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 Attachments submitted with Respondent's Opposition to Motion for Accelerated Decision on Liability and Motion to Strike Affirmative Defenses contain material claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). The materials claimed as CBI are Exhibit A to Attachment 3 (Declaration of Jason Isley) and Exhibits A and B to Attachment 5 (Declaration of Allen Stoner). These exhibits contain information regarding Respondent Borla Performance Industries, Inc.'s pricing and wholesale and individual customers of vehicle exhaust parts and components at issue in this case. 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. These exhibits are therefore filed under seal pursuant to 40 C.F.R. § 22.5(d).

A copy of the Opposition with a complete set of all of the Attachments, and a copy of the Opposition with a set of Attachments in which the materials containing CBI 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 OPPOSITION TO MOTION FOR ACCELERATED DECISION ON LIABILITY AND TO STRIKE AFFIRMATIVE DEFENSES

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I. INTRODUCTION

In seeking to penalize a well-established manufacturer of racing parts with undeniable and extensive ties to the racing industry, the EPA is grossly overstepping the letter, intent, and long-time understanding of the applicable portions of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7521–7590. Racing vehicles used exclusively for competition, whether built from scratch or redesigned from production vehicles, were never understood to be covered "motor vehicles" subject to the myriad restrictions applicable to consumer vehicles. Such competition-only vehicles are not driven on our streets and highways, are not designed for transporting persons or goods, and were not considered a significant source of pollution. EPA's unilateral attempt to regulate large swaths of the racing industry was never authorized or intended by Congress, punishes behavior that has long been understood as lawful, and cannot be reconciled with fundamental constitutional principles of fair notice, separation of powers, procedural due process, and proportionality of punishment.

Beyond such fundamental flaws, EPA's effort to short circuit the development of the facts relating to these many issues, and to avoid the ordinary factual and legal determinations that would occur in a judicial or quasi-judicial proceeding, highlights the procedural irregularity not just of its current motion, but of its choice of venue for this oversized enforcement action to begin with. To the extent it is seeking the home-court advantages of an administrative forum and a multiplication of hurdles and expenses to burden Respondent Borla Performance Industries, Inc. ("Respondent" or "Borla"), such heavy-handed tactics and procedural concerns should also be explored and developed in order to create a proper record.

In the end, Borla is a well-established and respected member of the racing community that has long and correctly understood its conduct to be well within the law. Complainant has

not met its burden to demonstrate the absence of any genuine issues of material fact on the elements of liability. The motion for accelerated decision should be denied.

II. FACTUAL BACKGROUND

Overview of the Racing Industry

This enforcement action challenges the longstanding tradition of redesigning cars manufactured for use on the street into racing vehicles used solely for competition. The racing industry is vast and diverse, with most segments dominated by racing vehicles that started as motor vehicles but were subsequently redesigned and repurposed into 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 redesigned and repurposed into racing vehicles.

There are more than 260 racing sanctioning bodies active at the national, regional, and local levels. The sanctioning bodies establish participation and competition rules, generate sponsorship, promote and market racing events, and create a membership organization. Nationwide racing circuits prominently include race series sanctioned by 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 on particular makes and models (such as the Spec Miata class) and that include rules specifying the types of modifications that

can be made in order to preserve 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, that also sanction racing and have rules regarding acceptable modifications. Even the professional NASCAR racing circuit uses vehicles based on (though heavily modified from) "stock" makes and models of consumer cars. *See* Chris Estrada, *NASCAR Next Gen car makes public debut*, NBCSPORTS.COM (May 5, 2021), https://nascar.nbcsports.com/2021/05/05/nascar-next-gen-car-public-unveiling-chevrolet-ford-toyota-cup-series-2022/ (discussing and showing images of new NASCAR racers based on Chevy Camaro, Ford Mustang, and Toyota Camry platforms; "'We really wanted to get back to a promise that we had made to the fans, which is to put the "stock" back in stock car,' said NASCAR president Steve Phelps at the unveiling.").

The modifications typically made to convert street cars into 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; Attachment 1 (Spec Miata articles). These modifications to the design and physical attributes of these vehicles make converted racing cars unsuitable and impractical for further street use. Varying levels of modifications and performance upgrades to the engine, exhaust and emissions systems, and other components are allowed consistent with the applicable rules for specific racing classes. A large industry of aftermarket suppliers has developed to serve these racing activities. Performance Racing Industry, the host of the industry trade show, has estimated that retail sales of racing products make up a nearly $2 billion market annually.

Borla Has Deep Ties to the Racing Industry

From Respondent Borla's founding in 1978, the company has forged a deep connection with the professional and amateur racing circuits, teams, and drivers. Co-founder and CEO Alex Borla has been involved in the automotive industry his entire 50+-year career. He is a member of the Society of Automotive Engineers ("SAE") and holds multiple patents for innovative exhaust technologies. 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. The company remains family-owned today and all of Borla's parts are designed and manufactured in facilities in the United States.

Borla's racing connections include more than 20 years of mutually beneficial relationships with the automotive original equipment manufacturers ("OEM"). Borla was a pioneer in the use of high quality austenitic stainless steel in its parts for enhanced performance and durability. Borla has participated in the design and build up of many concept vehicles for DaimlerChrysler and Ford as well as General Motors, Mazda, Nissan, and Lexus. Ford Motor Company chose Borla exhaust for their limited Cobra-R model. Borla has also worked with Toyota and Mazda on aftermarket opportunities and limited production runs and developed exhaust systems for Honda's Performance Division. Borla has sponsored, partnered with, and supplied race teams and drivers involved (and winning) at the highest levels of racing, including longstanding relationships with Turnersports (Borla Exhaust has been a Turner race partner since 1998 and Borla products have been used on all Turner Motorsport racecars)[1] and Flying Lizard Racing. These relationships and successes include traditional road and oval course racing and other motorsports such as drag racing, drift racing, autocross, and off-road competition series.

[1] *Turner Motorsport Racing News & Press Feed*, TURNERMOTORSPORT.COM, (Feb. 23, 2015), https://www.turnermotorsport.com/t-racing-newsitem-319.

The Parts EPA Claims Are Illegal Were Intended for Racing

The Second Amended Complaint identifies 57 different parts that EPA alleges were sold in violation of the CAA. As explained in the declaration of Ted Wofford, Borla's manager of research and development, each of those parts was designed and intended for use in a competition-only vehicle. *See* Attachment 2 (Wofford Decl.) at ¶ 5. Borla designed its racing exhaust systems and parts to improve performance for specific vehicle models used in amateur and sporting racing competition (and in professional competitions as well), including the most popular models for conversion to dedicated racing, such as the Chevrolet Corvette and Camaro, Ford Mustang, Dodge Challenger, Mazda Miata, and Porsche Cayman. *Id.* at ¶ 6. Each of the vehicle models associated with the 57 parts at issue can be converted for competition-only use and qualify for various racing classes designated by SCCA, NASA or other motorsports sanctioning bodies. *Id.* at ¶ 6. Examples of each of these car types being redesigned, used, and/or sold for racing purposes are presented at RX 37 – RX 65.

Moreover, installation and racing use of the type of performance exhaust parts produced by Borla in these makes and models is fully consistent with the sanctioning body rules for street car conversion racing classes. As noted above, NASA, SCCA, and similar sanctioning bodies establish rules for specific racing classes that specify the types of modifications that can be made to the vehicles in order to preserve equal competition within the classes. The rules for these conversion classes commonly allow modifications to a competition vehicle's exhaust systems consistent with installation of the type of Borla aftermarket racing parts that EPA has identified in this case. For example, under the Porsche Club of America ("PCA") Racing Rules, the rules for modifying "stock" classes, which are typically significantly limited in terms of performance modifications, provide that the exhaust system is "free" provided the engine meets any local noise limit requirements. That means that there are no specific limitations on modifications to

the exhaust system. These Rules specifically state: "On turbocharged cars, the manifold and other exhaust piping between the exit of the port on the head and the entrance to the stock turbocharger is part of the exhaust system. All components which serve only to control emissions may be removed, and cars are not required to meet emissions standards . . . ." RX 69 at 20.

The racing connection with Borla parts is even more clear in the SCCA Road Racing General Competition Rules (2019 ed.) for the Spec Mustang racing class, which specifically allows installation of "Long tube headers: Borla PN 17237 with X pipe." *See* RX 66 at 192. This specific part number is on EPA's list of alleged illegal parts.

The declaration testimony of amateur racer Jason Isley exemplifies how an intended (and actual) end user for Borla's racing exhaust parts uses those parts for converting an OEM street car to a competition-only vehicle and racing in sanctioned amateur events. *See* Att. 3 (Isley Decl.). Mr. Isley and his wife, Jennifer Isley, are both accomplished amateur race drivers who have raced successfully in the NASA and SCCA circuits for many years. In 2015, Jennifer set a goal of competing in the 2017 SCCA National Championship Runoffs at the Indianapolis Motor Speedway. Jennifer chose the Spec Miata as her preferred car and class, and the Isleys decided to purchase a used OEM Miata and convert it to a race car on their own. *Id.* ¶¶ 5-6. Jason, who worked for an automotive publisher, chronicled the full conversion process of the street Miata into the Spec Miata racing-only vehicle in a four-part series for SCCA publications SportsCar magazine and RACER.com, titled *SCCA Spec Miata Process*. *See* Attachment 1 (compilation of the four articles).

As further explained in the articles, the modifications made during the conversion process included gutting the interior, removing all OEM safety devices, installing a required roll cage for safety purposes, installing a racing seat, and modifying the suspension, brakes, wheels, tires,

engine, fuel pressure, exhaust system, clutch, and radiator. The changes made to the exhaust system included installation of an exhaust kit from Borla. *See id*. at p. 13; Att. 3 (Isley Decl.) at ¶¶ 10-11. The SCCA rules for the Spec Miata class allow for changes to the exhaust system, including installation of the Borla performance exhaust. Borla provided the Miata exhaust parts to the Isleys in conjunction with the article series and the part used by the Isleys (Part No. 12667) is one of the specific parts included in Complainant's total alleged violations as reflected in the invoice to Mr. Isley. *See* CX 8 at 1509 (Isley invoice dated No. 0402163 dated Nov. 30, 2015).

Following completion of the conversion, Jennifer met her goal of participating in the SCCA Nationals in 2017 and has continued to race the Spec Miata several times per year. Att. 3 (Isley Decl.) at ¶ 10 and photo exhibits. All transportation of the car is by trailer. It is never driven on public streets and is not registered or insured for such use. *Id.* at ¶ 14.

Borla Acted in Good Faith in the Face of EPA's Inaction

The types of racing products at issue in this action have been sold openly and used for racing conversions for decades with no apparent interest or interference from EPA. Indeed, the legality of these practices was so thoroughly understood that the sanctioning bodies for such racing expressly endorsed the now-challenged conversions and even the specific parts EPA now attacks. Notwithstanding EPA's more recent change of opinion, the racing industry and the public have long understood that EPA did not consider the manufacture, sale, and use of these parts for competition-only vehicles to violate the CAA. When EPA attempted through a proposed rulemaking in 2015 to assert authority over converted competition vehicles, manufacturers who had been developing racing parts for converted competition vehicles for decades now were faced with the potential that EPA would newly regulate those activities into a violation of the Clean Air Act. However, in the face of public and industry backlash, EPA

retracted that proposal and reiterated that its "focus is not (nor has it ever been) on vehicles built or *used* exclusively for racing." RX 77. Thus, Borla understood in good faith prior to this enforcement action, both before and after EPA's abortive attempt to change the rules, that use of Borla's parts designed and intended for use in vehicles that had been initially built as or converted to race cars did not violate the CAA. EPA continued to publicly assert that it did not intend to prevent the manufacture of parts used for on-track racing, but provided no guidance on how a manufacturer such as Borla should produce or track its parts for racing vehicles.

Absent any direction from EPA, Borla took affirmative steps to clearly inform potential purchasers and end users that the racing parts were not designed for or intended to be used in non-racing applications. Borla took this voluntary action based on guidance from California, typically the most stringent air regulatory market in the country. Borla began to incorporate in its sales and marketing materials an informational disclaimer that was based on a 2015 settlement between the California Air Resources Board ("CARB") and a parts manufacturer ("K&N"), in which CARB instructed K&N to label all parts that were exempt from CARB's emissions requirements due to California's racing exemption with specific language that included the following: "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY." Borla included this language or other comparable language on its website, technical documentation for each part, invoices, and in its digital catalogs. Borla also physically attached the warning to the product itself by way of a tag securely affixed to the part with a bolt so that the purchaser must manually remove it using a tool in order for the part to be used in the vehicle. *See* Att. 2 (Wofford Decl.) at ¶ 10; RX 32 – RX 35.

Nature of Case

The Second Amended Complaint alleges in one count that Respondent is liable for a total of 5,338 violations of section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B) arising from Respondent's manufacture and sale of 5,338 exhaust system parts or components between January 15, 2015, and September 26, 2018 that bypass, defeat, or render inoperative pollution control equipment on motor vehicles (hereinafter referred to as the "Subject Products"). That section states that it is a violation of the Act: "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use ...." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B) (hereinafter the "Defeat Device Prohibition").

Because this prohibition only applies to parts intended for use with a "motor vehicle," the definition of a "motor vehicle" is of central importance to EPA's claim. Section 216(2) of the Act establishes the following definition: "The term 'motor vehicle' means any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550 (emphasis added).

EPA also suggests, incorrectly, that its regulation regarding certification of "new motor vehicles" is relevant to the definitional issue. Under CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1), manufacturers of new motor vehicles or motor vehicle engines must apply for and obtain a certificate of conformity ("COC") from the EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States.

But while such COCs set the conditions for selling a new vehicle intended for use on the streets and roads, and for its continued legality in such street-use, it does not address the prior question of what vehicles constitute motor vehicles obliged to conform to such COCs. That is one of the central issues in this case, and there are genuine disputes between Complainant and Respondent with respect to both the legal interpretation and application of the Defeat Device Prohibition to racing vehicles and the critical facts that are necessary to determine liability.

