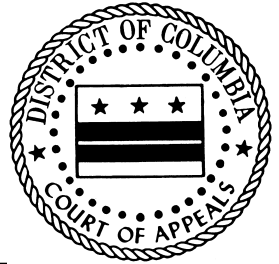


Appeal No. 24-CV-718



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**DISTRICT OF COLUMBIA
COURT OF APPEALS**

MATTHEW JOSEPH RICCIARDI,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

Appeal from the Superior Court of the District of Columbia
Case No. 2023-CAB-6981

REPLY BRIEF OF APPELLANT

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Date: May 8, 2025

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REPLY TO THE DISTRICT'S BRIEF

The District of Columbia's brief ("D.C. Br.") is most remarkable for what it does not say. The District does not purport to prove by clear and convincing evidence that Appellant's vehicle was *actually* travelling 11–15 MPH over the speed limit, as charged. Instead, the District offers three purely legal arguments: (1) the agency satisfied the heightened burden of proof imposed by the legislature because the agency's own calibration regulation declared its speed measurement to be literally perfect as a matter of law "even if it might not be 100% accurate in fact"; (2) Appellant did not proffer any "competent contrary evidence"; and (3) the penalty table requires the same \$100 fine regardless of whether the District proved the infraction charged. The District is wrong on all three counts.

A. The District cannot rely on its agency's own calibration regulation to satisfy a heightened burden of proof imposed by the legislature.

The District charges Appellant with speeding 11–15 MPH over the limit in a 50-MPH zone. Notice of Infraction, App'x at A8. To sustain that charge, the District must prove "by clear and convincing evidence" that Appellant's vehicle was travelling at least 61 MPH. D.C. Code § 50-2302.06(a). The District says it meets that heightened burden of proof because the Department of Motor Vehicle's own calibration regulation, 18 DCMR § 1035.2, creates a legal fiction: "if the [calibration] criteria are satisfied, the camera's output is *treated* as accurate in law, even if it might

not be 100% accurate in fact.” D.C. Br. at 10, 15 (emphasis original). The District is wrong for at least three reasons.

First, the plain text of the calibration regulation says no such thing. The calibration regulation provides, in relevant part, “A photo radar device shall be *deemed to be calibrated correctly and in proper working order* if ... a Unit Deployment Log for the device ... [i]ndicates that the tuning fork reading was accurate to plus or minor one (1) mile per hour...” 18 DCMR § 1035.2(b) (emphasis added). Citing Black’s Law Dictionary, the District contends that the word “deemed” in the calibration regulation *necessarily* implies the creation of a legal fiction that its photo radar devices measure with literally perfect accuracy. D.C. Brief at 15. The reason for the District’s optimistic interpretation is obvious: it solves the District’s problem of proving close speeding cases, like this one, under a clear and convincing standard when the speed measurements of its cameras are, in truth, too coarse to meet that heightened burden.¹

¹ The District also contends that the Notice of Infraction “does not refer to a measurement” but rather “asserts an ultimate fact” about the velocity of Appellant’s vehicle—and, therefore, should be read without regard to the margin of error. D.C. Br. at 13. The District’s contention is not credible—how else would a speed camera determine a vehicle’s speed but by measuring it? The agency itself confirmed that the Notice of Infraction refers to a speed measurement. Final Order, App’x at A5 (“Appellant’s vehicle was the vehicle *being measured*, as evidenced by the yellow box covering the rear tag in the photographs [on the Notice of Infraction].”) (emphasis added).

Unfortunately, the plain language of the calibration regulation does not support the District’s self-serving interpretation. The calibration regulation says nothing at all about creating a legal fiction or perfect accuracy. *See Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) (“[I]t is axiomatic that words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.”) (internal quotation omitted). And, in urging its strained interpretation, the District conveniently omits the second part of Black’s “deem” definition: “To consider, think or judge.” The far more “ordinary” and “common” interpretation of the calibration regulation is simply that the agency “considers” an ATES speed camera to be “in proper working order” when it is tested and determined to be accurate to ± 1 MPH. The device is then fit for use—not as an impossibly perfect speed measuring device, but instead still subject to its acknowledged and unavoidable margin of error. *See infra* § B. Reading the calibration regulation as a standard for use is also consistent with the agency’s own Final Order in this case. App’x at A4 (“If the reading of the radar during testing is not within plus or minus one [mile per hour] to the speed of the tuning fork, then tickets are not issued.”).

