

ORAL ARGUMENT SCHEDULED FOR MAY 11, 2022

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)

REPLY BRIEF OF PETITIONER

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GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

EPA

United States Environmental Protection Agency

SUMMARY OF ARGUMENT

U.S. Environmental Protection Agency's ("EPA") response brief describes a world that nobody has ever seen. In EPA's alternative reality, there are only two types of lawful racecars: (1) stock production vehicles; and (2) purpose-built racecars, such as open-wheel IndyCars. It is difficult to describe how divorced that hypothetical world is from the world as it exists and has been for decades.

In the real world, without any objection or even a caution from the EPA, millions of motorsports enthusiasts have actively, visibly, and passionately been converting EPA-certified motor vehicles into race-only vehicles¹ over the 50-plus years that EPA has regulated emissions from motor vehicles. Nobody has been trying to hide this activity. The practice is widely promoted and, indeed, celebrated. Pet. Br. at 2. It is a pastime enjoyed by most racers in its own right, but also serves as a crucial stepping stone for the few racers that make it to the big leagues, such as the National Association for Stock Car Auto Racing (*aka*, "NASCAR") or IndyCar.

¹ As explained in Racing Enthusiasts and Suppliers Coalition's (the "Coalition") opening brief ("Pet. Br."), 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. Pet. Br. at 11.

Racing of modified production cars is a staple on national television.² Moreover, a multi-billion-dollar, widely advertised industry has evolved to produce and sell the necessary parts. Tellingly, when Congress enacted the Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401 *et seq.*, it defined competition-only vehicles and expressly provided that they are not regulated under the Clean Air Act, thus ratifying the practice.

While EPA filed tampering enforcement actions before the 2016 Final Rule, 81 Fed. Reg. 73,478 (Oct. 25, 2016), JAXX, those actions focused on cars that continued to be driven on public streets. Race-only vehicles produced from EPA-certified motor vehicles were not the target of such actions. As the Congressional Research Service concluded, EPA had not issued any guidance documents, policy statements, or regulatory interpretations asserting that the practice is a violation of its rules or the law. Until the 2016 Final Rule, EPA was silent.

Remarkably, EPA in its response brief does not acknowledge the 50-year history of converting motor vehicles into race-only vehicles, makes no effort to dispute that history, fails to explain why it stood silently on the sidelines for decades rather than announcing and enforcing a prohibition that it now says was baked into the law in 1965, and does not admit that its new view of the law puts millions of race

² When Congress enacted the statutory definition of “motor vehicle” in 1965, NASCAR still was racing “stock” cars—i.e., production vehicles converted into competition-only vehicles.

car owners immediately into non-compliance with federal law. At least EPA is consistent, as it similarly failed to address these issues on the record in the instant rulemaking—notwithstanding the fact that commenters submitted detailed comments directly on point.

Might EPA have been engaged in a secret, half-century-long exercise in enforcement discretion? No, that is simply implausible. The truth is that the conversion of EPA-certified motor vehicles into race-only vehicles has been permissible under the law and EPA's regulations since the inception of EPA's motor vehicle emissions control program in 1965. EPA's current attempts at revising history and its interpretation of the law should be rejected.

In trying to create its alternative reality, EPA painted itself into a corner in the 2016 Final Rule. It expressed a first-ever definitive interpretation of its regulations that purported to reverse a well-established, decades-long meaning that allowed EPA-certified motor vehicles to be converted into race-only vehicles. It then made numerous changes to its rules to lock in that view, after saying in the preamble that it decided not to make the changes. Ironically, EPA at the same time said it “support[ed] motorsports and its contributions to the American economy and communities all across the country.” 81 Fed. Reg. at 73,957, JAXX.