III. STANDARD OF REVIEW

The Consolidated Rules of Practice at 40 C.F.R. § 22.20 provide that the Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding so long as there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. The applicable standard of proof is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

Prior EAB rulings have consistently applied the summary judgment standard provided in Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and when adjudicating motions on accelerated decisions. *See e.g.*, *In re BWX Techs.*, 9 E.A.D. 61, 2000 WL 365958 at *10 (EAB 2000) (relying on FRCP 56's "copious jurisprudence" for guidance on accelerated decision motions); *ALM Corp. v. EPA*, 974 F.2d 380, 382 n.2 (3d. Cir. 1992) (explaining that an accelerated disposition under 40 C.F.R. § 22.20 is "comparable to a motion for summary judgment"); *In re Kent Hoggan & Frostwood 6 LLC,* No. CWA-08-2017-0026, 2019 WL 2166249 at *6 (ALJ 2019) (same). FRCP 56 provides that summary judgment may be granted only if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Further defined, summary judgment is only appropriate if—when viewing the evidence in the light most favorable to the nonmoving party—

no reasonable decision-maker could find for the nonmoving party. *See e.g.*, *In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 2004 WL 326954 at *13 (EAB 2004) (looking to FRCP 56's summary judgment standard for guidance on the standard for granting an accelerated decision) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

In applying the principles of FRCP 56 to motions for accelerated decision under 40 C.F.R. § 22.20, the moving party "assumes the initial burden of production on a claim and must make a case for presumptive entitlement to summary judgment in his favor." *In re N.Y. State Dep't. of Transp.,* No. CWA-02-2016-3403, 2018 WL 691663 at *3 (ALJ 2018) (citing *BWX Techs*., 2000 WL 365958 at *11). The burden of production (though not proof) then shifts to the nonmoving party. *See BWX Techs.*, 2000 WL 365958 at *11. In evaluating whether the nonmoving party has presented evidence demonstrating that there is indeed a genuine issue of material fact and an accelerated decision should be denied, courts are to apply an "indulgent standard of review" and are "not supposed to engage in the jury function of determining credibility or weighing facts; instead, courts are to view the record in the case and submissions in the light most favorable to the nonmovant . . . and are to believe all evidence offered by it." *See BWX Tech.*, 2000 WL 365958 at *12 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985)); *see also In re VSS Int'l, Inc.*, No. OPA-09-2018-0002, 2018 WL 6930805 at *3 (ALJ 2018). Furthermore, fact finders should be cautious in granting summary judgment (or an accelerated decision), especially when the record has not yet been sufficiently developed to allow for factual exploration critical for resolving the issues in the case. *Consumers Scrap Recycling, Inc.*, 2004 WL 326954 at *14 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 296 (1986)).

IV. VEHICLES USED SOLELY FOR COMPETITION ARE NOT MOTOR VEHICLES SUBJECT TO THE DEFEAT DEVICE OR TAMPERING PROHIBITIONS

A central element of EPA's claim, and on which it bears the burden of proof, 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. CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B). If the parts are intended for use with a vehicle that is not properly categorized as a "motor vehicle" under the CAA, then EPA lacks enforcement authority under this provision and has failed to state a violation. In this case, all the Subject Products were designed and sold expressly for use with vehicles designed and used solely for competition, not for vehicles designed for transporting persons or goods on the streets and highways. Such vehicles are not "motor vehicles under the CAA, regardless whether they were built for racing from the outset or whether they began their existence as motor vehicles but were later redesigned and used solely for competition.

The principal dispute between Respondent and EPA thus is whether a vehicle imported or sold as a "new motor vehicle" pursuant to a COC remains forever after a "motor vehicle" regardless of any redesign eliminating the required characteristics of a motor vehicle and dedicating the vehicle solely to non-street competition use, *i.e.*, not on the streets or highways. Regardless whether a vehicle began its life as a certified "new motor vehicle," it seems an obvious truism that sufficient alterations can strip it of that status. A motor vehicle stripped to its component parts and reassembled into an object of art or even just left as a pile of scrap at a junkyard is *not* a "motor vehicle," regardless of its past status. Indeed, were it otherwise, every scrapyard dismantling a car for parts would, almost by definition, have tampered with a motor vehicle by removing any emissions related parts or deconstructing the elements of design of the

vehicle as a whole. Yet that is precisely the implication of the position espoused by Complainant and it is facially absurd.

As with motor vehicles that are dismembered and repurposed – or *redesigned* as something other than a motor vehicle, to express it in terms of the definitional language of the CAA – a vehicle once designed and intended for use on the streets and highways can be redesigned and dedicated to a different use and hence cease to be a motor vehicle. And that is precisely what happens when a "street" motor vehicle is converted to a competition-only vehicle. The process of such conversion strips the vehicle of the defining characteristics of a motor vehicle such that it is no longer designed for or even suitable or practical for use on the streets and highways.

A. The Plain Language of the CAA Does Not Cover Vehicles Designed or Redesigned Solely for Competition

The common sense understanding of the difference between a motor vehicle used on the streets and a racing vehicle used only on a closed track is amply reflected in the CAA. The CAA contemplates three categories of vehicles: motor vehicles, nonroad vehicles, and vehicles used solely for competition. 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). A "motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." A vehicle that is not designed for use on the streets, such as a purpose-built race car even if based on a related consumer platform and parts, thus is not a motor vehicle and parts for such competition vehicle would not constitute defeat devices.

EPA's primary argument, however, 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 Br. at 33. 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,[2] the distinct category of racing vehicles indeed turns on competition being the sole "use" of a vehicle.

Even assuming that attributes and design controlled *both* the initial categorization of a car as a "motor vehicle" and its proper categorization at some later date, whether as a "competition" vehicle or as a "nonroad" vehicle, EPA's fundamental error is in assuming that the "design" of any given vehicle is fixed at the point an OEM applies for and obtains a 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 typically followed to convert a street-legal vehicle into a racing vehicle involve

[2] 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 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).

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.[3]

That the relevant emissions device or design element may have *previously* been part of a certified motor vehicle, even if such vehicle is *no longer* a motor vehicle, is insufficient to satisfy the statutory elements of the offense and would lead to absurd results. If the phrase "installed on a motor vehicle" is backward looking and refers to the time of initial installation, then it is illegal to "render inoperative" or "defeat" such an emissions device even after it has been removed or even in the process of removing and replacing such a part.[4] Under such a "past tense" view of the statute, even a wrench or other tool designed for removing a catalytic converter in order to replace it would be a "part" "intended for use with" a motor vehicle whose principal effect would be to defeat or render inoperative that emissions device. That reading is incoherent. The far plainer and more sensible reading of the language is that the phrase "installed on or in a motor vehicle" refers to the *present* tense of whether the part is *currently* "installed on or in a motor vehicle." *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) ("Past participles like 'owed' are routinely used as adjectives to describe the present state of a thing—so, for example, burnt toast is inedible, a fallen branch blocks the path, and (equally) a debt owed to a current owner may be collected by him or her."; "past participles can and regularly do work just this way, as adjectives to describe the present state of the nouns they modify"). Similarly, the phrase "installed … in compliance with regulations under this chapter" is most sensibly read

[3] 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.

[4] This would also be true regarding the "tampering" prohibition in CAA § 203(a)(3)(A), which would make destroying such a device illegal if the test was had it ever been installed on a motor vehicle rather than is it currently installed on a motor vehicle.

to mean in *current* compliance with those regulations. The further use of the word "installed" and other past participles later in the sentence confirms that the entire provision addresses the present state of the relevant parts being added or removed, not simply a past condition – having been installed on a motor vehicle at some time in the past – that may no longer exist. *See* CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B) (requiring knowledge that "part or component is being offered for sale or installed for such use or put to such use"; prohibition applicable to "any part or component intended for use with" a motor vehicle); *Henson*, 137 S. Ct. at 1722 ("to rule for them we would have to suppose Congress set two words cheek by jowl in the same phrase but meant them to speak to entirely different periods of time. … [S]upposing such a surreptitious subphrasal shift in time seems to us a bit much.").[5]

Once a present-tense reading of the relevant language is accepted, the language best supports the non-coverage of vehicles "used solely for competition" (another present tense statutory use of the past participle) because even if they once were motor vehicles, they are such no longer and hence the devices on them are not presently "installed on or in a motor vehicle."

B. The Exemption of Vehicles Used Solely for Competition from New Regulations of Nonroad Vehicles and Engines in 1990 Confirms that Such Vehicles Were Understood to Be Previously Unregulated Nonroad Vehicles Not Meeting the Definition of a Motor Vehicle

It was previously understood that vehicles used solely for competition were not designed for use on the streets and highways and hence not encompassed by the CAA definition of a "motor vehicle" or subject to pollution requirements. When the 1990 Amendments added new requirements for the newly defined and complementary category of nonroad vehicles, however,

[5] Given that motor vehicles and their engines, as well as emissions devices, have a limited useful life, there comes a point where an emissions device, or the entire vehicle, will be removed from service, whether due to age or for other reasons like salvage, and hence no longer subject to emissions standards. It makes no sense to say that a no-longer-required emissions device or design element on a decommissioned engine or vehicle cannot be altered because it was required at the outset for a *new* or in-service motor vehicle.

it became necessary for Congress to expressly exempt competition-only vehicles from those new requirements in order to maintain their unregulated status. That there was no express exemption before merely reflects that they were never even covered by the terms of the statute. *See infra*, at 23 & Section VI-E, at 53-54. An exemption became necessary only because emissions requirements expanded beyond the previous category of motor vehicles, which did not reach dedicated racing vehicles, to regulate nonroad vehicles, which would encompass dedicated racing vehicles used only on tracks rather than on streets absent an express exclusion. Read in context of the prior law, the 1990 Amendments thus confirm that vehicles used solely for competition are, by their nature, nonroad vehicles but for the express exclusion, but are not, and never were considered, motor vehicles subject to the defeat device or tampering prohibitions.

EPA's reliance, EPA Br. at 13, 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.

But the prior question whether a particular vehicle is a "motor vehicle" under the statute is independent of the COC and in fact determines at the front end whether a COC is required at all. While a "motor vehicle" subject to a COC must comply with its terms in order to be lawfully used on the streets and highways, if it ceases to be a motor vehicle it ceases to be subject to the terms and conditions of the COC. The COC thus 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.[6]

C. The Lack of an Express "Exemption" from the Defeat Device Prohibition Is Irrelevant Given that Vehicles Used Solely for Competition Are Not Motor Vehicles Needing Such an Exemption

Like so many of EPA's arguments, its reliance, EPA Br. at 22, on the lack of an express exemption for competition vehicles from the tampering or defeat device restrictions or the motor vehicle definition begs the question whether such vehicles are subject to those provisions to begin with. Whether a vehicle is a "motor vehicle" subject to the broad range of CAA requirements is a prior question and an element of EPA's case, not a defense or exception to an otherwise applicable rule. If a vehicle is not a "motor vehicle," there would be no need to create an exception and doing so would add confusion rather than clarity. A simple example is a nonroad vehicle, which is not designed or intended to carry persons or goods on roads and highways. Prior to 1990, such vehicles were not subject to emissions regulations because they did not fit the definition of a motor vehicle. There was no previous need to have a separate exclusion for such vehicles because their non-coverage was inherent in the limited definition of a motor vehicle. Similarly, a purpose-built race car is not a motor vehicle because it is not designed or intended for use on the roads or highways and hence not within the CAA's definition. EPA does not dispute that such purpose-built vehicles are not motor vehicles subject to the Act, notwithstanding the lack of a separate exemption from the defeat devices or

[6] 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 are 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).)

tampering restrictions or from the already limited definition of a motor vehicle. The express exemption for competition vehicles from nonroad vehicle regulations, but not from "motor vehicle" regulations, perfectly illustrates the point that such vehicles were *never* "motor vehicles" needing an exemption from prior regulations but were plainly "nonroad vehicles" subject to that separate set of requirements but for the express exemption.

EPA thus gets its analysis entirely backwards and the lack of exception confirms, rather than refutes, that vehicles used solely for competition are not "motor vehicles" under the CAA.

Even if one were to assume, arguendo, that some further exclusion was required for racing vehicles, EPA itself, of course, recognizes such an exclusion elsewhere in its regulations and guidance. EPA's own importation regulations and guidance recognize "racing vehicles" as discrete category of 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 the existing physical attributes of the vehicle, but nowhere does the regulatory criteria indicate that the vehicle must have been designed or manufactured with such physical attributes *ab initio*. Accordingly, a motor vehicle could be modified to exhibit such physical characteristics and it would no longer be a motor 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*, RX 73 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 previously covered motor vehicles can be redesigned into non-covered racing vehicles. When approving the importation of a racing vehicle, EPA reviews documentation that includes: "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). A vehicle presently lacking such "street" features, regardless whether they were present at some prior time, would not be a motor vehicle.

EPA's current aggressive position in this case also is contradicted by the *EPA Import Procedures* where the characterization of an "excluded vehicle" not governed by the emissions requirements of the CAA turns on the presence of "competition or racing features, or lack of features associated with practical street or highway use." *See* RX 72, *EPA Import Procedures,* at B-2. That guidance similarly describes a "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*." *Id*. at B-4. Such guidance plainly reflects that a racing vehicle is characterized by both its present physical attributes and its present intended and expected use solely for competition. That such a vehicle may once have been a motor vehicle intended for street use is both recognized by the regulations and irrelevant in determining its current status once converted into a dedicated competition vehicle.

