NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 16-1447

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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.

Petition for Review of a Rule of
the U.S. Environmental Protection Agency

EPA's Proof Answering Brief

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by D.C. Circuit Rule 28(a)(1), EPA certifies:

A. Parties and amici

All parties appearing here are listed in petitioner's opening brief.

B. Rulings under review

Under review is the 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).

C. Related cases

This petition was once consolidated with, but later severed from, *Truck Trailer Mfrs. Ass'n v. EPA*, 17 F.4th 1198 (D.C. Cir. 2021).

/s/ Sue Chen
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Gear Box Br.	United States' Response to Amicus Br., *United States v. Gear Box Z, Inc.*, Case No. 20-cv-08003, ECF No. 105 (D. Ariz. Mar. 8, 2021)
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INTRODUCTION

A coalition of auto-parts businesses wants to do what the Clean Air Act calls a "[p]rohibited act[]": tamper with emissions controls on "motor vehicle[s]" like cars and trucks. 42 U.S.C. § 7522(a)(3).

That prohibition is a broad one. It does not, as the Coalition urges, carve out motor vehicles used in racing competitions. Perhaps because the tampering prohibition leaves so little wiggle room to defeat emissions controls, the Coalition cloaks its intent in euphemism: It tries to pass off the tampering it wants to do as vehicle "conversion." Rebranding an illegal act, however, does not make the act legal.

EPA, for its part, has faithfully implemented the tampering prohibition. Though the agency exempts certain competition vehicles from the prohibition, those vehicles are not "motor vehicles" under the statute. And EPA has never exempted motor vehicles used for competition. Indeed, for years its regulations have specified that the competition exemption does not apply to motor vehicles. In the challenged 2016 action, EPA merely restated that limit.

The Coalition claims that the 2016 restatement transformed the law and conflicts with the Act. These claims clash with the facts and the Act's plain text. The Court should reject the Coalition's challenge.

STATEMENT OF JURISDICTION

The Court lacks jurisdiction over claims that EPA acted arbitrarily because the Coalition has no standing. *See* Argument §§ I, IV. The Court also lacks jurisdiction over the Coalition's challenge to the preamble text, which is not a final action. *See* Argument § III; 42 U.S.C. § 7607(b)(1). The Court otherwise has jurisdiction under 42 U.S.C. § 7607(b)(1).

ISSUES PRESENTED

The Clean Air Act prohibits tampering with emissions controls on motor vehicles. Some competition vehicles are excluded from that prohibition—but not motor vehicles used for competition. EPA's regulations, in turn, exempt some competition vehicles from the tampering prohibition. Well before the action challenged here, those regulations also specified that the competition exemption does not apply to motor vehicles. In the challenged 2016 action, EPA restated the exemption's scope. Against this backdrop, the issues presented are:

1. The Coalition claims that the 2016 action arbitrarily altered the competition exemption's scope.
    a. Does the Coalition have standing to pursue this claim?
    b. Did the 2016 action arbitrarily alter the exemption's scope?
2. Does the Clean Air Act allow tampering with motor vehicles if they are used solely for competition?

3. The Coalition challenges preamble text describing preexisting law on tampering. Is that text a final action?
4. EPA also revised its regulatory "motor vehicle" definition to clarify a provision dealing with safety features.
   a. Does the Coalition have standing to challenge this clarification?
   b. Did EPA act reasonably in making the clarification?

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

I. Legal background.

A. Which vehicles are regulated under the Clean Air Act.

Title II of the Clean Air Act protects air quality by regulating emissions of certain air pollutants from mobile sources. 42 U.S.C. §§ 7521-7590. Whether and how a source is regulated depends on what kind of mobile source it is. This dispute involves three types of vehicles:

Motor vehicles are defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." *Id.* § 7550(2). A passenger car, for one, is a self-propelled vehicle designed for transport on public roads. It is thus a motor vehicle. So are pickup trucks, minivans, buses, and most other vehicles seen on public roads.

Nonroad vehicles are defined as vehicles that are powered by nonroad engines and that are "not a motor vehicle or a vehicle used solely for competition." *Id.* § 7550(11).[1] The nonroad category covers a wide range of vehicles not designed for use on public roads, such as tractors, airport baggage cars, boats, snowmobiles, and others. *See Bluewater Network v. EPA*, 370 F.3d 1, 7 (D.C. Cir. 2004).

Title II regulates motor vehicles and nonroad vehicles. These vehicles must comply with various statutory requirements, including being certified by EPA before entering commerce. *See* 42 U.S.C. §§ 7522(a)(1), 7547(d).

The statute does not define *racing vehicles*. We use this term to mean two types of vehicles that fall outside the Act. First, vehicles that are designed, built, and used exclusively for racing on racecourses—think Indy 500 cars, NASCAR cars,[2] and competition-grade snowmobiles—are, by definition, neither "motor

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[1] The Act defines "nonroad engine" as an "an internal combustion engine…that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards [for stationary sources or motor vehicles]." 42 U.S.C. § 7550(10). It does not define "motor vehicle engine." We use "motor vehicle" and "nonroad vehicle" to refer to both vehicle and engine.

[2] NASCAR stands for the National Association for Stock Car Auto Racing. The "stock car" part of the name often leads people to imagine NASCAR cars as souped-up street cars. *See* Br. at 51. In reality NASCAR cars are professional-grade racecars designed for racing at high speeds on racecourses. The only "stock" parts in them are "strictly cosmetic." Brian Rohrig, The Science of NASCAR, ChemMatters (Feb. 2007) at 4, *available at* https://www.acs.org/content/dam/acsorg/education/resources/highschool/chemmatt

Cont.

vehicles" nor "nonroad vehicles." *Id.* § 7550(2), (11). So they need not be certified (or comply with other statutory requirements). Second, a racing vehicle can start life as a certified *nonroad* vehicle—a recreational snowmobile, say—that is later dedicated for use solely in competition. That snowmobile, if it also meets other regulatory criteria not at issue, can become exempt from the Act. 40 C.F.R. § 1068.235(b)-(c).

Motor vehicles, however, cannot become racing vehicles even if they are used solely for competition. They remain motor vehicles, "designed for transporting persons or property on a street or highway," and continue to be regulated as such. 42 U.S.C. § 7550(2); *see infra* Statement of the Case § I.C; Argument § II.

