of the* Ex Post Facto *Clause***

To the extent this case is viewed as a criminal enforcement matter depending on the penalty sought, it would also violate the Ex Post Facto Clause. That clause forbids the government for punishing "as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time" of the act's commission. *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). To the extent that EPA's interpretation of "motor vehicle" to

encompass converted racing-only vehicles constituted a permissible change in the law, applying that change retroactively to Borla's past conduct violates the Ex Post Facto Clause.

10. *The Rule of Lenity*

See discussion of Defense No. 2 above.

11. Violation of Due Process and of the Seventh Amendment Right to a Jury Trial

Assuming this case is viewed as a civil matter, Borla maintains that it still violates its right to a jury trial. The Seventh Amendment preserves the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The Supreme Court has held, however, that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" *Oil States Energy Servs, LLC v. Greene's Energy Grp, LLC*, 138 S. Ct. 1365 (2018) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989)). It has thus held that the "Seventh Amendment is no bar to the creation of new [public] rights or to their enforcement outside the regular courts of law." *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977). Under current doctrine, enforcement actions such as this one might be viewed as involving public rights and thus not subject to the Seventh Amendment. Several justices on the current Court, however, have expressed some willingness to reconsider or potentially narrow the public-rights doctrine. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) ("To the extent that administrative agencies could, consistent with the Constitution, function as courts, they *might* only be able to do so with respect to claims involving public or quasi-private rights.") (emphasis added); *see also Stern v. Marshall*, 564 U.S. 462, 504 (2011) (Scalia, J., concurring) ("[I]n my view an Article III judge is required in all federal adjudications" except for "true 'public rights' cases.").

Borla notes that the doctrine makes little sense given that one of the very purposes of a jury is to provide a check on the government and a check on oppressive laws. Its function would be particularly important, therefore, where the government seeks crushing penalties and imposes costs of defending administrative proceedings in a manner that while quite punitive, might fall short of being a criminal proceeding. The consequences to and burdens on a defendant are no less than in a matter seeking to impose a criminal fine. And they are certainly more significant than in the ordinary civil suit for far lesser amounts.

12. *Violation of the Excessive Fines Clause*

While EPA has not yet set forth the penalties it is seeking under its new penalty policy, to the extent EPA eventually seeks a fine as large as its previous suggestions, that fine would violate the Constitution. The Eighth Amendment forbids the government from imposing excessive fines. That clause imposes a limit on "the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (cleaned up). At the core of the constitutional inquiry is the "principle of proportionality." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Thus, when a fine is "grossly disproportional to the gravity of the defendant's offense," it violates the constitution. *Id.* at 337. There can be no

serious question that the fine that EPA seeks to impose on Borla here is a "fine" for purposes of the Excessive Fines Clause. EPA's claimed authority to levy the fine is based on its determination that Borla acted contrary to the CAA. Because EPA had a decades-long practice of allowing the very conduct for which it now seeks to fine Borla, a potential fine of several million dollars would be grossly disproportionate to the alleged offense. Indeed, Borla's lack of notice that it was doing anything wrong, coupled with the EPA's seeming endorsement of the practice by amateur racers and through inaction in other cases suggests a disproportionate approach here. And upon learning of the EPA's change in policy, Borla immediately stopped the conduct it is now accused of. To impose millions of dollars in fines in these circumstances would be grossly disproportionate to the alleged offense in violation of the Excessive Fines Clause.

13. <u>Arbitrary and Capricious Penalties</u>

Borla discusses below in Section 3.D. how the 2021 penalty policy is not based on scientific data regarding relative emission impacts and does not produce fair or equitable penalty assessments. Borla will supplement this discussion as appropriate upon receiving EPA's proposed penalty amount and detailed explanation.

14. <u>Estoppel</u>

For the many reasons described in connection with Borla's fair-notice defense, EPA also is estopped from enforcing its broader definition of "motor vehicle" for the time period in question here. During the time the parts here were sold, EPA and others had given Borla and racing enthusiasts in general every reason to believe that sales of parts for the conversion and maintenance of vehicles used solely for competition was not covered by the CAA and did not constitute tampering. And Borla reasonably relied on such assurances of legality, as did many others in the industry:

> In the 46 years since enactment of the 1970 CAA, EPA took no enforcement action with regard to EPA-certified vehicles modified solely for racing, and *it was widely accepted that these vehicles were exempted from the statute's anti-tampering provisions*. This proposed change would abruptly end this policy. …. With *EPA's tacit approval over nearly a half-century*, an entire industry has grown around the modification of EPA-certified cars, motorcycles, and other vehicles for racing purposes—from parts manufacturers and retailers to garages to race tracks—most of which are small businesses. Now, the legality of this industry has been called into question by the EPA.
>
> In addition, there are the thousands of racing enthusiasts who own these vehicles and who have had every reason to believe that what they were doing was legal.

RX 75, Letter from Fred Upton, Ed Whitfield, and Richard Hudson, House of Representatives to Gina McCarthy, Administrator (April 12, 2016) (emphasis added).

Such prior positions by EPA and others, and Borla's reasonable reliance thereon, is sufficient to estop EPA from enforcement actions against parts sold prior to the Notice of Violation

("NOV") in this case. *See Heckler v. Cmty. Health Servs. Of Crawford Cnty., Inc.*, 467 U.S. 51, 59–60 n.12 (1984) ("[A]n administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests."); *Lehman v. Burnley*, 866 F.2d 33, 38 (2d Cir. 1989) (DOT estopped from enforcing a new interpretation of the Recreational Boating Safety Act retroactively because of reliance on the former interpretation); *Hoeber v. D.C. Redevelopment Land Agency*, 483 F. Supp. 1356, 1365 (D.D.C. 1980), *aff'd*, 672 F.2d 894 (D.C. Cir. 1981), *and aff'd sub nom. L'Enfant Plaza Properties, Inc. v. D.C. Redevelopment Land Agency*, 672 F.2d 895 (D.C. Cir. 1981) (agency estopped from applying new interpretation of statute because of reliance interests of others); *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (estoppel may be asserted against the government, upon a showing that (1) the government engaged in "affirmative misconduct" causing a "serious injustice," and (2) "the public's interest will not suffer undue damage.").

15. *Compliance with Laws*

See discussion of Defense No. 1 above.

16. *Good Faith*

See Sections 3.C and 3.D below.

17. EPA cannot demonstrate a legal or equitable basis for imposing civil penalties.

See Sections 3.C and 3.D below.