EPA also argues, EPA Br. at 27, 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 COC, but will not, in fact comply with the certificate originally issued for that vehicle. Some mechanism thus was required for a new certificate to be issued or for an exception to the tampering rules that would continue to apply to what remains, without dispute, a motor vehicle intended 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, and hence there is no need to create an exception to rules that no longer apply by their own terms. A vehicle starting its existence as a covered "motor vehicle," but converted to a competition-only vehicle having the exact same racing characteristics and parts as a purpose-built racing vehicle is not different from such purpose-built racer in any legally relevant way and thus it does not need a modified COC.[7]

Other EPA regulations likewise confirm that a vehicle can be converted from one category to another, regardless of its initial condition on import or sale. For example, various regulations involving the definition of "model year," a term which triggers applicability of

[7] 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. Andrew Bornhop, *The Mustang Challenge: A leap up from Spec Miata, this series doubles the cylinder count and power*, ROAD AND TRACK (May 1, 2008), https://www.roadandtrack.com/motorsports/news/a14035/the-mustang-challenge/ (describing Ford Mustang racers purpose-built at Ford's Ohio manufacturing plant and using Borla headers); Rory Jurnecka, *Take a Photo Tour of Where They Build Honda Civic Type R TCR Race Cars*, AUTOMOBILE MAGAZINE, (Mar. 23, 2020), https://www.automobilemag.com/news/photo-gallery-tour-jas-motorsports-honda-civic-type-r/ (article discussing purpose-built Honda Civic racers with Borla downpipes and exhausts; "Engines comes from Honda's Ohio plant and receive more modifications—a new heavy-duty head gasket and Honda Performance Development (HPD)/Borla downpipe and exhaust, among other items"; discussing racing circuit for Accords and Civics). That the exact same frame and engine for a Ford Mustang or a Honda Civic 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.

various emissions standards, acknowledge the permissible conversion of a motor vehicle/engine to a different status. In particular, 40 C.F.R. § 1039.801 provides the following:

> Model year means one of the following things:
> . . .
> (2) For an engine that is converted to a nonroad engine after being placed into service as a stationary engine, or being certified and placed into service as a motor vehicle engine, model year means the calendar year in which the engine was originally produced. For a motor vehicle engine that is converted to be a nonroad engine without having been certified, model year means the calendar year in which the engine becomes a new nonroad engine.

40 C.F.R. § 1039.801 (emphases added); s*ee also* 40 C.F.R. §§ 1054.801, 1051.801.

Other regulatory language that refutes EPA's position that initial classification as a "motor vehicle" is a permanent status can be found in the 2008 preamble to the final rule for *Control of Emissions from Nonroad Spark-Ignition Engines and Equipment* where EPA clearly describes that an engine/vehicle can change classes so that it qualifies as a nonroad vehicle or engine. 73 Fed. Reg. 59134 (Oct. 8, 2008) ("Note that the regulations generally treat engines converted to a different category as new engines, even if they have already been placed into service. For example, if a motor vehicle is modified such that it no longer fits under the definition of motor vehicle, its engine generally becomes a new nonroad engine and is subject to emission standards and other requirements based on its model year as specified in the regulation."); *see also* OFFICE OF TRANSP. AND AIR QUALITY, U.S. EPA, EPA-420-F-09-014, REGULATORY UPDATE, MINI TRUCKS: IMPORTING USED MOTOR VEHICLES AS NONROAD VEHICLES (Feb. 2009) ("The revised regulations apply when someone modifies a motor vehicle (or motor-vehicle engine). The regulation also clarifies how 'model year' applies to modified and

imported products. (See the definitions for 'new nonroad engine' and 'model year' in the Code of Federal Regulations (CFR) section 1048.801.").[8]

Finally, the legislative history of the 1970 amendments, *see* RX 71, confirms that Congress never intended the definition of motor vehicles to cover racing vehicles. In a notable exchange over the scope of the Act as applied to racing vehicles, Senator Nichols asked "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*?" Senator Staggers replied that "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." ENVTL. POLICY DIV., CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 TOGETHER WITH A SECTION-BY-SECTION INDEX, SER. NO. 93-18 (1974), *Vol. 1* at 117 (emphases added).

As will be discussed in more detail later, *infra* at Section VI-E, Defense No. 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. Indeed, when EPA tried to change

[8] EPA argues, EPA Br. at 29, that only cars that are "permanently" configured as racing vehicles unsuitable for the streets, and that cannot ever be modified into street-legal condition, qualify as non-motor vehicles. That bizarre condition, of course, is nowhere to be found in the statute, is not a fair reading of any EPA regulations, and would completely swallow the rule given that *any* racing vehicle can eventually be converted to street legal condition with sufficient effort. While the "capable of modification" limit might make sense if applied to some simple and temporary adjustment – retune the car, inactivate the airbags – claimed to make a vehicle exempt for the moment, it cannot sensibly be applied to the significant structural changes involved in creating dedicated racers such as reflected in the many exhibits in this case.

that view in proposed regulations in 2015, the pushback 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.

EPA adds several policy arguments as supposed thumbs on the scale supporting its strict view, including that allowing conversion to racing vehicles is inconsistent with the goals of the CAA and that it would be impossible to enforce the defeat device prohibition if it did not apply to converted racers. EPA Br. at 31-32, 35-38. Neither argument, of course, can override the statutory language and neither argument makes sense in any event. As for the statutory purpose, all statutes, the CAA included, have mixed purposes and purposely limit the means of achieving general goals in order to balance them against conflicting goals and purposes. The CAA is not designed to reduce pollution at all costs, and the competition-only exemption was one example where some limited potential pollution was permitted in order to serve a competing (pun intended) purpose. Furthermore, EPA itself does not consider any pollution caused by competition-only vehicles to be a meaningful derogation of the CAA's purpose. It has said repeatedly that purpose-built race cars are not covered by the CAA's emissions restrictions and that even for converted cars that it claims are covered, EPA has no interest in and intention of enforcing the Act against the owners and builders of such vehicles or the events where such vehicles are raced. Obviously, any supposed derogation of the Act's generic "purpose" from such vehicles is not significant enough to matter to EPA and hence cannot have any meaningful impact on the interpretive question here.

As for enforceability concerns, once again EPA cries wolf. If EPA is concerned with legitimate racing parts being diverted for illegitimate non-racing use on motor vehicles driven on

the streets and highways, it has ample means of addressing that concern. At a minimum, EPA could use its regulatory authority to establish record-keeping requirements to ensure that parts with legitimate uses but the potential for illegitimate diversion, are only sold to proper recipients and thereafter tracked as needed. Such records, or the failure to keep them, would provide EPA with whatever proof it needed to enforce against misconduct by parts manufacturers or distributors. Indeed, Borla has repeatedly asked EPA what it could do to comply with EPA's unspecified requirements to qualify for its much-touted discretion to not enforce against *bona fide* racers and their suppliers, and EPA has refused to provide any guidance. Borla acted upon the best guidance available from California and would welcome sensible guidance from EPA that allowed the racing industry to continue but also guarded against any improper sales. But the notion that EPA can re-write the statute and over-enforce the Defeat Device Prohibition merely because the Agency is insufficiently resilient or unwilling to implement an express statutory limitation that narrows the scope of that Prohibition, is absurd.

D. Respondent's Direct and Supporting Evidence Creates Genuine Issues of Material Fact Regarding the Intended Sale and Actual Use on Vehicles Used Solely for Competition

Complainant's attempt, EPA Br. at 23, to have the Presiding Officer simply duck the statutory questions as "hypothetical" is misguided. It is true that Complainant made the choice not to present evidence regarding the actual or intended use of Respondent's racing parts. But Respondent has presented direct testimony and supporting evidence here both as to the intended and actual use of the parts in competition-only vehicles, and certainly enough to raise a genuine issue of fact. While EPA may understandably wish to avoid scrutiny of its overly broad motor vehicle definition, there is no valid basis for the Presiding Officer to avoid making a threshold legal determination here.

First, EPA's citation to the district court decision in *United States v. Gear Box Z, Inc.*, No. CV-20-08003-PCT-JJT, 2021 WL 1056396 (D. Ariz. Mar. 18, 2021), which found it unnecessary to address the CAA's application to competition vehicles, does not support EPA's effort to duck the issue here. *Gear Box Z* arose from the United States' motion for preliminary injunction, not a motion seeking final judgment on liability as Complainant seeks here. The United States supported its argument for avoiding the legal dispute regarding competition vehicles by emphasizing the preliminary nature of the proceeding. *See* U.S. Response to *Amicus* Brief, *Gear Box Z, Inc.*, No. CV-20-08003-PCT-JJT, at 9 ("Thus, SEMA's argument, legally flawed as it is, need not detain this Court as it is not relevant to the facts in this matter. At this point in the proceeding, the Court need only to decide whether the United States is likely to prevail on the merits, *not that a violation has occurred*.") (emphasis added). Without acknowledging this key distinction, Complainant now asks the Presiding Officer to ignore this critical issue precisely *in order to find that a violation has occurred*. Given the finality of the determination Complainant seeks here, the Presiding Officer cannot defer resolution of this critical legal question as the court did in *Gear Box Z.*[9]

Second, by asserting that Respondent's argument should fail based on an alleged lack of supporting facts related to the intended and actual use of the parts on vehicles used solely for competition, Complainant concedes that those facts *do* matter for this motion, and the facts are clearly in dispute.

The burden of proof here lies squarely with EPA. *See Getty Oil Co. (E. Operations) v. Ruckelshaus*, 467 F.2d 349, 357 (3d Cir.), *cert. denied*, 409 U.S. 1125 (1972) ("[I]n an enforcement proceeding, the burden of establishing a violation of the applicable regulation

[9] The district court in *Gear Box Z* described its decision to treat the racing vehicle issue as moot as based on the absence of "any evidence that there is a motor sports use for Defendant's products." 2021 WL 1056396 at *4. There can be no dispute in this case that Respondent's parts have a specific motor sports use.

would be carried by the Government."). Complainant brings this action to enforce the defeat device provisions, and thus it must prove each element of its claims. But the elements of this statute are not just strict liability standards. EPA must prove both Respondent's "intent" and that it knew or should have known that its parts would be used on motor vehicles, and **not** on vehicles used solely for competition. EPA's suggestion that the mere *possibility* that a part *could* have been used in a motor vehicle creates a presumptive violation that cannot be squared with the elevated *mens rea* requirement and would improperly force Respondent to prove its innocence. If EPA believes that manufacturers should be tracking sales or customers to ensure that sales are for competition-only vehicles, it has the means to enact regulations or propound guidance to place everyone on a level playing field, instead of pursuing piecemeal enforcement targeting companies who tried to comply in good faith. Nor can EPA shift its burden by calling the motor vehicle question an affirmative defense. Respondent has explained that vehicles used solely for competition have never fallen under the definition of motor vehicle, so no exception or exclusion is necessary to rebut Complainant's claims.

Though EPA bears both the burden of proof and the burden to meet the stringent standard for accelerated decision, Respondent has presented substantial evidence supporting the intended and anticipated use of the relevant parts in competition-only vehicles that is more than sufficient to raise genuine issues of material fact and defeat accelerated decision. Consistent with representations previously made by Borla in its prehearing exchange submission, Respondent's manager of R&D, Ted Wofford, states in his declaration (Att. 2, at ¶ 5):

> Borla designed and manufactured the exhaust parts for enhanced performance of racing/competition-use-only vehicles. The intended end-user was a person who uses Borla's products on purpose-built or converted race cars competing in the various racing circuits that sanction professional and amateur races across the country.

Respondent also has presented significant additional evidence (which would be supplemented by additional testimony at hearing) that further supports the credibility and reasonableness of these statements, including evidence:

- Describing the breadth and size of the racing industry and racing participation. Respondents have provided testimony from Thomas Deery, who has more than 45 years of personal and professional experience in the racing industry, including managerial and consulting work for multiple race series. *See* Att. 4 (Deery Decl.). Mr. Deery identifies various metrics that provide a sense of the scale of racing across the country (more than 1200 tracks, more than 260 racing sanctioning bodies) and explains that the vast majority of racing is conducted by participants driving race cars that were converted from OEM street cars. *Id.* at ¶¶ 12-14.

- Respondent's deep connections to the racing industry and participation in the racing parts market: As discussed *supra* in Section II and as would be further supported through hearing testimony, Borla has sponsored, partnered with, and supplied race teams and drivers at the highest levels of racing. Borla racing exhaust systems and parts are recognized for high quality and performance enhancement.

- Demonstrating the common racing use of the makes and models for which Borla produced parts at issue in this matter, including the Mazda Miata, Ford Mustang, and Chevrolet Corvette. *See* Att. 2 (Wofford Decl.) at ¶ 6; RX 37 – RX 65 (pictures and information showing racing uses for vehicle models at issue).

- Demonstrating that the rulebooks for national amateur racing sanctioning bodies (including PCA and SCCA) recognize and authorize use of the types of exhaust parts at issue for modification of OEM vehicles in various racing classes. *See* Att. 2 (Wofford Decl.) at ¶ 8; Att. 4 (Deery Decl.) at ¶ 14, 15; RX 66 – RX 69 (racing rulebooks). Modifications to the exhaust system consistent with installation of the types of parts at issue here are very common even in the lower racing classes. *See* Att. 4 (Deery Decl.) at ¶ 12.a. The rules for some racing classes specific to individual vehicle models expressly allow the installation of Borla parts at issue here. The SCCA competition rules for the Spec Mustang racing class specifically allow use of the "long tube header for Mustang – Borla part number 17237," which is one of the part numbers at issue in this case. *See* RX 66 at 192; Att. 2 (Wofford Decl.) at ¶ 9.

Without conceding any burden to do so, Respondent also has produced testimony from an individual end user of one of the racing exhaust parts identified as an alleged violation by

Complainant. As Jason Isley explains in his declaration, Att. 3, Mr. Isley's wife, Jennifer Isley, undertook a project to convert an OEM Mazda Miata into a competition-only race car for the Spec Miata class. Jason chronicled the entire project in a four-part series for SportsCar magazine and RACER.com titled *SCCA Spec Miata Project*. *See* Att. 1. As part of that rebuild, Part 4 of the series, Att. 1 at p. 11-14, describes the installation of a Borla racing exhaust kit consistent with applicable SCCA rulebook:

> The factory exhaust manifold and its downpipe have to stay in place, but the catalytic converter and everything downstream can be replaced. Borla Exhaust offers a kit specifically for the Spec Miata, eliminating the need to fabricate a pipe to replace the catalytic converter; the fit is excellent, as is the sound. Borla also offers an optional secondary muffler for those racing at tracks with very stringent sound limits, and it can be installed or removed in minutes.

