No. 24-6945

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

TRACY COITEUX

Defendant-Appellant

On Appeal from the United States District Court for the Western District of Washington (Tacoma)
No. 3:21-cr-05184-BHS-2
Hon. Benjamin H. Settle

APPELLANT'S OPENING BRIEF

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INTRODUCTION

For almost 30 years, the government's public position was that modifying "automotive air emission systems still cannot be prosecuted criminally under the [Clean Air Act]."[1] Yet in 2021, Tracy Coiteux was prosecuted criminally under the Clean Air Act for doing exactly that. Her family-run autobody shop provided a popular service among truck owners known as "deleting" and "tuning." It involves modifying a truck's emission control system and then programing its software (called the onboard diagnostic system, or "OBD") to accept this modification. This was long understood to be a civil offense under the Clean Air Act, not a criminal one. That is, until roughly 2020, when the government abruptly—and incorrectly—changed its mind.

The government's "hook" for its new charging theory is 42 U.S.C. § 7413(c)(2)(C), which criminalizes modifying a "monitoring device" that is "required to be maintained" under the Act. But under its plain terms, Section 7413(c)(2)(C) cannot apply to OBDs. First, OBDs are not

[1] Kathleen A. Hughes, EPA Memorandum to Regional Criminal Enforcement Counsels, re: New Criminal Enforcement Responsibilities Under 1990 Clean Air Act Amendments 6 (Apr. 19, 1993) [hereinafter *Hughes Memo*].

"required to be maintained" under any provision of the Act. The district court wrongly took this as a given, but the Act does not impose an OBD maintenance requirement on anyone. Second, an OBD is not a "monitoring device." "Monitoring devices" monitor stationary emissions sources (like power plants) and are creatures of Title I of the Act. OBDs do not monitor emissions at all and are used solely with mobile emissions sources (like trucks) under Title II of the Act.

The government's new reading of Section 7413(c)(2)(C) also conflicts with the rest of Section 7413. Other provisions of Section 7413 withhold from EPA the authority to make criminal referrals or pay criminal informants in Title II cases. Such restrictions are nonsensical if OBD modification can be criminally prosecuted under the Act. This is just one of many absurd results that follow the government's attempt to graft Section 7413(c)(2)(C) from Title I onto this Title II conduct.

This cannot be what Congress intended. Even if Section 7413's language is sufficiently ambiguous to allow the government's new theory criminalizing OBD modification, due process and the rule of lenity require a narrow construction in Ms. Coiteux's favor.

JURISDICTIONAL STATEMENT AND BAIL STATUS

This appeal stems from the judgment of conviction entered by the district court on November 4, 2024, under 42 U.S.C. § 7413(c)(2)(C). Tracy Coiteux filed a timely notice of appeal on November 14, 2024. (2-ER-126.) This Court has jurisdiction under 28 U.S.C. § 1291.

Ms. Coiteux is serving a sentence of four years of probation. (1-ER-3.) She is not in custody.

STATUTORY AND REGULATORY AUTHORITIES

Pertinent constitutional, statutory, and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. Section 7413(c)(2)(C) criminalizes tampering with a "monitoring device . . . required to be maintained" under the Clean Air Act. OBDs are not required to be maintained under any provision of the Clean Air Act. Nor are they "monitoring devices" because they do not monitor emissions data. Nor is EPA authorized to make criminal referrals or pay informants for OBD tampering under the Act. Is tampering with an OBD subject to criminal prosecution under Section 7413(c)(2)(C)?

2. The government for decades said criminal penalties do not apply to Title II of the Act. If Section 7413(c)(2)(C) is ambiguous enough for

the government to now adopt a contradictory position, should it be construed narrowly to preserve fair notice and under the rule of lenity?

STATEMENT OF THE CASE

I. Legislative Background

A. Structure of Clean Air Act

The Clean Air Act began in 1955 as a modest statute called the "Air Pollution Control Act" that served mostly as a funding mechanism for air pollution research.[2] It has since greatly increased in complexity due to a series of amendments, most notably in 1970 and 1990.

The 1970 amendments organized the statute into several titles. The most comprehensive are Titles I and II, which respectively focus on "stationary sources" and "mobile sources" of emissions.[3] Stationary sources under Title I include physical facilities like fossil fuel power plants, incinerators, and blast furnaces.[4] To regulate these sources, Title

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[2] *See Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 63 (1975).

[3] *See United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984); *Weiler v. Chatham Forest Prods., Inc.,* 392 F.3d 532, 534 (2d Cir. 2004).

[4] The Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3).

I (i) establishes programs to monitor and control their emissions;[5] (ii) provides a framework for states to develop state implementation plans ("SIPs") to meet the National Ambient Air Quality Standards ("NAAQS") set by EPA;[6] and (iii) authorizes EPA to impose performance standards and permitting requirements on owners and operators of stationary sources to ensure compliance with applicable emission limits.[7]

Title II, on the other hand, focuses on emissions from "mobile sources," such as motor vehicles, trains, and planes. It imposes various requirements on (i) vehicle and engine manufacturers with respect to engine design, fuel content, and maintenance systems;[8] (ii) fuel refiners, importers, and distributors regarding fuel standards;[9] and (iii) engine

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5 *E.g.*, 42 U.S.C. §§ 7411 (standards of performance for new stationary sources); 7412 (regulations of hazardous air pollutants).

6 *E.g.*, 42 U.S.C. § 7410 (state implementation plans, which require enforcement of national air quality standards to local stationary sources).

7 *E.g.*, 42 U.S.C. §§ 7414 (recordkeeping, inspections, monitoring, and entry requirements); 7503 (permit requirements).

8 *E.g.*, 42 U.S.C. § 7521 (emission standards for new motor vehicles and new motor vehicle engines).

9 42 U.S.C. § 7545 (regulation of fuels).

manufacturers for various non-road engines (such as aircrafts or construction equipment).[10]

Titles I and II have separate provisions for the establishment of emissions and performance standards (*compare* 42 U.S.C. § 7411 & 42 U.S.C. § 7412, *with* 42 U.S.C. § 7521), recordkeeping and reporting (*compare* 42 U.S.C. § 7414, *with* 42 U.S.C. § 7542), and, as relevant here, enforcement (*compare* 42 U.S.C. § 7413(b) (imposing civil penalties under Title I), *and* § 7413(c) (imposing criminal penalties under Title I), *with* 42 U.S.C. § 7524 (imposing civil penalties under Title II)).

Congress preserved these differences in delegating authority to EPA. For example, when Congress authorized EPA under Title I to require "any person who owns or operates any emission source" or "who manufactures emission control equipment or process equipment" to 'install, use, and maintain [emission control] monitoring equipment," Congress exempted motor vehicle manufacturers. *See* 42 U.S.C. § 7414(a) ("other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title with respect to a provision of subchapter II"). Additionally, Congress only authorized EPA to request criminal enforcement

[10] 42 U.S.C. § 7547 (regulation of nonroad engines and vehicles).

and to pay informants for violations of Title I (among other parts of the Act), *but not Title II*. *See id.* § 7413(a)(3)(D), (f).

B. OBDs Under the Clean Air Act

OBDs are diagnostic and reporting systems that assess the performance of vehicle components, including those responsible for emissions-related controls. (2-ER-70–71; 3-ER-227–229, 247–248, 253–255.) They are essentially computer systems that detect and report malfunctions in a vehicle's pollution control system. (3-ER-247–248.) As an example, where a vehicle's exhaust gas recirculation is not functioning properly, the OBD will notify the vehicle's operator using the check-engine light. (3-ER-254–255.) In some circumstances, depending on the severity of the malfunction, the OBD might also trigger an effect referred to as "limp mode," which can limit the vehicle's speed to as low as 5 miles per hour. (2-ER-83; 3-ER-227–229, 248.) The OBD will also store the diagnostic code so technicians can identify and service the component needing attention. (2-ER-71; 3-ER-247–248.)

In practice, these emissions controls cause vehicles to be less fuel efficient, they cause more significant maintenance issues, and they

increase operating costs. (3-ER-256, 288–289.)[11] In response, some vehicle owners—especially those with heavy-duty diesel pickup trucks—have engaged in a practice known as "deleting and tuning" their vehicles. (3-ER-256, 288–289.)