Second, even if the agency meant to create a legal fiction by its calibration regulation, the District cites no authority for the proposition that an agency can satisfy a heightened burden of proof *imposed by the legislature* through a *regulation*

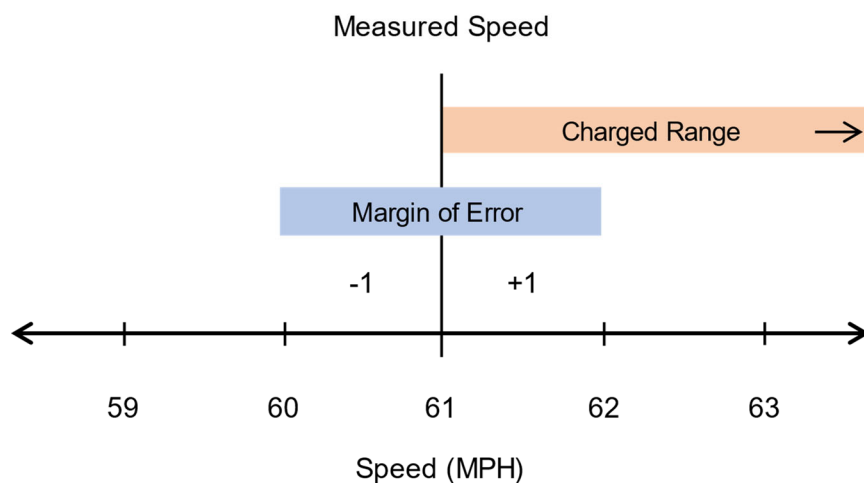
declaring its own evidence to be perfect as a matter of law. Tellingly, the *Rogers* and *Agomo* cases cited by the District, D.C. Br. at 12–13, both involve *statutory* presumptions, not legal fictions declared by the prosecuting agency itself. The District again omits a critical part of Black’s definition: “*The legislative branch* may create an evidential presumption....” *Compare* D.C. Br. at 12 (italicized portion omitted). It is axiomatic that agency implementing regulations cannot override their authorizing statutes. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 392 (2024) (agency actions “inconsistent with the law” must be “set aside”).²

Third, even if the Court finds the District’s interpretation of the calibration regulation to be plausible, “[i]t is well-established that criminal statutes should be strictly construed and that ambiguities should be resolved in favor of the defendant (*i.e.*, the Rule of Lenity).” *Belay v. District of Columbia*, 860 A.2d 365, 367 (D.C. 2004). While generally applied in the criminal context, the Rule of Lenity also

² The underlying statute says nothing about deeming ATES speed camera images to be perfectly accurate. *See* D.C. Code § 50-2209.01(b) (“Recorded images taken by an automated traffic enforcement system are *prima facie* evidence of an infraction and may be submitted without authentication.”). Appellant has never disputed the authenticity of the images or objected to their use as evidence. *See* Appellant’s Brief at 12 n.3. But the images do not establish the infraction charged; they establish the lesser infraction of speeding 6–10 MPH over the limit. *See id.* at 14. For the heightened burden of proof imposed by the legislature, D.C. Code § 50-2302.06(a), to have meaning, Section 2209.01(b) must be read to mean that the images are *prima facie* evidence of the infraction *actually demonstrated* by the images, not whatever infraction the District chooses to print on the Notice of Infraction.

applies to civil traffic infractions. *Whitfield v. United States*, 99 A.3d 650, 656 n.14 (D.C. 2014) (“...we also think that it is within the spirit of the law to apply the rule of lenity to civil traffic regulations...”)³ The Rule of Lenity thus also favors reading the agency’s calibration regulation as establishing a minimum standard for use, not creating a legal fiction that the agency’s evidence is perfect.

Without the benefit of its agency’s self-created legal fiction of perfection, the District cannot, of course, meet its burden to prove the charged speeding infraction by clear and convincing evidence because the margin of error extends equally below and within the charged range,



³ The District also contends that “deeming” ATES speed camera measurements to be perfect as a matter of law is necessary to maintain the “efficiency” of the District’s speed camera enforcement program. D.C. Br. at 15–16. As a legal matter, the District’s desire for efficiency does not lessen its burden of proof. More practically, when, as here, the margin of error extends across two charging ranges, the obvious—and efficient—solution is simply to charge the lower speeding range, as suggested by the Superior Court below. Order Granting Appeal, App’x at A15 n.3 (vacated).

and a coin flip is not clear and convincing evidence. The Court need go no farther to reverse the agency's Final Order and dismiss the Notice of Infraction.

B. Appellant *has* proffered evidence that the margin of error of the camera at issue is ± 1 MPH and, therefore, extends below the charged range.