Borla provided the Miata exhaust kit to the Isleys in conjunction with articles and the Spec Miata part used by the Isleys (Part No. 12667) is one of the specific parts included in Complainant's total alleged violations. *See* CX 8 at 1509 (Isley invoice dated No. 0402163 dated Nov. 30, 2015). The project was completed successfully and Jennifer Isley is still racing the Spec Miata.[10]

Mr. Isley confirmed that the Miata is not registered or insured for use on the public roads and is transported by trailer to all events or repairs. Att. 3 (Isley Decl.) at ¶ 14. The pictures attached as exhibits to his declaration show the car on its trailer and on the track. Mr. Isley further stated that the type of conversion process undertaken with the Miata is similar to OEM to race car conversions he has done on other vehicles and that he commonly purchases race car parts from online distributors to use in the conversion process. *Id.* at ¶ 17.

Borla also took affirmative steps to clearly inform potential purchasers and end users that the racing parts at issue were not to be used for non-racing applications, even where the sales

[10] *See* California Sports Car Club, *Andy Porterfield Memorial US Majors Tour* (Jan. 16, 2021), http://calclub.com/html/html2/archives/2021/group4_01_16_2021.pdf; California Sports Car Club, *Andy Porterfield Memorial US Majors Tour* (Jan. 17, 2021), http://calclub.com/html/html2/archives/2021/group4_01_17_2021.pdf.

were not made directly by Borla to the end user. Borla included this warning language, based on guidance from a California settlement, for its racing parts on its website, technical documentation for each part, invoices, and in its digital catalogs, and also physically attached the warning to the product itself by way of a tag securely affixed to the part with a bolt so that the purchaser must manually remove it using a tool in order for the part to be used in the vehicle. *See* Att. 2 (Wofford Decl.) at ¶ 10; RX 32 – RX 35 (documentation of disclaimers).

In contrast to the direct and substantial evidence offered by Respondent regarding the intended, anticipated and actual competition use for its racing parts, Complainant has provided no direct evidence of its own to establish that the parts at issue were used on or intended to be used on motor vehicles (as opposed to competition-only vehicles). And nothing EPA has presented would conclusively rebut the broad evidence Respondent has identified to support the genuine issues of fact regarding the elements of intent, knowledge and use. Complainant's speculative criticisms of the likely effectiveness of Respondent's disclaimer, EPA Br. at 24-25, are not supported by any evidence and insufficient to overcome the genuine issues of material fact demonstrated by Respondent's cumulative evidence, particularly when the evidence is viewed, as required, in the light most favorable to Respondent as the non-moving party. *See BWX Techs.*, 2000 WL 365958 at *12 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985)).

Complainant's decision not to provide evidence regarding the competition use issues means that it cannot meet its burden for accelerated decision. That alone should result in denial of the motion. However, even if the competition use issue was deemed an affirmative defense on which Respondent bears the burden of proof (which Respondent disputes), Respondent's cumulative direct and supporting evidence is more than sufficient to identify genuine issues of

material fact. *See BWX Tech.*, 2000 WL 365958 at *15 (reversing grant of accelerated decision to EPA where factual issues remained regarding an affirmative defense); *Consumers Scrap Recycling, Inc.*, 2004 WL 326954 at *13 (same). These issues should be addressed in adjudicatory hearing and not through accelerated decision.

V. GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING RESPONDENT'S ALLEGED LIABILITY

With the above discussion of the difference between "motor vehicles" and vehicles "used solely for competition" in mind, the asserted proof for many of the specific elements of EPA's claim fail to meet the stringent standards for accelerated decision. *See BWX Techs.*, 2000 WL 365958 at *11 (stating that an accelerated decision is granted only if "the evidence, viewed in the light most favorable to the nonmoving party, is such that no reasonable decision maker could find for the nonmoving party").

A. The Subject Products Were Not Intended for Use with, or as Part of, Motor Vehicles or Motor Vehicle Engines

Once the mutually exclusive categories of covered and non-covered vehicles are recognized, it is apparent that the racing parts designed and sold by Borla were not "intended for use with or as part of, any motor vehicle or motor vehicle engine" because they were instead manufactured, sold, and offered for use on or as part of vehicles designed and used solely for competition, and such vehicles are not "motor vehicles." At a minimum, there are certainly many genuine issues of material fact regarding the "intended" use of the subject parts that would preclude accelerated disposition of such violations. *See supra*, Section II (discussing facts support for intent to sell for racing, history of the company, and related relevant matters).

EPA's claim, EPA Br. at 27, that converted racing vehicles started out as motor vehicles and hence remain covered was discussed above and, of course, begs the question whether a

"motor vehicle" can ever be redesigned into a vehicle used solely for competition that would not be covered by the Defeat Device Prohibition. And it does not establish the required intent if Borla did not understand converted race cars to be "motor vehicles" even if the Presiding Officer ultimately favors EPA's more expansive reading. Because EPA must prove *mens rea* in addition to other elements of any violation, it must shoulder the burden of demonstrating that Borla understood that it was marketing and selling to forbidden customers rather than to customers that everyone believed were entitled to build and use converted competition vehicles and who have been doing so openly and without threat or liability for decades.

Complainant completely discounts Respondent's voluntary disclaimer to potential customers, even calling it "disingenuous in light of no actual effort by Respondent to keep its products off public roads." *See* EPA Br. at 25. But Complainant provides no evidence to support its value judgment, and no explanation of what alternative action (but for shutting down production) it asserts Respondent should have done in the moment. EPA has publicly stated that it had no interest in pursuing parts for converted racing vehicles but provided no guidance at all to manufacturers as to how they could continue to sell their racing-only parts. It was in the context of that regulatory vacuum that Respondent took the voluntary and affirmative step of using the disclaimer language, relying on guidance from California for sale of racing parts. EPA further provides no evidence as to why EPA's assumption that such language will be roundly ignored is more reasonable than believing that end users would heed the warnings. The parts had a legal racing use (Respondent certainly believed they did based on EPA's actions),[11] and the

[11] The sole case cited by Complainant on this issue, *United States v. Gardner*, 860 F.2d 1391 (7th Cir. 1988), has no application here. The court in *Gardner* was evaluating a disclaimer by a company who made illegal cable converters. The court found the disclaimer to be evidence of unlawful activity where there was no credible legal application of the technology at issue. *Id.* at 1396. Here, where Respondent had a good faith belief that racing applications for these parts were lawful, the disclaimers cannot compel an automatic finding of intent, knowledge, or liability. *See United States v. McFadden*, 823 F.3d 217, 226 (4th Cir. 2016) (finding evidence of the purpose and impact of the disclaimer to be "contested evidence").

disclaimer clearly warned against any other uses. It is paradoxical for EPA to suggest that Respondent's good faith action can be turned around to actually make the case for liability; Respondent was aware that using racing parts is not allowed for on-road vehicles, it informed its customers of that, and reasonably believed that warning would be considered.

Complainant also argues that Respondent's "indiscriminate" sale of its products through wholesalers undermines the assertion that those parts were intended for competition use vehicles only. But wholesale sales are a primary distribution mechanism for conversion racing parts, so there is no presumption to be made that such sales are likely not to be for racing purposes. *See, e.g.*, Att. 3 (Isley Decl.) at ¶ 17. Respondent ensured that the warning language was contained in the product documentation and bolted to the product itself so even a wholesale customer would receive the warning before installation of any racing part. EPA's observation, EPA Br. at 13, that the instruction manuals for the parts at issue in this case refer to specific makes and models of vehicles "covered by a COC demonstrating they were manufactured by their OEM to conform with the OEM's motor vehicle design as certified by the EPA to meet emission standards" likewise begs the question. That such vehicles began their existence as certified motor vehicles does not demonstrate that they remained motor vehicles once redesigned and converted to exclusive racing use. It is not the nominal make and model of the underlying components that define a motor vehicle, but the *current* design of the completed product. The makes and models associated with parts at issue here include many of the most popular OEM cars for conversion to racing, including the Mazda Miata, Ford Mustang, and Chevy Corvette and Camaro. See Att. 2 (Wofford Decl.) at ¶ 6. Indeed, EPA undoubtedly knows – at a minimum from materials sent to it by Respondent -- that many dedicated racing vehicles that were never certified and intended from the start to be competition-only vehicles nonetheless are identified by the make and model

of the popular consumer versions of such vehicles. With the existence of NASCAR and other racing circuits using stock-car platforms, such concession is obvious.

EPA further concedes that purpose-built racing vehicles are not motor vehicles subject to the Defeat Device Prohibition (CX 309 at 2), and many such vehicles are based on the same starting components, including engines, that go into consumer motor vehicles. Indeed, many purpose-built cars, for example Ford Mustang and Honda Civic are built by OEMs using stock components with the addition of racing aftermarket parts. Borla parts have been used on such purpose-built vehicles through its sponsorships of racing series such as the Mustangs featured in the Miller Cup Mustang Series where all racing vehicles were fitted with Borla racing parts. That such parts *could* be used on a motor vehicle, or even are designed to fit overlapping components of racing vehicles and motor vehicles, falls far short of demonstrating that they are intended for use on "motor vehicles."

B. The Subject Products Did Not Have the Principal Effect of Removing Emissions Devices from Motor Vehicles

Regarding the principal effect element of EPA's charge, and whether any vestigial catalytic converters on redesigned racing vehicles constitute emissions devices removed from motor vehicles again depends on whether the vehicle on which the part is to be used constitutes a motor vehicle. If the vehicle has been, or is in the process of being, redesigned into a vehicle used solely for competition, then the Subject Products are not bypassing or defeating any emissions devices "on or in a motor vehicle." That such devices were once part of a new motor vehicle designated as such by the OEM and certified by EPA gets the temporal question wrong. It is the present status of a vehicle, not its past status, that matters. Thus, catalytic converters included in compliance with the COC governing the past status of a vehicle, but no longer

required given the changed current status of such vehicle can no longer be deemed to *currently* be "installed in compliance with regulations" that no longer apply.

Furthermore, the process of conversion of an ordinary "motor vehicle" into a vehicle used solely for competition generally involves the substantial disassembly of such vehicle, the removal of many parts unnecessary or detrimental to such competition use, and addition of many new parts (such as roll cages and specialized tires) needed on competition vehicles but unneeded or absurd for vehicles driven on the streets or highways. On such a converted vehicle, major exhaust components, including the catalytic converters, may have long been abandoned or disabled by the owner, and thus the installation of the subject parts will not bypass, defeat, or otherwise have any effect on such absent emissions devices. Thus, even if EPA is correct that a motor vehicle can never be converted into a non-motor vehicle, the parts sold by Borla would have no effect at all on emissions devices already removed by the car's owner. Such parts never impact such devices at all, any more than a straight piece of tubing bought at a plumbing store and welded to a disassembled engine would. The same would be true of parts sold and installed as replacement parts on vehicles that have long been operating as competition-only vehicles. Even if one imagines that the first replacement headers or tubes defeated or bypassed the original equipment, surely the second, third, and subsequent replacements do nothing of the sort.

At a minimum, there is a factual dispute whether the products sold by Borla were used on vehicles that still had their catalytic converters, and hence use of such products removed or bypassed such existing catalytic converters, and it would be EPA's burden to prove that central element of its case. Even assuming a converted racer retained its legal status as a motor vehicle despite not being designed for or used on the roads or highways, the principal effect element involves a separate factual question that turns on how the parts were actually used and intended

to be used. And the answer to that factual question may vary for each individual sale. A part sold to the owner of a purpose-built racer based on the Ford Mustang platform but never containing a catalytic converter could not possibly have the prohibited "principal effect" of removing, defeating, or otherwise impacting a non-existent emissions device. Similarly with parts sold to previously converted vehicles where prior emissions devices had been removed long before Borla's replacement parts entered the picture.

EPA's reliance, EPA Br. at 14, on Respondent's description of the "function" of its parts in its October 2018 Response to EPA's information request does not establish that such parts removed or otherwise defeated existing emissions devices. In response to EPA's leading question essentially asking Borla to admit that its parts "*could enable* the customer or end user end user" to defeat an admissions control device, EPA Br. at 14 (emphasis added), Borla replied that such theoretical possibility existed only in a limited set of circumstances and even then, would depend on an intervening decision by the end-user to act in a manner EPA presumably deems illegal. That response is a far cry from any evidence of the "principal" effect of its parts, is in fact evidence that such effect may be only occasional or incidental at best and depends on the independent and potentially improper actions of the end-user rather than on the ordinary or intrinsic use of the parts themselves. EPA's cited evidence thus, at a minimum, confirms the existence of a serious factual question regarding the effect of the Subject Products, and may very well rebut the very notion that removal of existing catalytic converters is the "principal" effect of using such parts.

Furthermore, if the mere *possibility* that a part could be used to remove or disable an emission device were sufficient to establish the principal effect of such part, then that construction is overbroad and absurd. A wrench, hacksaw, drill, or blowtorch *could* be used with

or on a motor vehicle to remove or disable a catalytic converter. Likewise, any suitably sized piece of straight tubing *could* be welded on a vehicle to replace or bypass a catalytic converter. While in fact using such ordinary tubing on a vehicle to be driven on the street might well constitute tampering, the piece of pipe when manufactured can hardly be said to be a defeat device due to the mere potential for such improper use or to have such use as its "principal" effect. Such effect would seem to be a factual inquiry turning on the circumstances of actual or expected use and the condition of the vehicle and its devices before such use. EPA certainly has not come close to establishing undisputed facts sufficient to meet its burdens on those issues.

The second piece of supposed evidence cited by EPA, EPA Br. at 14-15, is its own analysis of the results of replacing OEM parts with the relevant Borla parts. But such analysis merely begs the question of principal effect and assumes that the parts are both intended to be used and actually used on vehicles in their OEM configuration. As explained in the previous discussions, such parts are intended for redesigned racing vehicles based on common platforms but are expressly not intended for use on OEM motor vehicles that are to be used on the streets and highways.

That Borla's installation manuals refer to particular makes, models and years of cars likewise offers no evidence regarding the principal effect of the use of its parts absent the same assumptions discussed above regarding the current status and condition of those cars at the time the Borla parts were purchased by the end user. Furthermore, and as explained above, even purpose-built racers conceded by EPA to not be "motor vehicles" are based on many of the same platforms and components as cars intended for the consumer market, hence are necessarily and reasonably identified by such makes, models, and years. That EPA has issued COC's for the consumer version of such makes and models sold and used on streets and highways is

completely irrelevant to whether vehicles using a subset of identical underlying parts, but designed or redesigned solely for use in competition, constitute motor vehicles at all, much less have any emissions devices installed that could be impacted in any way by Borla's parts. Once again, the most EPA has shown is that such parts *could* be used by an end user to replace an OEM part containing a catalytic converter, not that it is so used or that the intended and actual use of the product has that principal effect. Speculative possibilities of how a product might be used in an unknown number of instances do not prove actual violations.