And it did all this without asserting any factual, policy, or legal explanation or other justification. EPA did not even respond to the many relevant comments

submitted on the proposed rule, except to say that it decided not to finalize what it proposed. This is textbook arbitrary and capricious decisionmaking.³

EPA's response is flawed from its inception. EPA's lawyers raise an array of policy and legal arguments in support of its actions. Yet none of these arguments appears in the administrative record, and none of them were asserted as justification for the 2016 Final Rule. Post-hoc litigating positions do not cure EPA's fundamental failure to explain and justify its actions on the record in the rulemaking. Moreover, EPA's newly developed claim that, in a *2011* rule, it codified a prohibition on converting motor vehicles into race-only vehicles is incorrect. That rule expressly addressed only "motor vehicle engines" and not "motor vehicles." Motor vehicle engines, which may be certified separately from motor vehicles, **are not at issue in this case.**

In any event, for the reasons described below, EPA's arguments are unavailing. In short, the Coalition has standing as to all parts of the rule that it contests. Moreover, the Agency's definitive interpretation of its regulations is reviewable final agency action. That it was expressed in the preamble to the Final Rule makes no difference. Lastly, contrary to EPA's current arguments, the Clean Air Act expressly provides that a motor vehicle may lawfully be converted into a

³ Professor Davis would *not* be proud. Kenneth Culp Davis, *ADMINISTRATIVE LAW* (1958).

race-only vehicle by way of a use-based definition of competition vehicles that expressly distinguishes such vehicles from motor vehicles. 42 U.S.C. § 7550(2), (11). Prior to the rule challenged here, EPA's regulations did not and could not lawfully prohibit this practice.

The bottom line is that EPA sought in the Final Rule to change the text and the meaning of its rules but offered absolutely no support or justification for these changes. Even had it tried, EPA could not have justified the purported prohibition on converting motor vehicles into race-only vehicles because the law authorizes such conversions. The Coalition respectfully requests that the contested rules be vacated.

ARGUMENT

I. EPA Changed Its Rules.

EPA begins its rebuttal by arguing that the Final Rule did not change anything. According to EPA, it merely restated what the rules already required. EPA is wrong.

As an initial matter, all of EPA's arguments here should be set aside as the post-hoc rationale of litigation counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated ... by the agency itself."). Here, commenters explained how the Proposed Rule would result in a change to the meaning of EPA's prior rules. EPA had the opportunity—and, indeed,

the obligation—to respond to these comments on the record of this rulemaking. 42 U.S.C. § 7607 (d)(6)(B). EPA did not. Instead, EPA simply asserted that it decided not to finalize what it had proposed. EPA is precluded here from providing the explanation that it should have put in the administrative record. *Burlington Truck Lines*, 371 U.S. at 168-69.

In any event, EPA’s newfound arguments are unavailing. For example, EPA asserts for the first time here that it prohibited the conversion of EPA-certified motor vehicles into race-only vehicles in a 2011 rulemaking. EPA argues that what it terms the regulatory “competition exemption” (i.e., 40 C.F.R. § 1068.235) was limited in that rule to nonroad vehicles and that the Agency expressly provided in 40 C.F.R. § 85.1701(a)(1) that the “competition exemption” does not apply to motor vehicle engines. EPA Br. at 19. EPA suggests that the Coalition “admits in passing ... th[is] inconvenient fact.” *Id.* at 21.

The fact that the regulatory competition provision applies to nonroad vehicles does not on its face erect a barrier to the conversion of EPA-certified motor vehicles into race-only vehicles. It only became a problem after EPA in the 2016 Final Rule announced for the first time that a motor vehicle may not lawfully be converted into a race-only vehicle. That statement and the corresponding rule changes that EPA made in the 2016 Final Rule establish the prohibition the Coalition challenges in this case. It is thus not surprising that the racing community did not object in 2011.

In addition, the 2011 limitation on “motor vehicle engines” is irrelevant because this case involves “motor vehicles,” not “motor vehicle engines.” EPA’s program provides for separate certification of motor vehicle engines (e.g., engines for heavy-duty diesel trucks often are made by a different manufacturer than the one that assembles the truck and carry their own certifications). *See, e.g.*, 40 C.F.R. Part 1036 (specifying standards for *engines* that will be installed in heavy-duty vehicles). Such vehicles are not at issue here.

