ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1447

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RACING ENTHUSIASTS AND SUPPLIERS COALITION,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Agency Action by the
United States Environmental Protection Agency
81 Fed. Reg. 73,478 (Oct. 25, 2016)

INITIAL OPENING BRIEF OF PETITIONER

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Dated: December 23, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner states as follows:

A. Parties, Intervenors, and *Amici Curiae*

Petitioner is the Racing Enthusiasts and Suppliers Coalition. Respondents are the United States Environmental Protection Agency ("EPA" or "Agency") and Michael S. Regan in his official capacity as Administrator of the EPA. There are no intervenors and at the time of this filing, no entity has filed a motion for leave to participate as *amicus curiae*.

B. Ruling Under Review

The Agency action under review is "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," 81 Fed. Reg. 73,478 (Oct. 25, 2016), Joint Appendix ("JA") XX.

C. Related Cases

This case was formerly consolidated with *Truck Trailer Manufacturers Ass'n., Inc. v. EPA*, No. 16-1430 (D.C. Cir.), a case involving a challenge to different provisions of the final rule than challenged here. On December 26, 2019, this Court severed this case from *Truck Trailer Manufacturers Ass'n*. This Court issued an opinion in *Truck Trailer Manufacturers Ass'n* on November 12, 2021. *Truck Trailer Mfrs. Ass'n, Inc. v. EPA*, 17 F.4th 1198 (D.C. Cir. 2021).

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Racing Enthusiasts and Suppliers Coalition ("RESC") makes the following disclosures:

RESC is a trade association, as defined by D.C. Circuit Rule 26.1, that advocates for the appropriate implementation of the Clean Air Act and other relevant statutes on behalf of its member companies. RESC also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. RESC's members include entities that design, manufacture, distribute, and sell aftermarket parts in the automotive industry supply chain and are directly affected by the challenged action. RESC has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in RESC.

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CAA	Clean Air Act
EPA	United States Environmental Protection Agency
RESC	Racing Enthusiasts and Suppliers Coalition
SEMA	Specialty Equipment Market Association

JURISDICTIONAL STATEMENT

Jurisdiction is pursuant to 42 U.S.C. §7607(b)(1). The Racing Enthusiasts and Suppliers Coalition ("RESC") challenges a nationally applicable rule promulgated by EPA pursuant to Clean Air Act ("CAA") Title II. RESC timely petitioned for review.

STATEMENT OF ISSUES

Whether EPA's determination that the CAA does not allow any person to disable, remove, or render inoperative (i.e., "tamper with") emission controls on an EPA-certified motor vehicle that is converted to be used solely for purposes of competition is arbitrary and capricious, an abuse of discretion, or not in accordance with law.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Henry Ford famously stated, "auto racing began five minutes after the second car was built." Lawrence Goldstone, *Drive! Henry Ford, George Selden, and the Race to Invent the Auto Age* 83 (2016). There is a rich history of auto racing in the U.S.—dating back over 100 years. Auto racing is as iconically American as apple pie.

Much high-profile auto racing involves purpose-built racecars incorporating unique designs and cutting-edge technology. A good example is IndyCar racing,

which is epitomized by the Indianapolis 500's annual racing spectacle that is among the nation's highest attended sporting events.

Such high-profile, professional car racing circuits occupy the apex of a large racing pyramid mostly consisting of lower-level circuits and leagues. Like the professional baseball farm system, most car racers start their careers in the "minor leagues"—racing everything from go-karts, to almost-stock production vehicles, to highly-modified production vehicles. As in baseball, most car racers never push past the minor leagues. Indeed, "[a]uto racing often seems like a sport that many aspire to, but few succeed in. While it's true that the road to professional racing is a long and narrow one, there are ample opportunities for the novice enthusiast to have fun on the track as well." Kristin Cline, *10 Ways To Get A Start In Racing*, DrivingLine (Sept. 13, 2013). Racecars created out of production vehicles are widely used in the "minor leagues." *See, e.g.*, National Hot Rod Association, Drag Racing Classes, https://www.nhra.com/nhra-101/drag-4acing-classes (last visited Dec. 21, 2021), JAXX; National Muscle Car Association, 2021 NMCA Class Descriptions, https://www.nmcadigital.com/dl/2021/2021-nmca-class-descriptions.pdf (last visited Dec. 21, 2021), JAXX; Sports Car Club of America, Car Classifications and Groups, https://www.scca.com/pages/car-classifications-and-groups (last visited Dec. 21, 2021), JAXX.

Although it is impossible to obtain a precise count of the amateur and professional car racers, it is an incredibly popular sport and pastime. For example, the National Hot Rod Association alone includes among its membership over 40,000 licensed competitors and the Sports Car Club of America has nearly 75,000. *See* NHRA History, https://www.nhra.com/nhra-101/nhra-history#:~:text=With%2070%2C000%20members%20and%20more,in%20the%20world%20of%20motorsports (last visited Dec. 21, 2021), JAXX; Lime Rock Park, The SCCA: How Amateurs Go Racing in America, https://limerock.com/scca-amateurs, (last visited Dec. 21, 2021). These are just two of scores of similar U.S. racing organizations. Events are held at hundreds of tracks across the country. *See* speedwaysonline.com/tracks/category/all-tracks/ (last visited Dec. 21, 2021). Yet the number of racecars is a small fraction of the estimated 276.6 million registered vehicles nationwide. *See* U.S. Dep't of Transp., Bureau of Transportation Statistics (2019 data), https://www.bts.gov/content/number-us-aircraft-vehicles-vessels-and-other-conveyances (last visited Dec. 21, 2021). Thus, air emissions from motorsports are very small as compared to emissions from the on-road fleet.

Not surprisingly, an entire industry serves the racing community. Countless manufacturers produce a variety of components for racers, from seats and harnesses, to specially-designed suspension components and tires, to a dizzying array of engine components—including turbo-chargers, competition cams, advanced fueling

systems, higher-efficiency exhaust systems, and revised software for today's computerized engine management systems. "Mom-and-Pop-type" businesses are a big part of this industry.

The parts these manufacturers produce reach customers through a complex network of distributors and retailers, many of which are small businesses themselves. The Specialty Equipment Market Association ("SEMA")—a national trade group representing the aftermarket parts industry—says the domestic market for aftermarket parts in 2019 was $46.2 billion. SEMA & Avrio Institute, SEMA Industry Indicators at 5 (Nov. 2020), JAXX. SEMA represents over 6,800 businesses nationwide manufacturing, distributing, marketing, and retailing specialty parts and accessories. SEMA, Comments on Proposed Rule at 1(Dec. 28, 2015), EPA-HQ-OAR-2014-0827-1469 ("SEMA-2015-Comments"), JAXX.

In a nutshell, motor racing is a prominent and significant part of both our culture and economy. In recognition, EPA in the instant rule emphasizes it "supports motorsports and its contributions to the American economy and communities all across the country." 81 Fed. Reg. at 73,957, JAXX.

I. EPA and its predecessors have regulated motor vehicles for decades.

The legislative and regulatory history of controlling air emissions from mobile sources is long and complex. The federal program began in 1965, when Congress enacted the Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272,

title I, §101(8), 79 Stat. 992 (1965) ("1965 Act"), JAXX. "Pursuant to this authority, the Secretary of [Health, Education, and Welfare] promulgated regulations to control hydrocarbons (HC), [carbon monoxide], and crankcase emissions starting with the 1968 Model Year (MY)." Clean Air Act Advisory Committee, The 50th Anniversary of the Clean Air Act; Clean Air Act Advisory Committee Report to the EPA, at 33 (Oct. 18, 2021) (CAAAC 50th Anniversary Rpt.), JAXX. Responsibility for administering the program shifted to the EPA when it was formed in 1970. EPA's authorities and obligations have been revised and expanded over the years such that its program now comprehensively regulates emissions from virtually all types of mobile sources—from cars and trucks to weed wackers.

Importantly, in general, Congress authorized EPA to regulate only newly produced motor vehicles.

> Before a manufacturer may introduce a new motor vehicle into commerce, it must obtain an EPA certificate indicating compliance with the requirements of the Act and applicable regulations. It submits an application containing test data and other information specified by the EPA, which issues a certificate if the manufacturer has shown, among other things, that the vehicle's emissions control systems will achieve compliance with emissions standards over the vehicle's full useful life.

Ethyl Corp. v. EPA, 306 F.3d 1144, 1146 (D.C. Cir. 2002). In practice, original manufacturers, like Ford and Mazda, build and perform emissions testing on a prototype vehicle, then submit those test results to EPA to demonstrate that the vehicle, if built like the prototype, will comply with applicable emission standards.

EPA then issues a document—the certificate of conformity or for that year and vehicle classification.

Once EPA issues a certificate of conformity, the manufacturer must produce all such model-year vehicles in conformance with the "certified configuration." This system establishes that new motor vehicles sold domestically for use on streets and highways comply with applicable emissions standards.

The federal motor vehicle emissions control program has been a hands-down success. Overall, the federal mobile source emissions control program has resulted in millions of tons of reductions in key air pollutants. CAAAC 50th Anniversary Rpt. at Tbl. 3, JAXX.