18. *EPA cannot utilize the penalty policy because it is not listed in EPA's Guidance Document Portal.*

EPA cannot rely on its Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (2021) ("Penalty Policy") for purposes of calculating or justifying a civil penalty because the Penalty Policy is not listed on EPA's Guidance Document Portal. Under EPA's recently enacted rules regarding guidance documents, guidance not included on the portal cannot be relied upon by the Agency except to establish historical facts. *See* 85 Fed. Reg. 66230, 66233 (Oct. 19, 2020) (implementing new rules at 40 C.F.R. Part 2). The penalty policy has direct impacts on regulated entities in the way it is implemented by EPA and should be considered to be a guidance document. By failing to list the document on the portal, EPA is precluded from citing the document as a basis for its penalty assessment.

19. *EPA's adjudicatory structure and procedures violate the appointments clause and the separation of powers.*

The Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), held that administrative law judges were "Officers of the United States" subject to the Appointments Clause. That ruling called into question the validity of the appointment of EPA's ALJs. *See* Barry Hartman, Steve Morton, Christopher Jaros and Janessa Glenn, *Assessing Lucia's Impact Beyond The SEC*, LAW360, July 11, 2018 (available at

https://www.law360.com/articles/1061864/assessing-lucia-s-impact-beyond-the-sec). Borla has not been able to ascertain whether, in the wake of the *Lucia* ruling, EPA's ALJs have been properly reappointed in compliance with that decision, though such information is presumably possessed by EPA. To the extent their appointments have not been cured, the proceeding in this case would violate the Constitution. Furthermore, even if cured, existing limits on the ability of the Executive Branch to remove such ALJs except for cause would violate the separation of powers. And to the extent the for-cause removal provision is read narrowly, that raises due process concerns with the statutory deference accorded to ALJ findings on judicial review. It is only the supposed independence of ALJs that even begins to address the due process requirement of an impartial decisionmaker in such quasi-judicial proceedings, and a broad ability by the political branches to remove ALJs is wholly at odds with such adjudicatory independence. The structure of quasi-judicial administrative enforcement proceedings, therefore, poses a dilemma where it can comply with the Appointments Clause and separation of powers principles, or it can comply with basic due process requirements reflected in the Administrative Procedures Act and related agency-specific provisions, but not both.

In addition to those issues with the ALJ structure, the EAB also raises Appointments Clause concerns. The EAB exercises substantial and largely final authority for EPA and, accordingly, its members are principal, rather than "inferior," Officers of the United States who, unlike ALJs, must be nominated by the President and confirmed by the Senate. Michael Poon, *EPA appeals board is unconstitutional without reform*, THE HILL, Jan. 13, 2020 (available at https://thehill.com/opinion/energy-environment/477788-epa-appeals-board-is-unconstitutional-without-reform). The test for whether EAB members are principal or inferior Officers of the United States is set forth in *Edmond v. United States*, 520 U.S. 651 (1997), and looks to the degree of supervisions and ultimate review of EAB decisions by presidentially nominated and Senate-confirmed individuals. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1325 (Fed. Cir. 2019), *cert. granted sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 549, 551 (2020). Borla contends that EPA's administrative appeal structure violates the Constitution in that it faces the same dilemmas regarding removal and due process as with the ALJ structure and also the members of the EAB are not presidentially nominated and Senate confirmed.

3.C. Factual Information Relevant to Penalty Assessment

Respondent disputes that EPA can meet its burden to demonstrate Respondent's liability for the alleged violations or the basis for imposing a penalty. However, consistent with 40 C.F.R. § 22.19 and the Prehearing Order, Respondent is providing both general and specific information relevant to any consideration of a potential penalty assessment. This information will be further addressed at hearing and together with the arguments and information presented in Section 3.D. below supports only a minimal or reduced penalty.

Respondent is a pioneer and leader in the design and manufacture of stainless-steel performance exhaust. The company started more than four decades ago and is still operated by the same family founders. Borla designs and manufactures auto parts that are used in several ways: (1) by OEMs, both as original equipment added to the vehicle on the assembly line and as aftermarket parts offered as accessories that can be added to the vehicle at the dealership; (2) in used vehicles as aesthetic, acoustical, and performance upgrades; and (3) in racing/competition-

use-only vehicles. For the racing-related component of Borla's business, which represents only a very small portion of company operations, Borla designs and manufactures the subject auto parts for use in racing/competition-use-only vehicles. The intended end-user is a person who utilizes Borla's products on race cars competing in the various racing circuits that have long been a popular pastime of many throughout the country. Borla performance parts are also sold and shipped to international customers across dozens of countries in Asia, Europe, the Middle East and South America.

1. Background on Racing Industry.

The racing industry is vast and diverse, with most segments dominated by racing vehicles that started as motor vehicles but were subsequently converted to competition vehicles. Though an over-simplification of this vast community, racing can be loosely broken up into two categories: professional and amateur. Professional racing circuits include the International Motor Sports Association ("IMSA"), Formula 1, IndyCar Series, and the National Association for Stock Car Auto Racing ("NASCAR"). Professional racing vehicles are generally purpose-built racing vehicles and make up a small portion of the U.S.'s racing vehicle population. The vast majority of racing, described as amateur or sportsman racing, involves vehicles that are converted street cars, meaning they started their life as street cars and were modified to be racing vehicles.

There are numerous amateur racing bodies active at the national and local levels, many of which are focused on a specific make of vehicle. Nationwide racing circuits prominently include the National Auto Sport Association ("NASA") and the Sports Car Club of America ("SCCA"). NASA, SCCA, and similar organizations have specific racing classes that may focus particular makes and models (such as the Spec Miata class) and that include rules specifying the types of modifications that can be made to ensure equal competition within the classes. There is also a network of model-specific racing-oriented clubs, including Porsche Club of America, BMW Club of America, Corvette Club of America, and National Mustang Racing Association, which also sanction racing and have rules regarding acceptable modifications.

The modifications typically made to convert street cars into a race cars are extensive, with the interiors gutted to remove all unnecessary weight (e.g., seats, dashboard components and all mats and coverings) and safety devices (such as air bags) used for street driving removed and replaced with protective structures for the track (including roll cages and harnesses). *See, e.g.*, RX 70. These modifications to the design and physical attributes of these vehicles make converted racing cars unsuitable and impractical for further street use. Depending on the racing class, varying levels of modifications and performance upgrades to the engine, exhaust systems, and other components are allowed consistent with the applicable rules.

Respondent anticipates that Thomas Deery will provide expert testimony regarding the size and scope of the racing industry. Mr. Deery has more than 45 years of leadership in the motorsports community and broad experience in motorsports events, series and operational administration. *See* RX 24. Mr. Deery is expected to describe the multiple types of racing conducted across the United States. Mr. Deery also will address various metrics related to the size of the industry, including testimony that there are more than 1200 operating racing facilities in the United States, more than 250 sanctioning bodies for racing events, more than 74,000 races run

each year, and more than 395,000 racing vehicles. Mr. Deery also may address the relationship between the racing community and the associated market for aftermarket racing parts. Mr. Deery's testimony is further supported by information included in Respondent's exhibits at RX 25 through RX 30.