B. Regulating vehicle emissions.

Title II authorizes EPA to set emission standards for new motor vehicles and nonroad vehicles. 42 U.S.C. § 7521(a)(1), 7547(a). To meet those standards, vehicles must have emissions controls. These controls often involve filters and catalysts in the vehicle's exhaust system, along with calibrations that manage the engine's fueling strategy and other operations.[3]

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ers/articlesbytopic/thermochemistry/chemmatters-feb2007-nascar.pdf (last visited Feb. 18, 2022).

[3] *See* EPA, Nat'l Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines, *available at* https://www.epa.gov/enforcement/national-

Cont.

New motor vehicles and nonroad vehicles must receive certificates of conformity from EPA before they can enter commerce. *Id.* §§ 7522(a)(1), 7547(d);[4] 40 C.F.R. § 1068.101(a)(1). To get a certificate for a class or category of vehicles, manufacturers must show that the vehicles will meet applicable emission standards throughout their useful lives. 42 U.S.C. § 7525(a); 40 C.F.R. §§ 86.007-30(a)(1)(i), 86.1848-01(a)(1).

Of course, that showing assumes that the vehicle stays in its certified configuration once in commerce. To ensure that the assumption remains true (a cornerstone of the statutory design), the Act prohibits removing or deactivating vehicle emissions controls. *See* 42 U.S.C. § 7522(a)(3)(A) (prohibiting "remov[al] or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [emission] regulations"). It also prohibits manufacturing, selling, or installing defeat devices for those controls. *See id.* § 7522(a)(3)(B) (prohibiting the manufacture, sale, offer to sell, or installation of parts "a principal effect [of which]…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 [emission regulations]"); *see also id.* §

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compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines (last visited Feb. 18, 2022); Jorquera Decl., JA____-____.

[4] Under 42 U.S.C. § 7547(d), emission standards for nonroad vehicles are enforced in the same way as emission standards for motor vehicles.

7547(d); 40 C.F.R. § 1068.101(b). We refer to both sets of prohibited conduct as "tampering."

Stopping tampering is an EPA enforcement priority. And for good reason: Tampered vehicles emit enormous amounts of pollutants that harm public health. Take diesel pickup trucks. Compared to an untampered truck, the same truck with its emissions controls removed emits about 310 times more nitrogen oxides, 120 times more carbon monoxide, and 40 times more particulate matter. *See* EPA, Nat'l Compliance Initiative, *supra* n. 3.

For years, EPA has enforced the tampering prohibition against defeat-device manufacturers and distributors. *See* 42 U.S.C. § 7524 (authorizing civil penalties); *see, e.g.*, *United States v. Casper's Elecs.*, Case No. 06-cv-03542 (N.D. Ill. 2006); *United States v. Edge Prods. LLC*, Case No. 13-cv-00010 (D. Utah 2013); *United States v. Punch It Performance & Tuning LLC*, Case No. 19-cv-1115 (M.D. Fla. 2019); *United States v. Gear Box Z, Inc.*, No. 20-cv-08003 (D. Ariz. 2020). The defeat devices involved in those cases include physical hardware that bypass or replace emissions controls, as well as electronic tuning software that tricks the

engine-control module into thinking that emissions controls are working when they are not.[5]

C. The competition exemption and its limits.

EPA's regulations implementing the tampering prohibition allow one limited exception for vehicles used solely in competition. Known as the competition exemption, it applies only to certified nonroad vehicles. 40 C.F.R. § 1068.235(b). If these nonroad vehicles are modified "so they will be used solely for competition" (and are actually used this way), they are exempt from the tampering prohibition. *Id.*;[6] *see id.* § 1068.235(c) (also requiring destruction of original emission labels). The competition exemption, however, does not apply to motor vehicles. *Id.* § 85.1701(a)(1).

This distinction follows from the statutory text. A motor vehicle is defined as "any" self-propelled vehicle "designed" for transport on public roads. 42 U.S.C. § 7550(2). The statutory definition makes no exceptions if such a vehicle is also used in competitions. *See* 39 Fed. Reg. 32,609, 32,609/3 (Sept. 10, 1974) (rejecting use-based approach to regulating motor vehicles). That vehicle is still a

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[5] *See, e.g.*, EPA, Punch It Performance Clean Air Settlement (Jan. 10, 2020), *available at* https://www.epa.gov/enforcement/punch-it-performance-clean-air-act-settlement (last visited Feb. 18, 2022).

[6] Another subsection of Section 1068.235 applies to original-equipment manufacturers. It excludes, from the emission standards, new nonroad vehicles used solely for competition. 40 C.F.R. § 1068.235(a). That subsection is not at dispute. Br. at 29, 40.

motor vehicle and thus subject to all motor-vehicle rules—like the tampering prohibition. *See* 42 U.S.C. § 7522(a)(3).

In contrast, use can affect the legal status of nonroad vehicles. That is because the statutory definition of nonroad vehicles carves out "vehicle[s] used solely for competition." *Id.* § 7550(11). As a result, certified nonroad vehicles used that way enjoy certain breaks from regulation—like the tampering prohibition. 40 C.F.R. § 1068.235(b); *see* 67 Fed. Reg. 68,242, 68,265/1 (Nov. 8, 2002) (tying the competition exemption to statutory nonroad definition's exclusion of vehicles used solely for competition).

The competition exemption for nonroad vehicles was originally promulgated in 2002. 67 Fed. Reg. at 68,264/3-68,266/1, 68,427/2-68,428/1, 68,435/2. Though the original exemption did not contain the word "nonroad," it came under 40 C.F.R. Part 1068, which, at that time, was the general compliance provision for the "nonroad program" and did not apply to motor vehicles. *Id.* at 68,427/2-68,428/1 (internal capitalization omitted), 68,435/2. So from the start, the competition exemption has applied only to nonroad vehicles. *See id.* at 68,264/3-68,266/1 (addressing off-highway motorcycles, snowmobiles, and all-terrain vehicles used solely for competition).

