Official Comments for CARB, On the Record

RE: California Regulation and Certification Procedures for Light-Duty Engine Packages for Use In New Light-Duty Specially-Produced Motor Vehicles for 2019 And Subsequent Model Years

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DATE: May 6, 2019

CARB's Proposed Definition of Replica is Preempted, Unconstitutionally Violates Interstate Commerce, Unauthorized, and Arbitrary and Capricious

CARB's attempted proposed definition of replica in the additional modified text faces four fatal legal challenges:

I. CARB's proposed definition of "replica" is preempted by Federal Motor Vehicle Safety Standards.

II. CARB's proposed definition of "replica" unconstitutionally restricts interstate commerce.

III. CARB's attempt to limit the definition of replica falls completely outside of CARB's jurisdiction and statutory authority.

IV. CARB's proposed definition of replica is inherently arbitrary and capricious.

If CARB attempts to adopt their proposed definition of replica despite these substantial legal roadblocks, we will file suit in Federal Court.[1]

I. Federal Motor Vehicle Safety Standards Preempt CARB's Attempted Revised Definition of Replica

The State of California (through the California Air Resource Board) is attempting to prescribe a standard to define "replica" vehicles that differs from the standard already set under the Federal Motor Vehicle Safety Standards.

Federal Motor Vehicle Safety Standards preempt California from adopting any standard that is not identical to the standard prescribed by Federal Motor Vehicle Safety Standards.

A. California is attempting to adopt a standard that is not identical to one prescribed by Federal Motor Vehicle Safety Standards.

Title 49 U.S. Code § 30114 is under Chapter 301. This section prescribes standards to define "replica" vehicles including applicable motor vehicle safety standards that apply to those vehicles.[2] Title 49 U.S. Code § 30114(b)(7)(B) created a standard to define replica vehicles as follows:

> ''(B) REPLICA MOTOR VEHICLE.—The term 'replica motor vehicle' means a motor vehicle produced by a low-volume manufacturer and that—
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> > ''(i) is intended to resemble the body of another motor vehicle that was manufactured not less than 25 years before the manufacture of the replica motor vehicle; and
> >
> > ''(ii) is manufactured under a license for the product configuration, trade dress, trademark, or patent, for the motor vehicle that is intended to be

[1] CARB, its Board, and all staff members should take these comments as a notice of pending litigation, and are advised to preserve any and all communications, meeting minutes, informal notes, audio recordings, files, etc. related to this proposed regulation generally, and to the proposed definition of replica specifically.

[2] 49 U.S. Code § 30114(b)(1)-(3) (describing applicable safety standards and vehicle labeling requirements), and § 30114(b)(7)(B) (defining "replica" vehicles).

> replicated from the original manufacturer, its successors or assignees, or current owner of such product configuration, trade dress, trademark, or patent rights.[3]

The State of California is proposing, in its third revision, the following standard for definition of "replica":

> "Specially produced motor vehicle" or "SPMV" means a newly produced current model year passenger car or light-duty truck, with a gross vehicle weight rating (GVWR) at or below 8,500 pounds, that meets all of the following requirements:
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> (A) Resembles the body of a motor vehicle, on an overall 1:1 scale (+/- 10 percent) of original body lines, excluding roof configuration, ride height, trim attached to the body, fenders, running boards, grille, hood or hood lines, windows, and axle location, that had been commercially manufactured, during consecutive model years, for sale not less than 25 years after the latest model year, with a production run of at least 50 units of a unique body style, before production of the current model year motor vehicle;[4]
>
> (B) Meets any applicable National Highway Traffic and Safety Administration (NHTSA) provisions requiring the vehicle to be manufactured under a license agreement for the intellectual property rights for the replicated vehicle from the original manufacturer or its current owner, successor or assignee, as determined by NHTSA;
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> (C) Meets any applicable NHTSA requirements regarding vehicle safety, as determined by NHTSA;
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> (D) SPMVs are subject to state titling and registration laws and regulations, including smog check and emissions compliance, and must consider the following:
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> 1. Subject to smog check requirements starting with registrations first made or renewed on or after January 1, 2019.
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> 2. A SPMV shall be treated as a new vehicle for purposes of smog check, resale and previously registered outside the state shall be subject to a smog check inspection upon registration.
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> 3. SPMV manufacturer's name must be listed in state titling and registration information.[5]

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[3] FAST Act §. 24405(b)(7)(B)(i)-(ii) EXEMPTION FOR LOW-VOLUME MANUFACTURERS.— Definitions, as enacted in Title 49 U.S. Code § 30114(b)(7)(B).

[4] CARB Amendment A § 2209.1. Definitions, *available at*: https://www.arb.ca.gov/regact/2018/spmv2018/15daynotice.pdf?utm_medium=email&utm_source=govdelivery

[5] Original proposal available at: https://www.arb.ca.gov/regact/2018/spmv2018/spmvpro.pdf?_ga=2.194678893.1315279371.1556726246-271517307.1537301534 (last accessed May 1, 2019.)