C. There Are Genuine Issues of Fact Surrounding the Allegation that Respondent Knew or Should Have Known Its Subject Products Would Result in the Removal of Catalytic Converters

Regarding the knowledge element, once again that turns on the definitional question and numerous factual assumptions about how the subject products would be used. While some parts were certainly employed by users converting their cars to dedicated racing vehicles, others were used on competition-only vehicles that had already been converted and the owner was merely replacing or upgrading parts that already lacked catalytic converters. There is no suggestion that Borla knew or could have known whether particular parts would be used as part of an initial conversion, or on an already-converted or purpose-built vehicle, much less that it knew that its parts would be installed on any motor vehicles that used the streets and highways, as opposed to non-covered competition-only vehicles that would never again be driven on the streets. To the extent this is a *mens rea* element, EPA should have to prove that Borla knew or should have known both the status of the vehicles on which its parts would be used, and the physical condition of such vehicles at the time of sale, *i.e.*, whether they still had any previous emissions devices or whether such devices had long since been removed by the owners. Actual knowledge, of course, is a factual question, and Borla plainly did not know of the details of each and every

purchaser of its parts. Respondent PHE at 25. While it obviously knew about a limited number of its end-users – those sponsored racers and racing schools to which it provided promotional parts – many of its other parts were sold by distributors and Borla had no contact with the final purchasers. EPA proffers no evidence to establish actual knowledge regarding whether, or how many, parts sold directly or through distributors would replace or bypass existing catalytic converters.[12]

As for whether Respondent should have known that its parts would be used to remove catalytic converters, EPA again falls short. EPA certainly provided no guidance regarding any record keeping or sales inquiry requirements for parts manufacturers such as Borla. And given that Borla sold its parts primarily through distributors, it had no reason to believe that its parts were going towards non-racing uses or on a significant number of racing vehicles that still had catalytic converters at the time the parts were purchased and used. Furthermore, to the extent the should-have-known element involves normative considerations going to the reasonableness of Borla's conduct, Borla followed the only and strictest guidance available to it – the rules applied by California requiring express notice that the parts were for racing use only. Any reasonableness inquiry thus is a highly fact- and time-bound question requiring testimony and a consideration of the existing circumstances to understand how a reasonable manufacturer in that time period would have behaved. Nothing in EPA's motion resolves such genuine issues of fact or mixed fact and law.

[12] Insofar as some Borla instruction manuals used ordinary cars to demonstrate the use of a part, those cars were always returned to their original condition following the demonstrative change of parts. There is nothing sinister about using such demonstration models because racing vehicles, whether purpose built or converted, are based on the same platforms and have the same physical connections as street vehicles of the same type. And it is far easier to use a consumer vehicle as a demonstration model than it is to use an existing, and often extremely expensive racing vehicle, whose owners are understandably reluctant to turn over as demonstrative aids. Nothing in such illustrative examples endorses using such parts on vehicles that would continue to operate on the streets, and Borla expressly and repeatedly instructed against such use in its marketing materials and on the parts themselves.

EPA suggests, with no explanation and a bare cite to legislative history, EPA Br. at 16, that "the knowledge element here does not require Complainant to prove the Respondent knew the Subject Products were actually installed or to prove how the modified motor vehicles were used." But that description is misleading at best, and the actual passage cited by EPA explains that the "new section 203(a)(3)(B) has been added to the Act to clearly prohibit the manufacture, sale, or offering for sale of such devices where it is *known or should be known* that they *will* be used for tampering." S. Rpt. No. 101-228, at 124 (December 20, 1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3509 (emphasis added). Knowledge that particular parts *will* be used for tampering, rather than for their legitimate intended and non-tampering purposes, requires far more than the possibility that such parts *could* be improperly used. Were the test as sweeping as EPA suggests, nobody could manufacture any race-car headers or exhaust system components at all, even for purpose-built racers, given that such parts *could* be used to replace original components on motor vehicles designed for street and highway use. The test is far more stringent than that, and EPA makes no attempt to demonstrate that Borla knew or should have known its parts *would* be so used, much less that such would be the "principal" effect of the use of its parts.

D. There Are Genuine Disputes Regarding the Number of Parts Properly at Issue in This Case.

EPA also fails to satisfy its burden for accelerated decision regarding the total number of parts potentially subject to liability. Complainant seeks accelerated decision for 5,338 alleged violations of the CAA relying on information originally submitted by Respondent. In subsequent review of these submissions, Respondent identified discrepancies in its original information submission that resulted in an overstatement of parts responsive to Complainant's information request. Respondent asserts that the appropriate number of units at issue for purposes of this

matter should be 4,787 as reported in Respondent's prehearing submission. EPA acknowledges Respondent's dispute with respect to the correct number of parts but asserts that Respondent has not provided evidentiary support to explain the difference between its prior and revised unit counts. *See* EPA Br. at 18-20. At a minimum, the declaration of Borla CFO Allen Stoner (Attachment 5), the list of parts and units at RX 7, and the accompanying set of invoices at RX 2 create a genuine issue of fact requiring a hearing on the number of parts involved.

First, EPA cannot simply rely on the original list of parts (CX 7) submitted to EPA by Respondent because it inadvertently included sales of parts that were outside the scope of EPA's information request. As explained in his declaration, Mr. Stoner identified potential discrepancies with the numbers in CX 7 when conducting analysis of sales records for his economic benefit evaluation. Att. 5 (Stoner Decl.) at ¶ 13. Mr. Stoner and his staff then conducted a partial analysis of the information in CX7 in comparison to the sales invoices (CX 8) that were provided to EPA in conjunction with CX 7. Even in a limited review of sales in 2016 and for certain parts in 2017, Mr. Stoner determined the numbers reported for many parts on CX 7 were significantly higher than was supported by the sales documentation in CX 8. *Id.* at ¶ 16. The most significant difference was that the sales invoices excluded sales to international customers falling into one of three categories: (1) sales billed to an international customer with an international shipping address (see invoices attached as Exhibit B to Mr. Stoner's declaration), (2) sales billed to an international customer with a shipping address of a freight forwarder in the United States who then ships the part overseas (see invoices attached as Exhibit A to Mr. Stoner's declaration), and (3) sales to an international customer with a shipping address in the United States but with other information supporting ultimate shipment overseas. *Id*. at ¶ 16. Respondent excluded these sales from the invoices based on the good faith belief that they

were outside the scope of EPA's request for information; however, Respondent inadvertently included those same sales in the summary submission in CX 7. Given these documented inaccuracies, there are genuine issues of material fact regarding the numbers in CX 7 and EPA cannot rely entirely on that data.

Second, Mr. Stoner further explains in his declaration the basis for his revised calculation of 4,787 potentially applicable parts that was provided as part of Respondent's prehearing submission. In order to prepare an updated economic benefit analysis, Mr. Stoner and his staff conducted a further review of Borla's sales records consistent with the final part numbers and date range parameters identified by EPA. Att. 5 (Stoner Decl.) at ¶ 7. Mr. Stoner further identifies the process for that review, including the identification and exclusion of the three types of international sales discussed above. For the first two categories, International Bill-to and International Ship-to and International Bill-to and US freight forwarder Ship-to, the invoices directly demonstrate evidence of export. For the third category of international customers with United States shipping addresses, Mr. Stoner and his staff compiled additional information, presented in RX 3, that support Respondent's position that those parts were sent abroad. Whether or not EPA agrees with the approach taken by Respondent, the testimony and additional information in RX 2, RX 3, and RX 7, which must be viewed in the light most favorable to Respondent as the non-moving party, are more than sufficient to preclude accelerated decision on the total number of parts at issue.

EPA's fallback suggestion that the mere manufacture of parts in the United States alone is "an independent and sufficient basis of liability," EPA Br. at 19, for parts sold to international customers is simply wrong. As explained above, EPA cannot evade its burden to show a violation of each element of the statute for each part by reliance on a broad presumption about

what could have happened to those parts. Moreover, EPA does not have authority to pursue CAA enforcement where the alleged violation will have no impact on emissions in the United States. Such broad enforcement authority would be contrary to longstanding extraterritoriality limitations. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted) ("It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"). The Second Circuit recently addressed this very question of the CAA's reach in *City of New York v. Chevron Corp.*, 993 F.3d 81, 100 (2d Cir. 2021), finding that "[n]o such clear indication [of an extraterritorial application] appears in the Clean Air Act." Accordingly, the Court expressly found "that the Clean Air Act regulates only domestic emissions." *Id.* at 100-01. Thus, whether a part was sold and delivered to an international customer such that it could not affect domestic emissions is a material factual question that remains genuinely in dispute for a significant number of the parts included in EPA's total alleged violations.

EPA's "automatic" liability argument for international parts also runs contrary to its prior actions in pursuing this matter. Complainant's original request for information sought the identification of and copies of receipts for relevant components sold by Borla only for customers with shipping addresses in the United States. *See* CX 4 at 7. Thus, direct sales to international customers receiving deliveries abroad were not included in EPA's request. In subsequent correspondence, Borla informed EPA that it had identified certain unit sales associated that were sold to an international customer but were shipped to a freight forwarder in the United States for subsequent shipment to the Chinese customer. *See* RX 1 at 12 (response to RFI 2.d). Borla indicated that it was removing those sales and EPA did not object. Having acknowledged that

such international sales were outside the scope of its enforcement action, EPA should not be allowed to reverse course at this late stage.

VI. RESPONDENT'S DEFENSES SHOULD NOT BE STRICKEN

A. Standards for Motions to Strike

Insofar as EPA is arguing that the various defenses it seeks to strike are insufficient as a matter of law or fact, the motion to strike is not meaningfully different from a motion for summary judgment, is generally disfavored, and should be treated accordingly. Furthermore, several of the defenses challenged provide detail for why EPA has failed to state its case, and thus are ordinary defenses for which the burden of proof remains with EPA to prove its case. Insofar as a defense is a genuine affirmative defense, Respondent Borla would bear the burden of proof on any factual issues, but merely need show that the evidence is such that a reasonable jury *could* find in its favor; it need not carry the full burden of presentation and persuasion at this preliminary stage. And, as in the summary judgment context, if there is further relevant factual development that could be obtained through discovery or trial testimony, summary disposition prior to such discovery or trial testimony is inappropriate. That is particularly worth keeping in mind as to issues where EPA is in possession and control of relevant information not readily available to Respondent. The internal structure and operation of ALJs and the EAB, and their relationship to and control by the political appointees at the agency are but two examples where the need for factual development is important to determine constitutional issues relating to the Appointments Clause and due process.

To the extent the Presiding Officer believes she lacks authority to even consider certain objections to the constitutionality or other aspects of the CAA or of EPA's enforcement regime, she should simply deny the relevant defense on that ground, but not strike it. In such instances,

the defense merely serves to provide fair notice to EPA and preserve the issue for subsequent review so that there can be no suggesting of waiver or forfeiture. While respondent believes it is every agency's duty to consider the constitutionality and lawfulness of all aspects of its conduct, including the overall operation of its enforcement actions, it recognizes that such matters are ultimately for the courts and thus urge the Presiding officer to develop a record sufficient for subsequent review.

B. Fourth Defense – EPA's Actions in Pursuing Enforcement Against Respondent Are Inconsistent with Its Own Guidance for Pursuing Administrative Enforcement

EPA argues, EPA Br. at 39-41, that this defense should be stricken because the underlying Executive Order, directing agencies to respect basic fairness and due process principles in their enforcement proceedings, has been rescinded by President Biden. Notwithstanding that rescission, the agency was subject to that order during the development of this action, operated under its own internal directives implementing the order, and, in any event, should need no express command from the President to live up to such universal principles and to, at a minimum, comport with its own internal rules and procedures. Any other course would be almost definitionally "arbitrary and capricious" and hence contrary to fundamental rules of administrative procedure.

While the principles contained in such executive and agency guidance might have a degree of leeway for agency implementation and might not therefore serve as a sufficient basis for a cause of action against the agency, they certainly are a sufficient basis for a defense, whether ultimately conceived of in administrative law terms or due process terms. In fact, other defenses, such as fair notice and confusion, take into account numerous factors, including internal agency guidance, and this should be no different.

Finally, regardless whether such guidance is enforceable by a court, to the extent the Presiding Officer and later the EAB view themselves as making a decision on behalf of the EPA and as part of the EPA's internal decision-making process, then Complainant's arguments miss the point. The Presiding Officer would be exercising her own discretion to implement, or not, prior guidance, on behalf of the EPA itself and should hew to the fundamental principles outlined in those orders as a matter of discretion, even if she did not consider herself formally bound by them. In such circumstances, the administrative adjudicatory process *is* part of the "internal management" of the EPA delegated to the Presiding officer and the EAB, and accordingly this defense is properly directed at them and should not be stricken.

C. Fifth Defense: Statute of Limitations

While there is no dispute regarding the length and tolling of the 5-year statute of limitations in this case, there is a dispute as to when this action was properly commenced and hence as to the date from which the limitations period should be measured. Insofar as the original complaint was defective for failure to identify the specific parts alleged to violate the CAA, that complaint is not the proper starting point. Rather, the proper measure would be from the subsequent filing of a complete complaint, notwithstanding its characterization as an amended complaint. Using that date of August 6, 2020, the oldest date within the statute of limitations would be February 21, 2015 rather than January 15, 2015. Parts sold prior to that more recent date should be excluded from any penalty calculations.

D. Sixth Defense: Violation of Separation of Powers

The Constitution grants certain enumerated legislative powers to Congress. U.S. CONST. 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* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion of Kagan, J.). Thus, a "nondelegation inquiry always begins (and often almost 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 overbroad nondelegation framework deviates from the Constitution's structure and should be rejected. *Gundy*, 139 S. Ct. at 2139-42 (Gorsuch, J., dissenting). Borla thus challenges the overbroad "intelligible principle" jurisprudence, if and as necessary to the resolution of this case.