In 2011 EPA applied certain aspects of Part 1068 to motor vehicles. 76 Fed Reg. 57,106, 57,288/3 (Sept. 15, 2011). In doing so, it revised two regulations to

specify that the competition exemption still applies only to nonroad vehicles and not to motor vehicles. First, it added the word "nonroad" to the exemption itself to make clear that what is exempted is a "nonroad" vehicle that has been modified for use solely in competition. *Compare id.* at 57,489/1 *with* 40 C.F.R. § 1068.235(b) (2010). Second, EPA revised 40 C.F.R. § 85.1701(a)(1), which addresses motor-vehicle exclusions and exemptions, to say that "the competition exemption of 40 CFR 1068.235…do[es] not apply for motor vehicle engines." *Compare* 76 Fed. Reg. at 57,374/2 *with* 40 C.F.R. § 85.1701(a) (2010).[7]

Here one may ask, what do emissions controls have to do with racing? And why might competitors care about the tampering prohibition? The answer: Removing or disabling emissions controls often increases a vehicle's power. *See* Jorquera Decl. ¶ 31, JA____. So for those who race, it may be tempting to alter their vehicles this way. That, of course, would be tampering. 42 U.S.C. § 7522(a)(3). And under the competition exemption, a *nonroad* vehicle that is used

[7] Beyond its regulations, EPA has long publicly stated that the tampering prohibition applies to certified motor vehicles whether they drive on public roads or not. *See, e.g.*, EPA, Fact Sheet: Exhaust System Repair Guidelines (1991) at 2, *available at* https://19january2017snapshot.epa.gov/enforcement/us-epa-fact-sheet-exhaust-system-repair-guidelines-march-13-1991_.html (last visited Feb. 18, 2022) (stating that the prohibition applies to motor vehicles used for "off-road" driving and "it is not legal for anyone to 'de-certify' a motor vehicle for 'off-road' use."); EPA, Federal Emission Requirements (presentation at Specialty Equipment Market Association's 2008 trade show) at 38, JA____ (stating that it is tampering to sell defeat devices even if they are installed on motor vehicles used solely for racing).

solely for competition (and that meets other regulatory criteria) is not subject to the tampering prohibition. *See also* 40 C.F.R. § 1068.235(c). But if the vehicle is a *motor* vehicle, there is no exemption from that prohibition.

To be clear, as far as the Clean Air Act is concerned, those who want to race their motor vehicles are free to do so. They just cannot tamper with these vehicles' emissions controls. If they want to race vehicles without emissions controls, they can do that too—but only in racing vehicles like Indy 500 cars or competition-only snowmobiles.

This, then, was the state of tampering law on the eve of the 2016 rulemaking.

II. The 2016 rulemaking.

A. The proposal.

This case arises from a 2016 rule that principally regulates certain medium- and heavy-duty motor vehicles like commercial highway trucks. In 2015 EPA (jointly with the National Highway Traffic Safety Administration) proposed greenhouse-gas-emission standards (and fuel-efficiency standards) for these vehicles. 80 Fed. Reg. 40,138 (July 13, 2015). Those standards are not in dispute.

As part of that rulemaking, EPA also proposed applying certain provisions of 40 C.F.R. Part 1068 to motor vehicles. Recall that Part 1068 had originally applied only to nonroad vehicles but was partially expanded over time to cover

motor vehicles. 67 Fed. Reg. at 68,427/2; 76 Fed. Reg. at 57,288/3; *see* 80 Fed. Reg. at 40,174/3, 40,526/2 (summarizing regulatory history). The 2015 proposal sought to expand more of Part 1068 this way. 80 Fed. Reg. at 40,526/2-3.

But the competition exemption—also in Part 1068—was not part of the proposed expansion. 40 C.F.R. § 1068.235(b). This exemption, EPA's proposal explained, was crafted for nonroad vehicles and its applicability turns on vehicle use. 80 Fed. Reg. at 40,527/2. Use, however, does not affect a *motor* vehicle's legal status. *Id.* Nor has the competition exemption ever applied to motor vehicles. *Id.* And EPA did not want to change that approach. *See id.* (noting that Part 1068's exemptions "need to be amended to account for differing policies for nonroad and motor vehicle applications."). To make sure everyone would understand that point, EPA proposed two types of clarifications. *See id.* at 40,540/1 ("The proposed amendment clarifies that this part 1068 exemption does not apply for motor vehicles.").

The first proposed change would spell out the relationship between motor vehicles used for competition and the tampering prohibition: Motor vehicles must remain in their certified configuration "even if they are used solely for competition" and "anyone modifying a certified motor vehicle…for any reason is subject to the tampering…prohibition[]…." 80 Fed. Reg. at 40,720/3. EPA proposed making this change to four regulations. *Id.* at 40,565/2-3, 40,596/1,

40,650/2, 40,720/3 (proposing to amend 40 C.F.R. §§ 86.1854-12, 1036.601, 1037.601, and 1068.101(b)(4)).

The second proposed change would say that the competition exemption applies to "nonroad" vehicles but "not [to] motor vehicles." *Id.* at 40,724/3. EPA proposed making this change to three regulations, including Section 1068.235 itself. *Id.* at 40,724/3, 40,596/1, 40,650/2 (also proposing to amend 40 C.F.R. §§ 1036.601(a) and 1037.601(a)). A variation on this proposal would note that certified "nonroad" vehicles qualifying for the competition exemption must be used solely for competition. *Id*. at 40,720/3 (proposing to amend 40 C.F.R. § 1068.101(b)(4)(ii)).

Elsewhere in the same action, EPA proposed revising the regulatory "motor vehicle" definition, 40 C.F.R. § 85.1703. Under the then-existing definition, a self-propelled vehicle "capable of" transport is a motor vehicle—unless, relevant here, it "lacks features customarily associated with safe and practical street or highway use…." *Id.* § 85.1703(a)(2). Read in isolation, this safety exception could raise questions about whether vehicles designed for transport on public roads can avoid regulation as motor vehicles, simply because they lack safety features that have nothing to do with operation on those roads. 80 Fed. Reg. at 40,529/3. To avoid any potential confusion, EPA proposed clarifying the safety exception: It would not apply if the vehicle is "clearly intended" for operation on public roads. *Id.* at

40,552/1. So "[a]bsence of a particular safety feature is relevant only when absence of that feature would prevent operation on highways." *Id.*

Between July and September 2015, the public commented on the agencies' proposal. *Id.* at 40,138/2. A few months later, in response to a comment questioning the adequacy of notice for the proposed competition clarifications, EPA invited public comment on that issue. 81 Fed. Reg. 10,822, 10,826 (Mar. 2, 2016).

B. The final rule.

Trade groups objected to the first proposed change (no tampering with competition motor vehicles). As they saw it, the Clean Air Act had long allowed "certified motor vehicles to be converted into vehicles used solely for competition." Specialty Equip. Comment at 1, 7, JA____, ____; *see* Motorcyclist Comment, JA____-____; Auto Alliance Comment, JA____-____. The proposal, they said, "would alter current law." Specialty Equip. Comment at 7, JA____.