"Deleting" is the practice of removing or blocking components of the vehicle's pollution control system, such as an exhaust gas recirculation valve or sensors that detect emission levels within the selective catalytic reduction system. (3-ER-256–257.) Because deleting can trigger the vehicle's OBD system to detect a malfunction—potentially putting the vehicle into limp mode—the OBD system's software must be programmed to accept the modification. (3-ER-259–260.) This process is known as "tuning." Due to the measurable benefits deleting and tuning have on fuel efficiency, longevity, and maintenance costs, this has become a relatively common practice.[12] (3-ER-256, 4-ER-513.) Some auto-body shops

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[11] *See also* U.S. Envtl. Prot. Agency, *Tampering and Aftermarket Defeat Devices*, Clean Air Northeast (July 9, 2025), https://cleanairnortheast.epa.gov/tampering.html (listing reasons for demand for "aftermarket defeat devices").

[12] EPA estimates over 550,000 diesel pickup trucks were deleted between 2009 and 2019. *See* Letter from Evan Belser, Deputy Dir., Air Enf't Div., Off. of Civil Enf't, U.S. Envtl. Prot. Agency (Nov. 20, 2020), available at https://www.epa.gov/sites/default/files/2021-01/documents/epaaedletterreportontampereddieselpickups.pdf. EPA's Special

offer this service, and there are numerous YouTube tutorials guiding truck-owners on how to do it, using kits from places like Walmart and eBay. (3-ER-286, 289–290.)

The Act includes three general directives—specifically, two requirements and one prohibition—relating to OBDs.

First, Title II requires manufacturers to "install" OBDs in new light-duty vehicles. 42 U.S.C. § 7521(d)(1), (m)(1). With respect to heavy-duty vehicles,[13] Congress delegated to EPA whether to require the installation of OBDs.[14] *Id.* § 7521(m)(1).

Second, Title I requires states with high-pollution areas to inspect OBDs as part of their state implementation plans or "SIPs." Under Title I, states must develop plans to demonstrate how they will achieve and maintain compliance with NAAQS. Areas that are not meeting NAAQS

Agent testified at Ms. Coiteux's trial that this practice had become "pretty prevalent" and "kind of rampant." (4-ER-513.)

[13] Under the CAA, heavy-duty vehicles are vehicles with a GVWR above 8,500 lbs and up to 26,000 lbs. *See* 42 U.S.C. § 7585.

[14] For 2005 and newer models, EPA regulations require OBDs in heavy-duty vehicles at or below 14,000 lbs GVWR. *See* 40 C.F.R. §§ 86.1801-12, 86.1806-17, 86.1806-27, 1036.110.

are designated as "nonattainment" areas and are subject to stricter regulatory requirements. 42 U.S.C. § 7407(b), (d)(1)(A).

To be federally approved, the Act requires SIPs for nonattainment areas with high concentrations of ozone or carbon monoxide to adopt a "motor vehicle inspection and maintenance program[]." *See* 42 U.S.C. §§ 7511a, 7512a.[15] Depending on pollution risk, these programs can either be "basic" or "enhanced." Either way, EPA regulations require states to submit SIPs that provide for inspection of OBDs.[16] In areas with "enhanced" programs, the SIP must provide for enforcement through denial of vehicle registrations.[17] A SIP need not require vehicles with OBDs that fail inspection to be denied registration in areas subject to the "basic"

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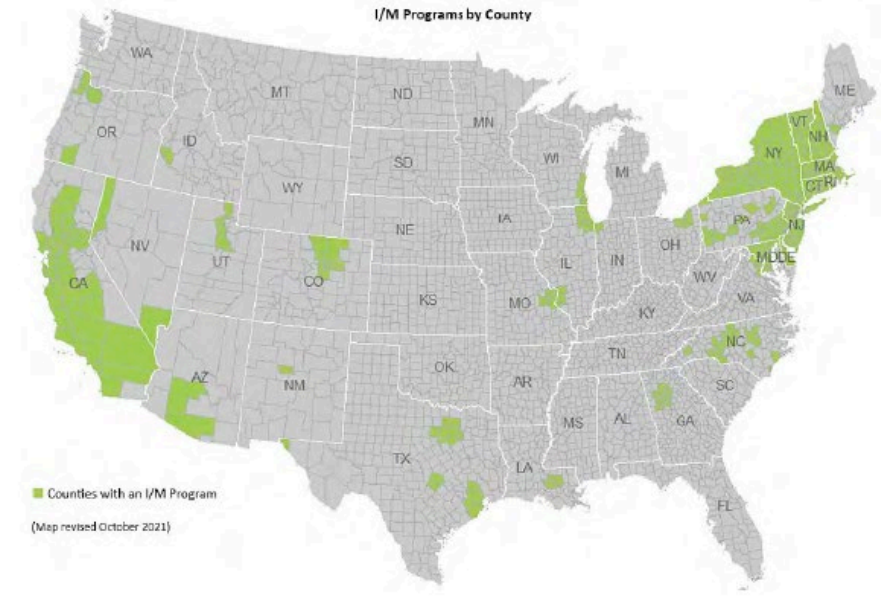
15 *See also* U.S. Envtl. Prot. Agency, EPA-420-F-21-067, *Overview of Vehicle Inspection and Maintenance (I/M) Programs*, at 2 (2021).

16 40 C.F.R. §§ 51.351(c), 51.352(c); *see also* U.S. Envtl. Prot. Agency, EPA-420-B-22-034, *Performance Standard Modeling for New & Existing Vehicle Inspection & Maintenance (I/M) Programs Using the MOVES Mobile-Source Emissions Model*, at 3 (2022).

17 42 U.S.C. § 7511a(c)(d)(C)(iv); 40 C.F.R. § 51.361.

program.[18] Few counties across the country have these required inspection and maintenance programs, as shown on EPA's map below[19]:

The map below highlights counties across the country with I/M programs:



For the rest of the country, the Act has nothing to say about whether states should be checking OBDs.

Third, the Act has one OBD-related prohibition—the only OBD provision in the entire Act that applies to members of the general public (the two requirements described above apply to manufacturers and states only). Title II prohibits anyone from "remov[ing] or render[ing]

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[18] 42 U.S.C. § 7511a; 40 C.F.R. § 51.361 ("A basic I/M area may use an alternative enforcement mechanism if it demonstrates that the alternative will be as effective as registration denial.").

[19] *See* U.S. Envtl. Prot. Agency, EPA-420-F-21-067, *Overview of Vehicle Inspection and Maintenance (I/M) Programs*, at 2 (2021).

inoperative any device or element of design installed on or in a motor vehicle . . . in compliance with regulations under this subchapter." 42 U.S.C. §§ 7522(a)(3)(A), 7524(a). Violators face *civil* penalties, which, for those who are not manufacturers or dealers, are capped at $2,500 per vehicle. *Id.* § 7524(a); *cf.* 40 C.F.R. § 19.4 (inflation adjustments).

C. Criminal Enforcement of Title II

Until around 2020, the government recognized that violations of Title II—including tampering with an OBD—were subject only to civil penalties. For example, in 1993, the Acting Director of EPA's Criminal Enforcement Counsel Division noted in guidance about the criminal enforcement of the 1990 Clean Air Act amendments: "Automobile dealer or repair shop tampering with automotive air emission systems *still cannot be prosecuted criminally under the CAA* since the mobile source regulations impose various compliance certification responsibilities only on automobile manufacturers and not on the dealers."[20]

The Congressional Research Service provided similar guidance in a paper discussing what penalties Volkswagen might face for installing

[20] *Hughes Memo*, *supra* note 1, at 6 (emphasis added); *see also id.* at 5 ("The 1990 Act continued the exclusion of Subchapter II violations from criminal penalties.").

defeat devices in the OBDs of diesel vehicles to evade emissions controls. It explained that "Title II of the CAA, which deals with emissions standards for moving sources, does not provide for criminal penalties."[21] Notably, neither Volkswagen nor its agents were criminally charged with violating emissions requirements of the Act, but rather were charged with making false statements, conspiracy, and obstruction of justice under Title 18 of the United States Code.[22] In other words, they were criminally charged for *attempting to cover up* the evasion of Title II's emission requirements, not for the evasion itself. These public statements and enforcement history aligned with what environmental scholars were saying as well.[23]

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[21] Bill Canis et al., Cong. Research Serv., R44372, *Volkswagen, Defeat Devices, and the Clean Air Act: Frequently Asked Questions*, at 9 (2016).

[22] Indictment, *United States v. D-2 Richard Dorenkamp, D-3 Heinz-Jakob Neusser, D-4 Jens Hadler, D-5 Bernd Gottweis, D-7 Jurgen Peter, and D-9 Martin Winterkorn*, No. 2:16-cr-20394, 2018 WL 3127224 (E.D. Mich. Mar. 14, 2018); Complaint, *United States v. Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, Dr. Ing. H.c. F. Porsche AG, and Porsche Cars North America, Inc.*, No. 2:16-cv-10006, 2016 WL 25162 (E.D. Mich. Jan. 4, 2016). *See also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1209 (9th Cir. 2020).