II. Vehicles used solely for competition are not regulated under the CAA.

From 1965-1990, the CAA required EPA to regulate only "motor vehicles," which is defined to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. §7550(2).

In 1974, EPA promulgated a regulatory definition of "motor vehicle." That definition stated, in relevant part:

> (a) For the purpose of determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall be deemed not a motor vehicle: …

> (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 (2016). In 1974, commenters argued that "motor vehicle" should be defined according to the intended use of a vehicle or use for which a vehicle is primarily designed. 39 Fed. Reg. 32,609 (Sept. 10, 1974), JAXX. EPA rejected these suggestions, opting instead for a "'capable of' test[,] … consonant with the literal language and the apparent intent of the Act." *Id*. EPA further explained that "[a] vehicle's capability is a more workable, objective standard than its intended or designed-for use, which is dependent upon the manufacturer's subjective determination of the ultimate use to which the vehicle will be put." *Id*.

Commenters on the 2015 proposal explained that vehicles used solely for competition were excluded under EPA's 1974 "capable of" definition of "motor vehicle":

> The definition of "motor vehicle" that the agency ultimately adopted excludes vehicles based on certain characteristics, such as whether the vehicle "lacks features customarily associated with safe and practical street or highway use" or "exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely." These

> criteria are used to assess whether a vehicle is used on-road, and is thus a "motor vehicle," or has undergone significant modifications such that it will no longer be used on-road, which would naturally exclude vehicles substantially modified for racing or combat operations.

SEMA, Comments on Notice of Data Availability at 2 (Apr. 1, 2016), EPA-HQ-OAR-2014-0827-1931 ("SEMA-2016-Comments"), JAXX; *see also*, Alliance of Automobile Manufacturers & Association of Global Automakers, Comments on the Notice of Data Availability at 6 (Apr. 1, 2016), EPA-HQ-OAR-2014-0827-1884 ("Auto Alliance Comments"), JAXX ("Vehicles … modified for off-road racing/competition have traditionally been held to fall under the second criterion. Modified competition vehicles have features that are not associated with "'safe and practical street or highway use'" and indeed, are meant to be used on racetracks and closed circuits. Some competition vehicles may also fall under the third criterion, depending on how they are equipped.").

In 1990, Congress expanded EPA's mobile source program to include "nonroad" engines and vehicles. *See* 58 Fed. Reg. 28,809, 28,810 (May 17, 1993) ("While the CAA had long authorized EPA regulation of on-highway vehicle and engine emissions, the [1990] amendments extended EPA's authority to nonroad vehicles and engines for the first time."), JAXX, JAXX.

The 1990 CAA amendments defined "nonroad vehicle" to mean "a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition." 42 U.S.C. §7550(11). The term encompasses

vehicles/engines not used on streets or highways, e.g., bulldozers, ATVs, marine engines, locomotives, all of which EPA has since regulated. *See* 73 Fed. Reg. 59,034, 59,036, tbl. I-1 (Oct. 8, 2008) (summary table of regulated nonroad vehicles and engines), JAXX, JAXX.

In expanding the mobile source program, Congress was careful to carve "vehicle[s] used solely for competition" out of the "nonroad vehicle" definition. The effect of that carve-out is to place vehicles used solely for competition outside the scope of the CAA.

EPA codified treatment of competition vehicles in 2008 at 40 C.F.R. §1068.235. *Id.* at 59,358, JAXX. Under that rule, "If you modify any nonroad engines/equipment after they have been placed into service in the United States so they will be used solely for competition, they are exempt without request." 40 C.F.R. §1068.235(b) (2016). The rule did not address, either way, conversion of a "motor vehicle" into a vehicle used solely for competition.

III. "Tampering" with motor vehicle emissions controls is prohibited.

To ensure EPA-certified emissions control systems remain in place over a vehicle's useful life, Congress prohibited modifying a motor vehicle's certified configuration in a way that compromises the effectiveness of emissions controls—i.e., Congress prohibited "tampering."

In 1965, when the federal mobile source control program started, Congress forbad "any person to remove 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 prior to its sale and delivery to the ultimate purchaser." 42 U.S.C. §1857f-2(a)(3) (Supp. I 1966). The 1970 CAA Amendments expanded that prohibition to add that no person could render the emissions controls inoperative "after such sale and delivery to the ultimate purchaser." 42 U.S.C. §1857f-2(a)(3) (1970).

The tampering prohibition was last modified in the 1990 CAA Amendments to, among other things, encompass those who make, distribute, and sell automotive parts used to tamper. In relevant part, the CAA now prohibits:

> 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….

42 U.S.C. §7522(a)(3)(B). Notably for purposes of this case, the tampering prohibition is directed only at "motor vehicles" and does not apply to vehicles used solely for competition.

The tampering prohibition is codified at 40 C.F.R. §1068.101(b)(1). In relevant part, this rule provides:

> You may not remove or render inoperative any device or element of design installed on or in engines/equipment in compliance with the regulations prior to its sale and delivery to the ultimate purchaser. You also may not knowingly remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

Id. This prohibition applies to "everyone with respect to the engines and equipment to which this part applies"—i.e., to engines and equipment subject to EPA emissions standards. *Id*. at §1068.101(b).

IV. What is at issue in this case?

This case involves only one subset of vehicles used solely for competition—those motor vehicles that: (1) are converted into vehicles used solely for competition; and (2) no longer conform to the EPA-certified emissions control configuration. For ease of reference, the term or "competition-use-only vehicle" is used in this brief to describe such converted race-only vehicles. The question is whether EPA overstepped its CAA and rulemaking authority when it determined in the Final Rule that it is unlawful to convert a motor vehicle into a competition-use-only vehicles.

For example, the Mazda Miata "is the best-selling two seat sports car in the world" and "has also become the most road raced car in the world." Mazda North American Operations, Supplemental Comments on Proposed Rule at 1 (Apr. 1, 2016), EPA-HQ-OAR-2014-0827-1924, JAXX. "The Mazda Motorsports Competition Parts program serves 9,000 registered grassroots racers across the United States. These racers compete in up to 25,000 races and events each year

across the country." *Id.* "Mazda has sold nearly 3,000 kits to turn a road-going Miata into a race car." *Id.* Mazda also sells "a ready-to-race Miata based on the vehicle sold in dealerships nationwide." *Id.* Although customers of Mazda competition parts must register with Mazda, "provide proof images of the car they compete with," and are contractually prohibited from using competition parts in on-road vehicles, *id.*, the instant rule is aimed at making it unlawful for Mazda to continue this program.

What this case does *not* involve are racecars that continue to be driven on streets and highways. Such vehicles are motor vehicles that must continue to conform to the EPA-certified emissions control configuration—even if sometimes used for racing. This case also does not involve vehicles used solely for competition that are originally-built for competition use (e.g., an IndyCar); EPA has no authority to regulate these vehicles under the CAA.

V. Until the Proposed Rule, EPA had not sought to ban conversion of motor vehicles into competition-use-only vehicles.

Over the 50 years EPA had been regulating motor vehicles before the instant rule, EPA said very little on the question of whether motor vehicles may lawfully be converted into competition-use-only vehicles. For example, EPA issued an "Interim Tampering Enforcement Policy" on June 25, 1974. EPA, Office of Enforcement and General Counsel, Mobile Source Enforcement Memorandum No. 1A, Interim Tampering Enforcement Policy (June 25, 1974), JAXX. That guidance, which

remained in effect until 2020, would have been an early and obvious platform for announcing a ban on converting motor vehicles into competition-use-only vehicles. Yet, that guidance—which was EPA's definitive guidance on tampering for almost 50 years—does not assert such a prohibition.

Indeed, EPA at times embraced the view that such conversions are permissible. In 2002 guidance addressing nonroad vehicles, EPA asserted: "You may also modify EPA-certified vehicles if you will use them only for competition. However, you may not modify your EPA-certified vehicle in a way that increases emissions if you use the vehicle for both recreation and competition." EPA, EPA420-F-02-045, Frequently Asked Questions, Emission Exemption for Racing Motorcycles and Other Competition Vehicles, at 4 (Sept. 2002), ("FAQs"). This was understood by many as a general statement of law applicable to both on-road and nonroad vehicles. SEMA-2016-Comments on Proposed Rule at 10, JAXX.

EPA also devised and heavily promoted the 2010 "Green Racing Initiative." "GT class vehicles" in the American Le Mans series, EPA explained, "are more production-based but are highly modified for racing." EPA, EPA420-F-10-058, Green Racing Initiative at 3 (Nov. 2010) ("Green Racing Initiative"), JAXX; *see also* Auto Alliance Comments at 6 ("If EPA meant to prohibit the modification of certified motor vehicles for racing/competition, establishing voluntary standards for

those vehicles is contrary to EPA's proposed 'clarification' to Part 86."), JAXX. Thus, EPA actively promoted modified, production-based racecars.