After reviewing these comments, EPA realized that its "attempt to clarify [had] led to confusion…." 81 Fed. Reg. 73,478, 73,957/3 (Oct. 25, 2016). The proposal "was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles." *Id.* On reflection, the agency decided against finalizing the first proposed change. *Id.*

Meanwhile, only one comment even mentioned the second proposed change (the competition exemption does not apply to motor vehicles), and only superficially in a footnote. Auto Alliance Comment at 4, JA____. EPA finalized that change in Section 1068.235, but not the other two provisions for which it was proposed. 81 Fed. Reg. at 74,227/2-3. Instead, to those two provisions EPA added text applying certain Part 1068 exemptions (but not the competition exemption) to heavy-duty motor vehicles, while noting that other exemptions are specific to nonroad vehicles. *Id.* at 74,034/1, 74,104/3 (amending 40 C.F.R. §§ 1036.601(a), 1037.601(a)). EPA also revised a few other regulations along similar lines, generally by adding the word "nonroad" when referring to the competition exemption. *See id.* at 73,972/2-3, 74,217/3, 74,226/1-2 (amending 40 C.F.R. §§ 85.1701(a)(1), 1068.1(d)(2), 1068.201); *see also id.* at 74,223/2-3 (amending 40 C.F.R. § 1068.101(b)(4)(ii) to say that certified "nonroad" vehicles qualifying for competition exemption must be used solely for competition). These final revisions, in short, provide that the competition exemption applies to nonroad vehicles but not to motor vehicles. We call these revisions the "2016 clarifications."

Lastly, EPA finalized its proposed clarification of the regulatory "motor vehicle" definition. *Id.* at 73,946/1. We call this revision the "safety clarification."

The final clarifications are summarized below:

Table 1

Regulatory provision	**Subject of provision**	**Disputed revision**
40 C.F.R. § 1068.235	Nonroad competition exclusions and exemptions	Adds introduction stating that Section 1068.235 applies to nonroad vehicles, not to motor vehicles.
40 C.F.R. § 1037.601(a)(3)	Compliance provisions for new heavy-duty motor vehicles	Applies certain Part 1068 exemptions (not the competition exemption) to heavy-duty motor vehicles. Notes that other exemptions "which are specific to nonroad engines" do not apply.
40 C.F.R. § 1036.601(a)(1)	Compliance provisions for new and in-use heavy-duty highway engines	
40 C.F.R. § 85.1701(a)(1)	Motor-vehicle exclusions and exemptions	Adds the word "nonroad" to clarify that Section 1068.235 applies to nonroad vehicles.
40 C.F.R. § 1068.1(d)(2)[8]	Applicability of part 1068's compliance provisions	
40 C.F.R. § 1068.201	Exemptions and exclusions	
40 C.F.R. § 1068.101(b)(4)(ii)	Prohibitions	Adds provision that "nonroad" vehicles qualifying for the competition exemption must be used solely for competition.
40 C.F.R. § 85.1703(b)	Definition of motor vehicle	Clarifies the safety exception's reach.

See Exhibit A (blacklining changes to these provisions); Br. at 28-33, 39-41.

[8] EPA has since removed Section 1068.1(d)(2). 86 Fed. Reg. 34,308, 34,588/2 (June 29, 2021).

III. The Coalition's petition.

The Coalition timely petitioned for review of the 2016 rule. *See* 42 U.S.C. § 7607(b)(1). Its petition was consolidated with Case No. 16-1430, brought by an association of trailer manufacturers to challenge a different aspect of that rule. The consolidated cases were in abeyance until late 2019, when the Court, in response to the trailer association's motion, lifted abeyance in the trailer case and left this case in abeyance. Case No. 16-1430, Per Curiam Order (Dec. 26, 2019); *Truck Trailer Mfrs. Ass'n v. EPA*, 17 F.4th 1198 (D.C. Cir. 2021). Last December, the Court granted the Coalition's motion to lift abeyance here and set a briefing schedule. Order (Dec. 6, 2021).

STANDARD OF REVIEW

This Court reviews EPA's actions for reasonableness. It can set them aside only if they are arbitrary and capricious. 42 U.S.C. § 7607(d)(9)(A). Under that standard, the Court cannot substitute its policy judgment for EPA's. *Bluewater Network*, 370 F.3d at 11. Rather, the question for the Court is whether EPA examined the relevant factors, articulated a rational connection between the facts found and the choice made, and made any clear error of judgment. *Id.* The Court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 50 (D.C. Cir. 2009) (internal quotation marks omitted).

In reviewing EPA's interpretation of the Clean Air Act, the first step is to decide whether Congress has directly spoken to the question at issue. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984). If it has, the inquiry ends and the Court should give effect to Congress's clear intent. *Bluewater Network*, 370 F.3d at 11. If the statute is silent or ambiguous, the Court examines whether EPA reasonably construed the statute. *Chevron*, 467 U.S. at 843.

SUMMARY OF ARGUMENT

The 2016 clarifications broke no new ground. They simply restate the competition exemption's existing scope. The Court should reject the claim that EPA arbitrarily altered that scope, a claim that is both unredressable and meritless.

More broadly, EPA's take on the competition exemption is sound because it reflects the Clean Air Act's plain text: Competition use does not exempt motor vehicles from the tampering prohibition. The Court should uphold EPA's position.

Next, the challenged preamble text has no legal effect and thus is not a final action. So the Court lacks jurisdiction over this claim.

As for the safety clarification, the Coalition both lacks standing and waived the argument. The clarification, in any event, is a reasonable one.

ARGUMENT

I. The 2016 clarifications restate—not alter—the competition exemption's existing limits.

No one here disputes what the 2016 clarifications say, which is that the competition exemption applies to nonroad vehicles, not to motor vehicles. Br. at 28-33; *see supra* Table 1. The dispute is whether those clarifications changed the law. *See, e.g.*, Br. at 23.

They did not. Well before 2016, the competition exemption was already limited to "nonroad" vehicles. 76 Fed. Reg. at 57,489/1. And to drive that point home, in 2011 EPA revised 40 C.F.R. § 85.1701(a)(1), which addresses motor-vehicle exemptions, to specify that "the competition exemption of 40 CFR 1068.235…do[es] not apply for motor vehicle engines." *Id.* at 57,374/2. These limits, then, have been on the books for years—hardly a "well-guarded secret." Br. at 36; *see id.* at 54-55 (citing various trade groups' professed surprise). The 2016 clarifications simply restate the competition exemption's existing scope. *See* 80 Fed. Reg. at 40,539/3 (noting at proposal that "[a]n existing provision in 40 CFR 1068.235 provides an exemption for *nonroad* engines converted for competition use" (emphasis added)).