The Standard to define "replica" that the State of California is attempting to prescribe is not identical to the Standard already prescribed by Federal Motor Vehicle Safety Standards.

B. Federal Motor Vehicle Safety Standards Preempt California's proposed standards to define replica

Federal Motor Vehicle Safety standards preempt States from prescribing a standard unless that standard is "identical to the standard prescribed" under Federal Law.

Title 49 U.S. Code § 30103(b) states:

> (1)When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.
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> (2) A State may enforce a standard that is identical to a standard prescribed under this chapter.[6]

The only statutory carve out to this preemption allows for a State to make a law or regulation relating to titling and registration of replicas.[7]

Since Title 49 of the U.S. Code preempts States from prescribing a "standard *applicable to the same aspect of performance* of a motor vehicle or motor vehicle equipment" unless "the standard is identical to the standard prescribed under this chapter,"[8] and since the same Chapter of Title 49 U.S. Code defines "replica" and applicable standards that apply to "replica vehicles,"[9] the State of California, and the California Air Resource Board are preempted from prescribing standards to define "replica" vehicle unless that definition is "identical to the standard prescribed"[10] under 49 U.S. Code, Chapter 301.

II. CARB's proposed definition of "replica" unconstitutionally restricts interstate commerce.

A. California's proposed regulation of replica restricts interstate commerce

Article 1, Section 8 of the U.S. Constitution grants Congress the authority to regulate commerce "among the several states".[11] Courts have inferred that since the power to regulate interstate

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[6] Title 49 U.S.C. § 30103(b) (Referring to Chapter 301, "Motor Vehicle Safety," the same chapter which defines "replica" and defines standards for those "replicas").
[7] 49 U.S. Code § 30114(b)(9).
[8] Title 49 U.S.C. § 30103(b) (emphasis added).
[9] 49 U.S. Code § 30114(b)(1)-(3) (describing applicable safety standards and vehicle labeling requirements), and § 30114(b)(7)(B) (defining "replica" vehicles).
[10] Title 49 U.S.C. § 30103(b).
[11] U.S. Constitution, Article 1, Section 8.

commerce is held by Congress, States are prohibited from passing laws that interfere with interstate commerce. "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.' *Philadelphia* v. *New Jersey,* 437 U. S. 617, 624 (1978)."[12] This is especially true in cases that affirmatively discriminate against interstate commerce as opposed to those that only discriminate incidentally.[13] California's proposed regulation affirmatively discriminates against interstate commerce, banning a product approved for commerce in 49 States.

The Federal Motor Vehicle Safety Standards apply that Congressional authority over interstate commerce to regulate vehicles that may be sold in interstate commerce.[14]

Scuderia Cameron Glickenhaus LLC was granted the right to manufacture for sale into commerce a replica Baja Boot.[15] We have registered and received title for several of these vehicles in New York State, and sold one of these vehicles in New York State. We have real customers who have asked for contracts and would like to purchase our vehicles in the State of California, and we have had to tell those customers the cars are not currently allowed to be registered in the State of California.

California's proposed definition discriminates against interstate commerce because under Federal Law and NHTSA's approval, we are allowed to sell our replica Boots, of which two original Boots were manufactured by General Motors in the 1960s. California's proposed definition defines replica only as a replica of a model when there were originally 50 examples produced. Since there were only two Boots originally produced, California's proposed regulation discriminates against interstate commerce by restricting our right to sell our Boots in California.

B. California's proposed regulation does not advance a legitimate local purpose that cannot be adequately served by non-discriminatory purposes

Once it is established that CARB's attempted standard restricts interstate commerce, the next consideration to determine whether that standard is unconstitutional is: "We still must consider whether either State regime "advances a legitimate local purpose that cannot be adequately served

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[12] Granholm v. Heald, 544 U.S. 460 (2005) (as referenced and upheld by the majority opinion).

[13] Maine v. Taylor, 477 U.S. 131, 138 (1986)("In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.,* 397 U. S. 137, 397 U. S. 142 (1970), statutes in the second group are subject to more demanding scrutiny.")

[14] 49 U.S. Code § 30101 ("The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary—(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment *in interstate commerce*; and")(*emphasis added*); 49 U.S. Code § 30112(a)(1)("Except as provided in this section, sections 30113 and 30114 of this title, and subchapter III of this chapter, a person may not *manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce*, or import into the United States, any motor vehicle or motor vehicle equipment manufactured on or after the date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or equipment complies with the standard and is covered by a certification issued under section 30115 of this title.") (emphasis added)

[15] We were granted the right by NHTSA when, under the law, they approved our application in 2017 for our Low Volume Replica Manufacturer Status, 90 days after it was submitted. We were also granted the right by New York State when they issued a Registration and Title based on our Manufacturer's Certificate of Origin and our 17 Digit VIN, which clearly states that the vehicle is a replica vehicle.

by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U. S., at 278."[16] CARB cited two reasons why their proposed standard could possibly advance a local purpose. I describe each in turn below.