[23] *See also* David Currie, *The Mobile-Source Provisions of the Clean Air Act*, 46 U. Chi. L. Rev. 811, 872 n.383 (1979) ("The enforcement provisions of section 113 [*i.e.*, Section 7413], including administrative orders

These interpretations of the Act were also consistent with its legislative history. When the Act was amended in 1977, the House reported that, whereas stationary source violations (under Title I) were subject to criminal penalties, mobile source violations (under Title II) were subject only to civil penalties:

> The mobile source enforcement provisions (sections 203–5 of the act) authorized the Administrator to seek injunctive relief and/or judicially imposed civil penalties. However, *no criminal sanctions were provided for violation of mobile source-related regulations*. On the other hand, the stationary source enforcement

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and criminal sanctions, do not apply to motor-vehicle violations."). Similarly, officials at EPA and the DOJ Environmental Crimes Section explained that the 1990 amendment of Section 7413(c)(2)(C) only raised tampering with a monitoring device from a misdemeanor to a felony without any mention of mobile sources. *See* James Miskiewicz & John Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, Pace Envtl. L. Rev. 281, 374–83 (1992); *see also* E. Donald Elliot *et al.*, *The Clean Air Act: New Enforcement and Liability Provisions*, 42 J. Air Waste Mgmt. Assoc. 1414, 1415 (1992), *available at* https://www.tandfonline.com/doi/epdf/10.1080/10473289.1992.10467086?needAccess=true (Yale Law School professor and former EPA Assistant Administrator and General Counsel explaining that the 1990 Amendments only extended felony liability to that which was previously subject to a misdemeanor); Michael S. Alushin, *Enforcement of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 2217, 2229 (1991) (EPA enforcement official explaining that: "The 1990 Amendments…clarified the enforcement provisions of section 113 in several important respects. *Amended section 113 provides for the enforceability of every requirement in the other titles of the Act* (*except for title II, which has its own enforcement provisions*.")) (emphasis added).

> provisions (section 113 of the act) authorized injunctive relief and the imposition of criminal penalties.

H.R. Rep. No. 95-294, at 69 (1977) (emphasis added).

This was the status quo until roughly 2020, when the government began asserting that aftermarket OBD modification was a criminal offense under the Act after all.[24] Almost overnight, a population of truck-owning Americans and mom-and-pop shops who deleted and tuned vehicles faced potential criminal liability.[25] From FY 2020 through FY 2023,

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[24] *See, e.g.,* U.S. Dep't of Justice, *Water Management Companies Enter into Resolutions, Pay $4.3 Million in Monetary Penalties for Clean Air Act Violations* (Sept. 24, 2020), https://www.justice.gov/usao-mdpa/pr/water-management-companies-enter-resolutions-pay-43-million-monetary-penalties-clean; U.S. Dep't of Justice, *Oklahoma City Business Owner Pleads Guilty to Violating the Clean Air Act by Tampering with the Emissions Control Systems on Heavy Duty Diesel Trucks* (Oct. 7, 2021), https://www.justice.gov/usao-wdok/pr/oklahoma-city-business-owner-pleads-guilty-violating-clean-air-act-tampering-emissions; *see also* U.S. Envtl. Prot. Agency, EPA-300-F-20-001, *Enforcement Alert: Aftermarket Defeat Devices and Tampering are Illegal and Undermine Vehicle Emissions Controls*, at 4–5 (2020).

[25] *E.g.*, U.S. Dep't of Justice, *Louisiana Company and Its Owner Sentenced for Manufacturing and Selling Software that Allowed the Disabling of Emissions Controls on Motor Vehicles* (Dec. 18, 2024), https://www.justice.gov/archives/opa/pr/louisiana-company-and-its-owner-sentenced-manufacturing-and-selling-software-allowed; U.S. Dep't of Justice, *New Jersey Man Indicted for Nationwide Scheme to Tamper with Diesel Pollution Control Systems in Violation of the Clean Air Act* (Apr. 8, 2024), https://www.justice.gov/usao-wdwa/pr/new-jersey-

the government completed 17 criminal cases resulting in penalties totaling $5.6 million, $1.2 million in restitution, $438,000 in environmental projects, and 54 months of incarceration.[26]

Because Title II has no provision for criminal enforcement, prosecutors have borrowed from Title I to bring these cases:

> Any person who knowingly . . . falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method *required to be maintained* or followed under this chapter shall, upon conviction, be punished by fine . . . or by imprisonment for not more than 2 years, or both.

42 U.S.C. § 7413(c)(2) (emphasis added). The government's new theory, adopted by the district court, is that an OBD is a "monitoring device" "required to be maintained . . . under this chapter" such that modification of an OBD (specifically, the "tune"[27]) is a felony. (1-ER-55–56.)

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man-indicted-nationwide-scheme-tamper-diesel-pollution-control-systems.

[26] U.S. Envtl. Prot. Agency, *Fiscal Year 2020–2023 National Enforcement and Compliance Initiatives*, at 11 (2024).

[27] EPA's Special Agent acknowledged at Ms. Coiteux's trial that a delete without a tune is not a crime. (4-ER-525–526.)

II. Factual Background

Tracy Coiteux co-owned Racing Performance Maintenance Northwest, LLC—a small, family-run auto-body shop—with Sean, her husband of 26 years, where they serviced their community in Ridgefield, Washington, for over a decade. (3-ER-325; 4-ER-540–543.) Sean oversaw mechanical operations, while Tracy kept the books and provided technical support. (3-ER-427, 431–432; 4-ER-471–472, 542–544.) While Tracy never personally deleted a vehicle (and would have no idea how), the mechanics did, and she assisted with installing "tunes" afterwards. (3-ER-351, 358.)

On January 20, 2021, 11 to 15 armed federal agents swarmed the shop to conduct a search. (4-ER-491–492, 516, 524–525, 562.) Terrified and confused, Tracy asked what the problem was and where she could go to learn more. (4-ER-562, 566.) An agent responded, "[i]n Washington State, you should go to the Department of Ecology to learn more." (*Id.*)

On May 12, 2021, Sean, Tracy, and their lead mechanic, Nick Akerill, were charged with 1 count of conspiracy to violate the Act and 11 counts of tampering with "a monitoring device or method in violation of the Clean Air Act." (2-ER-134.) Nick's charges were dropped in exchange

for his cooperation and a guilty plea to a state court misdemeanor. (3-ER-364, 394–395.) A superseding indictment issued on January 24, 2024, adding allegations against Sean and Tracy. (2-ER-115–125, 145.) Sean pleaded guilty and Tracy opted for a jury trial. (2-ER-146–147.)

Prior to the trial, Tracy moved to dismiss on the grounds that Act only provides civil penalties for OBD tampering and that OBDs were not "monitoring devices" under the Act. (1-ER-9.) The district court denied her motion (1-ER-55), finding that the "CAA's criminal sanctions facially apply to any person who tampers with any monitoring device required under the entire CAA as a matter of law." (1-ER-9, 58.) The district court then instructed the jury that "[a]n OBD is a monitoring device that is required to be maintained under the Clean Air Act." (1-ER-23.)

After a three-day trial, the jury rendered a guilty verdict on all counts. (4-ER-679–680.) Tracy was sentenced to four years of probation and a $10,000 criminal penalty. (1-ER-3, 5–6.) Tracy orally moved for acquittal both at the close of the government's case and the close of all the evidence. (1-ER-38–39, 43.) The district court denied both motions. (1-ER-40, 43.) The district court also denied Ms. Coiteux's post-trial motions for a judgment of acquittal and for a new trial. (1-ER-16.)

SUMMARY OF THE ARGUMENT

Ms. Coiteux's conviction should be reversed for five reasons.

First, the Clean Air Act only criminalizes tampering with devices "required to be maintained" under the Act. Yet, no provision in the Act requires anyone to "maintain" OBDs. The district court misread and misapplied Section 7413(c)(2)(C), in some instances leaving the "required to be maintained" element out altogether and in others simply assuming it was met and incorrectly instructing the jury accordingly.

Second, Section 7413(c)(2)(C) applies only to "monitoring devices," and OBDs are not monitoring devices under the Act. Title I requires emissions monitoring for stationary sources so regulators can track these sources' adherence to federal emissions standards, and it prescribes monitoring equipment for this purpose. OBDs are exclusively used in mobile sources, and they do not monitor emissions or emissions data.