EPA's response that the definition of motor vehicles is "clear" and involves no delegated discretion turns on its own misunderstanding of that language and is addressed earlier in this brief. Insofar as the Presiding Officer agrees with Respondent's reading of the statute and its context, then the interpretive issue is resolved and the issue of improper delegation would not arise as to that issue. But if the definition is viewed as ambiguous and EPA given deference as to its construction of the ambiguous language, that raises the delegation and separation of powers issue. It thus is premature to even address this aspect of the defense until the Presiding Officer has determined whether the definition of "motor vehicle" is clear or ambiguous as applied to competition vehicles, and then whether to handle such ambiguity through lenity or deference to the agency. If Respondent is correct on the meaning of the statute, or on the proper treatment of

any ambiguity, then this defense would be moot. If Complainant prevails on both of those issues, then the constitutional objection would become ripe for consideration.

Regarding EPA's penalty policy, EPA simply claims that it is based on the statutory factors and the behavior it challenges here is harmful. Those are factual questions that require further development and are certainly in dispute. Furthermore, that EPA can have fairly comparable penalties for behaviors with orders of magnitude differences in potential harm – diesel defeat devices versus gas-engine devices, for example – illustrates that there is no genuine intelligible principle from Congress that is driving that policy, but rather EPA's exercise of inconsistent and largely free-ranging legislative judgment. As noted previously, if that degree of delegation of essential policy judgments with tremendous impact on businesses and the public constitutes a sufficient intelligible principle for delegation purposes, then the entire doctrine needs revisiting. Respondent, of course, recognizes that as to that broader challenge, the Presiding Officer is not in a position to overrule Supreme Court precedent, but Respondent seeks to preserve the issue for later review and urges the Presiding officer to read existing delegation doctrine in light of the modern limitations and concerns emphasized in cases like *Gundy*.

E. Seventh Defense: Lack of Fair Notice

Due process is a fundamental component of the United States justice system. A basic component of due process is fair notice of prohibited conduct. *FCC v. Fox Tel. Stations, Inc.*, 567 U.S. 239 (2012). "In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *General Elec. Co. v. EPA,* 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); s*ee also United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (internal quotations and citations omitted) ("[W]hen violation of a regulation

subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Thus, the responsibility to promulgate clear and unambiguous standards is on the agency. The test is not what the agency might possibly have intended, but what was said. If the language is faulty, the agency had the means and obligation to amend. Thus, reliance on policies underlying a statute cannot be treated as a substitute for the agency's duty to promulgate clear and definitive regulations.").

Respondent contends that motor vehicles converted to competition-use only vehicles are not included within the definition of motor vehicles and cannot provide the basis for a violation of the defeat device provision of the CAA. However, even if Complainant's contrary interpretation of the statute and regulations is deemed reasonable, Respondent cannot be held liable for any violations or penalties because EPA failed to provide fair notice of its interpretation of what was required under the law. Given EPA's confusing regulatory pronouncements and public statements and its decades-long practice of knowingly allowing the conduct for which it now seeks penalties, EPA failed to provide fair notice to Respondent. EPA's enforcement action thus violates due process as protected by the Fifth Amendment.

EPA, EPA Br. at 43-45, makes only a perfunctory effort to defend its inconsistent past interpretations of the CAA, claiming that the statutory language is clear and that it was merely exercising enforcement discretion, not offering a narrower interpretation of what qualifies as a motor vehicle. The statutory question has been discussed at length above and some additional relevant background will be provided here. And whether EPA was merely exercising "enforcement discretion" is a factual question that would benefit from trial and testimony and is not dispositive of the due process and fair notice problem. Having told the entire racing community that it was permitted to use and supply converted racing vehicles, EPA cannot then

turn around and punish them *post hoc*. Even assuming EPA is empowered to change its supposed enforcement discretion on a forward-looking basis, it is not consistent with due process for it to prosecute past conduct it had encouraged and induced.

In assessing whether EPA provided fair notice of required behavior in the racing space at the time the parts in question were sold, courts evaluate multiple factors. In *General Electric*, the D.C. Circuit considered 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." *General Electric,* 53 F.3d at 1329. In addition to ambiguity in the agency's regulations and statements, courts also evaluate whether there a common understanding and common practice among industry and an inconsistent pattern of enforcement. *See Lake Bldg. Prods, 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"); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336-37 (6th Cir. 1978) (holding employer did not have fair notice of OSHA safety regulation where the regulatory language was ambiguous, where the defendant's interpretation was consistent with "industry practice," and where "the pattern of administrative enforcement" had confirmed that practice.). Both in its prehearing submission and in this filing, Respondent presents substantial evidence that EPA's current interpretation that the defeat device provision applies to competition-use only vehicles was not clearly communicated, understood, or enforced over the past four decades.

In its motion to strike, EPA attempts to short-circuit the necessary fair notice evaluation by asserting that the regulated entities could ascertain EPA's interpretation "through a plain reading of the statute." EPA Br. at 44. But EPA is wrong to the extent that it argues that such a conclusion can be reached "as a matter of law" without conducting an analysis of the agency's prior actions and other relevant factors. As explained in Section IV above, the statute does not plainly compel the interpretation that EPA has followed in this enforcement action. Moreover, as recognized in *General Electric*, the fair notice defense may apply even where EPA's position is ultimately deemed to be reasonable and is accorded deference by the court. *General Elec.,* 53 F.3d at 1328. Thus, EPA cannot prevail on this defense with a conclusory nod to "plain meaning" when it seeks substantial penalties from Respondent. The fair notice determination requires full consideration of all of the evidence presented by Respondent, viewed through the lens of "the facts as they appear to the party entitled to the notice, not to the agency." *Hoechst Celanese Corp.,* 128 F.3d at 226.

Each of the cases cited by EPA in support of its "plain reading" contention involved a review of the fair notice factors, including prior actions and inactions by the agency. Though the decision makers in those cases did not find a lack of fair notice, the decisions turn very much on the specific facts at issue and are distinguishable from the circumstances here. *See In re Tenn. Valley Auth*., No. CAA-2000-04-008, 9 E.A.D. 357, 2000 WL 1358648 (ALJ 2000) ("TVA") (relying substantially on prior judicial precedent addressing interpretation of contested language); *In re Harpoon P'ship,* 12 E.A.D. 182, 2005 WL 1254975 (EAB 2005) (identifying direct regulatory statements and published guidance addressing the specific issue challenged by defendant); *In re V-1 Oil Co.*, 8 E.A.D. 729, 2000 WL 29142 (EAB 2000) (finding that EPA had made direct communication of its position to defendant). EPA's cited decision in *United States*

v. Navistar Int'l Corp., 240 F. Supp.3d 789 (N.D. Ill. 2017) is also distinguishable. The *Navistar* court evaluated the regulation and EPA statements at issue and found on those specific facts that they were consistent and communicated a clear position to industry. *Id.* at 797-99. Here, as explained further below, EPA's confusing regulatory actions and its inaction in the face of decades of growth in the racing industry failed to inform Respondent, the regulated industry, or the public of the interpretation EPA's now advances in this enforcement action.

Rather than addressing any of the substantial evidence of lack of fair notice presented by Respondent, EPA simply waves it all off by suggesting that "the EPA statements cited by Respondent refer to the exercise of the Agency's enforcement discretion and in no way constitutes Agency interpretation of the Act's Defeat Device Prohibition." EPA Br. at 44. Respondent contests that characterization and it is not supported by the entirety of the evidence. But even taking EPA's contention at face value, enforcement discretion does not provide a free pass to EPA not to clearly communicate its regulatory interpretation. Indeed, 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.'" *Hoechst Celanese Corp.*, 128 F.3d at 224 (citations omitted). The lack of enforcement over an extended time period that occurred here regarding converted race cars is part of the public's understanding of the agency's position and a specific factor that courts review in evaluating whether fair notice has been given. *Lake Bldg. Prods.*, 958 F.3d at 506 (identifying that in 15 years, OSHA had enforced its interpretation only one other time.). EPA's lack of enforcement over the past forty years must be considered as part of a larger fair notice evaluation, however that inaction is characterized or justified by EPA. When

the three primary factors are evaluated under the specific facts in this case, they support a finding that EPA did not provide fair notice to Respondent of the conduct alleged to violate the CAA.

1. Ambiguity in EPA Regulations and Public Statements

In finding a lack of fair notice in *General Electric*, the D.C. Circuit gave substantial weight to its finding that the regulation at issue did not clearly bar the penalized conduct and, in fact, EPA allowed it in other relevant regulations, and the fact that EPA was proposing new regulations that would clarify the regulatory provision at issue. *General Elec. Co.,* 53 F.3d at 1331-32. Over decades of growth in the racing and aftermarket parts industry, EPA never clearly barred or penalized the manufacture of parts for conversion of motor vehicles to racing vehicles/vehicles used solely for competition. And given that those same parts can be and are used on purpose-built racecars of the same underlying make and model, *see supra*, at Section II, it is hard to imagine that EPA could prohibit the manufacture of parts that have such an entirely lawful use, even on EPA's reading of the statute. Furthermore, despite EPA's assertion that a motor vehicle can never be redesigned to be any other classification, certain EPA regulations expressly allow it. The fact that EPA felt it necessary to amend its regulations in 2015 to "clarify" its interpretation, and then abruptly withdrew its proposal, highlights the lack of ascertainable certainty regarding what conduct may subject a company selling racing parts to enforcement.

The conversion of motor vehicles into racing vehicles has been a growing pastime for decades and is one that pre-dates the Clean Air Act. The SCCA, one of America's leading amateur motorsports organizations was founded in 1944. NASCAR, one of the leading professional motorsports organizations, held its first organized race in 1948. Whether amateur or

professional, the vehicles being raced were production vehicles (meaning available for consumers) or modified production vehicles.

Congress adopted the CAA's definition of motor vehicle with a clear understanding of this backdrop, as reflected in the widely referenced legislative committee discussion between Representative Nichols and Chairman Staggers related to the 1970 amendments, as discussed *supra*, at Section IV. When considering the definition of motor vehicle and its breadth, Congress understood that many racing vehicles were modified production vehicles, not the vehicles *used* onroad for *everyday use.* During this back-and-forth over the breadth of the definition of motor vehicle, there is no mention that the vehicle must have been a factory-built race car, a car that was never used on a street, or a car that was never intended to be used on the street. Moreover, there is no mention of the vehicle's design – the focus is on the *use* of the vehicle and whether the vehicle is *used* onroad for everyday driving.[13]

The 1990 Clean Air Act amendments created authority for EPA to regulate emissions from nonroad vehicles or engines. The definition of nonroad vehicle/engine expressly excludes motor vehicles and vehicles used solely for competition. The tampering prohibition was also amended to apply to individual car owners and operators as well as manufacturers of "defeat devices." S. Rep. No. 101-228, at 122. Nowhere in the legislative history is there a discussion indicating that vehicles used solely for competition must have originally been nonroad vehicles and *never* have been a "motor vehicle" in order to be excluded. Again, Congress understood that racing vehicles, or vehicles modified for racing use, were excluded from the definition of motor vehicles. This naturally would have pushed them into the nonroad classification and to ensure

[13] Early versions of tampering provisions included in the 1970 Amendments, and subsequently in the 1977 Amendments, contained no language that contradicted Congress' controlling premise that those provisions did not apply to racing vehicles or converted racing vehicles.

these were not regulated, Congress included in the nonroad definition an offramp for vehicles used solely for competition.

EPA's argument that a motor vehicle can never change its definitional status is not consistent with multiple other regulations EPA has issued following the 1990 amendments. In addition to the above chronology of EPA's omission of any discussion related to its interpretation that a motor vehicle can never be converted to any other classification of vehicle/engine, EPA contradicts itself in regulatory language allowing just that. For example, as discussed earlier in connection with the definition of a motor vehicle, *supra* at Section IV, regulations involving the definition of "model year" confirm that a "motor vehicle can be converted to a different status, including to a "nonroad" vehicle, which even EPA's reading concedes would then be subject to the competition-use carve-out. 40 C.F.R. § 1039.801 (discussing an "engine that is converted to a nonroad engine after … being certified and placed into service as a motor vehicle engine,"); 73 Fed. Reg. at 59134 (Oct. 8, 2008) ("Note that the regulations generally treat engines converted to a different category as new engines ….[I]f a motor vehicle is modified such that it no longer fits under the definition of motor vehicle, its engine generally becomes a new nonroad engine").

EPA's first direct regulatory or public statement[14] seeking to prohibit conversion race cars did not come until July 2015, more than 40 years after the defeat device provision was

[14] EPA has referenced presentations it made at the Specialty Equipment Marketing Association ("SEMA") annual conference over these years as support for its argument that it provided adequate notice, but these presentations were not the same as regulatory promulgation or published guidance and merely reinforced the confusion that existed. For example, in 2008 and 2010, EPA's presentations contained a question whether sales could be made as long as the customer was informed that the parts are for racing use only. CX 341 at 38. EPA's response was "no," but that answer merely begs the question because racing vehicles were not considered by the industry to be covered under the motor vehicle definition. Nothing in the 2008 and 2010 cited presentations explains that it is illegal to convert a motor vehicle to a racing vehicle.

In the 2010 presentation, EPA followed the above slide with a slide defining a racing vehicle: "Racing vehicle: 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." CX342 at

included in the CAA and with industry entrenched for decades in the belief that selling parts for competition use only was authorized under the Act. Buried in a 600-plus page proposed rulemaking entitled *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, a title that on its face has nothing to do with racing vehicles, EPA proposed a new interpretation of law that completely altered its prior position with the following proposed rule language:

> 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; anyone modifying a certified motor vehicle or motor vehicle engine for any reason is subject to the tampering and defeat device prohibitions of paragraph (a)(3) of this section and 42 U.S.C. 7522(a)(3).[15]

EPA was now stating that a certified motor vehicle can never be converted to a racing vehicle or any other type of nonroad vehicle, and thereby removed from the separate legal category of a "motor vehicle," even where that conversion is permanent, and the vehicle is never again used on-road. EPA further stated: "A motor vehicle qualifies for a competition exclusion based on the physical characteristics of the vehicle, not on its use."[16]

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10. The presentation further describes the information required to obtain a racing vehicle determination. The information presented, which mirrors the importation requirements discussed above, and in no way limits applicability to imports, includes the requirement to provide "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)." CX342 at 11. By referencing the above definition and requiring submission of a "list of street features that are lacking" including features that have been removed, audience members, or readers after the fact, could have easily interpreted this to mean that parts for racing vehicles are permissible so long as this process is followed by the owner of the vehicle. EPA argues that Borla had notice based on these presentations. A one-hour presentation to a members-only event, however, is insufficient to provide notice to an entire industry, or arguably any individual that happened to be present.