The first reason CARB presented to require an original production run of 50 vehicles was to limit replicas to vehicles "that were our history heritage vehicles."[17] This reasoning was reiterated by CARB staff throughout testimony on the record. "They're cars of our past, heritage classics, and works of art."[18] "These heritage vehicles of our past with designs we all recognize."[19] "CARB was concerned with making sure that the scope was limited, and exclude vehicles that were not production heritage classics."[20] And finally, as described by Vice Chair Berg:

> This proposal will create a process for the certification of newly produced replica cars in California, which are cars that resemble the iconic older cars that we all loved.
>
> That California car culture values the classic cars of the late 50s, the muscle cars of the 60s and 70s, and the sporty and stately convertibles.[21]

The U.S. Supreme Court has found a legitimate local purpose in preventing contamination of fish stocks with parasites from baitfish,[22] but California has presented no case law that suggests that ensuring vehicles are "heritage vehicles" important to the car culture of California is a legitimate local interest. We do not believe that the State of California wishing to regulate commerce only to those vehicles that are "heritage vehicles" is a legitimate local interest.

Nevertheless, even if a legitimate local interest is found, there is still no basis for excluding sales of replica Baja Boots, as the Baja Boot was unquestionably an iconic vehicle with heritage value. The original Boot is a car designed by Vic Hickey, the man who designed the lunar rover that is sitting on the moon. It was raced by Steve McQueen and Bud Edkins in the inaugural Baja 1000 race. The Boot has significant historical impact to California culture despite the fact that there were

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[16] Cited and supported by (Granholm v. Heald, 544 U.S. 460 (2005). Also, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)("Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[17] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534

[18] Air Resources Engineer Muradliyan, "Official transcript, CARB Meeting October 25, 2018," 220. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[19] *Id*.

[20] *Id*. at 223.

[21] CARB Vice Chair Berg, "Official transcript, CARB Meeting October 25, 2018," 217. (Official statements on the record.)

[22] Maine v. Taylor, 477 U.S. 131, 148-49 (1986).

only 2 original Boots produced as opposed to an arbitrary number of 50, and therefore sales of replica Boots in interstate commerce should not be discriminated against by CARB.

The second argument put forth by California for why they wanted to limit replicas to those cars of which 50 were originally produced is ease of enforcement. "When industry asked us to consider this rule, we wanted to keep it limited to those vehicles that we could identify, that were recognizable to us."[23] CARB continued this alleged justification in their notification of revised additional text, which stated:

> Limitations on historical production numbers and on design are needed to help CARB staff efficiently and effectively confirm proposed vehicles for certification are actually replica vehicles, rather than one-offs. Without such limitations, staff would need to engage in complex and subjective investigations and determinations regarding the status of each vehicle for which certification is sought. These provisions allow CARB staff to efficiently determine whether vehicles are in fact eligible.[24]

Whether or not ease of enforcement is a legitimate local concern is up for debate. The other 49 States have not seen this as a concern. New York State, for example, has already registered several replica vehicles that were based on original models where there were fewer than 50 vehicles produced. The Courts have looked at whether a State is the only state with a certain regulation as a factor that "casts doubt" on the existence of a legitimate local purpose.[25]

C. Even if California presented a legitimate local interest, the regulation unconstitutionally violates interstate commerce because such a purpose could be adequately served by less restrictive means

Even if a court upheld that restricting sales to "heritage classics" or that reduced effort in enforcement were legitimate local concerns, the analysis for the whether such a regulation is a violation of the Constitution then becomes the third part of the standard described under Hughes v. Oklahoma, which asks "whether alternative means could promote this local purpose as well without discriminating against interstate commerce."[26] California's justification fails to meet this standard, as there are three reasonable nondiscriminatory alternatives that California could use to ensure that the vehicles were "replicas", other than for State officials to become familiar with every vehicle over 25 years old, where there were originally more than 50 manufactured. Under the

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[23] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534. Continued on page 236 ("So now if someone wants to build a replica Tucker, which we can -- we can verify. We know what it looks like, and we know where it was produced, and so that way it will save some -- a lot of effort when it comes to implementing this rule.")

[24] CARB Notice of Public Availability of Modified Text and Availability of Additional Documents, page 3, *Available at* https://www.arb.ca.gov/regact/2018/spmv2018/15daynotice.pdf?utm_medium=email&utm_source=govdelivery (last accessed May 2, 2019).

[25] *E.g.* Maine v. Taylor, 477 U.S. 131, 143 (1986).

[26] Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)(describing three step standard to determine whether a state law that discriminates against interstate commerce is unconstitutional).

FAST Act, and its enacted sections in the Federal Motor Vehicle Safety Standards, the law makes the following requirements, any of which could be used by the State of California to easily ensure enforcement without needing to make decisions about whether a car was or was not a replica.