Similarly, 2010 guidance on importation of motor vehicles explained that "[a]nyone may import a racing vehicle"—even a "racing vehicle" that originally was an EPA-certified production vehicle. EPA, EPA-420-B-10-027, Procedures for Importing Vehicles and Engines into the United States at 36 (July 2010), JAXX. EPA further noted, "These vehicles are those which, in general, have been extensively modified for racing, and are incapable of safe and practical street or highway use because they lack features associated with safe and practical street or highway use." *Id.* Such vehicles "have been excluded from the emission requirements of the [CAA]." *Id.* at B-2, JAXX. *See also* FAQs at 2 (Sept. 2002) ("If you use an EPA-certified vehicle for competition only, it does not need to meet emission standards."), JAXX.

Commenters on the Proposed Rule observed that they were "unaware of a single instance in which the EPA previously took the position that the [CAA] applies to vehicles converted for race-use-only purposes." American Motorcyclist Association, et al., Comments on Notice of Data Availability at 2-3 (Apr. 1, 2016), EPA-HQ-OAR-2014-0827-1929, JAXX-XX. These commenters were not alone:

> At a March 15, 2016 hearing before the House Science, Space, and Technology's Oversight Subcommittee, Brent Yacobucci with the Congressional Research Service (CRS) testified that the CRS was unable to identify any EPA document before this current rulemaking

> that stated motor vehicles converted for racing were ineligible for the CAA exclusion.

Id. at 3, JAXX.

But given the size of the U.S. motorsports community, its very high profile, and the fact that EPA clearly was well aware of it, EPA's near-silence communicated agreement that motor vehicles lawfully could be converted to competition-use-only vehicles.

Trade association commenters representing all major manufacturers of light-duty vehicles sold domestically observed:

> EPA's proposed regulatory revision to Part 86 in the Proposed Rule would be a departure from how EPA has historically treated the conversion of street vehicles to off-road use, including for racing or competition. To date, the Agency has not attempted to regulate such conversions and thereby prohibit individual vehicle purchasers from engaging in lawful uses of their property.

Auto Alliance Comments at 5, JAXX. State governments charged under the CAA with achieving ambient air quality standards also agreed. *See*, Mike DeWine, Ohio Attorney General, Comments on Proposed Rule at 1 (Mar. 9, 2016), EPA-HQ-OAR-2014-0827-1799 ("EPA's historic practice [has] made it clear that vehicles built or modified for racing purposes, and not used on public streets, are not regulated under the [CAA]."), JAXX.

Indeed, "it has been a long accepted understanding that the CAA does not prohibit the modification of certain vehicles and/or engines if those vehicles and/or

engines are used "'solely for competition'" on race tracks and closed circuits, or used for exclusive use at off-road rally events." Auto Alliance Comments at 6, JAXX.

VI. EPA recently made tampering an enforcement priority.

Since at least 2013, EPA has undertaken studies to ascertain the extent of tampering in the on-road vehicle fleet. *See, e.g.*, Eastern Research Group, Inc., Investigation Summary Report DRAFT, H&S Performance (Sept. 26, 2013), JAXX-XX. Based on this and other similar studies, EPA ultimately concluded that for one narrow category of vehicles alone—on-road diesel pickups—"that the emissions controls have been removed from more than 550,000 diesel pickup trucks in the last decade." Tampered Diesel Pickup Trucks: A Review of Aggregated Evidence from EPA Civil Enforcement Investigations at 1, Enclosure to Letter from Evan Belser, EPA, to Jason E. Sloan, Ass'n of Air Pollution Control Agencies, et al. (Nov. 20, 2020), JAXX.

Not surprisingly, EPA has identified "Stopping Aftermarket Defeat Devices for Vehicles and Engines" as a national compliance initiative. EPA, National Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines, https://www.epa.gov/enforcement/national-compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines (last visited Dec. 16, 2021), JAXX-XX. EPA has since undertaken dozens of tampering enforcement cases. EPA, Clean Air Act Vehicle and Engine Enforcement Case Resolutions,

https://www.epa.gov/enforcement/clean-air-act-vehicle-and-engine-enforcement-case-resolutions, (last visited Dec. 16, 2021). EPA reports that 41 tampering enforcement cases have been resolved in 2021. EPA, 2021 Clean Air Act Vehicle and Engine Enforcement Case Resolutions, https://www.epa.gov/enforcement/2021-clean-air-act-vehicle-and-engine-enforcement-case-resolutions (last visited Dec. 16, 2021).

VII. As an adjunct to its tampering enforcement initiative, EPA decided to change its rules to add a prohibition on converting motor vehicles into competition-use-only vehicles.

EPA published a lengthy proposed rule in 2015 primarily to set greenhouse gas emissions standards for heavy-duty on-road vehicles. 80 Fed. Reg. 40,138 (July 13, 2015) ("Proposed Rule"), JAXX. But in furtherance of its tampering enforcement initiative, EPA incongruously buried in that proposal—which weighed in at over 600 *Federal Register* pages—two paragraphs dealing with tampering.

EPA asserted "if a motor vehicle is covered by a certificate of conformity *at any point*, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." *Id*. at 40,527 (emphasis added), JAXX. EPA further asserted "[t]here is no prohibition against actual use of certified motor vehicles or motor vehicle engines for competition purposes; however, it is not permissible to remove a motor vehicle or

motor vehicle engine from its certified configuration regardless of the purpose for doing so." *Id.* EPA proposed to revise its rules to reflect these views:

> EPA is proposing in 40 CFR 1037.601(a)(3) to clarify that the [CAA] does not allow any person to disable, remove, or render inoperative (*i.e.*, tamper with) emission controls on a certified motor vehicle for purposes of competition. An existing provision in 40 CFR 1068.235 provides an exemption for nonroad engines converted for competition use. This provision reflects the explicit exclusion of engines used solely for competition from the CAA definition of ''nonroad engine''. The proposed amendment clarifies that this part 1068 exemption does not apply for motor vehicles.

Id. at 40,539-40, JAXX-XX. The preamble provided no further factual, policy, or legal justification for these proposed changes. The Proposed Rule is brevity itself, at least on this topic.

Not surprisingly, the tampering part of the proposal almost flew under the radar of the regulated community. SEMA—a major trade association representing the aftermarket parts industry—realized the existence and importance of what EPA had proposed and submitted comments on December 28, 2015. SEMA-2015-Comments, JAXX-XX.

Recognizing that the potentially-affected public may not have noticed the tampering proposal, EPA published a "Notice of Data Availability" identifying SEMA's comments and explaining that they address "how a proposed amendment related to the [CAA's] prohibition of tampering of emission controls would impact light-duty vehicles used for racing and raises questions about whether adequate

notice was given for this proposed amendment." 81 Fed. Reg. 10,822, 10,826 (Mar. 2, 2016), JAXX, JAXX. EPA reopened the comment period to allow additional comments on the tampering proposal, but offered no further explanation or justification for it.

Once it became more widely known, numerous opposing comments were filed by individuals, companies, and trade associations for major manufacturers of light-duty vehicles and for virtually all aftermarket automotive parts' manufacturers, distributors, and retailers.

EPA published the final rule later in 2016. 81 Fed. Reg. 73,478 (Oct. 25, 2016) ("Final Rule"), JAXX-XX. In a marked shift from proposal, EPA said it decided not to promulgate the proposed rule changes on tampering. As in the proposal, EPA's tampering discussion was brief:

> 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, EPA has decided to eliminate the proposed language from the final rule.
>
> EPA will continue to engage with the racing industry and others in its support for racing, while maintaining the Agency's focus where it has

> always been: Reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.

Id. at 73,957-58, JAXX-XX. Seemingly, EPA's decision appears to be a repudiation of the proposal—particularly because it is couched in declarations of support for motorsports.

Yet, notwithstanding EPA's assertion that the proposed rule "is not being finalized," the Final Rule did, in fact, include material changes to several key regulatory provisions related to tampering—changes that clearly are intended to cement in the rules EPA's newfound view that motor vehicles cannot lawfully be converted into competition-use-only vehicles.

For example, EPA significantly revised 40 C.F.R. §1068.235 to state expressly that the "competition exemption" for nonroad vehicles does not apply to motor vehicles. *Id*. at 74,227, JAXX. Similarly, EPA revised 40 C.F.R. §85.1701 to specify that heavy-duty vehicles are not eligible for the "nonroad" competition exemption. *Id*. at 73,972, JAXX.

These changes bring into sharper focus EPA's Final Rule preamble statement that, "The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles." *Id*. at 73,957, JAXX. Rather than a repudiation of the proposed rule, this statement represents an EPA decision to establish for the first time through this rulemaking that, even under

its pre-existing rules (i.e., the rules as they stood prior to the instant rulemaking), motor vehicles cannot lawfully be converted into competition-use-only vehicles.

Thus, EPA finalized what it claimed it had not finalized—a converted-racecar prohibition. In a brief filed recently in a federal district court enforcement case, EPA provided much clearer explanation than it mustered during the rulemaking:

> In its promulgated 2016 nonroad vehicle regulations, EPA effectuated the exclusion from the nonroad vehicle definition for "vehicles used exclusively in competition." Importantly, however, these regulations expressly state that the competition exemption for nonroad vehicles does not apply to motor vehicles. 40 C.F.R. §1068.235; *see also* 40 C.F.R. §85.1701 (the nonroad competition exemption provisions "do not apply for motor vehicle engines"). This explicit limitation manifests EPA's view that competition-only motor vehicles are covered by the [Tampering] Prohibitions; otherwise its statements would have been completely unnecessary.