2. Borla's Racing Connections.

Over several decades, Borla has developed a deep connection with the professional and amateur racing circuits servicing these converted race cars, including through partnerships with racing schools and sponsorships of prominent sanctioned racing events throughout the country. As a highly regarded supplier in the racing industry, Borla designs and manufactures racing parts such as exhaust systems, headers, downpipes, and x-pipes that end-users can use to enhance their racing experience. Borla's racing interactions have included relationships with the Bondurant Racing School (Borla exhaust systems were installed on Bondurant's fleet of dozens of track-only vehicles), and Turnersports (Borla Exhaust has been a Turner race partner since 1998 and Borla products have been used on all Turner Motorsport racecars), among others.

Borla designs its racing exhaust systems to improve performance with specific vehicle models while minimizing the track's noise level to the surrounding neighborhood. Each of the vehicle models associated with the 57 parts at issue in this proceeding are models that are raced. Respondent has compiled public information providing examples of each of these car types being modified, used, and/or sold for racing purposes. *See* RX 37 – RX 65. Additional evidence of this racing use can be found in the racing rulebooks for vehicle-specific racing clubs and sanctioning bodies that define acceptable modifications for many of the relevant models within different racing classes. *See* RX 66 – RX 69. Certain of these rulebooks contain specific references to the authorized use of Borla headers and exhaust parts, even where other changes may not be allowed. For example, the SCCA Road Racing General Competition Rules (2019 ed.), at 191, specifically allow Borla long-tube headers and x-pipes in the Spec Mustang class of racing, even while barring many other modifications. *See* RX 66.

3. Borla's Good Faith Actions.

As noted above, Borla designs its racing-directed parts for use with a particular makes and models of vehicles that have been or will be converted to racing, or that have been purpose-built from the foundations of those base makes and models, such as the Chevrolet Corvette, Ford Mustang, or Mazda Miata. Borla understood in good faith prior to this enforcement action that use of the parts at issue in vehicles that had been initially built as or converted to race cars did not violate the CAA. Therefore, Borla took affirmative steps to comply with available guidance regarding how to protect against use of the parts in non-racing applications. In the absence of any guidance from EPA on how to ensure racing parts are only used on racing vehicles, Borla looked elsewhere for guidance, to the most stringent regulatory market in the country—California. Borla voluntarily began modeling its sales and marketing materials on guidance provided in the K&N settlement with the California Air Resources Board ("CARB"), *see* RX 31, in which CARB instructed K&N to include specific language on all parts that were exempt from CARB's emissions requirements due to California's racing exemption. That language was as follows: "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR

LICENSED FOR USE, UPON A HIGHWAY." Borla included this language on its website, technical documentation for each part, in its digital catalogs, and on the product itself by way of a tag securely affixed to the part that the end-user will clearly see because it must be manually removed (removal requires the use of a tool and cannot be accomplished by hand) in order for the part to be used in the vehicle. *See* RX 32 – RX 35. This language discourages potential and actual customers from using the relevant parts outside of competition-only vehicles. Notably, such disclaimer language has been used for decades to sell racing parts, has been publicly visible by EPA and other regulators, and there has been no suggestion until recently that such language was inadequate for compliance with state or federal standards. *See* RX 80.

These proactive steps were reasonable and conducted in good faith given EPA's lack of guidance on the topic. Borla sells it racing parts primarily through distributors, having no interaction with the end-user, and cannot know the specific configuration of a given end-user's vehicle or how an end-user utilizes its products. As described above, the racing community is vast and varied with respect to vehicle make and model. Without further guidance from EPA, it was reasonable for Borla to utilize California's settlement-mandated approach and use its disclaimers.

Borla also has acted in good faith since being contacted by EPA. Borla provided access to EPA investigators, supplied requested documentation, and participated in good-faith settlement discussions. Borla also stopped selling the parts at issue as soon as EPA identified the parts it considered non-compliant and even purchased back parts still in stock at distributors. These good faith actions should be important considerations in any penalty assessment.

3.D. Arguments in Support of Reduced or Eliminated Penalty.

For the reasons stated above, Respondent has not committed any violations of the CAA and EPA has not and cannot satisfy its burden to demonstrate liability or the applicability of a civil penalty. However, in the event penalty issues are considered by the Presiding Officer, and consistent with the Prehearing Order, Borla is presenting multiple arguments below that any penalty assessed should be mitigated based on the specific facts and circumstances of this matter.

Respondent has been placed in a very challenging situation with regard to identifying its arguments in support of a reduced penalty in this submission. Because EPA chose to defer providing a proposed penalty amount or accompanying explanation until its rebuttal submission, Respondent must attempt to identify bases for reducing a penalty which it has not yet seen. This lack of information has been compounded here by EPA's issuance of a new mobile source penalty policy on January 18, 2021, that differs substantially with respect to certain factors relevant to the violation alleged here. *Clean Air Act Title II Vehicle & Engine Civil Penalty Policy* (Jan.18, 2021) ("2021 Penalty Policy"). This new policy was issued after all prior settlement communications in the case and after EPA's prehearing exchange submission, and just shortly before the due date for Respondent's initial submission. Thus, EPA's rebuttal submission will be the first time that EPA has applied the 2021 Penalty Policy in this case, and perhaps in any case. For these reasons, Borla anticipates the likely need to supplement these arguments in support of a reduced penalty and that additional documentation and/or witnesses may be necessary to respond to EPA's proposed penalty when ultimately provided.

1. Applicable Standard for Determining a Penalty

The Presiding Officer's evaluation of a potential penalty is governed by the penalty factors set forth in the Clean Air Act. Pursuant to 40 C.F.R. § 22.27(b), "[i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." The applicable CAA penalty provision is CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2), which states that "the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require."

EPA bears the burden of presentation and persuasion that the relief it seeks is appropriate. 40 C.F.R. § 22.24(a). Though 40 C.F.R. § 22.27(b) provides that the Presiding Officer shall "consider any civil penalty guidelines issued under the Act," the Presiding Officer is not bound by EPA's penalty policy. *See Freedom Performance, LLC*, EPA Docket No. CAA-HQ-2019-8362, 2020 WL 978714, at *12 (ALJ, Feb. 24, 2020) (Initial Decision and Penalty Order) ("While the Rules require this Tribunal to consider relevant penalty policies, such policies are not binding and I have wide discretion to adopt, reject, or deviate from the rationale of an applicable penalty policy where appropriate.") (citing 40 C.F.R. § 22.27(b); *DIC Americas, Inc.*, 6 E.A.D. 184, 1995 WL 646512, at *4 (EAB 1995)). Therefore, EPA must do more than merely rely on its penalty policy to justify its proposed penalty amount.