Notably, EPA neither cited nor relied on the 2011 regulatory amendments in the 2015 Proposed Rule or the 2016 Final Rule. To the contrary, in the 2015 Proposed Rule EPA stated that “[t]he 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.** ... This aligns with the **statutory provisions** for the racing exemption.” 80 Fed. Reg. 40,138, 40,526, 40,527 (July 13, 2015), JAXX, JAXX (emphases added). EPA made no reference to the 2011 rule in the administrative record because that rule did not prohibit the conversion of motor vehicles into race-only vehicles.

As a corollary to this argument, EPA asserts that the Coalition does not have standing because changes made in the 2011 rule cannot be redressed here. EPA Br. at 20. But as explained above, EPA did not in its 2011 rule prohibit the conversion of motor vehicles into race-only vehicles. It did so in the 2016 Final Rule. The

Coalition's standing to challenge that rule has been conclusively demonstrated. Pet. Br. at 24-27.

EPA also asserts that “[t]he record shows why EPA made the 2016 clarifications.” EPA Br. at 20. But no, the record does not. The Proposed Rule preamble section to which EPA refers for support states that “[t]he 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.”⁴ 80 Fed. Reg. at 40,527 (emphasis added), JAXX; Pet. Br. at 17. Later in the Proposed Rule, EPA more specifically explains that it proposed to amend 40 C.F.R. § 1037.601(a)(3) to “clarif[y] that this part 1068 ... does not apply for motor vehicles.” 80 Fed. Reg. at 40,539-40, JAXX-XX; Pet. Br. at 18.

Thus, EPA described changes it thought were needed to accommodate the expanded applicability of Part 1068 as applied to the 40 C.F.R. § 1068.235 competition provision. These were among the changes that EPA disavowed making in the 2016 Final Rule when it announced that it decided not to finalize what it had

⁴ Quoting EPA's reference to the provision as an “exemption” in no way concedes that it is an exemption. It is one thing to say that something is subject to regulation but has been exempted, but another to say that something falls outside the scope of regulation in the first instance. Here, competition vehicles are not exempt. The statute defines three separate and distinct categories of vehicles: (1) motor vehicles; (2) nonroad vehicles; and (3) vehicles used solely for competition. 42 U.S.C. § 7550(2), (11); *see also* Pet. Br. at 46. Each category stands on its own two feet, and none requires an exemption finding.

proposed. 81 Fed. Reg. at 73,957-58, JAXX-XX; Pet. Br. at 19-20. Contrary to EPA's assertion that the record "shows why" it made the contested changes, EPA Br. at 20, the record indicates EPA decided to do nothing at all.

While relevant and detailed comments were submitted on the Proposed Rule in opposition to EPA's proposed prohibition, EPA's only response was to say that it decided not to finalize what it proposed. Even in the face of specific comments, EPA could not muster an explanation. In short, the record simply does not explain or justify the newly adopted prohibition. *Burlington Truck Lines*, 371 U.S. at 168-69.

EPA then shifts gears and asserts that it "had proposed two sets of changes" and that commenters focused on only one. EPA Br. at 21. EPA explains that

[t]he 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.

Id. at 12. "The second proposed change would say that the competition exemption applies to 'nonroad' vehicles but 'not [to] motor vehicles.' *Id.* at 40,724/3." *Id.* at 13.

This mischaracterizes what occurred. The Proposed Rule plainly described the "two sets of changes" as a single issue:

EPA is proposing in 40 CFR 1037.601(a)(3) to clarify that the Clean Air Act 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 [Clean Air Act] definition of “nonroad engine”. The proposed amendment clarifies that this part 1068 exemption does not apply for motor vehicles.

80 Fed. Reg. at 40,539-40, JAXX-XX; Pet. Br. at 18. EPA asserts at the beginning of this paragraph its proposed prohibition and then explains at the end of the paragraph its intent to modify part 1068 to “clarify” the prohibition. There is one, and only one, issue here—EPA’s effort to interpret its prior rules as prohibiting the conversion of motor vehicles into race-only vehicles and to lock that interpretation into the rules by adding new provisions. Thus, it is not true, as EPA suggests, that there is a “second” set of changes to which commenters failed to respond. Commenters comprehensively addressed the one issue that EPA raised. Pet. Br. at 19.