U.S. Response to *Amicus* Br. at 27, *U.S. v. Gear Box Z, Inc.*, No. CV-20-08003-PCT-JJT (D. Ariz. Mar. 8, 2021), ECF 105 ("EPA *Gear Box* Br."), JAXX.

The newly promulgated prohibition on converting motor vehicles into competition-use-only vehicles is the issue petitioner challenges in this case.

SUMMARY OF ARGUMENT

This case is about people who convert production vehicles into competition-use-only racecars. This practice developed into a national pastime—especially for amateur racers—well before the federal government started regulating vehicle air emissions in 1965. The practice continued unabated until 2016, when EPA purported to prohibit the conversion of "motor vehicles" into competition-use-only vehicles.

Since the vehicle emissions control program began, it has been illegal to "tamper" with the emissions controls on "motor vehicles." To maintain the effectiveness of the factory-installed emissions controls during a motor vehicle's useful life, the law prohibits changes that compromise effectiveness.

The term "motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. §7550(2). Because competition-use-only vehicles are not designed for transporting persons or property on a street or highway, they are not a "motor vehicle[s]" under the CAA and therefore are not now, nor have they been historically, subject to the prohibition on motor vehicle tampering.

Among other things, such competition-only vehicles lack accessories useful or necessary for driving the vehicle on streets or highways, such as turn signals, air bags, and passenger seats. In fact, EPA's "motor vehicle" regulatory definition as it stood prior to the instant rule, expressly provided that a "vehicle [that] lacks features customarily associated with safe and practical street or highway use [such as] … safety features required by state and/or federal law" is not a motor vehicle. 40 C.F.R. §85.1703(a) (2016).

From 1965-2015, EPA allowed and, at times, *embraced* converting motor vehicles into competition-use-only vehicles. *See supra* p. 14 (EPA's Green Racing Initiative). Over this period, EPA never declared a prohibition on such conversions.

That changed in 2015, when EPA proposed the instant rule. In a dramatic departure, EPA asserted that "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." 80 Fed. Reg. at 40,527, JAXX. EPA proposed an express regulatory prohibition.

In the Final Rule, in response to critical comments, EPA said it decided not to promulgate the proposed prohibition. Without explanation or justification, however, EPA proceeded to make several other regulatory changes to accomplish the same outcome. And, EPA purported to definitively interpret its *pre-existing* regulations as already prohibiting the conversion of motor vehicles into competition-use-only vehicles.

This surreptitious effort should be rejected as arbitrary and capricious and not in accord with law. First, EPA's record asserts absolutely no supporting explanation, factual justification, policy analysis, or legal basis. This is the epitome of arbitrary and capricious decisionmaking.

More fundamentally, the CAA does not authorize a prohibition on converting motor vehicles into competition-use-only vehicles. The statutory definition of "motor vehicle" does not encompass competition-use-only vehicles because such vehicles are not designed to transport people or things on streets or highways.

Likewise, competition-use-only vehicles are carved out of the statutory definition of "nonroad vehicles." Hence, competition-use-only vehicles are not subject to the CAA.

Lastly, EPA's assertion that pre-existing regulations include a prohibition on converting motor vehicles into competition-use-only vehicles is an impermissible interpretation of those rules.

STANDING

RESC is a trade association representing businesses that manufacture, distribute, and sell automotive aftermarket products. RESC has associational standing to challenge the Rule on its members' behalf: (1) members would have standing to sue; (2) the interests RESC seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015).

First, RESC member Turn 14 Distribution, Inc. satisfies all three elements of Article III standing—injury, causation, and redressability. Turn 14 Distribution has Article III standing to sue as it has "suffered an injury in fact," which is "an invasion of a legally protected interest [that] is (a) concrete and particularized … and (b) actual or imminent rather than conjectural or hypothetical"; there is "a causal connection between the injury and the conduct complained of [so that] the injury [is]

fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court"; and it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 556, 560-61 (1992) (internal punctuation marks and citations omitted).

Turn 14 Distribution is an auto parts distribution business and benefits from selling parts used by competition-only vehicles. Declaration of Jon Pulli ¶1. Turn 14 Distribution's economic interests in selling auto parts have been, and will continue to be, harmed by EPA's finalization of a Rule that: (1) by its amendments to regulatory text, effectively outlawed the long-standing American pastime of converting once-certified motor vehicles into dedicated competition vehicles; and (2) in the same document created regulatory uncertainty about the legality of such conversions by stating: "The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles." *Id.* ¶¶8-12. Since the Rule, Turn 14 Distribution either must rely on EPA's textual changes and expend resources on compliance with this new regulatory landscape or rely on the seemingly contrary, yet unexplained terms of the EPA's statement that nothing has changed and risk enforcement action for noncompliance with EPA's actual changes to regulatory text. *Id.* Customers of Turn 14 Distribution face the same conundrum, affecting economic and recreational interests surrounding

the legality of building dedicated racecars. *Id.* ¶¶8, 9, 11. These harms are actual and imminent, not conjectural or hypothetical: The company continues and plans to continue to operate as an auto parts distribution business. *Id.* ¶12.

As to causation and redressability, EPA's final agency action has caused harm to the company's economic interests, which harm would be redressed if this Court invalidates the action. If that occurs, it would eliminate the regulatory uncertainty caused by the Rule. Likewise, invalidation of EPA's action would significantly reduce the ongoing enforcement threat faced by Turn 14 Distribution as it continues its business.

Second, the interests RESC seeks to protect are germane to its purpose. RESC's purpose is to participate collectively in rulemaking and litigation that arises from administrative proceedings under the CAA before EPA that affect member interests. RESC's goal in this litigation is to require EPA to comply with CAA obligations that impact the aftermarket auto parts industry. As manufacturers, distributors, and retailers of aftermarket automotive products, RESC's members are directly affected by the regulations at issue, making its objective pertinent to its mission.

Third, nothing requires RESC members' participation. "Member participation is not required where a 'suit raises a pure question of law' and neither the claims pursued nor the relief sought require the consideration of the individual

circumstances of any aggrieved member of the organization." *See Ctr. for Sustainable Econ.*, 779 F.3d at 597-98 (citation omitted).

ARGUMENT

I. Petitioner challenges nine elements of the Final Rule.

At the outset, it is important to explain what EPA *actually did* in the Final Rule, as compared with what EPA *said it did*. The Final Rule preamble claims that EPA decided not to revise the rules to incorporate its proposed determination that motor vehicles cannot lawfully be converted into competition-use-only vehicles. 81 Fed. Reg. at 73,529 ("EPA is not finalizing the proposed clarification related to highway vehicles used for competition."), JAXX; *id*. at 73,957 ("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."), JAXX.

EPA explains that "[t]he proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles" and "[s]ince our attempt to clarify led to confusion, EPA has decided to eliminate the proposed language from the final rule." *Id*. This explanation is couched in declarations of support for the racing community—e.g., "EPA supports motorsports and its contributions to the American economy and communities all

across the country"; "EPA will continue to engage with the racing industry and others in its support for racing." *Id.*

Ostensibly, EPA seems to have repudiated the Proposed Rule and decided not to codify a converted-racecar prohibition.

Yet, careful parsing of the final regulatory changes promulgated in the Final Rule shows that EPA did something very different. EPA, in fact, promulgated several revisions that very clearly changed the rules to codify its view that motor vehicles may not lawfully be converted into competition-use-only vehicles. At the same time, EPA in the Final Rule preamble sought to definitively interpret its pre-existing rules as already prohibiting such conversions.

A. EPA made eight changes to the regulations to lock in its view that motor vehicles may not lawfully be converted into competition-use-only vehicles.

EPA made eight rule changes in the Final Rule that are at issue in this case:

(1) **40 C.F.R. §1068.235:** Part 1068 sets "General Compliance Provisions for Highway, Stationary, and Nonroad Programs." Section 1068.235 codifies that the regulations do not apply to vehicles used solely for competition. EPA revised this rule by inserting an introduction stating: "The following provisions apply for nonroad engines/equipment, **but not for motor vehicles** or for stationary applications." 81 Fed. Reg. at 74,227 (emphasis added), JAXX. By making "motor vehicles"

ineligible for the exclusion for competition-only vehicles, the highlighted language codifies what EPA said it did not codify—a prohibition on converting motor vehicles into competition-use-only vehicles.

(2) **40 C.F.R. §1037.601(a)(3):** Section 1037.601 sets out general compliance provisions for heavy-duty vehicles and engines. Prior to the Final Rule, §1037.601(a)(1) stated: "The exemption and importation provisions of 40 CFR part 1068, subparts C and D, apply for vehicles subject to this part 1037 …." 40 C.F.R. §1037.601(a)(1) (2016). This meant §1068.235 was applicable. The Rule heavily modified and significantly expanded §1037.601. As relevant, §1037.601(a)(3) now expressly states: "The exemption provisions of 40 CFR 1068.201 through 1068.230, 1068.240, and 1068.260 through 265 apply for heavy-duty motor vehicles. **Other exemption provisions, which are specific to nonroad engines, do not apply for heavy-duty vehicles or heavy-duty engines.**" 81 Fed. Reg. at 74,104 (emphasis added), JAXX. The revision is intended to make heavy-duty vehicles ineligible for §1068.235, which effectively prohibits heavy-duty vehicles from being converted into competition-only vehicles.