First, the FAST Act mandates that:

> A) In general.-The Secretary shall require a low-volume manufacturer to affix a permanent label to a motor vehicle exempted under paragraph (1) that identifies the specified standards and regulations for which such vehicle is exempt from section 30112(a), states that the vehicle is a replica, and designates the model year such vehicle replicates.[27]

This label could easily allow California to determine that a vehicle was a replica under the FAST Act.

Second, the FAST Act mandates that:

> The Secretary shall maintain an up-to-date list of registrants and a list of the make and model of motor vehicles exempted under paragraph (1) on at least an annual basis and publish such list in the Federal Register or on a website operated by the Secretary.[28]

The State of California could easily check a vehicle against this published list to confirm that the vehicle was indeed a "replica" under the FAST Act.

Finally, these "replica" vehicles are being produced by NHTSA-Approved Low-Volume Manufacturers, who create 17-digit VINs that indicate the vehicle is a low volume replica vehicle. The State of California could run a vehicle's VIN through NHTSA's website: https://vpic.nhtsa.dot.gov/decoder/ and they would clearly see vehicle information displayed. For example, if California ran the VIN of our New York State registered Replica Boot, 4S9SCJBH8LC454000 (Model year 2020), it would show the vehicle information with no error code. Only NHTSA-approved low volume replica manufactures would be able to produce such 17 digit VINs for replica vehicles. Running a VIN attached to a license plate is standard practice for checking a vehicle's legality, and is unquestionably an alternative means of achieving California's local enforcement interest in a way that is less restrictive to interstate commerce.

The FAST Act's definition of replica also inherently ensures that a vehicle is of historical relevance by providing that the vehicle must be based on a model over 25 years old. Restricting the definition of replica to runs of at least 50 vehicles does not guarantee that a proposed replica will "resemble the iconic older cars that we all loved", and therefore does not effectively promote CARB's stated local concern of promoting heritage vehicles. Deferring to the FAST Act's existing definition of replica is an equally effective, reasonable and nondiscriminatory alternative to CARB's proposed restrictive definition.

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[27] 49 USC 30114(b)(3)(A).
[28] 49 USC 30114(b)(5).

Thus, there is no burdensome need for California State officials to become familiar with every vehicle over 25 years old, or determine if there were more or less than 50 models originally manufactured. The FAST Act, and its enacted sections in the Federal Motor Vehicle Safety Standards, already provide a simple, efficient, reasonable and nondiscriminatory alternative method by which the State of California could efficiently ensure proposed vehicles for certification are actually eligible replica vehicles. Therefore, even if CARB's stated local concerns are legitimate, CARB's proposed limitations on historical production numbers and design unconstitutionally discriminate against interstate commerce because there are reasonable nondiscriminatory alternatives that California could use to ensure that replicas meet such stated local interests. Therefore, if enacted, CARB's proposed definition of replica would create an unconstitutional discrimination of interstate commerce.

III. CARB lacks legal authority or jurisdiction to limit the definition of "replica" in this regulation from the definition of replica provided by the federal FAST Act, because the definition has no impact on air pollution in California

CARB's jurisdiction and statutory authority granted to it under the California Health and Safety Code, Division 26, Air Resources is limited to controlling and regulating air pollution.[29] However, according to CARB Board testimony on the record, the definition does not impact air pollution.

A. The definition of replica for this regulation has no impact on air pollution in California, and is therefore outside of CARB's authority or jurisdiction

The federal government has already defined "replica" vehicle for the purpose of low volume manufacturers or, "SPMV" manufacturers with regard to their air pollution requirements.

Under CARB's proposed regulation, "replica" vehicles will meet "all the exhaust and evaporative emission requirements of a new vehicle," including the Smog Check Program according to ECARS Division Chief Herbert's testimony on the record.[30]

Board Member Sherriffs asked on the record:

> Just to clarify to be sure I understand. This is not like the glider program? These are vehicles that are required to meet current emission standards. So if I buy one of these, it's comparable in terms of emissions to, as if I go buy a 2019 whatever in terms of fleet emissions, yes?[31]

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[29] HEALTH AND SAFETY CODE – HSC DIVISION 26. AIR RESOURCES, PART 2. STATE AIR RESOURCES BOARD [39500 - 39944], CHAPTER 3. General Powers and Duties [39600 - 39619.8]) HSC Division 26, Part 5 Chapters 1-2 43000 – 43024, 43100 - 43214], Chapter 5,

[30] ECARS Division Chief Herbert, "Official transcript, CARB Meeting October 25, 2018" 237 (Stated "little bit of OBD concessions," required for the placement of fuel lines and fuel tanks is "nothing that we're concerned is going to cause emission -- you know, negative emission impacts...But they're in the Smog Check Program. So if there's any failures, they're -- they're held to the same requirements as any other new vehicle with just a couple of OBD concessions given for flexibility for builds.") (comments on the record) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[31] Board Member Sherriffs, "Official transcript, CARB Meeting October 25, 2018" 236.