Next, EPA complains that the Coalition “strays beyond the record” to find support for their “fiction.” EPA Br. at 22. This is highly ironic, given that EPA’s entire brief is composed of post-hoc, non-record-based arguments devised by litigation counsel. In any event, EPA cannot run away in this brief from its own subsequent federal court filing that clearly describes what it believes it accomplished in the 2016 Final Rule.

This Court has authority to take notice of the filing. *See* Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”); *Hurd v. D.C., Gov’t*, 864 F.3d 671, 686 (D.C. Cir. 2017) (“This court has for various purposes taken judicial notice of court records from other cases. . . as a record of what was said.”); *see also Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017). EPA should not be allowed to deny in the 2016 Final Rule that it took an action and in a subsequent court filing claim that it took that action. Sanctioning that conduct would encourage EPA to similarly hide the ball in future rulemakings.

And in that later Arizona filing, EPA unambiguously explains that the Final Rule was needed to “effectuate” and “manifest” its new prohibition on converting motor vehicles into race-only vehicles. Pet. Br. at 34. EPA responds that “all that [it] meant by ‘effectuated’ was that it made the 2016 clarifications, not that those clarifications transformed existing law.” EPA Br. at 22. EPA has no explanation for what it meant by “manifest.”

But EPA spoke clearly in that filing and cannot backtrack now. The 2016 changes to 40 C.F.R. § 1068.235 were an “explicit limitation” that “manifest[] EPA’s view that competition-only motor vehicles are covered by the [Tampering] Prohibitions; otherwise [the changes] would have been completely unnecessary.”

U.S. Resp. to *Amicus Br.* at 27, *United States v. Gear Box Z, Inc.*, No. CV-20-08003-PCT-JJT (D. Ariz. Mar. 8, 2021), ECF 105, JAXX; Pet. Br. at 34. In other words, the 2016 changes imposed an “explicit limitation” intended to codify EPA’s “once a motor vehicle, always a motor vehicle” perspective. These subsequent Agency representations are relevant because they contradict EPA’s claim in the 2016 Final Rule that it decided to make no changes and its claims here that it did not undertake final agency action in 2016.

Lastly, EPA rejects the fact that numerous Agency statements over the years belie its current assertion that EPA’s rules all along have prohibited the conversion of motor vehicles into race-only vehicles. EPA Br. at 23-24. It likewise dismisses the fact that the Congressional Research Service found no historical EPA statements expressing such a prohibition. *Id.* at 24. But of course, EPA cannot unsay in this litigation prior inconvenient statements. It had the chance to rebut these materials on the administrative record but chose not to do so. And EPA certainly cannot put words in the mouth of the Congressional Research Service, whose independent assessment speaks volumes.

At the end, perhaps the most telling part of EPA’s argument is what it does not say. EPA does not cite any historical evidence to support its view that its rules for decades have prohibited the conversion of motor vehicles into race-only vehicles. Not a newspaper article. Not a guidance memo. Not an enforcement action. Not a

preamble statement. Nothing. All it can muster are recent self-serving statements that were issued at or about the time of the 2016 Final Rule and that clearly are designed to support the rule. *See, e.g.*, Pet. Br. at 35 (citing contemporaneous EPA press release). Surely if it could have, it would have cited them not only here but on the record in the rulemaking.

If that's how EPA's rules had always worked, it was the best kept secret in administrative law. If EPA really believed that millions of racers and a billion-dollar industry had been flouting the law in plain sight for 50 years, maybe the Agency would have said something over the decades? It did not—and for good reason—because the prohibition announced in the 2016 Final Rule did not exist before then.

II. The Clean Air Act Plainly Authorizes the Conversion of Motor Vehicles into Race-Only Vehicles.

Knowing that its regulatory arguments are thin, EPA pivots to the argument that it should win this case because the Clean Air Act itself prohibits the conversion of motor vehicles into race-only vehicles. EPA's view of the law is wrong and should be rejected.