(3) **40 C.F.R. §1036.601(a)(1):** Section 1036 sets emissions standards for heavy-duty highway engines. Changes to §1036.601(a)(1) mirror those made to §1037.601(a)(3)—i.e., §1036.601(a)(1) was revised to remove §1068.235 (regulatory competition vehicles exclusion) from the list of applicable provisions, and a sentence was added stating, "**[t]he other exemption provisions, which are specific to nonroad engines, do not apply for heavy-duty vehicles or heavy-duty engines.**" 81 Fed. Reg. at 74,034 (emphasis added), JAXX.

(4) **40 C.F.R. §85.1703(b):** Section 85.1703 is the regulatory definition of "motor vehicle." Section 85.1703(a)(2) provides that a vehicle is not a "motor vehicle" if it "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." 40 C.F.R. §85.1703(a)(2) (2016). The Final Rule's inserts a new §85.1703(b), which states, "… in applying the criterion in paragraph (a)(2) of this section, vehicles that are clearly **intended for** operation on highways are motor vehicles. Absence of a particular safety feature is relevant only when absence of that feature would prevent operation on highways." 81 Fed. Reg. at 73,972 (emphasis added), JAXX. This

provision fundamentally alters the "capable of" test that EPA promulgated in 1974—transforming it into an "intended for" test, which had been expressly rejected in 1974. Additionally, the new provision creates a new *per se* rule that absence of safety features is relevant *only* if the absence would "**prevent** operation on highways." *Id*. (emphasis added).

(5) **40 C.F.R. §1068.101(b)(4)(ii):** Section 1068.101 is entitled "What general actions does this regulation prohibit?" Before the Final Rule, §1068.101(b)(4) made it a violation to use competition vehicles "in a manner that is inconsistent with use solely for competition." 40 C.F.R. §1068.101(b)(4) (2016). The Final Rule preserved §1068.101(b)(4)'s original text without relevant change, but recodified it at §1068.101(b)(4)(i). 81 Fed. Reg. at 74,223, JAXX. The Final Rule added new §1068.101(b)(4)(ii), which in relevant part states: "For certified **nonroad** engines/equipment that qualify for exemption from the tampering prohibition as described in §1068.235 because they are to be used solely for competition, you may not use any of them in a manner that is inconsistent with use solely for competition." *Id.* (emphasis added). As now reorganized, subsection (i) applies to competition vehicles that were never motor vehicles (i.e., purpose-built

competition vehicles, like IndyCars). New subsection (ii) provides that only nonroad vehicles are eligible for §1068.235, thus effectively prohibiting motor vehicles from being converted into competition-use-only vehicles.

(6) **40 C.F.R. §85.1701(a)(1):** Section 85.1701 establishes heavy-duty vehicle general applicability. Before the Final Rule, it stated "the competition exemption of 40 CFR 1068.235 … [does] not apply for motor vehicle engines." 40 C.F.R. §85.1701(a)(1) (2016). The Final Rule revised it to state that "the **nonroad** competition exemption" does not apply. 81 Fed. Reg. at 73,972 (emphasis added), JAXX. By adding "nonroad," EPA plainly sought to emphasize that the exclusion for vehicles used solely for competition is available only for "nonroad" vehicles, not motor vehicles.

(7) **40 C.F.R. §1068.1(d)(2):** Section 1068.1 establishes general applicability provisions for Part 1068. The Final Rule revised §1068.1(d)(2) to say: "The provisions of §§1068.30 and 1068.235 apply for the types of **nonroad** engines/equipment listed in paragraph (a) of this section beginning January 1, 2004, if they are used solely for competition." 81 Fed. Reg. at 74,217 (emphasis added), JAXX; *see* 40 C.F.R. §1068.1(d)(2) (2016). By adding "nonroad," EPA plainly

sought to establish that exclusion for vehicles used solely for competition is available only for "nonroad" vehicles and not motor vehicles.

(8) **40 C.F.R. §1068.201:** This section is entitled "General exemption and exclusion provisions." Before the Final Rule, §1068.201 stated in part: "We may exempt engines/equipment already placed in service in the United States from the prohibition in §1068.101(b)(1) if the exemption for engines/equipment used solely for competition applies (see §1068.235)." 40 C.F.R. §1068.201 (2016). EPA revised this provision in the Final Rule to say: "We may exempt **nonroad** engines/equipment … if the exemption for **nonroad** engines/equipment …." 81 Fed. Reg. at 74,226 (emphasis added), JAXX. By adding "nonroad" twice, EPA plainly sought to establish that the exclusion for vehicles used solely for competition is available only for "nonroad" vehicles, not motor vehicles.

The above "before-and-after" analysis is necessary because EPA stated twice in the Final Rule preamble that it decided not to amend its rules to incorporate a prohibition on converting motor vehicles into competition-use-only vehicles. Yet, there it is—buried deep in almost 800 pages of a *Federal Register* notice dedicated to the wholly different topic of heavy-duty truck greenhouse gases.

And, according to EPA, these changes effected significant substantive change. As EPA explained in Arizona federal district court in a subsequent tampering case, "In its promulgated 2016 nonroad vehicle regulations, EPA **effectuated** the exclusion from the nonroad vehicle definition for "vehicles used exclusively in competition." EPA *Gear Box* Br. at 27 (emphasis added), JAXX. EPA explains that §1068.235 "expressly state[s] that the competition exemption for nonroad vehicles does not apply to motor vehicles." *Id*. Of course, as shown above, §1068.235 did not make such an express statement until the Final Rule revised it. EPA concludes that "[t]his explicit limitation **manifests** EPA's view that competition-only motor vehicles are covered by the [Tampering] Prohibitions; otherwise its statements [i.e., the new language in §1068.235] would have been completely unnecessary." *Id.* (emphasis added).

The Final Rule's new tampering provisions "effectuated" and "manifested" in the regulations EPA's newfound view that motor vehicles cannot lawfully be converted into competition-use-only vehicles—otherwise, per EPA, the new rule language would not have been "necessary."

B. EPA definitively interpreted its pre-existing regulations to prohibit conversion of motor vehicles to competition-use-only vehicles.

Beyond the rule changes, RESC challenges the Final Rule preamble statement that: "The proposed language was not intended to represent a change in the law or in

EPA's policies or practices towards dedicated competition vehicles." 81 Fed. Reg. at 73,957, JAXX. This statement has significant substantive effect because it is the first time EPA has definitively asserted that, even without the Final Rule's regulatory changes, its rule prohibit the conversion of motor vehicles into competition-use-only vehicles.

EPA clarified the import of this statement in a press statement during the pendency of the Proposed Rule:

> People may use EPA-certified motor vehicles for competition, but to protect public health from air pollution, the [CAA] has—**since its inception—**specifically prohibited tampering with or defeating the emission control systems on those vehicles. **The proposed regulation that SEMA has commented on does not change this long-standing law, or approach.** Instead, the proposed language in the Heavy-Duty Greenhouse Gas rulemaking simply clarifies the distinction between motor vehicles and nonroad vehicles such as dirt bikes and snowmobiles. Unlike motor vehicles—which include cars, light trucks, and highway motorcycles—nonroad vehicles may, under certain circumstances, be modified for use in competitive events in ways that would otherwise be prohibited by the [CAA].

Auto Alliance Comments at 4 (citing statement of EPA Deputy Press Secretary) (emphasis added), JAXX. EPA thus asserted that it viewed the proposed express prohibition on converting motor vehicles into competition-use-only vehicles as a mere "clarification" that would simply restate a prohibition that already existed in EPA's rules and not change the meaning of the pre-existing rules. So when EPA asserted in the Final Rule preamble that "[t]he proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated

competition vehicles," 81 Fed. Reg. at 73,957, EPA awkwardly, yet definitively, established by rule the same thing that it said in its press release—that its pre-existing rules should be construed as already containing the proposed prohibition.

EPA doubled-down on this view in a federal court CAA tampering enforcement case, where EPA asserted it "has consistently interpreted the CAA to prohibit the use, manufacture and sale of defeat devices for motor vehicles used in competition motorsports" and that "this has 'always' been EPA's view." EPA *Gear Box* Br. at 26, 27 JAXX, JAXX.

If so, it was a well-guarded secret. Commenters on the Proposed Rule uniformly explained that, for the decades-prior, EPA had neither announced such a prohibition on conversion nor sought to enforce such view. *See supra* pp. 8, 13, 18-19, 35-36; *infra* pp. 44-45. If anything, EPA had embraced such conversions. *See supra* p. 14 (Green Racing Initiative). Even the Congressional Research Service found no historical EPA statements asserting such a view. *See supra* p. 15. EPA failed to rebut these comments on the record in the Final Rule.