2. *Evaluation of the Statutory Penalty Factors Supports Substantial Mitigation of Any Penalty Amount.*

The CAA statutory factors, as applied to Respondent's specific facts, support substantial mitigation of any penalty proposed for the alleged violations.

a. Number of Parts at Issue

The number of alleged violations is a critical component of assessing both economic benefit and gravity for purposes of the statutory penalty factors (and under the 2021 Penalty Policy). Over the course of its investigation preceding the initiation of this action, EPA made multiple modifications to the list of the parts at issue and the relevant date ranges for its allegations. In its Notice of Violation, EPA identified 73 part numbers and alleged 6,337 violations over a period that included 2014 through August 2018. In its November 14, 2019 letter to EPA regarding economic benefit issues, Borla requested a revision of that number down to 6,113. *See* CX 22, at 2. EPA has continued to modify the relevant parameters and the alleged number of violations even after the initial Complaint was filed, with EPA finally identifying the number of violations at issue as 5,338 parts, as described in EPA's prehearing exchange (submitted on January 8, 2021) and Second Amended Complaint (motion for leave to file submitted on February 23, 2021).

In reviewing EPA's modified part numbers and time frames and assessing the materials submitted as part of EPA's prehearing exchange, Respondent has determined what it believes to

be a more accurate universe of the number of parts that are within the information requested and violations alleged by EPA. The number of parts within the 57 part numbers identified by EPA in the Amended Complaint that were sold and shipped to United States customers during the period of January 15, 2015 through September 26, 2018 is 4,787 parts. A summary of the part numbers and individual part sales to U.S. customers is provided as part of Respondent's exhibits at RX 7.

As part of this review under EPA's revised parameters, Respondent conducted a further review of its sales records consistent with the final part numbers and date range parameters identified by EPA. This review used similar analytical tools as the process followed by Respondent in generating the revised number of parts provided to EPA by letter in November 2019, *see* CX 22, at 2, but required additional adjustments to conform to EPA's reduction in the part numbers at issue from 73 to 57 and narrowing of the date range at issue to January 1, 2015 through September 26, 2018. This additional review was performed by and at the direction of Allen Stoner, Respondent's CFO, using Respondent's corporate accounting software and Mr. Stoner is expected to testify as necessary to describe the steps that produced Respondent's number of 4,787 parts at issue. In support of this evaluation, Respondent is producing a set of invoices (at RX 2) that correlate directly to shipments of the 4,787 parts.

In addition to making the necessary corrections to account for EPA's modified parameters, Mr. Stoner and his staff took steps to confirm that the part sales numbers included in the final total were supported by documentation of an actual invoiced sale. Respondent's parts (both those included in EPA's list and other parts not at issue) are regularly subject to greater demand than production capacity can accommodate. As a result, many of the sales requests from customers are for parts that have not yet been manufactured and cannot be shipped at the time of the invoice. As reflected in both Exhibits RX 2 and CX 8, these production delays result in the creation of one or more "0" shipment or back order invoices in which partial orders may be shipped to a customer but certain of the requested parts will not be shipped until they can be produced at a later date. Orders for certain parts may be cancelled before shipment is made due to the delay in production. Mr. Stoner's final count appropriately excluded the "0" shipment invoices.

Respondent also re-examined its records to identify any further sales to non-U.S. customers during the relevant time period. Based on the applicable information request, which limited the sales information sought to parts shipped to addresses in the United States, *see* CX 5, and subsequent correspondence regarding parts sold to non-U.S. customers through freight forwarders, *see* RX 1 (response to RFI 2.d.) (Respondent identifying 20 parts—ultimately removed by EPA—that were purchased by a Chinese company but first shipped to a U.S. based freight company before final delivery to China), these international sales generally were not included in the sales records previously provided where the invoice reflected the international customer's location.

In addition to those parts for which the international sale was documented on the invoice, Respondent has identified an additional 102 parts sold to non-U.S. customers that were initially shipped to a U.S. address before being delivered to a customer outside of the United States. Because the invoice information is not definitive regarding these part sales, Respondent is providing the relevant invoices as well as associated information supporting the customer's

location as outside the United States. This information is presented in RX 3. Respondent has removed these sales as part of its determination of the final 4,787 sales number.[11]

b. Economic Benefit

EPA also bears the burden of persuasion with respect to demonstrating any alleged economic benefit. Economic benefit is generally considered to be the financial benefit, if any, gained from the alleged non-compliant activity as opposed to the status quo. In the context of alleged illegal defeat devices, ALJ opinions have recognized that in cases of sale of emission control defeat devices, the economic benefit should be calculated "considering the benefits from business transactions that would not have occurred but for the illegal conduct, that is, the net profits from the sale of illegal devices." *Freedom Performance, LLC*, EPA Docket No. CAA-HQ-2019-8362, 2020 WL 978714, at *3 (ALJ, February 24, 2020) (Initial Decision and Penalty Order) (quoting EPA 2009 penalty policy); *Spartan Diesel Technologies, LLC*, EPA Docket No. CAA-HQ-2017-8362, 2018 WL 5887550, at *8 (ALJ, Oct. 30, 2018) (Initial Decision and Order on Default) (same).

Respondent's Chief Financial Officer, Allen Stoner, who has 36 years of experience in cost accounting and financial analysis across dynamic manufacturing environments, conducted and directed the evaluation of economic benefit issues presented in this submission. Mr. Stoner performed two analyses regarding potential calculation of economic benefit based on the specific circumstances of Respondent's business operations. Mr. Stoner's first analysis utilizes generally accepted accounting principles ("GAAP") and manufacturing accounting principles to identify an after-tax, net profit associated with the sales of the 4,787 parts identified above. His second analysis recognizes Respondent's lost "opportunity cost" based on the company's decision to produce certain of the racing parts at issue rather than other types of parts and that such lost opportunity costs exceed the profit for all of the sales at issue, demonstrating the lack of any economic benefit.

i. Net Profit Analysis

The starting place for purposes of the net profit calculation is the total number of relevant part sales (4,787) identified by Mr. Stoner under the part number and date range parameters identified by EPA in this proceeding. To determine the net profit associated with the sales of the identified parts, Mr. Stoner began with the full revenue from sales of those parts, for the appropriate timeframe, and subtracted the production costs, other direct costs, operational expenses, and taxes. Using this formula consistent with GAAP and manufacturing accounting principles, Mr. Stoner determined the after-tax net profit associated with these sales as $[redacted]. The data supporting this calculation is provided in the spreadsheet identified as RX 5, which contains confidential business information.