To begin, EPA suggests that the Clean Air Act unambiguously asserts such a prohibition and, thus, the inquiry should end there under “*Chevron* step one.” EPA Br. at 24 n.11. Yet, when it promulgated its regulatory definition of “motor vehicle” in 1974, EPA rejected the notion that the statutory definition is unambiguous. The

whole point of the 1974 rulemaking was to interpret what EPA understood to be an ambiguous statutory definition.

After considering several alternative approaches (including “capable of,” “intended use,” and “designed for use”), EPA “adopted the ‘capable of’ test which is consonant with the literal language and the apparent intent of the Act.” 39 Fed. Reg. 32,609, 32,609 (Sept. 10, 1974), JAXX. In stark contrast to EPA’s current litigation position, EPA **rejected** the “designed for” approach, concluding that “it is not feasible to regulate a vehicle based on the use it is primarily designed for.” *Id.*; Pet Br. at 43. EPA has failed to explain how the view of the law it advances in this litigation can be squared with that prior rulemaking. It hasn’t done so because it cannot.

EPA alternatively argues that its view is a reasonable interpretation that should be upheld under the second prong of *Chevron*. EPA Br. at 24 n.11. But this argument is unavailing because the administrative record contains no legal argument or analysis asserting or justifying EPA’s interpretation. EPA’s counsel should not be allowed to cure this problem through this litigation. EPA must do so through rulemaking. 42 U.S.C. § 7607(d)(3)(C). And for good reason, given the millions of racers whose interests and the billion-dollar industry whose livelihoods are at stake.

But there is no ambiguity here to resolve—the statute expressly authorizes the conversion of motor vehicles into race-only vehicles. The Coalition explained in its

opening brief that the “design” of a vehicle changes when a motor vehicle is converted into a race-only vehicle. Pet. Br. at 47. A race-only vehicle that is used only on closed racecourses “plainly is not ‘designed’ to transport people or things on a street or highway.” *Id.* Thus, such a vehicle no longer meets the definition of “motor vehicle.”

To the degree there was any confusion on this point, Congress in the Clean Air Act Amendments of 1990 expressly provided that vehicles “used” solely for competition are not “motor vehicles” or “nonroad vehicles,” and thus are not subject to regulation under the Act. 42 U.S.C. § 7550(11). A motor vehicle that is converted into a race-only vehicle unambiguously fits into this use-based definition. Pet. Br. at 47. EPA acknowledged this to be true when it stated in the 2016 Final Rule that its “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, JAXX (emphases added); Pet. Br. at 47-48.

Lastly, legislative history shows that Congress indisputably was aware of the practice of converting motor vehicles into race-only vehicles and did not intend to prohibit the practice. Pet. Br. at 50. In fact, the Clean Air Act is rife with express prohibitions on various other activities. *Id.* at 48-49. There is no such express prohibition here. The absence of an express prohibition is telling because surely

Congress would have spoken clearly and directly if it intended to prohibit millions of racers from converting motor vehicles into race-only vehicles and, at the same time, gutting a billion-dollar industry. *Id.* at 49, citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (major questions doctrine).

Altogether, Congress was clear. The Clean Air Act expressly authorizes the conversion of motor vehicles into race-only vehicles.

EPA's various rebuttals are unconvincing. EPA's primary argument is that a motor vehicle cannot be converted into a race-only vehicle because such a conversion can be accomplished only by tampering with the motor vehicle. EPA points to the word "designed" in the statutory definition of "motor vehicle" and argues that "[w]hat makes a vehicle a motor vehicle ... is that it is designed for transport on public roads." EPA Br. at 24-25. According to EPA, "[h]ow a motor vehicle is used is irrelevant to that analysis." *Id.* at 25. EPA then points to the statutory prohibition on tampering with motor vehicles and concludes that because "[a] motor vehicle remains a motor vehicle however it is used" and "[t]ampering with motor vehicles is prohibited," then it necessarily follows that "[t]he Clean Air Act prohibits tampering with motor vehicles, even if they are used solely for competition." *Id.* at 26.