Most importantly, before the Final Rule, EPA's regulations simply did not state a prohibition on converting motor vehicles into competition-use-only vehicles. As EPA explained in federal district court, it needed rule changes to "effectuate" and "manifest" this position. And the CAA does not impose such a prohibition.

> As a general matter, two conditions must be satisfied for agency action to be 'final: First, the action must mark the "consummation" of the

> agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligation have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal punctuation and citations omitted). In this case, EPA's statement clearly is not tentative or interlocutory. EPA explained in its contemporaneous press release that it believes the prohibition always existed in its rules. And, EPA now uses this view as a cornerstone of its tampering national enforcement strategy. *See, e.g.*, EPA *Gear Box* Br. at 3-4 ("The CAA is clear that a certified motor vehicle remains a motor vehicle throughout its life even if it is modified for some other use such as competition motorsports or is not used on public roads.").

Moreover, EPA's interpretation has significant legal consequences. EPA's view would make illegal a vast swath of amateur racing in the United States. Millions of individual racers and mechanics would face liability for converting motor vehicles into race cars, as well as those who made, distributed, and sold the necessary parts. And, by the Agency's lights, these millions might also be **criminals**. *See, e.g.*, Information, *United States v. Rockwater Northeast LLC*, 4:20-cr-00230-MWB (M.D. Pa. filed Sept. 24, 2020), ECF 1, JAXX. EPA's view would cut the heart out of motorsports in the United States.

EPA's interpretation also is final agency action because the Agency asserted the interpretation as its rationale for purportedly not revising its rules to include an

express prohibition on converting motor vehicles into competition-use-only vehicles. EPA concluded that it can enforce that view of the rules in the absence of a rule change.

That EPA expressed its determination in a final rule preamble does not change this result for judicial review purposes. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478-79 (2001) (preamble statements reviewable final action); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (guidance final action); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (press release final action). What matters is the action's nature, not the vehicle chosen to express it.

II. Seven of the rule revisions must be vacated because EPA failed to provide rationale or support.

Seven of the eight changes detailed in Section I.A, *supra*, that EPA made to its motor vehicle regulations to codify its view that motor vehicles cannot lawfully be converted into competition-use-only vehicles are entirely unsupported (the eighth being addressed separately below). EPA provided in the rulemaking record absolutely no explanation of these changes, no factual or policy justification supporting the changes, and no legal analysis demonstrating that the changes are authorized or required under the law. Indeed, EPA denies in the Final Rule preamble that it even made any changes to its rules or policies. This is the epitome of arbitrary and capricious decision-making.

Both the Administrative Procedure Act and the CAA authorize this court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A), 42 U.S.C. §7607(d)(9)(A). It is well established that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) ("*MVMA*") (internal punctuation omitted).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

The first change is the amendment to 40 C.F.R. §1068.235, the regulatory exclusion for competition vehicles. EPA added a new introductory sentence to this section stating: "The following provisions apply for nonroad engines/equipment, **but not for motor vehicles** or for stationary applications." 81 Fed. Reg. at 74,227 (emphasis added). This new sentence prohibits motor vehicles from qualifying for the exclusion for competition vehicles.

The second is the amendment to 40 C.F.R. §1037.601(a)(3). Section 1037.601 sets out "general compliance provisions" for heavy duty vehicles and engines. Prior

to the Final Rule, §1037.601(a)(1) stated in relevant part: "The exemption and importation provisions of 40 CFR part 1068, subparts C and D, apply for vehicles subject to this part 1037…." 40 C.F.R. §1037.601(a)(1) (2016). The exclusion at Section 1068.235 for vehicles used solely for competition is in Subpart C and, thus, was encompassed by this provision.

Section 1037.601 was heavily modified and significantly expanded in the Final Rule. In relevant part, the Final Rule at §1037.601(a)(3) now expressly states: "The exemption provisions of 40 CFR 1068.201 through 1068.230, 1068.240, and 1068.260 through 265 apply for heavy-duty motor vehicles. **Other exemption provisions, which are specific to nonroad engines, do not apply for heavy-duty vehicles or heavy-duty engines.**" 81 Fed. Reg. at 74,104 (emphasis added), JAXX. The effect of the highlighted language is to make heavy-duty vehicles ineligible for the Section 1068.235 competition exclusion. This precludes heavy-duty vehicles from being converted into excluded competition-only vehicles. Notably, this change was made in the very section of the regulations that EPA said it had decided *not* to revise.

The third change was made to §1036.601(a)(1). Changes to this section mirror those made to §1037.601(a)(3)—i.e., §1036.601(a)(1) was revised to remove §1068.235 (regulatory competition vehicles exclusion) from the list of applicable provisions, and a sentence was added stating, "**[t]he other exemption provisions,**

which are specific to nonroad engines, do not apply for heavy-duty vehicles or heavy-duty engines." 81 Fed. Reg. at 74,034 (emphasis added), JAXX.

Fourth, at 40 C.F.R. §1068.101(b)(4), EPA added new regulatory language characterizing the exclusion for competition vehicles as being available only to nonroad vehicles and not motor vehicles.

The remaining three changes were made at 40 C.F.R. §§85.1701, 1068.1(d)(2), and 1068.201, EPA added the word "nonroad" to existing regulatory provisions that reference the exclusion for competition vehicles. These are targeted changes that plainly are intended by EPA to lock in its view that an EPA-certified motor vehicle may not lawfully be converted to race-only vehicles.

Remarkably, there is absolutely no explanation or justification for these seven rule changes presented in the Proposed Rule, Final Rule, or supporting EPA documents in the rulemaking docket. No dissertation of facts supporting the need for these changes. No identification and assessment of relevant policy factors. No identification of applicable law or discussion of how the law supports or requires these changes. Nothing. This total lack of support for the rule changes is the epitome of arbitrary and capricious decision making.

The situation is made worse by EPA's statement in the Final Rule preamble that it chose not to finalize the tampering elements of the proposed rule out of concern that the changes would be "confus[ing]." 81 Fed. Reg. at 73,957, JAXX.

But by finalizing changes to the rule it claims it decided not to finalize and strategically including most of those changes in parts of the rule not mentioned in the discussion of tampering in the proposed or final rules, EPA acted surreptitiously and surely created far more confusion than it claims to have alleviated.

Beyond "entirely fail[ing] to consider an important aspect of the problem," *MVMA*, 463 U.S. at 43, EPA entirely failed to consider any aspect of the problem. Consequently, EPA's decision to finalize these seven rule changes was arbitrary and capricious and the changes should be vacated.

III. EPA failed to consider key factors and to explain reversal of prior rationale in changing the definition of "motor vehicle."

EPA's amended definition of "motor vehicle" at §85.1703 added language that transforms the definition from a "capable of" test to an intent-based test and specifies that absence of safety features is relevant only if it prevents vehicle use on streets. 81 Fed. Reg. at 73,972, JAXX; *see supra* Section II.A. EPA explained in the Proposed and Final Rules that these changes help close a loophole in the rules related to certain rebuilt vehicles, an issue that is wholly unrelated to the issues addressed in the instant case. 80 Fed. Reg. 40,529, JAXX; 81 Fed. Reg. 73,946, JAXX. That rationale fails for two reasons.

First, EPA did not acknowledge or respond to public comments explaining how this change would fundamentally and unjustifiably alter the treatment of motor vehicles that are converted to competition-use-only vehicles. *See supra* pp. 1-21.

That alone demonstrates EPA failed to consider relevant factors in formulating this aspect of the Final Rule. *MVMA*, 463 U.S. at 49-51.

Second, the new text specifies that "vehicles that are clearly intended for operation on highways are motor vehicles." 81 Fed. Reg. at 73,972, JAXX. This provision pivots to an intent-based test for defining "motor vehicle." Yet, when the pre-existing rule was promulgated in 1974, EPA carefully explained why it *rejected* an intent-based approach to defining "motor vehicle," instead adopting a capability-based approach. EPA does not acknowledge on the record that its new approach reverses the 1974 rule, nor does it explain why it adopts an approach expressly rejected in 1974. This is arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio*….").

IV. EPA's definitive interpretation of its pre-existing regulations is arbitrary and capricious.

EPA's determination that pre-existing rules (i.e., the rules as they stood before the instant rulemaking) should be interpreted as prohibiting conversion of motor vehicles into race-use-only vehicles is arbitrary and capricious for largely the same reasons as the changes discussed in Section II, *supra*—EPA provides absolutely no support for it in the rulemaking record of this rulemaking.

The Proposed Rule preamble asserts "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and

defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." 80 Fed. Reg. at 40,527, JAXX. EPA says nothing more. No citation to the regulatory provisions that express, or should be construed as imposing, that requirement. No discussion of where under the CAA such a requirement is mandated or authorized. No prior policy memoranda or interpretive statements references where EPA expressed this. Nothing at all.

Some Commenters nevertheless understood the import of that statement. "Essentially, the EPA is saying 'once a motor vehicle, always a motor vehicle.' However, this contradicts long-standing agency policy, which has for decades recognized that vehicles that are used solely for competition are excluded from the EPA's regulations under the [CAA]…." SEMA-2016-Comments at 3 (footnote omitted), JAXX.