Yet the Coalition challenges and seeks vacatur only of the 2016 clarifications. It does not challenge earlier regulations, including the 2011 revisions. *See* Br. at 39-42.

That posture creates a standing problem for the Coalition's claim that the 2016 clarifications are inadequately explained. *Id.* at 39-45, 53-57; *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (reiterating that plaintiff must show standing for each claim). Were the Court to agree with the Coalition and grant the requested relief, the 2011 revisions—which say the same thing as the 2016 clarifications—would remain in place. So any injury the Coalition can link to the allegedly deficient 2016 explanation cannot be redressable. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (setting forth elements of Article III standing); *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015) (per curiam) (seeing no causation or redressability for challenged rule because petitioners are subject to the same requirements in different, unchallenged rule).[9] The Court should dismiss this claim for lack of jurisdiction.

Even setting aside the jurisdictional defect, the Coalition's claim is meritless. *See* Br. at 39-45, 53-57. The record shows why EPA made the 2016 clarifications. In the same rulemaking, the agency expanded big chunks of Part 1068 to apply to various types of motor vehicles. 81 Fed. Reg. at 73,939/3-73,941/1. But the competition exemption—also in Part 1068—was not among

[9] To be sure, an incremental step that relieves a discrete injury can satisfy the redressability element. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). But vacating the 2016 clarifications is not such a step. It is more like taking away the mirror that reflects an offending object, while leaving the object itself in place.

them. And EPA wanted to be clear about that. 80 Fed. Reg. at 40,526/2-40,527/2. Hence the 2016 clarifications. There is nothing arbitrary here.

Nor did EPA "finalize what it claimed it had not finalized." Br. at 21; *see id.* at 27-28, 42. EPA had proposed two sets of changes. Commenters focused their objections on the first proposed change (no tampering with competition motor vehicles). *See* Special Equip. Comment, JA____-____; Motorcyclist Comment, JA____-____; Auto Alliance Comment, JA____-____. In response to those comments, EPA said that "[t]his clarification"—meaning the first proposed change—"is not being finalized." 81 Fed. Reg. at 73,957/3. That remark does not apply to the second proposed change (the competition exemption does not apply to motor vehicles).

Most of the Coalition's arguments hinge on the fiction that the 2016 clarifications somehow changed the law. *See, e.g.*, Br. at 35-38, 42, 43-45, 53-57. Because the fiction cannot stand, those arguments too must fall. To be fair, the Coalition admits in passing that before 2016, Section 85.1701(a)(1) did already say that the competition exemption does not apply to motor vehicles. *Id.* at 32. It then tries to skate over that inconvenient fact by casting the 2016 clarifications as "emphasiz[ing]" the exemption's limit. *Id.* Maybe so, but the fact remains that those clarifications did not alter the exemption's scope. The Coalition devotes more time to arguing why *other* regulatory provisions do not limit the competition

exemption to nonroad vehicles. *See id.* at 55-57. They do not have to, not when the 2011 revisions (and, indeed, the statute) had done the job. *See also infra* Argument § II.

Unable to find real support for its fiction, the Coalition strays beyond the record. Br. at 13-14, 36-37. The Court should reject that attempt. *See* 42 U.S.C. § 7607(d)(7)(A) (limiting judicial review to administrative record).

In any case, the Coalition strays in vain because none of its extra-record material suggests that the competition exemption has ever applied to motor vehicles. Indeed, contrary to what the Coalition contends (at 34, 36), the United States' *Gear Box* brief rejects that very idea. *See Gear Box* Br. at 26, JA____ ("EPA has consistently interpreted the [Act] to prohibit the use, manufacture and sale of defeat devices for motor vehicles used in competition motorsports" (internal capitalization omitted)); Br. at 36 (admitting as much). The Coalition seizes on a single word from that brief, that the 2016 clarifications "'*effectuated* the exclusion from the nonroad vehicle definition'" for vehicles used solely in competition. Br. at 34. But all that EPA meant by "effectuated" was that it made the 2016 clarifications, not that those clarifications transformed existing law. In fact, EPA went on to quote the text added to Section 85.1701 in 2011 that the competition exemption "'do[es] not apply for motor vehicle engines.'" *Gear Box* Br. at 27, JA____.

The Coalition likewise misreads other EPA statements. The agency's 2002 guidance addressed, as the Coalition admits, "nonroad vehicles." Br. at 13; *see* EPA, Frequently Asked Questions: Emission Exemption for Racing Motorcycles and Other Competition Vehicles at 1, JA____ (answering questions about 2002 emission standards, 67 Fed. Reg. at 68,242, for "recreational vehicles, including snowmobiles, off-highway motorcycles and all-terrain vehicles"). The guidance was not talking about exempting *motor* vehicles from the tampering prohibition. The same is true of EPA's Green Racing Initiative and import guidance. Br. at 14. The "GT class vehicles" and imported vehicles "highly modified for racing" mentioned there are, like Indy 500 cars, racing vehicles, not motor vehicles. EPA, Green Racing Initiative at 3, JA____; EPA, Procedures for Importing Vehicles and Engines into the United States (July 2010) at 36, JA____; *see* 40 C.F.R. § 85.1511(e) (allowing racing vehicles to be imported if they are not motor vehicles and barring them from being registered or licensed for use on U.S. public roads).[10]

Finally, the Coalition refers to Congressional Research Service testimony of being "unable to find a document from EPA before 2015 that explicitly stated that motor vehicles converted to racing were not eligible for exemption." 114th Cong.

[10] Before a vehicle enters the United States, it is not subject to the Clean Air Act and not certified. *See* 42 U.S.C. § 7522(a)(1) (requiring imported new motor vehicles to be certified). EPA's import guidance used "modify" to mean modifications outside the United States and before certification.

46-52 (2016) (hearing before the H. Subcomm. on Oversight, Comm. on Science, Space, and Tech.) at 47, JA____. But—and the Coalition omits this part—the testimony then says, "nor could CRS identify provisions in the Act or regulations which would explicitly allow for a certified motor vehicle to be reclassified." *Id.*; *see* Br. at 15, 37, 55. Anyway, whatever the Research Service did or did not find, well before 2016, EPA's regulations had expressly limited the competition exemption to nonroad vehicles. The 2016 clarifications simply reiterate that limit.