Third, in addition to the plain text of Section 7413(c)(2)(C), all other indicators show Congress did not intend OBD modification to be subject to criminal enforcement. For example, in the same section, Congress precluded EPA from making criminal referrals or paying criminal informants in connection with violations of Title II, which would include

OBD modifications. Beyond this, interpreting the Act to criminalize OBD modification would also permit several other absurd inconsistencies.

Fourth, not surprisingly, the legislative history does not support the government's broad reading of Section 7413(c)(2)(C). To the contrary, Congress repeatedly indicated that Title II conduct is not intended to be subject to criminal enforcement.

Finally, even if the government's new interpretation fits the language, structure, and history of Section 7413, the government's abrupt change of position violated Ms. Coiteux's right to fair notice and should be rejected under the rule of lenity.

STANDARD OF REVIEW

This appeal involves pure questions of law and statutory interpretation, as well as constitutional claims, all of which are reviewed *de novo*. *United States v. Thompson*, 728 F.3d 1011, 1015 (9th Cir. 2013); *Rosas v. Holder*, 578 F. App'x 735, 736 (9th Cir. 2014).

ARGUMENT

The government was right for 30 years, and wrong for the last five. Modifying an OBD is not a crime under the Clean Air Act. It cannot be a crime because the Act only criminalizes tampering with "monitoring devices" that are "required to be maintained" under the Act, and OBDs

are neither. The Act's structure and history further make clear it does not criminalize OBD modification. And, even if the Act's language were ambiguous on this point, the government's new theory must be rejected for lack of fair notice and under the rule of lenity.

I. OBDs are not "required to be maintained" under the Act.

A. The district court misstated and then misapplied Section 7413(c)(2)(C).

Under the Clean Air Act, it is a crime to "tamper[] with . . . any monitoring device . . . *required to be maintained* . . . under this chapter." 42 U.S.C. § 7413(c)(2)(C) (emphasis added). In applying this statute to Ms. Coiteux's case, the district court omitted the "required to be maintained" element and misapplied the provision to her conduct.

Specifically, in stating the standard for criminal liability in its ruling on Ms. Coiteux's motion to dismiss, the district court left out the "required to be *maintained*" requirement altogether. (1-ER-57 ("[T]he CAA's criminal sanctions facially apply to any person who tampers with any monitoring device *required under 'this chapter'*—the entire CAA—including any monitoring device required under Subchapter II.") (emphasis added).) It then affirmatively instructed the jury that OBDs are "required to be maintained" under the Clean Air Act, providing no legal or

factual support for that (false) assumption. (1-ER-23.) And it then omitted the maintenance requirement again in its ruling on Ms. Coiteux's motion for acquittal, restating and citing its earlier misstatement of law. (1-ER-9 ("[T]he CAA's criminal sanctions facially apply to any person who tampers with any monitoring device *required under the entire CAA* as a matter of law.") (emphasis added).)[28]

This was error. Criminal sanctions apply to any person who tampers with a monitoring device "required to be *maintained*" under the Act. *See United States v. Louisiana Pac. Corp.*, 908 F. Supp. 835, 845 (D. Colo. 1995) (recognizing "required to be *maintained*" is a requirement under Section 7413(c)(2)(C)); *United States v. United Water Env't Servs. Inc.*, 2011 WL 3751303, at *4 (N.D. Ind. Aug. 24, 2011) (same, with respect to a identical provision under the Clean Water Act). Tracy Coiteux is not

[28] The government made the same error. The Second Superseding Indictment simply stated without support that OBDs are "required to be maintained" under the CAA. (2-ER-118, 124.) Similarly, in EPA's special agent's affidavit in support of her application for a search warrant, she stated that "OBD systems are monitoring devices or methods required to be maintained" while only citing EPA regulations requiring manufacturers to *install* OBDs. (2-ER-79.) Neither cited provision imposes a maintenance requirement on anyone (nor could it because, as explained below, the underlying statute has no such requirement).

such a person because, as explained below, OBDs are not "required to be maintained" under the Act.

B. The Act does not require that anyone maintain an OBD.

The Act contains no requirement that anyone—not a manufacturer, not a service provider (like Ms. Coiteux), and not an owner (like Ms. Coiteux's customers)—maintain an OBD. The Act has two requirements with respect to OBDs, neither of which impose a requirement to "maintain" OBDs on anyone.

First, the Act requires manufacturers to "install" OBDs in light-duty vehicles. 42 U.S.C. § 7521(m)(1). "Install" does not mean "maintain." *See United States v. Thomsen*, 830 F.3d 1049, 1057 (9th Cir. 2016) ("We interpret statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary.") (citation and quotation marks omitted). Rather, "install" refers to a specific act: "to set up for use or service."[29] It is not an ongoing obligation that persists beyond the completion of installation. *See Massy v. United States*, 214 F.2d 935, 938–39 (8th Cir. 1954) (collecting cases defining the

[29] *Install*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/install (last visited July 9, 2025).

term "install"). For example, Congress imposed a deadline or defined period for the installation of something at multiple points in the Act.[30]

"Maintain," on the other hand, means "keeping [something] in a state of repair, efficiency, and/or validity." *United States v. Korotkiy*, 118 F.4th 1202, 1210–11 (9th Cir. 2024). A requirement to "maintain" an OBD would therefore require the affirmative upkeep of the OBD. This is consistent with how the Act uses the term "maintain" in other places.[31] It places specific requirements on someone to keep devices in working order. *See, e.g.*, 42 U.S.C. § 7414(a)(1) (listing specific persons subject to maintenance requirements for records and monitoring equipment).

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[30] *E.g.*, 42 U.S.C. §§ 7412(f)(4)(B) (permitting EPA to grant a waiver for a period "necessary for the installation of controls"); 7412(i)(3)(B) (permitting EPA to grant an existing source an additional year "if such additional period is necessary for the installation of controls"); 7651k(c) ("Not later than January 1, 1995, the owner or operator of each affected unit that has not previously met the requirements of subsections (a) and (b) shall install and operate CEMS, . . ."); *see also* Memorandum for the Administrator of the Environmental Protection Agency, President Barack Obama, 76 Fed. Reg. 80727 (Dec. 21, 2011) ("The EPA has concluded that 4 years should generally be sufficient to install the necessary emission control equipment . . . .").

[31] *E.g.*, 42 U.S.C. §§ 7407(a) ("ambient air quality standards will be achieved and *maintained*…") (emphasis added); 7412(r)(1) ("to design and *maintain* a safe facility") (emphasis added); 7432(b)(2) ("purchasing, installing, operating, and *maintaining* infrastructure needed to charge, fuel, or *maintain* zero-emission vehicles") (emphases added).

Congress also used the words "install" and "maintain" separately elsewhere in the Act.[32]

None of this would make sense if the word "install" encompassed "maintain." That would violate the "usual rule against ascribing to one word a meaning so broad that it assumes the same meaning as another statutory term." *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022) (internal quotation marks omitted).

Second, the Act requires states that have ozone or carbon monoxide "nonattainment" areas to submit SIPs providing an inspection and maintenance program which, in part, verifies that OBDs in qualifying vehicles are working properly.[33] These provisions are the *only* context in

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[32] *E.g.*, 42 U.S.C. §§ 7410(a)(2)(F)(i) ("the *installation*, *maintenance*, and replacement of equipment") (emphasis added); 7414(a)(1)(C) ("*install*, use, and *maintain* such monitoring equipment") (emphasis added); 7432(a)(b)(2) ("purchasing, *installing*, operating, and *maintaining* infrastructure needed to charge, fuel, or maintain zero-emission vehicles") (emphasis added).

[33] *See* 42 U.S.C. § 7521(m)(3) (requiring that "States that have implementation plans containing motor vehicle inspection and maintenance programs . . . provide . . . for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems"); *see generally* 42 U.S.C. §§ 7511a, 7512a.

which the Act speaks to OBD maintenance at all, yet they impose no requirement to maintain on any actor.

The language "required to be maintained" refers to a specific obligation on *someone* to maintain *something*. For example, the Act uses this same language in a provision authorizing the EPA to have a right of entry on "any premises . . . in which any records *required to be maintained* under paragraph (1) of this section are located." 42 U.S.C. § 7414(a)(2)(A) (emphasis added). The referenced "paragraph (1)" imposes a requirement on various enumerated actors to "establish and *maintain* such records." *See id.* § 7414(a)(1)(A). The Act includes other examples where a specific actor is subject to a clear and explicit maintenance requirement.[34] EPA's regulations likewise identify a responsible actor for any imposed maintenance requirements.[35]

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[34] *See, e.g.*, 42 U.S.C. §§ 7414(a)(1) (requiring "any person who owns or operates any emission source" (excluding motor vehicle manufacturers) to "install, use, and *maintain* such monitoring equipment") (emphasis added); 7412(r)(1) ("The owners and operators of stationary sources . . . have a general duty . . . to design and *maintain* a safe facility . . . .") (emphasis added).