While these Commenters challenged EPA to justify its views, EPA was silent in the Final Rule and supporting record. EPA simply declared that its reason for not finalizing the proposed revisions was based on concern that they would mistakenly be interpreted as a change—i.e., that the pre-existing rules already prohibited conversion of motor vehicles into competition-only-vehicles. EPA says nothing more. Interestingly, EPA had plenty more to say in its contemporaneous press statements and in subsequent litigation in federal district court. But the record for

this Court on review is devoid of explanation, making the action patently arbitrary and capricious.

V. The CAA unambiguously authorizes conversion of motor vehicles into competition-use-only vehicles.

Ordinarily in taking final agency action, EPA's record explains its reasons, identifying applicable law and discussing how it requires or allows the final action. That record serves as the basis for judicial review.

Here, EPA cited no law and provided no factual, policy, or legal analysis in support of its pronounced ban on conversions. The full extent of EPA's justification is the conclusory statement that "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." 80 Fed. Reg. at 40,527, JAXX. That bare assertion utterly fails to legally justify EPA's final actions here.

That should be the end of the matter. "The courts may not accept appellate counsel's post hoc rationalizations for agency action. For the courts to substitute their or counsel's discretion for that of the (agency) is incompatible with the orderly functioning of the process of judicial review." *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971) (internal punctuation and citation omitted). Having offered no record justification or support for the tampering-related final actions, EPA cannot here devise post hoc rationale.

Yet, any legal analysis EPA might have mustered would have been unavailing because the CAA unambiguously authorizes the conversion of motor vehicles into competition-use-only vehicles. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter….").

The CAA establishes three categories of vehicles:

(1) **"motor vehicle[s]"**, "any self-propelled vehicle designed for transporting persons or property on a street or highway," 42 U.S.C. §7550(2);

(2) **"nonroad vehicle[s]"**, "a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition," 42 U.S.C. §7550(11); and

(3) **vehicles used solely for competition**, a category of vehicles established in the definition of "nonroad vehicle[s]," *id*.

Air pollution from motor vehicles is primarily regulated under 42 U.S.C. §7521. Air pollution from nonroad vehicles (e.g., farm tractors) is regulated under 42 U.S.C. §7547. Vehicles used solely for competition are not regulated under the CAA.

EPA's claim that a "motor vehicle" cannot lawfully be converted into a competition-use-only vehicle is not supportable under these definitions. A "motor vehicle" is a vehicle "designed" for transporting people or things on a street or highway. When a motor vehicle is converted to race-only, the vehicle's "design" changes. A vehicle used solely for competition plainly is not "designed" to transport people or things on a street or highway. A vehicle used solely for competition is

"designed" to compete on a closed course. Hence, under the unambiguous design-based "motor vehicle" definition, an EPA-certified vehicle that is converted into a competition-use-only vehicle is not a "motor vehicle."

Congress in the 1990 CAA Amendments confirmed this view when it established that competition-only vehicles should be identified according to how the vehicles are used—not on how they were originally designed. That is why "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." 81 Fed. Reg. at 73,957 (emphases added), JAXX. Everyone knows that "use" of a vehicle can change over time. That a vehicle is originally designed for street use does not mean that vehicle will forever be used on the street. EPA's declaration that such conversions are unlawful is wholly incompatible with the use-based exclusion of competition vehicles. *See* SEMA-2015-Comments at 7, JAXX.

Notably, EPA surely would argue that vehicles not originally certified (*e.g.*, purpose-built race cars) would have to obtain EPA certification before being sold for use on streets or highways. But curiously, the opposite is not true. EPA wants it both ways—a purpose-built racecar can become a certified vehicle, but a certified vehicle cannot become a racecar. That makes no sense.

EPA's converted-racecar prohibition also is belied by statutory definitional structure for these three categories. Congress carefully distinguished race-only vehicles from nonroad vehicles within the "nonroad vehicle" definition because race-only vehicles are not used on public streets. That structure emphasized that, although race-only vehicles are indeed "nonroad vehicles," as a practical matter, they should not be treated as "nonroad vehicles" for purposes of CAA regulation.

More generally, if Congress wanted to prohibit conversion of motor vehicles into competition-use-only vehicles, it knew how to do so. *See, e.g.*, 42 U.S.C. §7543(a) ("Prohibition" of state authority to regulate emissions from motor vehicles); 42 U.S.C. §7545(c) (allowing for "prohibition" of certain fuels and fuel additives); 42 U.S.C. §7545(h)(1) ("Prohibition" of high volatility fuels).

Nothing in the 1965 Act or in subsequent CAA amendments states that Congress was prohibiting the time-honored tradition of converting production vehicles into racecars. SEMA-2015-Comments at 7, JAXX. That Congress has not enacted an express prohibition clearly indicates such a prohibition does not exist.

Moreover, if Congress intended to impose a draconian ban affecting millions of Americans and a multi-billion dollar slice of the economy, it would have been explicit. Surely Congress would have debated whether to prohibit hobbyists nationwide from continuing to work on racecars in their garages, as they had done "after the second car was built," before taking such a profound action. EPA's

assertion of an expansive prohibition is invalid in the absence of such a clear statement. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (agency claiming unheralded power to regulate significant portion of economy under long-extant power greeted with judicial skepticism); *Whitman*, 531 U.S. at 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Such a "major question" would indeed surely have been addressed explicitly. *Id.*

Regardless, there is no need to speculate. Congress actually expressed the opposite intent. Congressional deliberations leading to the 1970 CAA Amendments show awareness that street cars often are converted to racecars and that the tampering provision did not prohibit such conversions. Consider this colloquy during House consideration of the conference committee report on the CAA as signed by President Nixon (H.R. 17255):

> MR. NICHOLS. I would like to ask a question of the chairman, if I may. I am sure the distinguished chairman would recognize and agree with me, I hope, that many automobile improvements in the efficiency and the safety of motor vehicles have resulted from experience gained in operating motor vehicles under demanding circumstances such as those circumstances encountered in motor racing. I refer to the tracks at Talladega in my own State, to Daytona and Indianapolis, competition. I would ask the distinguished chairman if I am correct in stating that the terms "vehicle" and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, modified for or utilized in organized motorized racing events which, of course,

> are held very infrequently but which utilize all types of vehicles and vehicle engines?
>
> MR. STAGGERS. In response to the gentleman from Alabama, 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.

H. CONSIDERATION OF THE RPT. OF THE CONF. COMM. (1970), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 TOGETHER WITH A SECTION-BY-SECTION INDEX, at 117 (U.S. Gov't Printing Office, Serial No. 93-18, 1974), JAXX. Thus, Congress anticipated that motor vehicles "modified" for use in "organized motorized racing events" would not be regulated under the CAA. SEMA-2015-Comments at 6-7, JAXX-XX. The 1990 CAA amendments confirmed this when Congress expressly carved competition-only vehicles out of the regulatory scheme.

VI. The CAA is not susceptible to an interpretation prohibiting the conversion of motor vehicles into competition-use-only vehicles.

Even assuming *arguendo* some statutory ambiguity exists as to whether motor vehicles may be converted into competition-use-only vehicles, it would be impermissible to interpret the Act as allowing EPA to ban such conversions.

EPA's assertion that it may prohibit such conversations is wholly implausible under law. It completely ignores the context in which Congress legislated. In 1965, when Congress first directed a motor vehicle emissions program, motorsports had

been a national pastime for decades, with conversion of street cars to racecars a prominent part. The famous professional racing circuit, the National Association for Stock Car Auto Racing ("NASCAR"), proudly trumpeted in its very name the conversion of "stock cars" into racecars. No doubt Congress understood this. *See supra* pp. 1-11. Motorsports' popularity has grown since.

Yet, neither the 1965 Act nor subsequent amendments suggest that Congress thought conversion of motor vehicles to competition-use-only vehicles was wrong; rather, in 1990, Congress carved vehicles used solely for competition completely out of the Act. 42 U.S.C. §7550(11). Thus, the origin of a vehicle is wholly irrelevant in identifying vehicles used solely for competition.

EPA's "once-a-street-car, always-a-street-car" approach is at odds with Congress's intention not to regulate such vehicles under the CAA. It also is contradicted by EPA's prior "capable of" definition of "motor vehicle" and EPA's 50-year practice of allowing conversion of motor vehicles into competition-use-only vehicles. As commenters explained, EPA is "'throwing the baby out with the bathwater'" by seeking "to enact a total ban on vehicle conversions, including legitimate activities that have been taking place since the inception of the CAA and before." Auto Alliance Comments at 9, JAXX.

Ordinarily, EPA's authority under an ambiguous statute is governed by *Chevron* "step 2." *Chevron*, 467 U.S. at 844 (where "the legislative delegation to an

agency on a particular question is implicit rather than explicit … a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the … agency").

Here, no *Chevron* deference is warranted; the CAA "give[s] no indication that Congress meant to delegate authority" to prohibit conversion of motor vehicles into competition-use-only vehicles. *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001). Though broad, EPA's rulemaking authority is not unlimited under CAA Title II.