When EPA goes so far as to liken the Coalition's argument as conceptually equivalent to condoning murder, *id.* at 28, it illustrates the preposterous nature of the

Agency's position. This is not about killing anyone. It is about a legitimate use of a vehicle.

EPA further argues that removing emissions controls from a motor vehicle (e.g., "removing a Camry's catalyst") does not cause the design of the vehicle to change. *Id.* EPA cites *United States v. Gravel*, 645 F.3d 549, 551 (2d Cir. 2011) (per curiam), for the proposition that the original design of a motor vehicle can never change.

But enthusiasts do not produce race cars simply by removing emissions controls. That makes no sense. Motor vehicles that are converted into race-only vehicles typically are heavily modified to improve the race performance of the vehicle. Such modifications might include removing seats and luxury fitments, installing safety equipment such as roll cages, changing the suspension, adding aerodynamic design elements, and making a wide spectrum of engine and drive train improvements (such as adding turbocharging, revising fuel delivery systems, modifying internal engine components such as pistons and cam shafts, etc.), and reprogramming computer controls. Pet. Br. at 3-4.

And, yes, racers also remove emissions controls, such as catalytic converters, usually because such devices limit the power of the engine. The resulting race-only vehicles indeed are redesigned—from vehicles designed to move people and things across public roads and highways into vehicles raced on closed courses.

Gravel is inapposite. That case involved a statute that defined “machinegun” to mean, in relevant part, “any weapon which shoots, is designed to shoot, **or can be readily restored to shoot**, automatically more than one shot, without manual reloading, by a single function of the trigger.” *Gravel*, 645 F.3d at 551 (emphasis added, citation omitted). While the court concludes that the word “designed” should be construed to “refer[] to what the gun was conceived of and designed for,” that conclusion is based in part on the observation that “[t]his is consistent with the statutory language further defining ‘machinegun’ as a weapon **readily restorable** to automatic fire” because “[t]here would be no need to include a definition taking future modifications into account if the word ‘design’ encompassed post-manufacture modifications.” *Id.* at 551-52 (emphasis added). In other words, the court’s interpretation of the word “designed” depended on the fact that the statutory definition of “machinegun” expressly encompassed modified weapons that could be readily restored to automatic fire.

Here, there is no such indication in the statutory definition of motor vehicle that it encompasses redesigned vehicles. And, unlike the situation in *Gravel*, there are companion provisions in the Clean Air Act that must be considered in understanding the overall statutory structure. *Util. Air Regulatory Grp.*, 573 U.S. at 320 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). And in this case, Congress went so far as to define competition vehicles

according to the “use” of the vehicle. Notably, Clean Air Act § 216(11) expressly states that a competition vehicle is neither a “nonroad vehicle” nor a “motor vehicle.” 42 U.S.C. § 7550(11).

There would be no reason for Congress to specify that a competition vehicle is not a “motor vehicle” unless it understood that a “motor vehicle” may lawfully be converted into a competition vehicle. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (“The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”); *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (“Statutory language ‘cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’”). EPA’s “once a motor vehicle, always a motor vehicle” approach cannot be squared with this provision.

In any event, the word “designed” is an adjective and not a verb as used in Clean Air Act § 216(2). 42 U.S.C. § 7550(2). **Adjectives do not have a tense.** Thus, the word “designed” does not necessarily refer to any point in time and certainly does not suggest that the design of an object is immutable. This comports with plain common sense and normal usage.

For example, the Queen Mary once was the flagship of Britain’s transatlantic passenger fleet. It is now a hotel permanently moored at the Port of Long Beach.

Nostalgia urges she is still the proud steamship that she was originally designed to be. The facts demand the conclusion that she has been redesigned to be a fixed hotel. *See* THE QUEEN MARY, <https://queenmary.com> (last visited Mar. 16, 2022). Similarly, the Uline Arena in Washington, D.C., for decades was a storied sports and entertainment venue. Indeed, even the Beatles played at Uline. It now, after being redesigned, is a retail/office complex. *See* ULINE ARENA, www.ulineoffices.com (last visited Mar. 16, 2022). Big name shows are a thing of the past.