Even if the Notice of Infraction is “deemed” to be sufficient *prima facie* evidence that Appellant’s vehicle was travelling at *exactly* 61 MPH as matter of law, the District acknowledges that Appellant can rebut that “legal fiction” by proffering “competent contrary evidence.” D.C. Br. at 13. Then, “the factfinder must evaluate the totality of the evidence in light of the [District’s] heightened burden of persuasion.” *Id.*

As a threshold matter, the District frames the “key question” as “whether [Appellant] produced competent evidence that his speed was less than 61 mph.” *Id.* at 14. It is certainly true that evidence establishing that Appellant’s vehicle was travelling at a speed less than 61 MPH would rebut the District’s *prima facie* case, but Appellant need not affirmatively disprove the charged infraction to prevail. Appellant can also prevail by proffering evidence that raises sufficient doubt about the District’s case such that the “totality of the evidence” no longer satisfies the District’s burden to prove the infraction charged “by clear and convincing evidence.” *See* D.C. Code § 50-2302.06(a); *see also* D.C. Br. at 13 (“the factfinder must evaluate the totality of the evidence in light of the heightened burden of persuasion”).

Contrary to the District's assertion, D.C. Br. at 14, Appellant has not "merely pointed to the speed camera calibration regulation, 18 DCMR § 1035.2." Appellant has also pointed to record evidence—the agency's own statements—establishing that the margin of error of the ATES speed camera at issue is indeed ± 1 MPH and, therefore, extends below the charged range:

- The agency hearing officer acknowledged the ± 1 MPH margin of error and even sought to rely on it to buttress the District's case. Hearing Record, App'x at A11 ("The margin of error *also* indicates +1 mph and so there is a real possibility that [Appellant's] vehicle was traveling at 62 mph.") (emphasis added). The hearing officer's statement is a judicially noticed fact, and therefore competent evidence, by statute. D.C. Code § 50-2302.06(d-1)(1)(B) (requiring judicial notice of "[g]enerally recognized technical or specialized facts within the knowledge and experience of hearing examiners").
- On the Deployment Log for the camera at issue here on the dates at issue here, the operator certified: "Is the reading accurate to plus or minus one mile per hour of frequency? YES" App'x at A10.
- The final agency decision confirmed that ATES speed cameras are only tested to an accuracy of "plus or minus one" mile per hour. Final Order, App'x at A4 ("Tuning forks are set to a specific speed and when the

testing is done, the technician ensures that the speed of the radar during testing is plus or minus one [mile per hour] to the speed of the tuning fork.”). As a matter of common sense, the accuracy of a speed measuring device cannot exceed the accuracy of its testing.

And if the margin of error is not ± 1 MPH, then what *is* the margin of error? Nowhere in the record does the District establish, or even advocate, a true margin of error other than the ± 1 MPH margin of error acknowledged by the hearing officer, stated on the face of the Deployment Log, and confirmed by the final agency decision. *See* D.C. Brief at 17 (tacitly acknowledging margin of error).⁴ Instead, the District speculates that the error might not be “evenly distributed above and below the camera’s reading” and, therefore, “the camera was much more likely to have underestimated [Appellant’s] speed.” *Id.* at 18. The District concedes, however, that “[t]here is no evidence in the record” regarding the distribution of errors within ± 1 MPH range. *Id.* Speculation is not “clear and convincing evidence.”

⁴ The District makes a passing reference to the Superior Court’s *sua sponte* determination that the speed camera measurement is “precise” (*i.e.*, has literally zero margin of error) because the Notice of Infraction lists “40 mph” for both the tuning fork frequency and test reading. D.C. Br. at 8–9. The Notice of Infraction includes no such statement about any margin of error, and neither the Superior Court nor the District addressed how the tuning fork is known to be a perfect reference or how the two “40 mph” indications were rounded up or down. The District is tellingly careful never to argue directly that its speed camera measurements are, in fact, perfectly accurate—presumably because the District knows they are not.

C. The District’s novel interpretation of the penalty table fails procedurally and substantively.

Finally, the District contends that “[u]nder the correct interpretation of the penalty table for speeding offenses, \$100 remains the appropriate penalty” even if the record establishes only that Appellant’s vehicle “was traveling somewhere between 60 and 62 mph in a 50-mph zone.” D.C. Br. at 18. The District’s novel “no harm, no foul” penalty table argument is both untimely and wrong.