ECARS Division Chief Hebert answered on the record, "Yes, that's correct. It meets all the exhaust and evaporative emissions requirements of a new vehicle, just any other new vehicles."[32]

Air Resources Engineer Muradliyan further reinforced this point when he stated, "Overall, the regulation would not pose any potential significant adverse impacts as further discussed in the Initial Statement of Reasons."[33]

Replicas will have the same requirements and impact on air pollution as new non-replica vehicles. Therefore, whether or not a vehicle is a replica, and the definition of replica, have no impact on air pollution in California.

Since the definition of "replica" has no impact on air pollution in the State of California, changing the definition of "replica" from the Federal FAST Act definition is outside the jurisdiction and statutory authority granted to CARB.

B. CARB's stated reasons for its attempt to limit the definition of replica have nothing to do with regulating air pollution, or are contradicted by its own testimony on the record, and therefore CARB lacks jurisdiction to redefine replica

CARB admitted on the record that it wanted to limit the definition of "replica" from the FAST Act definition, not for air pollution regulation, but for cultural reasons. As AIR RESOURCES ENGINEER MURADLIYAN testified on the record to Board:

> Industry would like a broad -- to broaden the scope of what -- of that which qualifies as an SPMV. CARB was concerned with making sure that the scope was limited, and exclude vehicles that were not production heritage classics.[34]

Whether or not a vehicle is a production "heritage classic" has nothing to do with CARB's statutory authority to regulate air pollution. This justification for CARB's attempt to limit the definition of replica for reasons that have nothing to do with air pollution were further reinforced by ECARS Emissions Compliance Branch Chief Lourenco when he testified on the record:

> Sure. So when -- the FAST Act, from what I understand, it was basically -- it's pretty broad about how the industry can produce a vehicle to bring in. When industry asked us to consider this rule, we wanted to keep it limited to those vehicles that we could identify,

[32] ECARS Division Chief Herbert, "Official transcript, CARB Meeting October 25, 2018" 236. *See supra* note 30.
[33] Air Resources Engineer Muradliyan, "Official transcript, CARB Meeting October 25, 2018," 223. (Official statements on the record.)
[34] Air Resources Engineer Muradliyan, "Official transcript, CARB Meeting October 25, 2018," 223. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

> that were recognizable to us, that were our history heritage vehicles.[35]

CARB's only attempt at connecting its redefinition of replica to its authority to regulate air pollution is as follows:

> And so we wanted to make sure that there wasn't a circumvention of our light-duty vehicle regulations for vehicles that were one-offs or show cars, things that we could not verify that they were -- they were real vehicles.
>
> So what we had done is we -- our definition is, like I said, more limited. It has a production limit. Initially, we had set that production limit at 500. So those would be vehicles that a manufacturer would have at least produced 500. We could verify them.[36]

Yet, this weak attempt by CARB to show that redefining "replica" relates to regulating air pollution is contradicted by its own testimony on the regulation. Under the proposed regulation, "replica" vehicles will meet "all the exhaust and evaporative emission requirements of a new vehicle," including the Smog Check Program according to ECARS Division Chief Herbert's testimony on the record.[37] Since the air pollution requirements of a new light duty vehicle would be essentially identical to the air pollution requirements for a "replica,"[38] whether or not a particular vehicle is a replica would not allow a manufacturer to circumvent California's light duty regulations.

Whether a vehicle is "identifiable" or "recognizable" to CARB, or whether it falls into CARB's idea of "our history heritage vehicles" again has nothing to do with CARB's statutory jurisdiction to regulate air pollution. Verification of whether the vehicles were "real vehicles" could easily come from three less restrictive methods, as described above in Section II.C., such as running the vehicle's VIN, which could show that the vehicle was manufactured under the 2015 FAST Act. A vehicle that was not a replica under the FAST Act or a brand-new vehicle under NHTSA would have no mechanism for receiving a new 17-digit VIN. Therefore, CARB has no reason or justification for changing the definition of replica from the FAST Act's definition.

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[35] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[36] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[37] ECARS Division Chief Herbert, "Official transcript, CARB Meeting October 25, 2018," 236-37. (Stated CARB made a "little bit of OBD concessions," required for the placement of fuel lines and fuel tanks is "nothing that we're concerned is going to cause emission -- you know, negative emission impacts...But they're in the Smog Check Program. So if there's any failures, they're -- they're held to the same requirements as any other new vehicle with just a couple of OBD concessions given for flexibility for builds.") (Official statements on the record.)

[38] *Id.*

Therefore, the definition of replica has no impact on air pollution in California and CARB lacks statutory authority or jurisdiction to redefine replica.

IV. CARB's proposed definition of "replica" is inherently arbitrary and capricious

According to the 9th Circuit Court of Appeals, a decision is Arbitrary and Capricious:

> only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[39]

In CARB's case, its proposed regulation and definition of replica is arbitrary and capricious for all three reasons.

First, CARB's proposed regulation mandates that the original vehicle being replicated must have had a minimum production run of at least 50 units to qualify as a replica, without any logical or justifiable basis for determining this restrictive number of units. In doing so, CARB is relying on factors that Congress did not intend to consider, and runs counter to evidence in front of the agency. Second, CARB's proposed regulation is written so that it obstructs CARB's stated purpose that regulation was intended to solve. This runs counter to the evidence before the agency and fails to consider an important aspect of the problem.