Similarly, EPA's argument that an object cannot be redesigned is akin to arguing that that a home cannot become a commercial establishment because it was "designed" as a house, that a playground sandbox cannot become a community garden planter because it was designed as a sandbox and subject to local regulations that apply to sandboxes, or that a school bus cannot be modified to become a tiny house.⁵ And in EPA's alternative universe, even an artist converting a car to modern art would find itself contravening the tampering prohibition if it altered the certified configuration of the originally-certified motor vehicle.⁶ Such outcomes are silly.

⁵ *See* Melissa Breyer, *12 Buses Converted Into Fabulous Tiny Homes on Wheels*, TREEHUGGER (Feb. 22, 2022), <https://www.treehugger.com/buses-converted-fabulous-tiny-homes-wheels-4859251> (last visited Mar. 16, 2022).

⁶ *See, e.g.*, Rima Pundir, *20 Times People Turned Old Cars Into Fantastic Works of Art*, HOTCARS (July 31, 2018), <https://www.hotcars.com/times-people-turned-old-cars-into-fantastic-works-of-art/> (last visited Mar. 16, 2022).

The counterfactual also is illustrative. EPA surely would argue that the use of the word “designed” in the motor vehicle definition does not preclude it from regulating as a motor vehicle a purpose-built race car that the owner converted to drive on the street. If so, EPA’s position is that the “designed” gatekeeper is a “one-way street”—competition vehicles converted to street use can get in, but motor vehicles converted into competition vehicles cannot get out. That makes no sense. And, the word “designed” does not demand or support such a strange result.

In sum, a vehicle originally designed to be a motor vehicle that is used on the streets naturally can be redesigned to be a race-only vehicle used exclusively on racecourses. Nothing about the adjective “designed” prevents that outcome.

EPA clearly understands that context matters, which is why it suggested that the very purposes of the motor vehicle emissions control program would be compromised (i.e., “[t]his setup would be pointless”) if motor vehicles may lawfully be converted into race-only vehicles. EPA Br. at 29. But such sweeping generalizations prove nothing. For one, by taking that 50,000-foot perspective, EPA seeks to ignore the inconvenient truth that the words of the statute embrace and accommodate the conversion of motor vehicles into race-only vehicles by providing a use-based definition for competition vehicles and expressly distinguishing such vehicles from motor vehicles.

Moreover, it is simply untrue that such conversions would compromise the effectiveness of the air quality program. While lots of people engage in motor sports, there are almost 300 million registered cars in the United States today. Pet. Br. at 3. As the Coalition’s opening brief explained, “air emissions from motorsports are very small as compared to emissions from the on-road fleet.” *Id.* EPA did not even try to rebut these particular facts in its response.⁷

EPA finally asks the Court to ignore legislative history that shows Congress was aware of the practice of converting motor vehicles into race-only vehicles and was careful not to prohibit that practice. EPA argues, for example, that Congress could have expressly exempted the conversion of motor vehicles into race-only vehicles from the statutory tampering prohibition but didn’t. EPA Br. at 29. That argument gets EPA nowhere because the Coalition does not challenge the scope of the tampering prohibition. As it should, that prohibition applies to motor vehicles. But because the vehicles at issue here are not motor vehicles, there is no need for a carve-out from the tampering prohibition. This case is not about an exemption. It is about a definition.

⁷ To the extent EPA believes this is an important issue that needs to be addressed, that is all the more reason for EPA to actually conduct a rulemaking that engages the issues. In such a rulemaking, it would analyze the impact, solicit comment, and reach a reasoned conclusion about the appropriate regulatory path forward.

EPA then points to a provision expressly authorizing “the conversion of gas- or diesel-powered vehicles into clean-fuel vehicles.” *Id.* at 30. But that provision does not do the work EPA asks of it because motor vehicles converted into clean-fuel vehicles are still motor vehicles (i.e., they still are meant to be used on public streets and highways). Thus, special provision for such conversions was necessary to prevent them from being covered by the tampering prohibition. No such special provision is needed for motor vehicles converted into race-only vehicles because race-only vehicles are encompassed by the use-based definition of competition vehicle.