The penalty table, 18 DCMR § 2600.1, lists several speeding ranges and corresponding civil fines. As relevant here, speeding “up to 10 mph in excess of limit” is a \$50 fine and “11 to 15 mph in excess of limit” is a \$100 fine. According to the District, “any excess speed greater than the upper bound of a given category falls into the next category—such that, for instance, an excess speed of 10.3 mph triggers a \$100 penalty.” D.C. Br. at 19. Alternatively, the District says the Court should apply “ordinary arithmetic rounding” so “an actual speed of 60.5 mph or greater” rounds up to 11 mph over the posted limit and triggers the \$100 fine.⁵ The penalty table says no such thing.

First, the District’s novel reading of “11 to 15 mph” as meaning “more than 10 mph” fails to provide the basic “fair notice” required by Due Process. Even in

⁵ And again, the District offers no reason to conclude that Appellant’s speed should be rounded *up* from 60.5 MPH rather than *down* from 60.4 MPH when both speeds are well within the acknowledged ± 1 MPH margin of error.

this civil enforcement context, Due Process requires “fair notice of what is prohibited” and mandates that “those enforcing the law do not act in an arbitrary or discriminatory way.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (setting aside civil fines imposed by federal regulator); *see also DeVita v. District of Columbia*, 74 A.3d 714 (D.C. 2013) (recognizing that ATES civil enforcement proceedings must still provide “constitutionally sufficient due process”). “[F]air warning” requires “language the common world will understand, of what the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). “To make the warning fair, so far as possible the line should be clear.” *Id.* There is nothing at all “clear” about the District’s novel interpretation of the penalty table. Reading 11 MPH as 10 MPH certainly does not comport with how “ordinary people” would understand the plain language. The District’s strained reading is an improper attempt to sustain a higher \$100 fine when the District can only prove a lesser 6–10 MPH speeding infraction.

Second, the District acknowledges that the agency did not consider its novel reading of the penalty table, D.C. Br. at 22, and so the issue is not appropriately raised here in the first instance. *See Glenbrook Road Ass’n v. D.C. Board of Zoning Adjustment*, 605 A.2d 22, 33 (D.C. 1992) (“In the absence of exceptional circumstances, this court will not entertain contentions not raised before the agency.”). Rather, “if a party asks this Court to affirm an agency order based upon a ground

that was not considered by the agency, we ordinarily must remand for the agency to consider the new ground in the first instance.” *Apt. & Off. Bldg. Ass’n of Metro. Washington v. Pub. Serv. Comm’n of D.C.*, 129 A.3d 925, 930 (D.C. 2016). Contrary to the District’s suggestion, D.C. Br. at 22, it is far from “clear” that the agency would adopt the same strained reading of the penalty table as the District urges now.⁶

Third, the District puts the cart before the horse. The penalty table establishes fines for traffic infractions; it does not define the elements of those infractions. The appropriate fine is determined by the infraction charged and proved. *See* 18 DCMR § 2200.11 (“Any individual violating any provision of this section ... shall, *upon determination of liability therefore*, be subject to a civil fine....”). The infraction charged here is speeding 11–15 MPH over the posted limit. Notice of Infraction, App’x at A8 (“SPEED 11–15 OVR LIMT”). If the District proves that infraction by clear and convincing evidence, then Appellant is liable for a \$100 fine. If the District fails to prove that infraction by clear and convincing evidence, then the Notice of Infraction must be dismissed.

⁶ Appellant loathes to perpetuate this litigation by remanding for a first-instance agency interpretation when this case can be resolved on other grounds now, as described above. If the Court is inclined to remand, however, Appellant respectfully requests an instruction permitting him to take discovery regarding the true margin of error of ATES speed camera measurements, as the District repeatedly suggests he should have done in the first instance. *See* D.C. Br. at 10, 14.

CONCLUSION

The District has not proved, and cannot prove, the speeding infraction charged by the required clear and convincing evidence because the *admitted* margin of error in its ATES speed camera measurement extends below the charged range. The agency's Final Order should be reversed and the Notice of Infraction dismissed.⁷

Respectfully submitted,

Date: May 8, 2025

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⁷ Appellant has repeatedly acknowledged that the District's evidence is sufficient to establish vicarious civil liability for speeding 6–10 MPH over the limit. *See, e.g.*, Appellant's Br. at 14; *see also* Order Granting Appeal, App'x at A15 n.1 (vacated). Throughout proceedings below, however, the District *chose* to maintain the original charge, speeding 11–15 MPH over the limit, and now should be held to its burden of proving *that* infraction.

CERTIFICATE OF SERVICE

The forgoing Reply Brief of Appellant was electronically filed with the Court of Appeals via the Court's electronic filing system on May 8, 2025, and thereby electronically served on counsel of record for the District of Columbia.

/s/ Matthew J. Ricciardi

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