II. The Clean Air Act prohibits tampering with motor vehicles, whether they are used for competition or not.

The 2016 clarifications are also legally sound because they reflect the statutory text. They make clear that competition use does not exempt motor vehicles from the tampering prohibition. In this way, the 2016 clarifications simply paraphrase the Clean Air Act's plain text, which prohibits tampering with motor vehicles—whether they are used in competition or not.[11]

To see why, consider first how the Act defines motor vehicles. That definition—"any self-propelled vehicle *designed* for transporting persons or property on a street or highway"—turns on vehicle design. 42 U.S.C. § 7550(2)

[11] Because Congress has directly spoken to this issue, the inquiry ends at *Chevron* step one. But were the Court to think the statute ambiguous, EPA's reading would be reasonable for the reasons set forth in this section.

(emphasis added). What makes a vehicle a motor vehicle, in other words, is that it is designed for transport on public roads.

How a motor vehicle is used is irrelevant to that analysis. 80 Fed. Reg. at 40,527/2. After all, the "motor vehicle" definition says nothing about use, let alone exclude vehicles from its ambit on that basis. 42 U.S.C. § 7550(2). The definition instead captures "any" self-propelled vehicle that meets the design parameter. *Id.* And so for decades, EPA has faithfully interpreted this definition to mean that it is design, not use, that matters. *See* 40 C.F.R. § 85.1703(a). In fact, when finalizing the regulatory "motor vehicle" definition in 1974, EPA rejected comments urging use-based carve-outs. 39 Fed. Reg. at 32,609/3. Such carve-outs would be "inconsistent with the Act," not to mention "virtually unmanageable" as a practical matter. *Id.*

How a motor vehicle is used, moreover, does not alter its design. A motor vehicle is designed by the automaker during manufacturing, not by customers through use.[12] In concrete terms, a Toyota Camry, for example, remains a vehicle

[12] *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500-01 (1982) (holding that "designed…for use with illegal cannabis or drugs" refers to "the design of the manufacturer, not the intent of the retailer or customer"). Because the statute does not define "designed," its ordinary meaning applies. *See, e.g.*, *Bluewater Network*, 370 F.3d at 13. The Merriam-Webster dictionary defines "design" as "to create, fashion, execute, or construct according to plan." https://www.merriam-webster.com/dictionary/designed (last visited Feb. *Cont.*

designed for transport on public roads even if it never ventures onto those roads and instead zips around racecourses all day. For that reason, the Camry is still a motor vehicle. By contrast, an Indy 500 car is not a motor vehicle within the meaning of the Act: It is designed for racing on racecourses, not for transport on public roads.[13] So although the Camry and the Indy 500 car may both be *used* solely for competition, they are *designed* for different functions, and are classified accordingly.

At the same time, the Act prohibits tampering with motor vehicles. 42 U.S.C. § 7522(a)(3). Here again, the statute gives no leeway to motor vehicles used solely for competition. *See id.* § 7522.

Now put the "motor vehicle" definition and the tampering prohibition together: A motor vehicle remains a motor vehicle however it is used. *Id.* § 7550(2). Tampering with motor vehicles is prohibited. *Id.* § 7522(a)(3). The result: The Clean Air Act prohibits tampering with motor vehicles, even if they are used solely for competition. *See* 80 Fed. Reg. at 40,527/2 (explaining that motor-

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18, 2022); *see Ass'n of Maximum Service Telecasters v. FCC*, 853 F.2d 973, 978 (D.C. Cir. 1988) (citing dictionary for similar definition).

[13] For example, because competition-grade vehicles run at far higher speeds than motor vehicles, their engines are designed to handle greater stresses than their motor-vehicle counterparts. Separately, though the Coalition speculates about whether racing vehicles like Indy 500 cars are ever regulated as motor vehicles, racing vehicles are not an issue here. *See* Br. at 12-13, 48.

vehicle status does not turn on use and that the tampering prohibition applies to motor vehicles used for competition); Br. at 44-45 (overlooking EPA's analysis).

The Coalition insists that "competition-use-only vehicles" are not motor vehicles because they are "not designed" for transport on public roads. Br. at 22, 47. Thus, it says, the statute allows the "conversion" of motor vehicles into "competition-use-only vehicles." *E.g.*, *id.* at 1, 11-12, 22-24, 47. That is wrong.

To begin, the Coalition conflates design with use. *See id.* at 22-24, 47-48. It is true that a vehicle "originally *designed* for street use" may not "forever be *used* on the street." *Id.* at 48 (emphases added). But again, use does not alter design.

More to the point, it is illegal to "convert" motor vehicles into "competition-use-only vehicles." All through its brief, the Coalition relies on this concept of "conversion" without ever defining the term. *E.g.*, *id.* at 1, 22. But it offers a clue. It uses "competition-use-only vehicle" to refer to "motor vehicles" that (1) are "converted" into vehicles used solely for competition, and (2) "no longer conform to the EPA-certified emissions control configuration." *Id.* at 11. A "converted" motor vehicle, in other words, has an emissions-control configuration that differs from what was certified. "Converting" thus entails removing, bypassing, defeating, or deactivating certified emissions controls. 42 U.S.C. § 7522(a)(3).

Or, simply put, "converting" means tampering and a "competition-use-only vehicle" is a motor vehicle that has been tampered with.[14]

In statutory terms, then, the Coalition's argument boils down to this: After tampering, a motor vehicle is no longer a motor vehicle, so the tampering is retroactively legal. That is like professing innocence after killing someone because what you stabbed is now a corpse. The Court should reject this fallacious argument.

Besides, altering a motor vehicle's emissions controls—for example, removing a Camry's catalyst—does not, as the Coalition thinks, alter the relevant vehicle design. *See, e.g.*, Br. at 47 ("When a motor vehicle is converted to race-only, the vehicle's 'design' changes."). A Camry without its catalyst is still a vehicle designed for transport on public roads (albeit one that emits more pollutants than what the law allows). *Cf. United States v. Gravel*, 645 F.3d 549, 551 (2d Cir. 2011) (per curiam) ("[T]he word 'designed,' when applied to a manufactured object such as a firearm, refers to what the gun was conceived of and designed for, and not to any modifications made afterwards."); *see* 42 U.S.C. § 7550(2) (defining motor vehicle using the past tense "designed").

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[14] Though the Coalition uses Mazda's competition program as an example of vehicle "conversion," the parts sold in that program "are all non-emissions affecting parts." Mazda Comment at 2, JA____; Br. at 12. And as Mazda noted, the engine of its Miata "is sealed to prevent any internal tampering…." Mazda Comment at 2, JA____.