[35] *See* 40 C.F.R. § 64.7(b) ("owner or operator").

No such mandate exists for OBD maintenance. Nowhere does the Act require that anyone—states, operators, manufacturers, vehicle owners—maintain an OBD. The most one can say is that OBDs may be "required to be *inspected*," *sometimes*, in a minority of localities that are not meeting NAAQS for ozone or carbon monoxide. *See supra* pp. 9–11, 25.

While the Act does not define "maintain," EPA's regulations describe what proper maintenance of a monitoring device entails, and that maintenance is specific and exclusive to stationary sources. Specifically, 40 C.F.R. § 64.7(b) provides that "[a]t all times, the owner or operator shall maintain the monitoring, including but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment." Section 64.7(b) only applies to stationary sources,[36] and the definition of "owner or operator" is similarly limited to "any person who owns, leases, operates, controls or supervises a stationary source subject to this part." 40 C.F.R. § 64.1. No similar provision exists for OBDs.

To be sure, the Act imposes a civil *prohibition* against tampering with OBDs. 42 U.S.C. §§ 7522(a)(3)(A), 7524(a). But this prohibition does not create an affirmative *requirement* to "maintain" OBDs. *See*

[36] 40 C.F.R. §§ 64.1, 64.2(a), 70.2.

Ysleta del Sur Pueblo, 596 U.S. at 696–97 (noting the "dichotomy between prohibition and regulation" was "almost impossible to ignore" where Congress used prohibitory language in one provision and regulatory language in a separate provision). To suggest otherwise would effectively "collapse" any difference between a regulation, which generally "fix[es] the time, amount, degree, or rate of an activity according to the rules," and a prohibition, which generally "forbid[s]" or "prevent[s]." *Id.* at 697 (citations and quotation marks omitted).

C. No district court has fully considered whether OBDs are "required to be maintained."

The district court here was the first of three district courts to consider whether OBDs fall within the scope of Section 7413(c)(2)(C). *See United States v. Carroll*, 2024 WL 4039807, at *1–*2 (E.D. Mo. Sept. 4, 2024); *United States v. Long*, 2024 WL 4711946, at *4–*5 (E.D. Va. Nov. 7, 2024). Both subsequent opinions relied on the district court's decision below in this case, and, like the decision below, they did not include any real analysis of whether OBDs are "required to be maintained." Rather, all these district courts skipped this element of Section 7413(c)(2)(C).

In *Long*, the court incorrectly stated—just like the district court did here—that "the statute covers '*any* monitoring device or method' that the

CAA requires." 2024 WL 4711946, at *4 (emphasis in original). No. The statute does *not* cover "*any* monitoring device." It only covers "any monitoring device" that is "required to be maintained" under the Act. And the court in *Carroll* appears to have incorrectly assumed that the Act's requirement that OBDs be *installed* equates to a requirement *to maintain*. 2024 WL 4039807, at *1. Again, a maintenance requirement is distinct from an installation requirement. *See supra* pp. 23–25. The Act does not impose a requirement to maintain an OBD on anyone, period.

II. OBDs are not "monitoring devices" under the Act.

The district court also wrongly held that OBDs fall within Title I's definition of a "monitoring device" merely because OBDs monitor *something*.[37] (1-ER-59–60.) But the subject of monitoring equipment as prescribed in the CAA is *emissions or data relating to emission output*.[38]

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[37] The district courts in *Carroll* and *Long* made the same error. *Carroll*, 2024 WL 4039807, at *1; *Long*, 2024 WL 4711946, at *10-11.

[38] *E.g.*, 42 U.S.C. §§ 7403(c) ("monitoring . . . air pollutants"); 7403(e) ("monitoring systems and networks for evaluating and quantifying exposure to and effects of multiple environmental stresses associated with air pollution"); 7403(j)(3)(B)(i) ("continuous monitoring of emissions of precursors of acid deposition"); 7410(a)(2)(B)(i) ("monitor, compile, and analyze data on ambient air quality"); 7412(b)(5) ("monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants").

Thus, "monitoring devices" under Section 7413(c)(2)(C) monitor *emissions* or track *emissions data*, while OBDs do neither.

The district court assumed that the term "monitoring devices" ought to be given an ordinary meaning rather than its technical meaning. (1-ER-58–60.) But "[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995). And, "when a statute . . . is 'addressing a . . . technical subject, a specialized meaning is to be expected.'" *Van Buren v. United States*, 593 U.S. 374, 388 n.7 (2021) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012)).

Here, the term "monitoring device" has a specialized usage under the Act. Again, Title I focuses on controlling large-scale, localized emissions from stationary sources.[39] *See supra* pp. 4–5. Throughout Title I,

[39] That's not to say Title I does not have any provisions related to mobile sources. For example, as described *supra* pp. 9–10, SIPs are a creature of Title I, and Title I imposes at least some requirements on states relevant to regulation of mobile sources under SIPs. Nevertheless, Title I *primarily* deals with stationary sources. *Weiler*, 392 F.3d at 534 ("Broadly speaking, Title I of the statute regulates stationary sources of pollution and Title II regulates mobile sources, most importantly motor vehicles.") (quoting *Sierra Club v. Larson*, 2 F.3d 462, 464 (1st Cir. 1993)).

Congress imposed various emissions monitoring requirements to ensure EPA and states can verify that stationary sources are complying with applicable emissions limitations, and thus NAAQS are met.

For example, under Title I, EPA is authorized to "establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants." 42 U.S.C. § 7412(b)(5). As another example, Title I requires states to create SIPs, which outline how each state will achieve, maintain, and enforce the NAAQS set by the EPA for six major air pollutants. *See* 42 U.S.C. § 7410. As part of these plans, states must "provide for establishment and operation of appropriate *devices*, methods, systems, and procedures necessary to . . . *monitor*. . . data on ambient air quality . . . ." *Id.* § 7410(a)(2)(B) (emphases added). Similarly, the SIPs must require "the installation, maintenance, and replacement of equipment . . . by owners or operators of stationary sources *to monitor emissions from such sources*." *Id.* § 7410(a)(2)(F). They also must require "periodic reports" related to the "amounts of emissions and emissions-related data from such sources." *Id.*

Additionally, the Act provides that EPA "may require any person who owns or operates any emission source" or "who manufacturers emission control equipment" to "install, use, and maintain such *monitoring equipment*." *Id.* § 7414(a). Tampering with *these* monitoring devices is what Section 7413(c)(2)(C) seeks to criminalize.[40] Notably, the Act explicitly *excludes* motor vehicle manufacturers from this grant of authority, thereby establishing that EPA *does not* have discretion to require vehicle manufacturers to "install, use, and maintain such monitoring equipment." *Id.*

EPA's regulations confirm the technical meaning of "monitoring devices." The regulations define "monitoring" in reference to various "data collection techniques," including "continuous emission or opacity monitoring systems" and "maintenance and analysis of records of fuel or raw materials usage," among others. 40 C.F.R. § 64.1. Importantly, this

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[40] *See United States v. Louisiana Pac. Corp.*, 908 F. Supp. 835, 841, 845 (D. Colo. 1995) (plywood mill owners charged with tampering with pollution "monitoring devices" required by the EPA under Section 7413(c)(2)(C)); *United States v. Baker*, No. 3:15-cr-30002-MGM, ECF No. 36, at 1–2 (D. Mass. 2015) (defendant was the "operations and maintenance manager" at a power plant and was responsible for overseeing the "calibration and maintenance of the Plant's continuous emissions monitoring system," but directed employees to "tamper with the CEMS" and was charged under Section 7413(c)(2)(C)).

technical definition is found in Part 64, which is limited to stationary sources,[41] and no similar definition is provided in the regulations applying to mobile sources.[42] In fact, this monitoring obligation applies "upon issuance of a part 70 or 71 permit," which are permits only required for stationary sources. *Id.* § 64.7(a).

It is within this framework that the Act criminalizes tampering with "monitoring devices." Despite the fact that Congress told EPA that it does not have the discretion under Title I to require vehicle manufacturers to "install, use, and maintain such monitoring equipment," the government now asserts that an OBD is a "monitoring device" under Title I's criminal provision. But, unlike the devices and mechanisms described in Title I, OBDs do not monitor emissions or data relating to emission output.[43] They do not track and maintain emission output data to

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41 *See supra* p. 27 & note 35.