A. CARB proposes an arbitrary minimum production run of 50 Units without any logical or justifiable basis for determining this restrictive number of units

The arbitrariness of the minimum production run requirement is highlighted by the fact that CARB at first proposed a 500-unit minimum production of the original car.[40] Evidence of the arbitrary nature of CARB's attempt to require a minimum number of vehicles is the fact that between the initial statement of reasons and the presentation to the Board on October 25, 2018, CARB changed this minimum number of original vehicles from 500 to 50.[41] As CARB attempted to justify this change:

> We dropped it down to 50, because there were some people who wanted a Tucker. So I think that was a car from the forties and they produced 51.[42]

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[39] 9th Circuit Court of Appeals, Guides and Standards of Review, 2012, page IV-2 (Citations omitted) *available at* https://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.pdf

[40] CARB's Proposed Regulation § 2209.1(17)-(A).

[41] ECARS Emissions Compliance Branch Chief Lourenco, "Official Transcript of CARB Meeting October 25, 2018," 235-36, *available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[42] *Id.* at 236.

It is inherently arbitrary and capricious to change from 500 to 50 original vehicles manufactured. The fact that a Tucker was previously excluded for no reason shows that any number of original units (more than one original car) is arbitrary.

Other alleged reasons stated by CARB for requiring a minimum number of 50 are equally as capricious. "CARB was concerned with making sure that the scope was limited, and exclude vehicles that were not production heritage classics.[43]" "When industry asked us to consider this rule, we wanted to keep it limited to those vehicles that we could identify, that were recognizable to us, that were our history heritage vehicles.[44]" CARB also stated:

> So what we had done is we -- our definition is, like I said, more limited. It has a production limit. Initially, we had set that production limit at 500. So those would be vehicles that a manufacturer would have at least produced 500. We could verify them.[45]

CARB's reasoning for requiring a minimum production run of 500 or 50 units in order to limit replicas to "production heritage classics" or "history heritage vehicles" is equally as arbitrary and capricious.

The most iconic, well known cars in the world, the cars that define "heritage classic" or "history heritage vehicles" often had fewer than 500 or 50 examples produced. The Ferrari 250 GTO is one of the most famous and recognizable cars in the world.[46] People build and sell replica Ferrari 250 GTOs.[47] Yet, there were fewer than 40 originals built.[48] One of the most expensive and historically significant cars in the world, the Bugatti Type 57 Atlantic, there were only four original cars produced. [49] CARB is being arbitrary and capricious to state that a Tucker is a "historical heritage classic vehicle, but that a Ferrari 250 GTO, or a Bugatti Type 57 Atlantic somehow do not qualify

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[43] Air Resources Engineer Muradliyan, "Official transcript, CARB Meeting October 25, 2018," 223. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[44] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[45] ECARS Emissions Compliance Branch Chief Lourenco, "Official transcript, CARB Meeting October 25, 2018," 235. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

[46] *See*, Amos Kwon, "Here to Eternity: The 50 Most Iconic Cars in Motoring History" December 2, 2011, Gear Patrol. Available at https://gearpatrol.com/2011/12/02/feature-here-to-eternity-the-50-most-iconic-cars-in-motoring-history/

[46] Initial Statement of Reasons, 2, *available at* https://www.arb.ca.gov/regact/2018/spmv2018/spmvisor.pdf.

[47] Howlett, Dan, "Hand Made Ferrari 250 GTO: Man Builds Perfect Replicas of Classic Cars," BARCROFT, http://cars.barcroft.tv/replica-of-thirty-eight-million-dollar-ferrari-built-in-chicken-shed-new-zealand

[48] *Aaron Severson* https://autoweek.com/article/car-life/exactly-how-many-ferrari-250-gtos-were-built July 31, 2014 Autoweek "Exactly how many Ferrari 250 GTOs were built?"

[49] Kurt Ernst, "The $114 million barn find (that has yet to be found)" February 26, 2019, Hemmings, *Available at* https://www.hemmings.com/blog/2019/02/26/the-114-million-barn-find-that-has-yet-to-be-found/

as such a "production heritage classic." CARB is ignoring facts that were in front of it on the Record.[50]

Any argument CARB proposed on providing a minimum number of 500 or 50 vehicles to ensure the vehicle could be "verified" is equally as arbitrary and capricious. First, California has provided no evidence that it is easier to "verify" that a Tucker existed than to verify that a Ferrari 250 GTO, or a Bugatti Type 57 existed. Second, as explained in Section II.C. above, there are three other easier mechanisms the state of California could use to "verify" such cars existed than to require an arbitrary original production run of 50 vehicles.

In CARB stating that it is attempting to regulate "heritage classics" CARB is attempting to rely on factors Congress had no intention of regulating when it created the FAST Act. Furthermore, CARB is ignoring evidence in front of it because it has written notification that some "heritage classics" originally had fewer than 50 units produced.[51] CARB's definition of replica is arbitrary and capricious.