[15] 80 Fed. Reg. 40565 (July 13, 2015).

[16] 80 Fed. Reg. 40527 (July 13, 2015).

EPA received vehement backlash from the public and industry because of the dramatic effect this change in position would have on the racing industry. [17] Even SEMA, the industry's main trade organization, was caught off-guard, commenting:

> Before the Clean Air Act was enacted and since that date, thousands if not millions of certified vehicles have been modified to become vehicles used solely for competition. Products have been manufactured, sold and installed on these competition vehicles throughout this time. SEMA has been working with the EPA on ways to regulate potential dual-use products, defined as products that could be used on both competition-use only and certified motor vehicles. However, the EPA has never implemented a policy making it illegal for certified vehicles to become competition-use only vehicles. Such a policy would overturn decades of understanding within the regulated community and expose that community to unfair findings of noncompliance and civil penalties.[18]

The uproar and confusion over EPA's proposed rulemaking led to a congressional hearing in March 2016 entitled "Racing to Regulate: EPA's Latest Overreach on Amateur Drivers," held before the Subcommittee on Oversight, Committee on Science, Space, and Technology, Chairman Loudermilk explained:

> EPA is attempting to enforce the CAA in a way that Congress never intended, and is doing so in a covert manner.
>
> . . .
>
> The proposed regulation would affect any vehicle used for racing that started as a street or production car.
>
> Racecars are fast and have been modified to be fast and safe. As a result, racecars strictly used at the track are not typically emissions compliant. Any

[17] Once becoming aware of EPA's proposed regulatory change, numerous publications expressed concern over EPA's proposed change in law from what the public understood to be legal conversions of motor vehicles to racing vehicles to a prohibition of such changes. Publications included titles such as "EPA Seeks to Ban Conversion of New Street Cars into Race Cars," EPA Wants to Ban Road-to-Race Conversions," The EPA wants to make it illegal to modify your car for racing." Bradley Iger, WINDINGROAD.COM (Feb. 9, 2016), https://www.windingroad.com/articles/blogs/epa-seeks-to-ban-conversion-of-new-street-cars-into-race-cars/; AUTO123.COM, https://www.auto123.com/en/news/epa-banning-road-race-conversions/61843/?folder=industry; Steven J. Ewing, AUTOBLOG.COM (Feb. 9, 2016, 8:20 AM), https://www.autoblog.com/2016/02/09/epa-illegal-modify-car-racing-sema-official/.

[18] U.S. EPA & U.S. DEP'T OF TRANSP., EPA-420-R-16-901, GREENHOUSE GAS EMISSIONS AND FUEL EFFICIENCY STANDARDS FOR MEDIUM- AND HEAVY-DUTY ENGINES AND VEHICLES-PHASE 2: RESPONSE TO COMMENTS FOR JOINT RULEMAKING, 1913 (Aug. 2016) (emphasis added)

> racecar that has a VIN plate, installed at the factory, can no longer be out of compliance under this proposed rule. This applies to racecars used strictly at drag strips, oval tracks, and other types of racing, with no intention of ever seeing the open road again.[19]

Other members of Congress also expressed concern, including Representative Patrick McHenry:

> While the Clean Air Act does authorize the government to regulate the emissions of vehicles, Congress never intended for the EPA to regulate vehicles that are modified for use on racetracks.
>
> In 1990, Congress affirmed this exemption when it authorized the EPA to regulate non-road vehicles and explicitly excluded any ''vehicles used solely for competition'' from the non-road definition. While the law has not changed, what the regulations put forward by the EPA state are dramatically different with the keeping of the last 40 years of regulatory environment. That is in fact the case. That's why we're here today, is the plain text of the regulation goes counter to the Congressional intent of a Democrat House and a Democrat Senate Majority as well as a Republican President that signed that into law. This is bipartisan legislation, and we're defending the law against regulatory overreach.[20]

In an April 2016 letter from the Committee on Energy and Commerce to EPA, Committee members raised concern about EPA's proposed regulatory language, and describing EPA's longstanding approval of the racing industry, particularly that of converted motor vehicles, provided the following:

> 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.
>
> Particularly troublesome is the lack of any analysis, pursuant to the Regulatory Flexibility Act, of the economic impacts of this regulatory change on small businesses. 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.

[19] RX 74 at 9 (also noting "millions of cars have been modified to be used strictly at the race track," and "[p]roducts have been manufactured and installed on race-only vehicles since the automobile was invented").

[20] RX 74 at 26-27.

> 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. Overnight, these vehicle owners may be considered lawbreakers by EPA and potentially subject to penalties similar to those Volkswagen now faces for allegedly using "defeat devices" to pass EPA emissions tests.
>
> We remain doubtful that this proposed policy change complies with Congressional intent, which we believe is to exempt racing vehicles from the CAA's provisions.[21]

To which EPA replied explaining its support for motorsports and vehicles *used* exclusively for racing:

> I'd also like to make it clear that the 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 companies that don't play by the rules and that make and sell products that disable pollution controls on motor vehicles used on public roads. These unlawful defeat devices pump dangerous and illegal pollution into the air we breathe.
>
> The proposed language in the CAA rulemaking was never intended to represent any change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, the EPA has decided to eliminate the proposed language from the final rule.
>
> We will continue to engage with the racing industry and others about ways to ensure that we support racing and also keep our focus where it has always been: reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.[22]

In May 2016, EPA sent a letter to the Automobile Competition Committee for the United States ("ACCUS") explaining that converted competition-use vehicles are not a priority and the agency will use enforcement discretion, stating:

> The EPA and the responsible racing community agree on two major points. First, vehicles that are used solely for competition in sanctioned events should be allowed to do so, as they historically have. Second, vehicles driven on public roads must have fully functioning pollution controls as required by the CAA.
> . . .

[21] RX 75.

[22] RX 76.

> 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.
> . . .
> For motor vehicles that are certified for use on public roads, the CAA has always prohibited tampering with or defeating those vehicles' emission control systems. However, just 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.[23]

In the face of this public response to its proposed policy change, EPA backtracked and did not adopt the proposed language. In doing so, EPA made the following statement:

> 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. These unlawful defeat devices lead to harmful pollution and adverse health effects. 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.[24]

EPA's decision effectively restored the status quo and reaffirmed that its "focus is not (nor has it ever been) on vehicles built or *used* exclusively for racing,"[25] reinforcing the

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[23] RX 77.

[24] U.S. EPA & U.S. Dep't of Transp., *supra* note 18, at 1915.

[25] Once EPA reversed course, publications reported the news with titles such as "Street-legal Racing Enthusiasts Have Just Defeated the EPA," "The EPA's Scary Race Car Ban Proposal is Dead," and "EPA Abandons Proposal to Ban Converting Street Cars for Racing." Jay Traugott, CARBUZZ.COM, (Apr. 17, 2016), https://carbuzz.com/news/street-legal-racing-enthusiasts-have-just-defeated-the-epa; Frank DuBois, THE WESTERNER, (Apr. 18, 2016, 12:18 PM), https://thewesterner.blogspot.com/2016/04/the-epas-scary-race-car-ban-proposal-is.html?m=1; Bob Sorokanich, ROADANDTRACK.COM (Apr. 15, 2016),

understanding of the industry and the public that EPA did not consider conversion of street vehicles to dedicated race cars, or the sales of parts for those conversions, to be prohibited by the CAA.[26] While it is notable that EPA moved to a face-saving "enforcement discretion" rationale to explain the plain contradiction between its attempt to alter the regulatory landscape and the long-accepted view that dedicated racing vehicles did not qualify as "motor vehicles," it does not matter for due process and fair notice purposes. Assurance and encouragement to the racing industry to continue with business as usual – even if disingenuously couched as a matter of grace – would still be misleading if EPA then sought to punish industry members for exactly the behavior it had encouraged.

Had EPA finalized the proposed language clearly prohibiting the conversion of street vehicle, then arguably Borla would have had ascertainable certainty as to the consistency of its operations with the CAA. Absent any clear regulatory provisions and coupled with EPA's consistent public position but sometimes shifting rationale in support of converted dedicated race cars, Borla and the aftermarket parts industry cannot identify with "ascertainable certainty" the standards with which EPA expects it to conform. *General Electric,* 53 F.3d at 1329.

2. Common Understanding and Industry Practice

An important second factor considered in the evaluation of fair notice is whether there was a common understanding and common industry practice regarding the conduct alleged to be regulated. *Hoechst Celanese Corp.,* 128 F.3d at 224-25. Here, as described above,

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https://www.roadandtrack.com/motorsports/news/a28850/epa-abandons-proposal-to-ban-converting-street-cars-for-racing/.

[26] Aiming to put any ambiguity to rest, bills were introduced in the House of Representatives and the Senate. The House of Representatives bill was entitled: "Recognizing the Protection of Motorsports Act of 2017" ("RPM Act") and seeks to amend the CAA, "consistent with the clear intent of Congress," to prohibit application of the tampering and defeat device provisions to actions taken for the purpose of modifying a motor vehicle into a vehicle to be used solely for competition." The RPM Act is based on confirmation of the interpretation that industry understood to apply to dedicated competition vehicles. Though the RPM Act did not pass in 2017, it was recently reintroduced in the House in 2021. H.R. 350, 115th Cong. (2017); H.R. 3281, 177th Cong. (2021).

manufacturers and sellers of aftermarket parts have understood for decades that aftermarket parts installed on off-highway vehicles or racing vehicles were not covered by the CAA. Consistent with this understanding, it was a common and longstanding industry practice for aftermarket parts manufacturers and resellers to include disclaimers on these racing products to inform customers that their use was limited to racing only or off-highway only.

This legal distinction between racing and non-racing uses for parts affecting emissions systems was commonly understood across the entire aftermarket parts industry, including OEMs that manufactured aftermarket racing parts. These highly-regulated OEMs, such as Ford Motor Company and Mopar, specifically advertised aftermarket parts described as racing only or off-highway only and including a disclaimer informing customers of the limits on their legal use.

For example, in its 2001 *Ford Racing Performance Parts Catalog*, Att. 6 (excerpts from Ford Racing Performance Parts: 2001 Catalog) (bold emphases added.) Ford explains the following:

> As one of the leading manufacturers of performance parts, Ford Motor Company recognizes a special responsibility regarding environmental concerns. Ford Racing Performance Parts is committed to a program of developing performance parts that allow motorsport enthusiasts to modify their vehicles and meet emission requirements.
>
> Using **guidelines established by the State of California for aftermarket parts used in vehicles driven on public highways, Ford engineers** have developed a system for identifying parts that are acceptable for use on emission controlled motor vehicles and **those intended for competition purposes only**.
>
> This catalog lists over **1,000** Ford Racing parts. For emission purposes, these parts are classified into three groups.
>
> . . .
>
> GROUP 2—PARTS WITH "1 ASTERISK"
>
> - Indicates that for emission considerations, the part is NOT "street legal". The following footnote appears at the bottom of catalog

pages describing these parts: "*Not legal for sale or use on pollution-controlled motor vehicles."

- Part numbers with a single asterisk typically include off road competition parts and parts that **may affect original equipment** emission function, such as cylinder heads, engine blocks, and camshafts.

NOTE—CALIFORNIA

Parts marked in this catalog with an asterisk and appropriately marked on their packaging may **legally be used in California only on a racing vehicle** which will never be operated on public roads.

. . .

OFF-HIGHWAY OR RACING USE

Because U.S., Canadian, state or provincial laws and regulations may prohibit removal or modification of components that were **installed on vehicles by Ford Motor Company to meet emission requirements** or to comply with motor vehicle safety regulations applicable to vehicles manufactured for use on public roads, Ford Motor Company recommends that vehicles equipped with parts designated "for off-highway use" not be operated on public roads, and **offers such parts only for track or off-highway competitive or performance use**. Such parts have a special "warning" label which reads:

WARNING:

This part has been **designed and is intended for off-highway application only**. Installation on a vehicle intended for use on public roads may violated U.S., Canadian, state or provincial laws and regulations including those relating to emission requirements and motor vehicle safety standards. (NOTE: In California this part **may legally be used only on a racing vehicle** which will never be operated on public roads.) In addition, installation of this part may adversely affect the warranty covered on your vehicle.

The Ford catalog contains multiple parts labeled with "1 Asterisk," including parts intended for certified motor vehicles such as the Mustang GT. Mopar, another OEM, has issued similar catalogs containing similar, and in some cases identical, language demonstrating an understanding that it was permissible to modify a certified motor vehicle so long as the parts are

labeled to ensure the end user knows such parts cannot be driven on public roads. *See* Att. 7 (excerpts from Mopar: 2010 Performance Catalog.)

This common industry understanding and practice that aftermarket racing parts could be sold for racing use subject to express disclaimers also was consistent with California's regulations and enforcement during this time.[27] CARB explicitly mandated the use of disclaimers in numerous settlement agreements, with typical required provisions stating in any advertisement for parts that affect emissions and are claimed to be sold exclusively for use on racing vehicles: "LEGAL IN CALIFORNIA ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED OR LICENSED FOR USE, UPON A HIGHWAY." Given California's reputation for stringent environmental regulations, its validation of disclaimers for sales of parts exclusively for racing vehicles reinforced the understanding that such sales were not prohibited by EPA either. As noted above, in absence of any guidance from EPA in this area, Borla voluntarily initiated the use of disclaimers based on the California settlement with K&N.[28]

3. Inconsistent Enforcement

The pattern of administrative enforcement is another important factor in evaluating what notice regulated parties had of a particular agency interpretation. *Lake Bldg. Prods.*, 958 F.3d at

[27] In 1982, California adopted an express exemption for racing vehicles from its mobile source emission standards. *See* CAL. HEALTH & SAFETY CODE § 43001. Racing vehicle is defined as "a competition vehicle not used on public highways." CAL. HEALTH & SAFETY CODE § 39048. In addition, CAL. CODE REGS., tit. 13 § 2222 requires manufacturers of aftermarket parts that are exempt from emissions standards, including racing vehicles, to include a disclaimer indicating the restricted use.