Mr. Stoner's primary analytical steps and assumptions are summarized below. The approach used by Mr. Stoner for this calculation is similar to the approach that he described and

[11] Respondent further notes that this number likely overstates the parts actually purchased by end users in the Unites States because a significant number of Respondent's parts are sold to wholesalers or distributors in the U.S. and then sold and shipped to non-U.S. customers.

performed as part of discussions between the parties prior to the filing of this action. *See* CX 22-23. Any differences in the approaches are identified as part of the discussion below.

- Production Cost: Respondent utilizes a GAAP accounting method called "Standard Cost," within a full enterprise system that determines the cost of production of all Borla parts. This system takes into account every step of the process to manufacture the product including materials, direct labor, and overhead. Material costs come from a Bill of Materials with precise material quantities. Labor costs are operation-specific based on the time needed to fabricate the product. The manufacturing overhead factors in the variable costs to build the product (e.g., welding wires, consumable supplies, production line material handlers/support, etc.). Manufacturing overhead costs also include fixed expenditures such as production equipment depreciation, facility costs, and manufacturing support departments (i.e., production schedulers, raw warehousing, manufacturing process engineers, repair technicians, and manufacturing supervision). Therefore, production costs are the total costs to manufacture its products.

  Note that within the population of hardware, the production costs for headers is significantly more than for Cat-back systems. This is because headers require more extensive design tolerances to account for each application (e.g., the geometry of each engine bay). Header production is also more labor-intensive because the assembly of each header requires hands-on attention to ensure that each pipe is measured, bent, and welded exactly to fit the specific application. Much of this work is done by hand.

- Other Direct Costs: These costs are allocated based on a composite average for aftermarket outbound freight, warranty, and interest expenses. These expenses are allocated specific to costs associated with the aftermarket portion of Borla's business and do not include Borla's main business related to servicing OEMs.

- Other Operational Activity Expenses: This terminology is common in manufacturing and government accounting (government contracting, Department of Defense, etc.) to recognize the additional costs necessary to operate the business. These costs are divided into three major groups: Research and Product Development ("R&D"), Administrative activity, and Sales and Marketing. R&D expenses begin with a composite average for the aftermarket-specific products. Recognizing that a Cat-back system may take one week to develop whereas a header system takes three weeks to develop, the development composite average is increased or decreased accordingly by product line. Most of these costs are for product model-year releases and new vehicle applications (new SKU's). Administrative activity and support costs include human resources, accounting (payroll, invoicing, receivables, vendor payables), IT, and corporate management. The administrative allocation is based on a company-wide composite. Sales and Marketing include customer sales order entry, customer service, new customer acquisition and marketing costs. These costs are allocated based on a composite specific to the aftermarket business and do not include costs related to Respondent's OEM business.

- Taxes: For purposes of the after-tax net profit calculation, Mr. Stoner has adopted the tax rate inputs identified by Industrial Economics in its submission on behalf of EPA. *See*

CX 19. Mr. Stoner calculated both the simple average and weighted cost average (based on 2015-2018 margin amounts) of the Industrial Economics combined rates for 2015-2018. Both methods produced a [redacted]% tax rate result which Mr. Stoner incorporated.

Respondent notes that Industrial Economics appears to have accepted the above-described methodology in assessing profit values in its submission regarding economic benefit. *See* CX 19. However, as noted above, EPA elected not to provide a proposed penalty, including any proposed value of any economic benefit component, and the IEC submission does not identify or explain which of the calculated values it supports as a proposed economic benefit value. Given the lack of information regarding EPA's position on economic benefit at this time, Respondent reserves its rights and anticipates providing supplementation to the evidence and arguments presented here after receiving EPA's penalty proposal and associated explanation.

ii. Analysis Based on Lost Opportunity of Alternative Sales

The premise for determining economic benefit as a function of net profit on the sales of alleged non-compliant parts is to recover economic gains achieved from those sales, with the underlying assumption that no profits would have been achieved if those sales were not made. However, that critical assumption is not correct for Respondent in this case. Mr. Stoner will testify that given the constraints on Respondent's production capacity and an abundance of open orders for exhaust systems that are not identified as non-compliant, production of many or most of the alleged non-compliant parts could have been replaced by production and sale of compliant parts. In addition, the low production rate of the alleged non-compliant header systems actually generated a net loss contribution for the company due to the very low yield of producing these parts on an assembly line and the opportunity cost associated with forgoing production of higher yield parts that were in high demand.

Respondent's decision to build and supply header systems for the racing industry had a direct adverse effect on Borla's profitability. The choice to dedicate production effort to build headers removed the production line capacity to build a greater number of Cat-back exhaust systems that are not alleged to be non-compliant. Header system production is significantly more difficult and time consuming than a Cat-back exhaust system. Historically, Borla's header production line built an average number of [redacted] header systems during a production day. This same production capacity was able to produce an average of [redacted] Cat-back exhaust systems.

Given this [redacted] production rate per day factor, Borla lost the capacity to build [redacted] exhaust systems while producing each individual header system. The net [redacted] units not produced and sold restrained Borla's overall revenue and accompanying profit margin. Borla effectively sacrificed the exhaust production capacity to produce the parts directed to the racing community. Each year during the relevant period, Borla had the opportunity to sell more units than it could produce. Therefore, each of the exhaust systems not built by Borla resulted in lost revenue and margin.

As set forth in more detail in the spreadsheet produced as RX 6, Mr. Stoner calculated this "lost opportunity" revenue based on the [redacted] units not built multiplied by the number of header units sold between January 15, 2015 and September 26, 2018. Over that time period, 1,207 header units were sold, meaning that a net [redacted] exhaust systems were not built. These unit counts were

multiplied times the average selling price of Borla's Cat-back exhaust product line for each respective year. The total "lost revenue" was $[redacted].

The "lost opportunity" economic profit impact was determined by taking the lost revenue multiplied by the margin. The Direct Margin in the prior Borla net profit analysis - specifically limited to the "Cat" product line - was [redacted]%. Therefore, the lost revenue of $[redacted] x [redacted]% Direct Margin = $[redacted] of lost margin. In summary, Borla lost the equivalent of $[redacted] potential contribution to direct profit by dedicating production resources to engage the racing industry. The lost revenue associated with manufacturing the racing headers exceeds any potential economic advantage gained from the sales of the entire group of parts alleged to be non-compliant.

c. Gravity

The gravity penalty factor focuses on the seriousness of the alleged violation. Given the underlying purpose of the CAA, a critical consideration under the gravity factor is the level of environmental harm caused by the violation. Respondent does not concede any emissions impact here because it intended to sell the relevant parts for legal use on racing vehicles. However, to the extent that the gravity penalty factor is considered, this factor supports a minimal or reduced penalty figure due to the relatively low potential emissions impact. Even if there is a violation resulting in emissions, the gravity of those emissions should be considered minor for reasons explained below.