B. CARB's proposed definition of replica is so capricious it prevents the regulation from meeting its stated goal.

The original proposed 500-unit original production requirement would have prevented the regulation from meeting its stated goal, and so does the revised proposed 50-unit original production requirement.

Discussion on the record of CARB's stated purpose is as follows:

"The objective of the proposed regulation is to create a path for manufacturers to sell low emitting replica cars in California as new vehicles."[52]

The "Problem that the proposal is intended to address" is to "establish a certification process for new light-duty certified engine packages for use in an SPMV" for SPMV manufacturers selling up to 325 vehicles per year under the Fixing America's Surface Transportation Act (FAST Act).[53] Furthermore, "Staff anticipates NHTSA will verify that a SPMV manufacturer is qualified to produce SPMVs and that per the FAST Act's language, the SPMV produced resembles the body of another motor vehicle that was made at least 25 years ago."[54]

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[50] Jesse Glickenhaus, "Official transcript, CARB Meeting October 25, 2018," 225-28. (Official statements on the record.)(Describing the original and replica Boots, the fact that there were only 2 originally produced, and the fact that the vehicles had clear historical heritage) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534

[51] *Id. Also*, Email sent by Jesse Glickenhaus to Mary Nichols, CARB Board Chair, Sandra Berg, CARB Vice Chair, CARB Automotive Related Member Daniel Sperling, CARB Chief Legal Counsel Ellen Peter and others at CARB on December 19, 2018.

[52] Notice of Public, 3, *available at* https://www.arb.ca.gov/regact/2018/spmv2018/spmvnotice.pdf. *See*, Amos Kwon, "Here to Eternity: The 50 Most Iconic Cars in Motoring History" December 2, 2011, Gear Patrol. Available at https://gearpatrol.com/2011/12/02/feature-here-to-eternity-the-50-most-iconic-cars-in-motoring-history/

[53] Initial Statement of Reasons, 2, *available at* https://www.arb.ca.gov/regact/2018/spmv2018/spmvisor.pdf.

[54] *Id*. at 3, emphasis added.

The restrictive 500-minimum definition proposed by CARB would have prevented CARB from achieving its own stated goals. To illustrate, CARB has used the example of an SPMV who wishes to make Ford GT40s.[55] The Ford GT40s clearly fit the FAST Act's definition (and intention of the Act) but do not meet CARB's more restrictive definition. Ford only manufactured 87 Ford GT40s in the 1960s: Ford manufactured nowhere close to the 500 cars required by the initial proposed regulation's definition.[56] It is also arguable about whether or not they were manufactured "for sale" as required by the proposed CARB definition. Most were manufactured for racing, and although approximately 30 road-legal versions were produced, it was more for the requirement of meeting the homologation racing rules than for the purposes of producing them for sale. When they were produced, Ford had difficulty selling any. Yet the Ford GT40s clearly meet the FAST Act's definition (without the requirements of "manufactured for sale," without the restriction on the "1:1 scale (+/- 10 percent)", and without the restriction of "with a production run of at least 500 units".

CARB's revised proposed 50-unit original production is still so arbitrary and capricious that it prevents CARB from achieving the regulation's stated purpose.

Scuderia Cameron Glickenhaus LLC is a NHTSA-approved SPMV Manufacturer (Low Volume Manufacturer) whose models have already been accepted and approved by NHTSA in our application and also in our NHTSA-approved VIN decoder,[57] but whose models do not meet the proposed CARB regulation's SPMV definition.

For example, our new Baja Boot is based off and "intended to visually resemble" the original 1967 General Motors Baja Boot, and meets the FAST Act's replica definition. The replica Boot has been approved by NHTSA,[58] and several replica Boots have been registered and titled by New York State for sale. However, the vehicle would not meet CARB's proposed regulations because only

[55] *Id*. at 1; Notice of Public Hearing, 3, available at https://www.arb.ca.gov/regact/2018/spmv2018/spmvisor.pdf .
[56] Keeshin, Ben, "Watch This Le Mans-Winning Ford GT40 Being Restored to Perfection," THE DRIVE, June 7, 2016, http://www.thedrive.com/vintage/3859/watch-this-le-mans-winning-ford-gt40-being-restored-to-perfection.
[57] 49 U.S.C. § 30114(b)(1)("The Secretary shall" exempt low volume replica manufacturers from various FMVSS.) Under the FAST Act, it is not required that the Secretary create regulations for its implementation. FAST Act Section 24405(c)("IMPLEMENTATION.—Not later than 12 months after the date of enactment of this Act, the Secretary of Transportation and the Administrator of the Environmental Protection Agency shall issue such regulations *as may be necessary* to implement the amendments made by subsections (a) and (b), respectively.)(emphasis added). Since the Secretary created no regulations in the congressionally mandated timeframe, under the law, no regulations were needed for manufacturers to submit to the Secretary. We submitted our application to the Secretary in the winter of 2017. Under 49 U.S. Code § 30114(b)(5) it was deemed approved 90 days later, around spring 2017.("The Secretary shall have 90 days to review and approve or deny a registration submitted under paragraph (2). If the Secretary determines that any such registration submitted is incomplete, the Secretary shall have an additional 30 days for review. Any registration not approved or denied within 90 days after initial submission, or 120 days if the registration submitted is incomplete, shall be deemed approved."). *See*, NHTSA, https://vpic.nhtsa.dot.gov/MfrPortal/Manufacturers/SubmissionDetails/6361?h=1.
[58] NHTSA VIN Decoder https://vpic.nhtsa.dot.gov/decoder/ running Replica Boot VIN 4S9SCJBH8LC454000 (Model year 2020) shows the information for the vehicle.