[28] Given the ubiquity of these disclaimers over several decades, EPA was certainly aware of their use and yet never issued any guidance or other public statement indicating its disagreement with their use. Hearing no objections from EPA and seeing CARB clearly mandate such disclaimers led the aftermarket industry to understand that racing parts were permissible so long as disclaimers are used. Such disclaimers are being used to this day, yet EPA, despite stating in these proceedings that disclaimers are insufficient and worse, are admissions of liability (for which we strongly disagree), has yet to issue any public statement or guidance indicating how it expects this industry to behave and to this day has affirmatively refused to provide such guidance when asked what suppliers could do to satisfy EPA's supposed willingness to not enforce against parts used exclusively in competition vehicles.

506. Where an agency has knowledge of ongoing alleged violations and fails to enforce for a period of decades, that lack of enforcement supports the regulated parties' reasonable understanding that the conduct is not prohibited.[29] Here, EPA knew about the conversion of street cars to racing vehicles and the supply of associated parts, including those subject to disclaimers, and yet took no enforcement action for decades. Indeed, it expressly disclaimed any enforcement interest and affirmatively lauded the industry and the conversion of motor vehicles to dedicated competition vehicles when the issue later arose. This demonstrated lack of enforcement, taken together with the evidence above regarding EPA's ambiguous statements, fully supported the racing industry's understanding that such conduct was legal. As one of the first, if not the first, manufacturer of racing parts for converted gasoline engine powered racing vehicles to face enforcement under EPA's newly adopted interpretation, Respondent had no fair warning that EPA considered its conduct to violate the CAA. Many in the industry continue to sell similar parts to this day, further indicating that this industry is uncertain as to what is allowed.

EPA failed to provide adequate notice that it considered the sale of aftermarket parts for use in dedicated racing vehicles to be a violation. Accordingly, this enforcement action violates due process and there should be no liability for Borla and thus no penalties. At a minimum, contrary to EPA's position in the motion to strike, evaluation of Respondent's fair notice defense

[29] Where an agency has knowledge of ongoing alleged violations and fails to enforce for a period of decades, that lack of enforcement supports the regulated parties' reasonable understanding that the conduct is not prohibited. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157–58 (2012) (internal quotations and citations omitted) ("Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.")

requires full consideration of the relevant factors described above under the specific facts of this case.

F. Eighth Defense: Violation of Due Process and Sixth Amendment Rights

While it is premature to dispose of this issue without knowing the full scope and justification for the penalties EPA seeks to impose, it is a general principle that both the Sixth Amendment and the Due Process Clause impose various limits on procedures for criminal penalties.

Even fines that are nominally civil can be punitive in nature such that they are properly viewed as criminal punishments. *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).

Many of factors that bear upon a finding that a nominally civil fine is actually criminal in nature are either apparent from the statutory and regulatory scheme itself or would involve facts to be developed when the penalties are finally argued and calculated. For example, fines have long been regarded as a criminal punishment, the violations alleged here require proof of

scienter, the penalty scheme plainly seeks both deterrence and punishment, not merely compensation, the alleged behavior can be and has been the basis for expressly criminal punishment as well, there is no alternative purpose, such as tax collection, that can be assigned to the deterrence and punishment purposes of the penalties, and the excessiveness of the penalty is a factual matter that must await the ultimate argument and disposition of the amount of penalty to be imposed and its proportionality to other behavior subject to the defeat device or tampering prohibitions.

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.

EPA's claim, EPA Br. at 45, that there is insufficient support for claiming that "the penalties assessed in this action are penal," is both disingenuous and premature. While the penalties EPA has *sought* are indeed excessive, as described above, the ultimate basis for EPA's attempt to impose those penalties, the penalties actually accepted and imposed by the Presiding officer, and whether such amounts and justifications reflect a penal rather than a civil character, all will turn on subsequent events and facts developed at trial, including facts and policies supposedly underlying EPA's revised penalty policy. If the Presiding Officer agrees with Borla's many arguments on why penalties should be minimal or non-existent, then this defense

will become moot. If large penalties are imposed in order to punish and deter conduct out of all proportion to any putative harm, then this defense will be very live indeed. But for now it is premature to even consider striking the defense.[30]

If EPA continues to seek and obtains a disproportionately large penalty, this 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.

G. Ninth Defense: 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 from 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.

[30] To the extent the Presiding Officer believes she lacks the power to consider the constitutional infirmities of congressional civil penalty procedures as applied to a particular case, so be it, but Respondent still preserves its as-applied challenge. It is worth noting that Respondent does not attack the statutory procedures on their face, but only where they are used to impose a fine that is excessive and punitive, and thus criminal, in nature. The statutory procedures would not run afoul of the Sixth Amendment and due process where applied to less aggressive penalties, or if EPA used a non-punitive and proportional penalty policy. There is thus no need for the Presiding Officer to rule on the validity, vel non, of the statute, merely on its application in this particular case. Certainly, any officer of the United States is empowered to determine the constitutionality of their own behavior and of those subject to their control and supervision and act accordingly.

EPA's objections to this defense repeat its claims that it is correctly interpreting the law and that this proceeding is civil, not criminal. On the first point, EPA is wrong, as discussed above, and even if such a construction were a permissible policy choice entitled to deference, it would still constitute a change in position regarding conduct undertaken under a different view of the law. As to the second point, the civil/criminal determination is fact-bound and premature for the reasons given in the previous section. EPA adds nothing new that is not dependent upon an analysis of how what penalty is actually sought and imposed.

H. Tenth Defense: The Rule of Lenity

Statutes that involve criminal penalties or that have mixed civil and criminal applications, do not receive *Chevron* deference and are subject to the rule of lenity to the extent they are ambiguous. *See Guedes v. ATF*, 140 S. Ct. 789 (2020) (Gorsuch, J., statement regarding denial of certiorari) (discussing the many errors of applying *Chevron* deference to a mixed use statute but finding a grant of cert. premature) ; *Gun Owners of America v. Garland*, 992 F.3d 446, 454-68 (6th Cir. 2021) (rule of lenity trumps *Chevron* deference in connection with certain firearms regulations notwithstanding that other circuit courts had deferred to the same regulatory interpretation as involving a mixed-use statute). EPA claims that lenity only applies where there is a gross ambiguity and defends its reading of the statute as the plain meaning. That, of course, is incorrect on both counts, as described above. Indeed, to the extent the meaning of the statute is plain, it plainly does *not* apply to vehicles not designed or used on the streets or highways. But assuming, arguendo, that EPA's reading is at least plausible, it still would reflect a gross ambiguity. Indeed, the fact that so many members of Congress and the industry understood for decades that modified racecars and their parts were legal confirms the severity of the uncertainty with, if not the outright error of, EPA's view. In any event, the case law does not require all

ambiguities to be "gross" in order to trigger the rule of lenity rather than *Chevron* deference. In fact, in many cases, the language suggests somewhat the opposite. Before turning to those cases, however, it is worth reviewing the underlying historical and constitutional basis for the rule of lenity.

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) (emphasis added). 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*, 139 S. Ct. at 2123 (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 such as *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), 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.

Returning to EPA's suggestion that any ambiguity must be "gross" before triggering the rule of lenity, that is not the general rule. As the Supreme Court recognizes, "when choice has to

be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see also Lewis v. United States*, 445 U.S. 55, 65 (1980) ("[T]he touchstone" of the lenity principle "is statutory ambiguity."), *United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute.") (citations omitted). Respondent would note that any level of ambiguity in a criminal or mixed-use statute sufficient to allow *Chevron* deference and the "legislative" enactment of crimes by the Executive Branch is sufficiently "grievous" to trigger the rule of lenity. While courts themselves should strive to resolve minor ambiguities when reading a statute, at the point a court is willing to throw up its hands and pass the ball to the Executive Branch to legislatively *define* crimes, it should be willing to look first to the rule of lenity. At a minimum, courts (and agencies) it should do so as a matter of constitutional avoidance given the serious separation of powers concerns raised by allowing the Executive Branch to define crimes.

And as for cases that do use language suggesting that a serious degree of ambiguity is required, they are less significant than it might first seem. The Court in *Maracich v. Spears*, 570 U.S. 48, 75-76 (2013), for example, considered a civil liability provision "written in different terms" than a separate criminal provision and concluded that the statute's "surrounding text and structure … resolve any ambiguity in" the disputed phrases. While it indeed cited some cases mentioning "grievous ambiguity," it also cited cases applying lenity "'where the language or history of the statute is uncertain'" after ordinary principles of construction are applied. *Id*. (cleaned up); *see Moskal v. United States*, 498 U.S. 103, 107–08 (1990) ("We have repeatedly

emphasized that the touchstone of the rule of lenity is statutory ambiguity. … [That] leaves open the crucial question – almost invariably present – of *how much* ambiguousness constitutes ... ambiguity. … [W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute.") (cleaned up). As reflected in the quote from *Moskal*, serious ambiguity is simply that amount of ambiguity that cannot be resolved by ordinary judicial methods of statutory interpretation. Those ordinary methods apply *before* ever according any *Chevron* deference and, if they resolve the ambiguity, would preclude *Chevron* deference.

While various cases use stronger or weaker language regarding how much uncertainty can be resolved by traditional tools before the rule of lenity, those cases do not address the *relative* amounts of uncertainty needed for lenity as opposed to *Chevron* deference for a criminal or mixed-use statute. Respondent's position is that if any remaining uncertainty is enough to justify a court taking the extreme act of abdicating to an agency its interpretive role for a criminal or mixed-use statute, it is more than enough for lenity.

As for EPA's insistence, EPA Br. at 48, that this is an exclusively civil statute, suffice it to say that alleged violations of emissions rules and restrictions governing "motor vehicles" have been used to bring criminal actions as well. *See, e.g.*, Information, *United States v. Rockwater Northeast LLC*, 4:20-cr-00230-MWB (M.D. Pa. filed Sept. 24, 2020) (tampering restrictions). Such dual use statutes are subject to the rule of lenity. *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005); *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Whitman* v. *United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J, joined by Thomas, J., statement respecting denial of certiorari); *Guedes*, 920 F.3d 1, 44 n. 13 (Henderson, J., concurring in part and dissenting in part); *but see Babbitt* v.

Sweet Home Chapter, 515 U.S. 687, 704 n. 18 (1995) (passing mention of *Chevron* deference in mixed use context, though hotly debated in later cases); *Guedes*, 920 F.3d at 24-25 (relying on *Babbitt* to apply *Chevron* deference in mixed use context).

I. Eleventh Defense: 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." U.S. CONST., amend. VII. 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, 1379 (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, 504-05 (2011) (Scalia, J., concurring) ("[I]n my view an Article III judge is required in all federal adjudications" except for "true 'public rights' cases.").

Respondent 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. While EPA contends that the fines it imposes will be perfectly reasonable, that awaits extensive factual development, including inquiry into the basis of its penalty policy, as described relative to the Sixth Amendment defense. The motion to strike thus is premature in assuming there is some policy justification for avoiding a jury determination of the facts. Furthermore, the lack of a jury in agency proceedings is only part of the question, and the absence of jury findings may reflect on whether a jury is required if this case reaches federal court or on whether a court may permissibly defer to non-jury findings at the agency level. For those purposes, Respondent merely seeks to preserve its objection and to make a record suitable for review.

J. Twelfth Defense: Violation of the Excessive Fines Clause

EPA has proposed an excessive administrative penalty in the amount of $1,272,126. 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.

As for the suggestion, EPA Br. at 53, that any fine within statutory limits cannot be "excessive," suffice it to say that is simply wrong. The Constitution prohibits excessive fines, and it matters not whether the fine is imposed by statute or by arbitrary executive conduct. The excessiveness of a fine will depend on the context and circumstances of that fine and hence, like other penalty-related defenses, the motion to strike is premature. Should this tribunal instead rule that al fines, regardless of amount or circumstance, are categorically immune from constitutional scrutiny so long as they are within statutory parameters, Respondent would respectfully disagree and simply preserve the point for later review.

K. Fourteenth Defense: Estoppel

The history of EPA's position on competition-only vehicles is discussed *supra*, at Section VI-E. 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. *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 Props., 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.").

Notwithstanding EPA's claim, EPA Br. at 54, that *only* affirmative misconduct can estop the government, the cases above demonstrate that reasonable reliance on a prior agency position may also estop the agency from enforcing against *past* conduct. While EPA could not be barred from adopting a different yet permissible reading on a forward-looking basis, applying a new interpretation to past conduct that relied on a prior interpretation raises the same concerns discussed in the fair notice/due process defense, and estoppel is simply an alternative legal pathway to protect those same interests. The facts and history raised in connection with that defense thus raise an equally genuine issue in connection with this defense.

L. Nineteenth Defense: 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 & Janessa Glenn, *Assessing Lucia's Impact Beyond The SEC*, LAW360.COM (July 11, 2018), 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. Complainant's suggestion that the Administrator's signature on the Presiding Officer's Commission is sufficient to demonstrate proper appointment ignores the many factual issues regarding whether such piece of paper was merely a formality, whether the actual decision was delegated to others and, if so, done properly, and even whether EPA ALJ's ought to be viewed as principal, rather than inferior, officers. *Lucia*, 138 S. Ct. at 2053-55.

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. *See Lucia*, 138 S. Ct. at 2059-62_(Breyer, J., concurring in part and dissenting in part) (discussing continuing constitutional difficulty with ALJ's being deemed officers yet protected from termination) 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. *Id*. 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) 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.

VII. CONCLUSION

For the foregoing reasons, Complainant's Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses should be denied, and this matter should proceed to hearing following any further discovery deemed necessary.

Respectfully submitted,

Dated June 11, 2021

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CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 11th day of June 2021, I have served a true and correct copy of Respondent's Opposition to Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses as set forth below:

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