First, the racing parts sold by Respondent do not all serve identical functions or affect the operation of a competition vehicle in the same way. Of critical relevance, more than 65% of the number of parts at issue are designed to be installed *after* the primary catalytic converter. Thus, assuming the vehicle at issue still has an operative emissions control system, the primary catalytic converter and associated oxygen sensors and exhaust gas recirculation ("EGR") system remain intact and operational, and only the secondary catalyst, if originally equipped with one, is impacted after installing these parts. This design structure has the effect of significantly reducing potential environmental harm associated with use of the relevant parts and should be an important consideration in weighing the gravity factor.

Respondent's expert Mr. Ian Manson, a chemical engineer with more than twenty-five years of experience working with catalysts and catalytic systems, may testify to explain the functioning of catalyst systems in gasoline engines and the difference between the role and operations of primary (close-coupled) and secondary (under-floor) catalyst in vehicles that have two separate catalyst systems. In many vehicles with multiple catalyst systems, the primary catalyst performs the bulk of the emissions removal due to its proximity to the engine and faster heating time. Thus, there is a strong expectation that there will be a substantially lesser impact on emissions where the primary catalyst remains intact and only the secondary catalyst (if one was in place) would be removed.

EPA has previously recognized the different potential emissions associated with partial versus complete removal of catalyst systems and acknowledged that those differences should be considered for purposes of reducing penalty assessments. In its Civil Penalty Policy for Administrative Hearings, issued by EPA's Office of Air and Radiation on January 14, 1993 ("1993

Penalty Policy"), provided as RX 20. Within that document, EPA provided a specific "Tampering and Defeat Device Civil Penalty Policy for Administrative Hearings," *id.* at 6. Within that policy, EPA identified "the primary concern in determining the gravity of the tampering violation or defeat device violation" as "the likely increase in vehicle emissions which may result from the violation." *Id.* at 7.

EPA further stated:

> Partial deactivation of certain emission controls, such as replacing a 3-way converter with a 2-way converter, will cause the vehicle to pollute **significantly less** than the total deactivation of the catalytic converter. Similarly, replacing a rusted out single or dual exhaust system on a vehicle with the converter already removed will have a minimal adverse effect on emissions, however, it is still a violation under current EPA policy. The above actions would, therefore, more appropriately be level "B" violations based on their lesser emissions impacts while the act of removing or totally deactivating a catalytic converter would be a level "A."

Id. at 8 (emphasis added). Accordingly, EPA recognized that a lower penalty was justified (by applying a Level B categorization) for a violation based on only partial catalyst removal (or for installing a part on a vehicle where the catalyst had already been removed).

In the present case, a significant majority of the parts at issue affect only the secondary catalyst (if installed on a vehicle with an existing original catalyst system). Ted Wofford, Respondent's R&D Manager, has identified the part numbers that have this particular design characteristic. The specific part numbers that are included in this category, and the associated number of parts, are identified on the table presented as RX 22. The total number of parts at issue included in this category is 3,140, out of a total of 4,787 parts, approximately 66%. This list includes part number 60547, an "x" pipe produced for the Chevrolet Corvette C-7 model, which has the largest single number of parts (1428) at issue in the case. EPA has included information in its prehearing exchange exhibits that recognizes these design characteristics, including Respondent's installation manuals. This evidence supports separate application of a significantly reduced gravity factor for this substantial group of parts.

In order to further demonstrate lower potential emissions associated with parts that only impact the secondary catalyst, Respondent had testing performed at SEMA Garage in Diamond Bar, California on a 2016 Corvette C-7 with part number 60547 ("x" pipe) installed. SEMA Garage is a recognized emissions lab certified by CARB to conduct testing appropriate for CARB Executive Order ("EO") applications. Between January 25 and January 27, 2021, SEMA Garage technicians performed federal test procedure ("FTP") and composite testing on the subject vehicle consistent with applicable requirements for such testing. A summary report of the test procedures, testing data and summary test results, certified by SEMA Garage testing personnel, is presented at RX 21.

As described in RX 21, the following three tests were performed on the test car with the "x" pipe modification in place: federal test procedure (FTP-75) and supplemental federal test

procedures US06 and SC03. The measured test results were then adjusted upward using appropriate deterioration factors ("DFs") for the characteristics of the test vehicle. The final test results for the applicable pollutants (NMHC, NOx, NMOG, NMOG + NOx, CO, and HCHO) are set forth on page 4 of RX 21.

These final test results were then compared against the applicable emission standards for 2016 Corvette C-7. All of the components subject to FTP standards (NMOG+NOx, CO, and HCHO) measured well below the applicable standards, with NMOG+NOx at [redacted]%, CO at [redacted]% and HCHO at [redacted]%, respectively, of the MY 2016 standard. For the composite test standard, which requires a weighted blending of the FTP, US06 and SC03 test results, CO was measured at only [redacted]% of the applicable standard. Though the NMOG+NOx results easily passed the FTP standards, the results were slightly higher (by [redacted]%) than the composite standard for MY 2016. (As noted in RX 21, the NMOG+NOx results would have been below the composite standard for the prior model year (MY 2015).)

These test results provide strong corroboration for Mr. Manson's testimony regarding the more limited anticipated emissions impacts associated with removal of only the secondary catalyst. The test results further support the likelihood of similarly limited impacts across not only the 1428 individual units of the same tested part 60547, but also the remaining group of 1,712 additional parts that share the same design characteristic of impacting only the secondary catalysts and not affecting the primary catalyst, oxygen sensors or EGR, as identified on RX 22.

Second, EPA recognized in its 1993 Penalty Policy that reduced penalties are appropriate for situations in which a part is replacing an existing exhaust system that has already had the catalyst removed or where the catalyst is non-functioning).

> Tampering or defeat devices which result in only partial deactivation of the above systems or parts, tampering which involves any other system or part not listed above, or tampering which involves the replacement of existing exhaust system components where the converter had been removed previously are all considered level "B" violations.

See RX 20 at 8. This circumstance is common when replacing exhaust systems on competition vehicles because the wear and tear requires more frequent replacement and many competition vehicles that have been racing previously will have already replaced the catalyst in their exhaust systems. As EPA recognizes, such consideration further supports a reduced gravity factor.

Third, any potential emissions associated with the parts at issue are likely to be reduced due to the decreased vehicle miles traveled by a typical racing vehicle. Actual emissions to the environment from a vehicle are a function of the emission rate and the miles driven. Even if a vehicle has a slightly higher emission rate, the actual impact on total emissions may be less if the car is driven fewer miles. Once a vehicle is converted for competition purposes, it would be anticipated to be driven fewer miles than a comparable street vehicle. Racing vehicles are typically trailered to and from the race track and total vehicle miles traveled would be limited to actual time on the track, either in practice or in races. These vehicles are not driven like a typical commuter

vehicle. Thus, the consideration of potential emission impacts must take into account the lower miles driven and that factor supports a reduced gravity factor here.