two were originally produced by GM, which is fewer than 50.[59] See the two photos for a visual example.

[59] Mate Petrany, "Jim Glickenhaus is Creating a Modern Take on Steve McQueen's Baja Boot," Road & Track, July 16, 2018, available at https://www.roadandtrack.com/new-cars/future-cars/a19057557/jim-glickenhaus-baja-boot/ (last accessed May 6, 2019).

Original Baja Boot

New SPMV Boot that is NHTSA-Approved/compliant but which does not meet proposed CARB SPMV Definition

If the CARB proposed regulation's definition of SPMV differs and is more restrictive than the definition under the FAST Act, SPMV manufacturers may have 49-state legal SPMVs with no mechanism to make these vehicles legal in California.

We are producing replica Baja Boots, a car designed by Vic Hickey, the man who designed the lunar rover that is sitting on the moon. This vehicle is certainly a historically significant vehicle. In fact, there will be a multi-page article in an upcoming magazine covering the 50th anniversary of the Baja 500.

CARB's attempt to limit the original production run to 50 vehicles prevents the regulation from meeting its own stated purpose, of allowing vehicles manufactured under the FAST Act to be sold in California.[60] This runs counter to evidence that was before the agency,[61] and fails to address an important aspect of the problem, namely, CARB's stated purpose of the regulation.

A regulation that blocks its stated objective from being achieved is arbitrary and capricious.

V. Conclusion

Scuderia Cameron Glickenhaus LLC is a NHTSA-Approved Low Volume Manufacturer. We would love to build our replica Boots in California and also to sell and service our cars in California. The purpose of CARB's proposed regulation is to allow this to happen. Yet, by attempting to limit the definition of replica from the definition in the FAST Act, CARB is blocking its regulation from achieving its own stated goal. CARB's proposed language has four fatal flaws.

First, Federal Motor Vehicle Safety Standards already prescribe standard for replicas, and the law preempts states from adopting any standards that are not identical.

Second, California's attempted definition of replica unconstitutionally restricts interstate commerce, and even if legitimate local interests were being protected, there are less restrictive methods of achieving those goals that do not block interstate commerce.

Third, CARB lacks the statutory authority and jurisdiction to limit the definition of replica in this regulation from the definition of replica provided by the FAST Act.

Finally, CARB's attempt to limit the definition of replica is arbitrary and capricious.

CARB may propose procedures for testing and certifying engines to be used in replica vehicles as long as CARB keeps the definition of replica identical to the definition provided in the Federal FAST Act.

Overall, Scuderia Cameron Glickenhaus LLC is excited to work with CARB to produce CARB-compliant, California-legal SPMVs for sale in California as long as the language of the proposal's definition of replica/SPMV is identical to the definition in the FAST Act.

If CARB passes this regulation using the definition of replica from the FAST Act, it will bring jobs both in manufacturing and in auto dealerships to the State of California. Scuderia Cameron

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[60] Notice of Public, 3, *available at* https://www.arb.ca.gov/regact/2018/spmv2018/spmvnotice.pdf. Initial Statement of Reasons, 2, *available at* https://www.arb.ca.gov/regact/2018/spmv2018/spmvisor.pdf.

[61] See Jesse Glickenhaus, "Official transcript, CARB Meeting October 25, 2018," 225-28. (Official statements on the record.) *Available at* https://www.arb.ca.gov/board/mt/2018/mt102518.pdf?_ga=2.257062536.2037626375.1545241202-271517307.1537301534.

Glickenhaus LLC is committed to invest over $500,000 during the next 12 months starting immediately, if this regulation is adopted with a definition of replica identical to that in the FAST Act. Scuderia Cameron Glickenhaus LLC also has plans starting in 2020 to spend at least $10 million per year in the State of California for further designing, engineering, development and manufacture of these SPMVs if CARB adopts this regulation with an identical definition of replica to that of the FAST Act, thus allowing Scuderia Cameron Glickenhaus LLC to have a SPMV that is CARB-compliant and legal in the State of California.

We are hopeful that CARB adopts this regulation with a definition of replica identical to that in the FAST Act. If this happens, Scuderia Cameron Glickenhaus LLC can begin investing immediately in these vehicles within the State of California.