EPA lastly argues that Congress could have expressly carved competition-only vehicles out of the definition of “motor vehicle,” but chose not to do so. This is puzzling because Congress actually did that in 1990 by enacting a use-based definition for competition vehicles and expressly distinguishing such vehicles from motor vehicles. That definition confirmed what everyone—including EPA—always knew to be true. Motor vehicles that are converted into race-only vehicles are not subject to the Clean Air Act motor vehicle emissions control program.

III. The Challenged Preamble Text Is Reviewable Final Agency Action.

EPA stated in the preamble to the 2016 Final Rule 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, JAXX.

This is a plain attempt to assert a first-ever interpretation that the pre-2016 regulations prohibited the conversion of motor vehicles into race-only vehicles. Pet. Br. at 35. The statement is definitive (nothing tentative or interlocutory here) and imposes new legal obligations by way of a reinterpretation of prior rules. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). It is thus reviewable final agency action.

EPA says it is not. The Agency first argues that the statement is not final agency action because it appears in the preamble to the final rule. EPA Br. at 31-32. But this Court has repeatedly held that it is the nature of agency statements that matters most, and not the vehicle by which the agency chooses to express itself. Pet. Br. at 38 (cases finding final agency action in preamble statements, guidance documents, and press releases). The fact that EPA expressed itself here in the preamble has no bearing on the finality of its action.

EPA next asserts that the statement is not final agency action because it does not change things, but “[i]t merely describes the continuity in EPA’s policies and practices.” EPA Br. at 32. But the preamble statement (and the companion regulatory changes) marked a distinct change, as discussed in detail in Section II, *supra*.

Finally, EPA retreats to the argument that the statute unambiguously demands the approach it advocates. That is untrue, for the reasons discussed in Section III, *supra*.

IV. The “Safety Clarification” Is Highly Relevant and Appropriately in Play.

The Coalition previously explained that “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).” Pet. Br. at 23. The Coalition pointed out that “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.” *Id.* at 22-23. Thus, this safety provision was understood to be one avenue under the rules by which a motor vehicle could lawfully be converted into a race-only vehicle.

Commenters on the 2015 Proposed Rule clearly made this point on the record. Pet. Br. at 8 (citing comments by auto manufacturing trade associations explaining that “[v]ehicles ... modified for off-road racing/competition have traditionally been held to fall under the second criterion [the “safety” provision in the regulatory definition of “motor vehicle”]. 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.”). Commenters asserted that EPA’s proposed revision to this provision would “narrow the kinds of competition vehicles that could be excluded from the definition of motor vehicle.” Alliance of Automobile Manufacturers & Association of Global Automakers, Comments on the

Notice of Data Availability at 4 n.3 (Apr. 1, 2016), EPA-HQ-OAR-2014-0827-1884, JAXX. That is because “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.” Pet. Br. at 43 (citing 81 Fed. Reg. at 73,972, JAXX). EPA failed to acknowledge or respond to these comments in the administrative record.

EPA argues that the Coalition lacks standing to challenge this rule change because “[i]t has nothing to do with the ‘conversion’ that the Coalition is interested in.” EPA Br. at 32. That is inaccurate. As described above, the “safety clarification” had the effect of narrowing the types of race-only vehicles that may be excluded from the regulatory definition of “motor vehicle.” While most of the arguments in this case have focused on the threshold question of whether the law and regulations allow the conversion of a motor vehicle to a race-only vehicle, the scope of the authorization also is plainly relevant. In other words, if the Coalition prevails on the question of whether such conversions are permissible, the Coalition still is injured if the range of permissible conversion is limited. This Court clearly can redress that injury by vacating the safety clarification. Standing on this issue is evident.

Lastly, as noted above, this issue was unambiguously raised in comments on the 2015 Proposed Rule. It has not been waived.

CONCLUSION

The Coalition respectfully requests the Court vacate the challenged regulatory interpretation and regulatory changes.

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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 6,384 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: March 16, 2022

/s/ Shannon S. Broome

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2022, the foregoing reply 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.

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