Fourth, EPA has explained in numerous documents that the main driver of its increased enforcement in the aftermarket parts space is to address alleged defeat devices installed on diesel trucks. Here, the parts are intended for gasoline-powered racing vehicles. Respondent's expert Mr. Manson will testify that diesel engines/vehicles emit far more pollutants (both in quantity and type), including toxic diesel particulate matter, than gasoline engines when emissions controls are modified. EPA recently released an analysis of emissions information it collected during its investigation of potential violations regarding Class 2b and 3 diesel pickup trucks. *See* RX 15 ("Tampered Diesel Pickup Trucks: A Review of Aggregated Evidence from EPA Civil Enforcement Investigations" (November 20, 2020)). This report summarized the impacts on NOx and PM as follows: "On average, AED observed that Class 2b and 3 diesel trucks emitted 30 to 300 times higher NOx and 15 to 40 times higher PM (depending on the drive cycle, when all emissions controls are removed or disabled (EGR, DPF, DOC, NAC, or SCR))." *Id.* at 12. Examples of specific testing by EPA further document the extent of emissions impacts associated with modification of diesel truck emissions systems. EPA has also reported that testing of a 2011 Ford F-250 with full removal of emission controls resulted in an approximately 310x increase in NOx, 1140x increases in NMHC, 120x increase in CO, and 40x increase in PM. *See* RX 16 and RX 17.

These values present a stark contrast to the emissions measured in SEMA Garage testing of the C-7 Corvette with Respondent's part 60547. The emission rates of the same pollutants measured by EPA were drastically lower from the tested Corvette, with NOx emissions two orders of magnitude lower than for the diesel truck. Compare RX 17 with RX 21. These substantially lower levels of potential emissions for the racing vehicles intended for use of Respondent's parts should not be ignored in considering a reasonable gravity factor for alleged violations of the same CAA provision.[12] Respondent further addresses these discrepancies below in the context of the 2021 Penalty Policy.

d. Size of Respondent's Business

This penalty factor is typically considered as part of an evaluation of whether the size of the penalty imposed provides adequate deterrence relative to the size of the business alleged to be in violation, with potential penalty enhancements for companies with larger business operations. However, whether a higher penalty based on business size is necessary or appropriate turns on the specific facts of each case, and higher penalties are not required to be imposed even for the largest of companies. *See United States v. General Motors*, 403 F. Supp. 1151 (D. Conn. 1975) (imposing $1 penalty on GM based on specific case circumstances); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1163 n.25 (D. Colo. 1988) (noting that "a nominal fine may be imposed upon even the largest enterprise in the appropriate circumstances" and imposing only $65,000 penalty on "one of the largest businesses in the United States") (citation omitted).

[12] Respondent reserves the right to compare actual penalty outcomes in other cases to the penalty proposed in this case following receipt of EPA's proposed penalty and detailed explanation.

No penalty enhancement for business size is necessary or justified under the specific facts presented here because no "extra" deterrence is necessary to affect Respondent's future actions. As explained above, sales of these parts were not a profitable business activity for Respondent and resulted in reduced sales of more profitable part lines. For that reason, the racing parts manufacturing business component relevant to EPA's allegations has been a very small part of Respondent's overall business. Unlike many other operators in this space, Respondent's business is not dependent on continued sales of these types of products. Accordingly, Respondent stopped all production of the parts at issue upon receiving EPA's NOV and voluntarily exited that portion of the market.

EPA's enforcement activities have already accomplished the full deterrent effect on Respondent's activities, and Respondent has no economic incentive to repeat the actions challenged by EPA in the future, particularly given that the cost of defending against alleged violations far exceeds even a standard GAAP estimate of any profits that ignores opportunity costs. Any additional penalty enhancement based on Respondent's unrelated business lines would not serve the intended purpose of the business-size factor, but instead would be punitive and constitute unfair treatment of Respondent relative to other defendants in similar cases. Indeed, rewarding under-capitalized manufacturers of allegedly violative parts with a reduced penalty, while more harshly penalizing legitimate manufacturers whose alleged violations are only an incidental portion of their overall business, seems to get the deterrence and fairness concerns exactly backwards.

e. History of Noncompliance

This is Respondent's first alleged violation of Title II of the CAA. This penalty factor supports a minimal or reduced civil penalty.

f. Action Taken to Remedy the Violation

As previously confirmed to EPA in CX 22, upon learning through EPA's NOV which specific parts that EPA alleged were non-compliant, Respondent ceased sales of all of the parts identified in the NOV. In addition, Respondent bought back from its wholesale/distributor customers any of the identified parts that had been purchased by the wholesaler but not yet sold. These good faith responses by Respondent support a minimal or reduced civil penalty.

g. Other Such Matters as Justice Requires

In addition to the specific factors discussed above, there are several additional matters that should mitigate any penalty in this matter. Many of these issues are described in detail above and are noted again here to identify their specific relevance to the penalty evaluation.

First, Borla has longstanding connections to the racing industry and the parts that are at issue are intended for use on vehicle models that have a demonstrated use in racing vehicles converted for competition use. These facts distinguish Respondent from other actors who may assert that their products are for racing use but do not actually serve the racing market.

Second, as explained in detail above, aftermarket parts suppliers like Respondent who were legitimately directing parts to the conversion racing market were not provided with fair notice regarding potential enforcement against the sale of parts to the racing industry. While Respondent contends that the lack of fair notice bars liability in this matter, at a minimum the facts regarding EPA's inconsistent conduct and messaging should be considered as an important component of a penalty evaluation and serve to reduce any penalty recommendation.

Third, Respondent undertook good faith measures to protect against potentially non-compliant uses of its products. Faced with the confusing landscape as discussed above, Respondent took affirmative steps consistent with guidance from a recent California settlement to place warnings on its website and directly on its products (through a tag that required physical removal) that they were for racing use only. These actions demonstrate good faith and should be considered to mitigate any penalty recommendation.

Fourth, Respondent has cooperated with EPA investigators throughout the process leading up to and including the present proceeding. Respondent provided access to EPA investigators, supplied requested documentation and participated in good faith settlement discussions. Respondent stopped selling the parts at issue after EPA identified the parts it considered non-compliant and bought back parts still in stock at distributors. This cooperation should be considered to mitigate any penalty recommendation.[13]

3. *The 2021 Penalty Policy Will Not Produce Fair and Equitable Results.*

EPA has stated in its proposed Second Amended Complaint that it intends to base its proposed penalty on the very recently issued 2021 Penalty Policy.[14] The 2021 Penalty Policy states that it supersedes EPA's *Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements* (Jan. 16, 2009) ("2009 Penalty Policy"), which had provided the context for all prior penalty discussions in this matter. Respondent identifies below substantive flaws in the 2021 Penalty Policy that should preclude mechanical reliance on its application in this case. Because EPA has yet to apply the 2021 Penalty Policy in this case (or in any other public case), Respondent anticipates further supplementing this submission regarding application of the penalty policy following receipt of EPA's proposed penalty and detailed explanation.