Statutory context confirms that a motor vehicle's design does not change after the vehicle enters commerce. Title II of the Act protects the public by ensuring that motor vehicles meet emission standards throughout their useful lives. That is why, before entering commerce, motor vehicles must be certified on that score. 42 U.S.C. § 7525(a). And that is why, once they are certified, Title II prohibits tampering with their emissions controls. *Id.* § 7522(a)(3). This setup would be pointless if certified motor vehicles could, through later "design" changes, alter their legal status to evade emission standards. The Coalition is thus right about one thing: Once a motor vehicle, always a motor vehicle. Br. at 44.

Next, the Coalition invokes congressional intent. *See id.* at 48-51. The best evidence of that intent is, of course, the statute's plain text, which rejects the Coalition's position. *See, e.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here…the statute's language is plain, the sole function of the courts is to enforce it according to its terms." (internal quotation marks omitted)). Had Congress wanted to allow competition motor vehicles to be tampered with, it had plenty of chances to say so. Yet it never did. Take Title II's "Prohibited acts" section (home of the tampering prohibition). 42 U.S.C. § 7522. There, Congress allowed EPA to exempt new motor vehicles from the prohibitions "for the purpose of research, investigations, studies, demonstrations, or for reasons of national security." *Id.* § 7522(b)(1). It did not mention competition.

Also in Title II, Congress allowed the conversion of gas- or diesel-powered vehicles into clean-fuel vehicles. *Id.* § 7587. These conversions, Congress said, "shall not be considered a violation of section 7522(a)(3)," the tampering prohibition. *Id.* § 7587(d). It made no such allowance for motor vehicles used for competition. *See Bluewater Network*, 370 F.3d at 14 ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal brackets and quotation marks omitted)).

Or Congress could have carved out vehicles "used solely for competition" from the "motor vehicle" definition. Yet even as it enacted that carve-out for nonroad vehicles, Congress did not do so for motor vehicles, even though, according to the Coalition, "[e]veryone knows that 'use' of a vehicle can change over time." Br. at 48. Congress's inaction confirms that motor-vehicle status turns on design, not use, and that motor vehicles used for competition get no special treatment. *See Bluewater Network*, 370 F.3d at 14.

Congress, in short, prohibited tampering with motor vehicles, including those used solely for competition. And whatever contrary comments that individual congressmen put into the congressional record cannot override the plain

text of the enacted law.[15] *See id.* at 50. Because the 2016 clarifications adhere to that text, the Court should uphold them.

III. The challenged preamble text is not a final action.

The Coalition's challenge to certain preamble text also lacks merit. *See* Br. at 35-38. The text at issue says: "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 73,957/3. To the Coalition, this statement has substantive legal effect because it is "the first time EPA has definitively asserted that, even without the Final Rule's regulatory changes, its rule prohibit[s] the conversion of motor vehicles into competition-use-only vehicles." Br. at 35. That argument fails on two fronts.

First, the Court lacks jurisdiction over this claim because the challenged preamble text is not a final action. *See Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019) (noting that finality is a jurisdictional requirement under the

[15] The colloquy cited by the Coalition happened in 1970. Br. at 50. Two decades later, Congress amended the Clean Air Act to also regulate nonroad vehicles. Pub. L. No. 101-549, § 222-23 (1990). The accompanying Senate report explains that in the nonroad definition, the phrase "a vehicle used solely for competition" means "racing vehicles *not capable of* safe and practical use on streets and highways." S. Rep. No. 101-228 at 3489 (1989) (emphasis added). That statutory phrase thus cannot, as the Coalition urges, include motor vehicles used solely for competition, which, by definition, *are* capable of safe and practical use on public roads. *E.g.*, Br. at 48; *see also Zuber v. Allen*, 396 U.S. 168, 186 (1969) (explaining that committee reports more reliably indicate legislative intent than floor colloquies).

Clean Air Act); 42 U.S.C. § 7607(b)(1). Though preamble statements may, "in some unique cases," be final actions, "this is not the norm." *NRDC v. EPA*, 559 F.3d 561, 564-65 (D.C. Cir. 2009). And this case *is* the norm rather than the exception: The disputed preamble statement is not final because it, in fact, has no legal effect. *See Bennett v. Spear*, 520 U.S. 154, 178-79 (1997). It merely describes the continuity in EPA's policies and practices. *See supra* Argument § I. And "[a]bsent some identifiable effect on the regulated community, an agency works no legal effect merely by expressing its view of the law." *Valero*, 927 F.3d at 536 (internal quotation marks omitted).

Second, even if the preamble statement were the first time that EPA announced its interpretive views and even if the statement were a final action, it would still be valid as a straightforward reading of the statute's plain text. *See supra* Argument § II. The Court should reject the Coalition's preamble claim.

IV. The safety clarification is a red herring.

The Coalition's last challenge, to the safety clarification, also fails. *See* Br. at 30-31, 43-44, 56-57. This clarification reasonably clarifies the safety exception in the regulatory "motor vehicle" definition. It has nothing to do with the "conversion" that the Coalition is interested in. But the Court need not reach the merits here, for the Coalition lacks standing on this claim and also waived its argument. *See Town of Chester*, 137 S. Ct. at 1650.

Start with standing. The regulatory definition does not apply to the Coalition. It instead helps automakers determine whether a vehicle it produced is a motor vehicle as defined by the statute. 40 C.F.R. § 85.1703(a) ("For the purpose of determining the applicability of section 216(2) [of the Act, 42 U.S.C. § 7550(2)]…"). That way, the automaker will know whether to certify the vehicle as a motor vehicle before sending it into commerce. 42 U.S.C. § 7522(a)(1). At the point of certification, the regulatory definition will have done its work. By the time the Coalition enters the scene, its customers will have already bought certified motor vehicles. Those vehicles will remain motor vehicles for reasons unrelated to the safety clarification. *See supra* Argument § II. So whatever injuries the Coalition suffers are neither traceable to the clarification nor redressable. *See Lujan*, 504 U.S. at 562 (noting that standing is "substantially more difficult to establish" when petitioner is not the object of challenged action (internal quotation marks omitted)).

The Coalition's causation and redressability problems do not end there. The safety clarification addresses only safety features. *See* 81 Fed. Reg. at 73,946/1. What the Coalition wants to disable, however, are not safety features but *emissions controls*. *See supra* Argument § II. Indeed, nothing in the declaration of Coalition member Jon Pulli suggests that he sells products that disable safety features in motor vehicles. Or that his customers used to buy those products but stopped

doing so. Or even that his customers want to do anything with safety features in their vehicles. Nothing, in short, ties Mr. Pulli's alleged sales losses to the safety clarification. Pulli Decl. ¶ 11. The Coalition thus lacks standing to press this claim.