42 To be sure, the regulations do acknowledge that OBDs "monitor," but they do not provide a technical definition of this term as they do for stationary sources. This makes sense, since "monitoring devices" and "monitoring equipment" are specific technical terms used for stationary sources, and those definitions do not apply to OBDs.

43 The district court inaccurately stated otherwise, citing Congress and "sister courts." (1-ER-60.) This was likely the result of a mis-transcription. The D.C. Circuit noted in an opinion that "OBDs monitor, control, and record the emissions released by automobile engines,"citing S.

confirm compliance with NAAQS. An OBD is merely "an onboard computer and memory system which is used to monitor and control engine systems." *See* S. Rep. No. 101-228, at 97 (1990). It does not monitor emissions. *Id.* (OBDs are intended to "monitor[] and diagnos[e]" problems with the "catalyst, oxygen sensor, exhaust gas recirculation system, evaporative emission control system, auxiliary air system, and the fuel metering and ignition systems" as well as "potential coolant leaks from those vehicle air conditioning systems").

Title II uses the word "monitor" (or some derivative) a total of *three times*, none of which is in reference to monitoring *emissions*.[44] On the other hand, Title I uses the word "monitor" (or some derivative) *almost 80 times*, and each of those times relates to monitoring emissions output or data of emissions output. To apply "monitoring devices" to OBDs

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Rep. No. 101-228 for support. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998). But Senate Report 101-228 says that OBDs "monitor emissions control equipment." Nowhere in the report does it say that OBDs monitor emissions, nor is that conclusion supported by the appellate record here. (2-ER-70–71; 3-ER-227–29, 247–248, 253–255.); *see also* U.S. Envtl. Prot. Agency, EPA-420-B-22-042, *Guidance on Biennial Performance Evaluation Requirements for Enhanced Vehicle Inspection and Maintenance (I/M) Programs*, at 7 (2022) ("OBD testing does not yield emission measurements, but rather verifies the operation of a vehicle's emission control system.").

44 *See* 42 U.S.C. §§ 7541(i)(2), 7522(a)(2), 7522(a)(3).

ignores these differences. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 41 (1990) (interpreting disputed language "in light of the language and structure of the Act as a whole"). And, to do that, the Court would have to consider OBDs to be *the first example* of a "monitoring device" that does not monitor emissions or related data. This would not be consistent with the text or the structure of the Act.

III. The remainder of Section 7413 confirms it cannot apply to conduct regulated under Title II, such as OBD modification.

The plain language of other provisions in Section 7413 further confirms that Section 7413(c)(2)(C) is not intended to apply to modifying an OBD under Title II.

First, in another part of Section 7413—Section 7413(a)(3)(D))—Congress expressly listed the Act provisions for which EPA can seek a criminal referral. *Title II is omitted from this list*. In fact, the one time Title II is mentioned in this provision, *it is expressly excluded*.

Section 7413(a)(3)(D), titled "EPA enforcement of other requirements," provides:

> [W]henever . . . the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of *this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter*

> *VI*, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States *under this chapter* (*other than subchapter II*), the Administrator may . . . *request the Attorney General to commence a criminal action in accordance with subsection (c).*

(emphases added) ("subchapter II" is Title II and "subsection (c)" is Section 7413(c)).

It would be strange indeed if Congress criminalized Title II violations using Section 7413(c)(2)(C) while at the same time not authorizing EPA (the agency upon which the DOJ in practice relies to initiate environmental criminal referrals[45]) to make criminal referrals for that same conduct. It would be even stranger if Congress did so while expressly excluding Title II violations the one time it mentioned them (where fees are owed).

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[45] Jonathan Brightbill, Principal Deputy Assistant Attorney General, Remarks at the Fall Business Meeting of the Association of Air Pollution Control Agencies (Aug. 27, 2019), available at https://www.justice.gov/archives/opa/speech/principal-deputy-assistant-attorney-general-jonathan-brightbill-delivers-remarks-fall ("Something else that is also somewhat unique about our enforcement work — ENRD does not employ inspectors or investigators. Instead, we rely on referrals from other agencies, such as the EPA or states.").

Second, Section 7413(f) authorizes EPA to pay an award for information leading to a "criminal conviction" for "any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter ***enforced under this section***" (emphasis added). Here, Congress omitted Title II from the list of provisions "enforced under this section," i.e., Section 7413.[46] And again, it would be odd if Congress criminalized OBD modification under Title II while preventing EPA from paying informants in such cases.

These specific exclusions of Title II from Section 7413 must outweigh the single, vague reference upon which all these prosecutions are hinged: Section 7413(c)(2)(C)'s reference to monitoring devices "required

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[46] In fact, all throughout Section 7413, Congress was explicit regarding which portions of the CAA are subject to enforcement. For example, in Section 7413(c)(1)—immediately before Section 7413(c)(2)—the Act lists various requirements by statute subject to criminal enforcement. *None* of those requirements are found in Title II. Similarly, in Section 7413(c)(3)—immediately after Section 7413(c)(2)—the Act criminalizes failure to pay a fee owed to the United States under certain subchapters of the Act. Again, *none* of those subchapters are in Title II. This pattern is consistent throughout Section 7413. *E.g.*, 42 U.S.C. § 7413(a)(3), (b)(2), (c)(1), (c)(3), (c)(4), (c)(5)(A), (d)(1)(B), (f). None of the requirements and prohibitions subject to Section 7413 enforcement are found in Title II, yet the government suggests that Section 7413(c)(2)(C) is *the only one* that applies to Title II—despite the fact that its own language is self-limiting to concepts only applicable to stationary sources under Title I (i.e., "monitoring devices . . . required to be maintained").

to be maintained . . . *under this chapter*." Scalia & Garner, Reading Law, at 152 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). This case, and cases like it, have relied on this "under this chapter" language as the entire basis for applying Section 7413(c)(2)(C) to OBD modification, which is Title II conduct. The above context clues indicate this is a clear overread.

To be sure, Section 7413(a)(3) follows the phrase "under this chapter" with the additional words, "other than subchapter II." So, too, does Section 7413(b)(2), which permits EPA to seek civil penalties. This makes sense because, for both provisions, there is a specific corollary provision in Title II.[47] The absence of the "other than subchapter II" language from Section 7413(c)(2)(C) indicates it was unnecessary, which indeed it was because Title II does not contain a similar corollary provision for criminal penalties, nor does it include monitoring devices required to be maintained—including OBDs. *See supra* Parts I and II.

When Congress has chosen to criminalize conduct involving changes to individual cars and trucks, it has done so explicitly. *See, e.g.*,

[47] 42 U.S.C. § 7524(a) (imposing civil penalties for violations of Title II); 7524(c)(6) (Title II provision providing for fees owed to the government).

49 U.S.C. § 32703 (making it a crime to alter a vehicle odometer); 18 U.S.C. § 511 (making it a crime to tamper with a VIN). Similarly, where Congress criminalizes tampering with safety features, like a seatbelt or airbag, it is explicit with respect to who this conduct applies and what the prohibited conduct entails. 49 U.S.C. § 30122(b). In fact, the language used in Section 30122(b) establishing this crime is *nearly identical* to the civil anti-tampering provision used in the Act.

Congress knows how to create liability for modifying a vehicle in a way that conflicts with its policy goals, and it knows how to clearly communicate whether that liability is civil or criminal. It is illogical to conclude that Congress hid a vast new crime in an ill-fitting, attenuated clause of Title I. If Congress wished to criminalize vehicle emissions tampering, it would have done so expressly in Title II where all significant vehicle-related provisions of the Act are found. And Congress certainly would not have prohibited the EPA from referring violations of Title II to the DOJ for criminal enforcement, as it did in Section 7413(a)(3).

Instead, in Title II, Congress precisely described the challenged conduct in its *civil* prohibition, which creates liability for rendering inoperative of "any device or element of design installed on or in a motor

vehicle . . . in compliance with regulations under this subchapter." 42 U.S.C. § 7522(a)(3)(A). Congress knew how to prohibit *Ms. Coiteux's precise conduct*, yet it did not import any of these details or concepts into Section 7413(c)(2)(C), leaving it just as it was before OBDs were required by the Act (other than to elevate the crime to a felony). According to the government, this congressional decision is of no consequence. But "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022) (citation omitted).