But whether *Chevron*-step-two's rule of reason or the less deferential assessment of "power to persuade," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), applies, EPA fails to chin the bar. Regulating in the face of ambiguity requires EPA to identify applicable law and explain how that law authorizes the regulation. Even assuming *arguendo* ambiguity exists, EPA's failure to present even a nominal legal basis for its actions renders them invalid.

Moreover, even had EPA tried, no good reason exists to interpret the CAA—50 years into federal motor vehicle regulation—as suddenly prohibiting converted-racecars. Congress clearly intended that vehicles used solely for competition should not be regulated under the CAA. EPA's approach would implausibly render illegal cars that are, and for a century have been, a prominent part of motorsports.

VII. EPA's pre-2016 regulations cannot plausibly be interpreted to ban conversion of motor vehicles into competition-use-only vehicles.

As explained in Section I.B, *supra*, EPA's Final Rule statement that "[t]he proposed [regulatory] language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles," 81 Fed. Reg. at 73,957, JAXX, is a final agency action with significant substantive effect. It is the first time EPA definitively asserted that, even prior to 2016's rule changes, its rules incorporated a prohibition on converting motor vehicles into competition-use-only vehicles.

As explained in Section IV, *supra*, the utter lack of explanation or record justification renders this action invalid. But even had EPA sought to justify this action, it would have failed.

Ordinarily, an agency's interpretation of its own rules has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). But to warrant deference, "an agency's reading of a rule must reflect 'fair and considered judgment.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). "[A] court should decline to defer to a new … interpretation … that creates 'unfair surprise' to regulated parties." *Id*. at 2417-18.

Deference is not warranted here. EPA's action is not the product of "fair and considered judgment" because it asserted no explanation or justification for its declaration that motor vehicles cannot lawfully be converted into competition-use-

only vehicles under its pre-existing rules. Such a conclusory declaration is the antithesis of "fair and considered judgment."

Moreover, record comments show EPA's final action constituted "unfair surprise" to regulated entities. The trade group for all major car manufacturers observed "[t]o date, the Agency has not attempted to regulate such conversions and thereby prohibit individual vehicle purchasers from engaging in lawful uses of their property." Auto Alliance Comments at 5, JAXX.

Similarly, an aftermarket auto parts trade association asserted:

> Before the [CAA] 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. … 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."

SEMA-2015-Comments at 2-3, JAXX-XX.

Even another part of the government agreed with these commenters. A Congressional Research Service section manager testified to Congress that "'[Congressional Research Service] was unable to find a document from EPA from before 2015 that explicitly stated that conversions of motor vehicles for racing were not eligible for an exemption.'" SEMA-2016-Comments at 4, JAXX.

Notably, EPA neither contested nor rebutted these comments on the record, making it undisputed that this action constituted a sharp departure from prior government practice—an "unfair surprise."

Consequently, *Seminole Rock* deference is unwarranted.

On the merits, even EPA contradicts the notion that pre-existing rules prohibited conversion of motor vehicles into competition-use-only vehicles. The Proposed Rule's first sentence on this issue stated: "The existing prohibitions and exemptions in 40 CFR part 1068 related to competition engines and vehicles **need to be amended** to account for differing policies for nonroad and motor vehicle applications." 80 Fed. Reg. at 40,527, JAXX (emphasis added). *See also*, EPA *Gear Box* Br. at 27 (Rule changes were needed to "effectuate" and "manifest[]" such a view in the regulations.), JAXX. If the pre-existing rules already prohibited conversions, why did they "need to be amended"?

Looking at the rules, EPA's regulatory definition of "motor vehicle" tells the tale. Before this rulemaking, "motor vehicle" meant:

> For … determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall be deemed not a motor vehicle: …
>
> (2) … 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) … 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 (2016) (emphases added).

In comments unrebutted by EPA, automobile manufacturers explained how the definition applies to converted racecars:

> "Vehicles that have been modified for off-road racing/competition have traditionally been held to fall under the second criterion. Modified competition vehicles have features that are not associated with "safe and practical street or highway use" and indeed, are meant to be used on racetracks and closed circuits. Some competition vehicles may also fall under the third criterion, depending on how they are equipped. Similarly, modified off-roading vehicles virtually always fall under the second or third criterion, generally because components or features are added to the vehicle to enhance the off-roading experience, not that components are removed to enhance racing."

Auto Alliance Comments at 6, JAXX (emphases omitted).

Notably, the "motor vehicle" definition does not say an existing EPA-certified vehicle may not be modified such that it ceases to be a "motor vehicle." In fact, as Auto Alliance commented, the regulations naturally allow conversions. No wonder EPA believed the rules "need to be amended" to prohibit conversion.

Context matters here too. As explained above, no one understood EPA to have construed then-existing regulations as prohibiting conversion of motor vehicles into

competition-use-only vehicles. That EPA for decades believed its rules to contain such a prohibition, yet never mentioned it to anyone, is wholly implausible. EPA was the quintessential "dog that didn't bark." *See Am. Lung Ass'n v. EPA*, 985 F.3d 914, 999 n.31 (D.C. Cir. 2021) (per curiam), *cert. granted, sub nom. West Virginia v. EPA*, 142 S. Ct. 420 (U.S. Oct. 29, 2021) (20-1530) (Walker, J., concurring in part) (citing ARTHUR CONAN DOYLE, *Silver Blaze*). No such prohibition existed.

CONCLUSION

RESC respectfully requests the Court vacate the challenged regulatory interpretation and regulatory changes.

Dated: December 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g) and Circuit Rule 32(e)(1), I hereby certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(e) because it contains 12,774 words, excluding the parts of the filing exempted by Federal Rule of Appellate Procedure 32(f). The filing complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

Dated: December 23, 2021

/s/ Shannon S. Broome
Shannon S. Broome

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2021, the foregoing brief was filed electronically with the Court via the Court's CM/ECF system and that copies were served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Shannon S. Broome
Shannon S. Broome

DECLARATION OF JOHN PULLI

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

RACING ENTHUSIASTS AND SUPPLIERS COALITION, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; and MICHAEL S. REGAN, in his official capacity as Administrator, U.S. Environmental Protection Agency, Respondents.	No. 16-1447

Declaration Jon Pulli

I, Jon Pulli, declare as follows:

1. I am a co-founder and Chief Executive Officer of Turn 14 Distribution, Inc. ("Turn 14") located at 100 Tournament Drive, Horsham, PA 19044. Turn 14 is a wholesale automotive parts distributor of a range of vehicle products, including products for niche vehicle markets, such as vehicles used solely for racing.

2. I serve as the co-chair of the Racing Enthusiasts and Suppliers Coalition ("RESC"). Among its purposes, RESC represents the collective interests of manufacturers, distributors, wholesalers, and retailers of automotive aftermarket

products in advocacy before the U.S. Environmental Protection Agency (EPA) and state environmental agencies on environmental issues. RESC also supports its membership with respect to federal legislative analysis.

3. Consistent with its purpose, RESC challenged the final action "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," 81 Fed. Reg. 73,478 (Oct. 25, 2016), (the Rule) in support of its members' interests.

4. My company is also a member of the Specialty Equipment Market Association (SEMA). SEMA is a trade association, representing more than 6,800 businesses nationwide that manufacture, distribute, market and retail specialty parts and accessories for motor vehicles. SEMA submitted comments on EPA's proposed rule "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," 80 Fed. Reg. 40,138 (July 13, 2015) on December 28, 2015 and on April 1, 2016.

5. I offer this declaration as CEO of Turn 14 Distribution, Inc. and as a member of RESC to explain the harm to my business caused and continued to be caused by the Final Rule.

6. EPA has recognized the racing industry's "contributions the American economy and communities all across the country." 81 Fed. Reg. at 73,957.

7. Turn 14 Distribution contributes to its community beyond the racing

community, using its revenue to support and make substantial contributions to charitable organizations and causes, including environmental protection and conservation efforts, cancer research, under-privileged education initiatives, and advocates to end hunger, among others.

8. EPA's changes to its regulations and to its interpretation of the Agency's pre-existing rules and the uncertainty they have cast upon aspects of the auto racing industry activities resulting from the Rule have abruptly augmented the legal and regulatory landscape in which RESC members operate their businesses and in which employees recreate.

9. Because the rule has called into question the legality of significant aspects of the automotive aftermarket industry and cast a cloud of uncertainty over the recreation activity of building dedicated competition vehicles by hobbyists and enthusiasts, it has adversely impacted Turn 14 Distribution, and it continues to do so.

10. The Rule has caused an increase in compliance costs for Turn 14 Distribution.

11. The Rule has adversely impacted Turn 14 Distribution's sales due to the chilling effect the Rule has had on car hobbyists and enthusiasts that build dedicated competition vehicles, diminishing their participation and, as a consequence, their auto part purchases, and it will continue to do so.

12. If the Rule is left in place, for the reasons described above, it will

continue to adversely affect Turn 14 Distribution's business.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 22nd day of December, 2021, in Montgomery County, Pennsylvania.

Jon Pulli