The claim is also waived. The Coalition contends that EPA arbitrarily abandoned the regulatory definition's requirement that a motor vehicle be "capable of" transport. 40 C.F.R. § 85.1703(a); Br. at 43. The agency did so, the Coalition says, while ignoring objections that it would "fundamentally and unjustifiably alter the treatment of motor vehicles that are converted to competition-use-only vehicles." Br. at 43. But the Coalition fails to specify where the issue was raised in rulemaking. *See id.* (citing entire 22-page statement of the case). The only comment that even cited the safety clarification in the competition context never claimed that the proposed revision would ditch the capability requirement. Auto Alliance Comment at 3 n.3, 5-6, JA____, ____-____; *see* 42 U.S.C. § 7607(d)(7)(B) (requiring issues raised on judicial review to have been made with "reasonable specificity" before agency); *Bluewater Network*, 370 F.3d at 24 (rejecting claim not raised to agency as waived).

At any rate, the safety clarification does not abandon the capability requirement. It still exists at the first step of the regulatory analysis: A self-propelled vehicle is a motor vehicle if it is "capable of" transport. 40 C.F.R. §

85.1703(a). The clarification comes into play only at the next step, the safety exception: A vehicle capable of transport is not a motor vehicle if it "lacks features customarily associated with safe and practical street or highway use…." *Id.* § 85.1703(a)(2). All that the clarification does is limit the safety exception's reach: It adds the condition that the relevant safety feature is one that, if missing, would prevent a vehicle that is intended for operation on public roads from doing so. *Id.* § 85.1703(b).

EPA also explained why it made the clarification. The safety exception had lacked "proper context." 81 Fed. Reg. at 73,946/1. Read literally, it could allow what would otherwise be motor vehicles to escape regulation simply because they lack safety features that have nothing to do with transport on public roads—the relevant design parameter for motor-vehicle status under the statute. *Id.*; 42 U.S.C. § 7550(2). EPA thus reasonably clarified its regulatory definition to better implement the statutory one.[16]

[16] The Coalition does not explain how the regulatory definition applies to its members. Nor does it claim that they had ever thought that they could evade the tampering prohibition by first removing safety features from certified motor vehicles and arguing that those vehicles are no longer motor vehicles under the regulatory definition. Br. at 22-23, 56-57. Indeed, had they done so, it would only confirm that EPA acted reasonably in clarifying the definition.

CONCLUSION

In bringing this case, the Coalition seeks nothing less than an overhaul of tampering law. It came to the wrong place. Like EPA, this Court should apply, not rewrite, the Clean Air Act as enacted by Congress: No tampering with motor vehicles, and no exceptions for motor vehicles that race.

The Court should dismiss, for lack of standing, the Coalition's claims that the 2016 clarifications and the safety clarification are arbitrary. It should dismiss, for lack of finality, the preamble claim. And it should deny the rest of the petition.

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because according to Microsoft Word's count, it has 8064 words, excluding the parts of the brief exempted under Rule 32(f).

Finally, I certify that on February 23, 2022, I electronically filed this brief with the Court's CM/ECF system, which will serve each party.

/s/ Sue Chen
Sue Chen

EXHIBIT A

A comparison of the 2015 version of the regulations with the 2017 version.

40 CFR 1068.235: ~~What are the provisions for exempting~~Exempting nonroad engines/ equipment used solely for competition~~?~~.

The following provisions apply for nonroad engines/equipment, but not for motor vehicles or for stationary applications:

…

(b) 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. This exemption applies only to the ~~prohibition~~prohibitions in §1068.101(b)(1) and ~~is~~(2) and are valid only as long as the engine/ equipment is used solely for competition. You may not use the provisions of this paragraph (b) to circumvent the requirements that apply to the sale of new competition engines under the standard-setting part.

40 CFR 1037.601(a)(3)

(a) Engine and vehicle manufacturers, as well as owners and operators of vehicles subject to the requirements of this part, and all other persons, must observe the provisions of this part, the ~~provisions of the Clean Air Act, and the following~~applicable provisions of 40 CFR part 1068, and the applicable provisions of the Clean Air Act. The provisions of 40 CFR part 1068 apply for heavy-duty vehicles as specified in that part, subject to the provisions:

…

(b) (3) 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.

40 CFR 1036.601(a)(1)

(1) The exemption ~~and importation~~ provisions of 40 CFR ~~part~~ 1068~~, subparts C and D,~~.201 through 1068.230, 1068.240, and 1068.260 through 265 apply for ~~engines subject to this part 1036, except that the hardship~~heavy-duty motor vehicle engines. The other exemption provisions ~~of 40 CFR 1068.245, 1068.250, and~~

~~1068.255~~, which are specific to nonroad engines, do not apply for ~~motor vehicle~~heavy-duty vehicles or heavyduty engines.

40 CFR 85.1701(a)(1)
(a) The provisions of this subpart regarding exemptions are applicable to new and in-use motor vehicles and motor vehicle engines, except as follows:

(1) Beginning January 1, 2014, the exemption provisions of 40 CFR part 1068, subpart C, apply instead of the provisions of this subpart for heavy-duty motor ~~vehicles and~~vehicle engines regulated under 40 CFR part 86, subpart A, except that the nonroad competition exemption of 40 CFR 1068.235 and the nonroad hardship exemption provisions of 40 CFR 1068.245, 1068.250, and 1068.255 do not apply for motor vehicle engines.

40 CFR 1068.1(d)(2)
(d) Specific provisions in this part 1068 start to apply separate from the schedule for certifying engines/equipment to new emission standards, as follows:
…
(2) 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.

40 CFR 1068.201
We may exempt new engines/equipment from some or all of the prohibited acts or requirements of this part under provisions described in this subpart. We may exempt nonroad engines/equipment already placed in service in the United States from the prohibition in §1068.101(b)(1) if the exemption for nonroad engines/equipment used solely for competition applies (see §1068.235). In addition, see §1068.1 and the standard-setting parts to determine if other engines/equipment are excluded from some or all of the regulations in this chapter.
…

40 CFR 1068.101(b)(4)(ii)
(4) Competition engines/equipment.
…
(ii) 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. Anyone violating this paragraph (b)(4)(ii) is in violation of paragraph (b)(1) or (2) of this section.

40 CFR 85.1703(b)

(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:

(1) The vehicle cannot exceed a maximum speed of 25 miles per hour over level, paved surfaces; or

(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.

~~(b) [Reserved]~~

(b) Note that, 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.