EPA bears the burden in an administrative proceeding to show why any proposed penalty is appropriate. *See* 40 C.F.R. § 22.24. In the 2021 Penalty Policy, EPA describes its purpose in part as ensuring that civil administrative penalties "are assessed in accordance with the Clean Air Act in a fair and consistent manner" and "are appropriate for the gravity of the violation." 2021 Penalty Policy, at 1. However, EPA is not entitled to any presumption that merely applying the

[13] Respondent notes that the vast majority of its parts were sold through distributors, at least one of which (Keystone) is the subject of an administrative complaint by EPA for similar alleged violations. To the extent that the allegations in both cases cover the same part (first sold to the distributor and then to an end user), that should be considered as a factor in determining a proposed penalty assessment. EPA should not be allowed to double-recover for the same alleged parts and harms.

[14] Located on EPA's website at https://www.epa.gov/enforcement/clean-air-act-title-ii-vehicle-engine-civil-penalty-policy.

policy will actually achieve a fair or appropriate outcome. In its *Guidance on Use of Penalty Policies in Administrative Litigation* (Dec. 15, 1995),[15] at 3, EPA recognizes that its burden of persuasion specifically includes demonstrating "why any applicable penalty policy is a reasonable approach to use in the instant case." EPA cannot make such a showing here given the absence of scientific support for the critical inputs in the policy and the failure to account for drastic differences in potential emissions impacts associated with alleged violations on different types of vehicles.

The most significant issues with the 2021 Penalty Policy are associated with the method for determining the gravity component. Though EPA suggests that its gravity calculation methods "provide a consistent way to measure the seriousness of like violations," 2021 Penalty Policy, at 9, EPA provides no explanation of how it developed the categories and penalty values that it assigns in structuring the gravity calculation matrix for alleged defeat devices in Appendix C of the 2021 policy. Actual and potential emissions impacts of any specific violation depend on scientific and technical information regarding the nature of the vehicle, the nature of the alleged defeat device, and the likely use and vehicle miles traveled of affected vehicles. EPA's own available data regarding those differences does not appear to have driven the proxy mathematical inputs chosen by EPA. Instead, EPA's inputs are based more on "rough justice" than any applicable scientific or technical basis.

The relative penalty amounts assigned for light-duty vehicles and diesel trucks present the most stark example. EPA is well aware of the emissions profile for diesel trucks without operative control systems – for example, they have identified increased NOx emissions of as much as 300 times more than normal operation. *See* RX 15 – RX 17. As noted above, Respondent's expert Mr. Manson will testify that a diesel truck that installs a part that deletes or bypasses its aftertreatment emission control devices such as the exhaust gas recirculation, diesel particulate filter, and Diesel Oxidation Catalysts systems will have a significantly larger emissions impact, both from a quantity and a quality (toxics vs. criteria) perspective, than a light-duty gasoline-burning vehicle without an operative control system. Despite this order of magnitude difference, EPA's Appendix C assigns only a 2x penalty amount to diesel trucks compared to light-duty gasoline vehicles. That differential does not adequately recognize the data-driven difference in the scope of relative emissions impacts and results in inequitable and inflated penalties for light duty vehicles.

EPA's 2021 Penalty Policy further compounds this inequity by failing to incorporate in its gravity methodology any mechanism for recognizing specific facts that reduce the real-world emissions impact of an alleged violation. Appendix C contains only two "egregiousness" tiers, with the 2x higher Tier 2 inclusive of any alleged violation that has the potential to increase emissions. Here, more than 65% of Respondent's parts would affect only the secondary catalyst (in vehicles with an original catalyst system) with no impact on the primary catalyst or oxygen sensor or EGR. *See* RX 22. As explained above, Mr. Manson will testify, corroborated by the SEMA Garage testing at RX 21, that such partial modification would have a significantly lesser emissions impact than complete catalyst removal. Moreover, any potential emissions impact would be a mere fraction of the uncontrolled diesel truck emissions EPA has documented.

[15] Available at https://www.epa.gov/sites/production/files/documents/gpoladminlitig-mem.pdf.

However, under EPA's policy, all of these alleged violations would be considered to be equally egregious. That is simply not scientifically accurate and does not serve the stated goal of producing fair and consistent penalties for "like" violations.

EPA previously recognized the need to account for these important variations in its 1993 *Civil Penalty Policy for Administrative Hearings*. *See* RX 20. That policy expressly describes various levels of egregiousness based on the potential for environmental harm, citing as an example where "partial deactivation of certain emission controls, such as replacing a 3-way converter with a 2-way converter, will cause the vehicle to pollute significantly less than the total deactivation of the catalytic converter." Such actions would be subject to a lesser violation level "based on their lesser emissions impacts." *Id.* at 7 ("A lesser gravity (and smaller penalties) are assigned to acts of tampering or defeat devices which involve emission related parts which are presumed to cause smaller increases in emissions."). Those facts are no less true today than in 1993. EPA's current policy should not be used as an arbitrary restriction on reducing Respondent's gravity penalty given the much lower emissions associated with the alleged violations.

EPA also fails to provide any explanation in the 2021 Penalty Policy for the specific values and limitations that it places on further adjustments made to the gravity factor (e.g., business size) or to the overall penalty amount (for cooperation and culpability). For the reasons set forth above with respect to the statutory penalty factors, Respondent contends that no penalty enhancement is appropriate under any of the potential adjustments in the 2021 Penalty Policy and that reductions would be appropriate based on Respondent's cooperation and other factors. Respondent reserves the right to supplement this evidence upon receiving EPA's proposed penalty and explanation of its application of the 2021 Penalty Policy.

Dated March 16, 2021

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 16th day of March 2021, that a true and correct electronic copy of the foregoing Redacted Respondent's Initial Prehearing Exchange and accompanying exhibits was filed and served on the Presiding Officer this day through the Office of Administrative Law Judges' E-Filing System, with the exception of certain exhibits that have been filed under seal. This Redacted submission is intended to replace the versions previously filed on March 5, 6, and 8, 2021, and to replace those submissions on the case docket. I further certify that a copy of this Redacted Initial Prehearing Exchange, along with an unredacted version that identifies the information that was redacted, was provided to the Presiding Officer via a file-share system established by the Office of Administrative Law Judges. I further certify that an electronic copy of the unredacted Initial Prehearing Exchange was sent this day by e-mail to the following e-mail addresses for service on Complainant's counsel:

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