IV. Other inconsistencies and absurd results follow if Section 7413(c)(2)(C) criminalized OBD modification.

The government's interpretation of Section 7413(c)(2)(C) introduces internal contradictions and absurd results.

First, the government's interpretation introduces an internal contradiction with respect to the available penalties under the Act. Title II's enforcement provisions cap the availability of civil penalties for violators who are not manufacturers or dealers, such as Ms. Coiteux, to $2,500 per vehicle.[48] 42 U.S.C. § 7524(a). But violations of Section 7413(c)(2)(C)

[48] Due to inflation adjustments, the amount has been updated to $5,911 under current regulations. 40 C.F.R. § 19.4.

"shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment for not more than 2 years, or both." *Id.* (emphasis added). Thus, according to the government's theory, Congress sought to limit the civil penalties available under the Act to $2,500 per incident in one provision, while simultaneously providing for imprisonment and additional criminal fines under Title 18, which, for felonies, are capped at $250,000. 18 U.S.C. § 3571(b)(3).

Similarly, Title I's enforcement provisions and Title II's enforcement provisions each provide separate criteria for assessing these penalties, which makes little sense if Section 7413's penalties were intended to apply to Title II requirements or prohibitions. *Compare* 42 U.S.C. § 7413(e) *with* 42 U.S.C. § 7524(b). The government's reading would render Title II's penalty factors entirely superfluous.

Second, Section 7413(c)(2)(C) could apply to OBDs in light-duty vehicles only while excluding OBDs in heavy-duty vehicles. That is because Section 7521(m)(1) requires manufacturers to install OBDs in new, light-duty vehicles only. It delegates to EPA's discretion whether to also require them for heavy-duty vehicles. Meaning that EPA could have chosen not to impose such a requirement and, in fact, it did just that for

heavy-duty vehicles with model years prior to 2005. To read the criminal provisions to apply to OBDs would therefore mean there could have been a world where modifying OBDs in light-duty vehicles was a felony while doing the same thing in heavy-duty vehicles (with greater emissions) was completely permissible. This nonsensical outcome is entirely possible if OBDs are "required to be maintained" under the Act. *See Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("[S]tatutory interpretations which would produce absurd results are to be avoided.") (internal quotation marks omitted).

V. Legislative history confirms that Section 7413(c)(2)(C) was not intended to criminalize violations of Title II, including OBD modification.

The government's new interpretation further conflicts with the Act's legislative history. That history confirms Congress did not intend Section 7413(c)(2)(C)'s criminal penalties to apply to mobile source requirements at all, including as to OBDs.

Criminal penalties for tampering with "any monitoring device or method" in Section 7413(c)(2)(C) were added as part of the 1970

amendments, well before the Act required OBDs.[49] When Congress amended the Act again in 1977, the House explained that "no criminal sanctions were provided for violation of mobile source-related regulations." H.R. Rep. No. 95-294, at 69 (1977). Rather, "the *stationary source enforcement provisions* (section 113 of the act) authorized . . . the imposition of criminal penalties." *Id.* (emphasis added).

Then, in 1989, Congress entered into the Congressional Record a section-by-section analysis of EPA's proposals for amendments to the Act, which included proposed changes to Section 7413(c)(2)(C).[50] With respect to these changes, Congress stated that the provision "is amended to ensure that administrative, civil, judicial, and criminal sanctions may be imposed for any violation of any requirement of *titles I, III, IV or V of the Act*." 135 Cong. Rec. S10,227 (1989) (emphasis added). Congress expressly excluded Title II.

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[49] Pub. L. No. 91-604, § 113(c)(2), 84 Stat. 1676, 1687 (1970). In fact, OBDs were first installed by automobile manufacturers almost a decade later in 1981. *See Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 453 (citing S. Rep. No. 101–228, at 97 (1990)).

[50] While the EPA's proposed 1989 amendments were ultimately not adopted, the 1990 amendments included the same proposed changes to Section 7413(c)(2)(C).

The Senate *twice* acknowledged the same with the 1990 amendments, writing that the bill "provides criminal fines and imprisonment for 'any person who knowingly violates any requirement or prohibition of *Titles I, III* [*and*] *IV*' of the Act." S. Rep. No. 101-228, at 342 (1989) (emphasis added); *see also id.* at 144 (noting that the 1990 amendments provide "a more general authorization for the Administrator to issue an administrative order or to bring a civil, or a criminal, action with respect to any violation of requirements contained in *titles I, III, and IV* of the Act") (emphasis added). Again, Congress did not list Title II, showing it understood Title II was not subject to criminal enforcement.

Had Congress intended to include OBDs within the scope of section 7413(c)(2)(C), it could have easily said so. For example, it could have written "~~monitoring~~ devices required to be <u>installed or</u> maintained." Or it could have simply mimicked or referenced Section 7413(c)(2)(C) in Title II. Congress's choice not to do either shows that it did not intend to implicitly create a whole new class of felon, as the legislative history discussed above makes clear and express. *See Bittner v. United States*, 598 U.S. 85, 98 (2023) (considering that "it would have been the simplest thing for Congress to model its work" as reflecting in another provision,

yet it failed to do so). After all, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

VI. The district court's interpretation of Section 7413(c)(2)(C) violated Ms. Coiteux's due process right to fair notice and the rule of lenity.

The district court's application of Section 7413(c)(2)(C) should additionally be disfavored under the right to fair notice and the rule of lenity.

First, "the Government violates [the guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). Thus, "[p]enal statutes are construed narrowly to insure (sic) that no individual is convicted unless a fair warning (has first been) given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Mourning v. Fam. Publ'ns Serv., Inc.*, 411 U.S. 356, 375 (1973) (internal quotation marks and citation omitted).

Here, two separate branches of government for years told the public that OBD tampering was not criminal. Specifically, three years after the OBD requirement was added to the Act, EPA explained in a public memorandum about the 1990 amendments that "Automobile dealer or repair shop tampering with automotive air emission *systems still cannot be prosecuted criminally under the CAA* since the mobile source regulations impose various compliance certification responsibilities only on automobile manufacturers and not on the dealers."[51] The Congress Research Service later published a paper explaining in connection with the Volkswagen scandal that "Title II of the CAA, which deals with emissions standards for moving sources, does not provide for criminal penalties."[52]

This was consistent with the government's enforcement practice for 30 years.[53] Indeed, unlike Ms. Coiteux, Volkswagen and its agents were

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[51] *Hughes Memo*, *supra* note 1, at 6 (emphasis added); *see also id.* at 5 ("The 1990 Act continued the exclusion of Subchapter II violations from criminal penalties.").

[52] Bill Canis, Richard K. Lattanzio, Adam Vann & Brent D. Yacobucci, Cong. Research Serv., R44372, *Volkswagen, Defeat Devices, and the Clean Air Act: Frequently Asked Questions*, at 9 (2016).

[53] *See, e.g.*, Appendix A to Consent Agreement and Final Order, *In the Matter of David Owens, Holderdown Performance, LLC*, No. CAA-05-2020-0012, at 1 (EPA Region 5, Mar. 16, 2020) (acknowledging that the CAA's "prohibitions against tampering and aftermarket

manufacturers (regulated by Title II), and even *they* were not charged under Section 7413(c)(2)(C) for using defeat devices to evade emission controls in approximately 11 million vehicles worldwide.[54]

Members of the public could not have been expected to have known that the Clean Air Act really meant something other than what the government[55] was saying it meant. Especially in the majority of states that do not have federally required inspection and maintenance programs (*see supra* p. 11), it is doubly unlikely that businesses and residents would suspect they could become felons for merely modifying their own vehicles. EPA has acknowledged that "[t]he CAA was, and indisputably remains, the most complex of the environmental statutes administered by the

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defeat devices are set forth in . . . 42 U.S.C. § 7522(a)(3)," notably excluding mention of Section 7413(c)(2)(C)).

[54] *See supra* note 22. Related to this litigation, the Ninth Circuit decided an appeal in which Volkswagen argued that the CAA preempts state and local efforts to apply anti-tampering laws to their installation of defeat devices in OBDs. *In re Volkswagen*, 959 F.3d at 1205. In considering that question, the Ninth Circuit *only considered the CAA's civil prohibition*. *Id.* at 1208–09, 1216–17, 1221, 1223. Section 7413(c)(2)(C) was not raised or analyzed as relevant to the issue of whether the CAA preempts state law with respect to "tampering with emission control systems."

[55] And environmental scholars. *See supra* note 23.

Agency," such that a "detailed understanding of the CAA regulatory schemes may only be required in the context of specific investigations."[56]

Thus, even if Section 7413(c)(2)(C) is capacious enough to allow the government's about-face, ambushing Ms. Coiteux with it violates the Due Process Clause. *See Bittner*, 598 U.S. at 103 ("If many experienced accountants were unable to anticipate the government's current theory, we do not see how 'the common world' had fair notice of it."); *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (construing a criminal statute narrowly due to due process concerns where the term "official act" was "not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does not encourage arbitrary and discriminatory enforcement") (internal quotation marks omitted); *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974) (reversing a conviction on due process grounds because the statute "use[d] . . . undefined terms of uncommon usage").

Second, this Court should apply the rule of lenity, which exists, in part, to protect against due process violations like the "serious fair-notice problem[s]" here. *See Bittner*, 598 U.S. at 102. "Under the rule of lenity,

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56 *Hughes Memo*, *supra* note 1, at 1.

th[e] [Supreme] Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals." *Id.* at 101. "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain," but "also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

Here, the government's change of views demonstrates there is a fair reading of Section 7413(c)(2)(C) that differs from the one the government is advocating for today. Indeed, it suggests the original reading is the correct one. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."); *Bittner*, 598 U.S. at 97 ("[C]ourts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court.").

Where "the government has repeatedly issued guidance to the public at odds with the interpretation it now asks us to adopt" that "surely

[]counts as one more reason yet to question whether its current position represents the best view of the law." *Id.* The Court should therefore disfavor the government's expansive reading of "monitoring device" and "required to be maintained" in Section 7413(c)(2)(C). And it should construe the provision in favor of the everyday American truck-operator or servicer who should not have to become a specialist in environmental law to understand that modifying her own property or that of her customers could make her a felon.

CONCLUSION

OBDs are not "monitoring devices . . . required to be maintained" under Section 7413(c)(2)(C). Thus, modifying an OBD is not subject to Section 7413(c)(2)(C). The government understood this for the 30 years, during which it told the public that tampering with an OBD is not a criminal act. Its change of heart was not a change of law. Ms. Coiteux's conviction should be reversed.

Date: July 9, 2025

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ADDENDUM

Table of Contents

Constitutional Provision

Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Statutes

Title I of the Clean Air Act

42 U.S.C. § 7413 – Federal enforcement (pertinent excerpts)

(a) In general.

[. . .]

(3) EPA enforcement of other requirements. Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this title, section 303 of title III, title IV, title V, or title VI, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or titles, or for the payment of any fee owed to the United States under this Act (other than title II), the Administrator may—

(A) issue an administrative penalty order in accordance with subsection (d),

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) or section 305, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c).

[. . .]

(b) Civil judicial enforcement. The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person,

commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

> (1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) that such person has violated, or is in violation of, such requirement or prohibition.
>
> (2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this title, section 303 of title III, title IV, title V, or title VI, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this Act, or for the payment of any fee owed the United States under this Act (other than title II).
>
> (3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) has been made.

[. . .]

(c) Criminal penalties.

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 111(e) of this title (relating to new source performance standards), section 112 of this title, section 114 of this (relating to inspections, etc.), section

129 of this title (relating to solid waste combustion), section 165(a) of this title (relating to preconstruction requirements), an order under section 167 of this title (relating to preconstruction requirements), an order under section 303 of title III (relating to emergency orders), section 502(a) or 503(c) of title V (relating to permits), or any requirement or prohibition of title IV (relating to acid deposition control), or title VI (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed the United States under this Act (other than title II) shall, upon conviction, be punished by a fine pursuant to title 18 of the United States Code, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly—

> (A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this Act to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);
>
> (B) fails to notify or report as required under this Act; or
>
> (C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this Act[,]

shall, upon conviction, be punished by a fine pursuant to title 18 of the United States Code, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction

of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this title, title III, IV, V, or VI shall, upon conviction, be punished by a fine pursuant to title 18 of the United States Code, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

[. . .]

(d) Administrative assessment of civil penalties.

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person—

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of title I, III, IV, V, or VI, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this Act, or for the payment of any fee owed the United States under this Act (other than title II); or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

[. . .]

(e) Penalty assessment criteria.

(1) In determining the amount of any penalty to be assessed under this section or section 304(a), the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 307(a), or actions under section 114 of this Act, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

[. . .]

(f) Awards. The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this title or title III, IV, V, or VI of this Act enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer[,] or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

[. . .]

42 U.S.C. § 7414(a) – Recordkeeping, inspections, monitoring, and entry

(a) Authority of Administrator or authorized representative.

For the purpose (i) of developing or assisting in the development of any implementation plan under section 110 or 111(d), any standard of performance under section 111, any emission standard under section 112, or any regulation of solid waste combustion under section 129, or any regulation under section 129 (relating to solid waste combustion), (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this Act (except a provision of title II with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—

(1) the Administrator may require any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this Act (other than a manufacturer subject to the provisions of section 206(c) or 208 with respect to a provision of title II) on a one-time, periodic or continuous basis to—

(A) establish and maintain such records;

(B) make such reports;

(C) install, use, and maintain such monitoring equipment, and use such audit procedures, or methods;

[. . .]

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located [. . .]

Title II of the Clean Air Act

42 U.S.C. § 7521(m)(1) – Emission standards for new motor vehicles or new motor vehicle engines

[. . .]

(m) Emissions control diagnostics.

(1) Regulations. Within 18 months after the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall promulgate regulations under subsection (a) requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of--

(A) accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction, including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

(B) alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

(C) storing and retrieving fault codes specified by the Administrator, and

(D) providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines.

[. . .]

42 U.S.C. § 7522(a)(3)(A) – Prohibited Acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

[. . .]

(3)

(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use;

[. . .]

42 U.S.C. § 7524(a), (b) – Civil penalties

(a) Violations

Any person who violates sections 1 7522(a)(1), 7522(a)(4), or 7522(a)(5) of this title or any manufacturer or dealer who violates section 7522(a)(3)(A) of this title shall be subject to a civil penalty of not more than $25,000. Any person other than a manufacturer or dealer who violates section 7522(a)(3)(A) of this title or any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3)(A), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component. Any person who violates section 7522(a)(2) of this title shall be subject to a civil penalty of not more than $25,000 per day of violation.

(b) Civil actions

The Administrator may commence a civil action to assess and recover any civil penalty under subsection (a) of this section, section 7545(d) of this title, or section 7547(d) of this title. Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred or in which the defendant resides or has the Administrator's principal place of business, and the court shall have jurisdiction to assess a civil penalty. In determining the amount of any civil penalty to be assessed under this subsection, the court shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require. In any such action, subpoenas for witnesses who

are required to attend a district court in any district may run into any other district.

Regulations

40 C.F.R. § 64.1 – Definitions (pertinent excerpts)

[. . .]

Monitoring means any form of collecting data on a routine basis to determine or otherwise assess compliance with emission limitations or standards. Recordkeeping may be considered monitoring where such records are used to determine or assess compliance with an emission limitation or standard (such as records of raw material content and usage, or records documenting compliance with work practice requirements). The conduct of compliance method tests, such as the procedures in appendix A to part 60 of this chapter, on a routine periodic basis may be considered monitoring (or as a supplement to other monitoring), provided that requirements to conduct such tests on a one-time basis or at such times as a regulatory authority may require on a non-regular basis are not considered monitoring requirements for purposes of this paragraph. Monitoring may include one or more than one of the following data collection techniques, where appropriate for a particular circumstance:

(1) Continuous emission or opacity monitoring systems.

(2) Continuous process, capture system, control device or other relevant parameter monitoring systems or procedures, including a predictive emission monitoring system.

(3) Emission estimation and calculation procedures (e.g., mass balance or stoichiometric calculations).

(4) Maintenance and analysis of records of fuel or raw materials usage.

(5) Recording results of a program or protocol to conduct specific operation and maintenance procedures.

(6) Verification of emissions, process parameters, capture system parameters, or control device parameters using portable or in situ measurement devices.

(7) Visible emission observations.

(8) Any other form of measuring, recording, or verifying on a routine basis emissions, process parameters, capture system parameters, control device parameters or other factors relevant to assessing compliance with emission limitations or standards.

Owner or operator means any person who owns, leases, operates, controls or supervises a stationary source subject to this part.

[. . .]

40 C.F.R. § 64.7(a), (b) – Operation of approved monitoring

(a) Commencement of operation. The owner or operator shall conduct the monitoring required under this part upon issuance of a part 70 or 71 permit that includes such monitoring, or by such later date specified in the permit pursuant to § 64.6(d).

(b) Proper maintenance. At all times, the owner or operator shall maintain the monitoring, including but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment.

[. . .]