GREGORY G. KATSAS
Assistant Attorney General
JOSEPH P. RUSSONIELLO
United States Attorney
SANDRA M. SCHRAIBMAN
Assistant Branch Director
DIANE KELLEHER
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7318
P.O. Box 883
Washington, DC 20044
(202) 514-4775
(202) 616-8470 (fax)

Attorneys for Michael Mukasey, Attorney General of the United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PUBLIC CITIZEN, INC., et al.,

Plaintiffs

v.

MICHAEL MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

Defendant.

No. CV 08-0833 (MHP)

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Hearing date: September 22, 2008
Courtroom 15
Time: 2:00 p.m.

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on September 22, 2008, at 2:00 p.m., before Hon. Marilyn Patel, 450 Golden Gate Avenue, Courtroom 15, 18th Floor, San Francisco, California 94102, Defendant Michael Mukasey, Attorney General of the United States, will move this Court for an order dismissing this case and/or entering judgment for Defendant pursuant to Federal Rules of Civil Procedure 12 and 56. This Motion is based on this Notice, the points and authorities in support of the motion, the declarations of James Burch and Eric Gormsen in support of the motion, and on such oral argument as the Court may permit. As the following memorandum of points and authorities demonstrates, the Court lacks jurisdiction over this matter because Plaintiffs lack standing to assert their claims, and Plaintiffs' claims are time-barred. Alternatively, summary judgment should be entered for Defendant because the materials submitted herewith show that the Department of Justice is making diligent progress on the actions that are the subject of Plaintiffs' claims.

INTRODUCTION

In 1992, Congress enacted the Anti-Car Theft Act, which established the National Motor Vehicle Title Information System ("NMVTIS"), a database designed to provide an electronic means for verifying and exchanging title, brand, and theft data among motor vehicle administrators, law enforcement officials, prospective purchasers, junk and salvage yards, and insurance carriers. Responsibility for the database was assigned to the Department of Transportation. In 1996, Congress, through the enactment of the Anti-Car Theft Amendments Act of 1996, transferred that responsibility to the Department of Justice ("DOJ"). In February of this year, Plaintiffs filed the instant lawsuit, alleging that DOJ has violated the Administrative Procedure Act ("APA") by failing to: (1) establish a commencement date for the monthly reporting to the database of vehicle-history information by insurance carriers and junk and

salvage yard operators; (2) establish by regulation procedures to facilitate the efficient reporting of that information; and (3) provide access to that information to prospective automobile purchasers. Compl. at ¶ 4. This Court should dismiss Plaintiffs' Complaint, or, in the alternative, enter summary judgment for Defendant.

As an initial matter, Plaintiffs lack standing to pursue their claims because they have failed to identify a single member who has suffered a cognizable injury from DOJ's alleged violations of the APA. And even if there were such individual members, their participation in this litigation would be necessary to establish that they had suffered a cognizable injury fairly traceable to DOJ's conduct. In addition, Plaintiffs' claims are barred by the statute of limitations; in their Complaint, Plaintiffs allege that DOJ had responsibility to take the specified actions by December 31, 1997. Compl. at ¶ 27. But this legal action did not follow until 2008, more than ten years later. Plaintiffs have filed their Complaint too late, as recent case law from the Supreme Court underscores the jurisdictional nature of 28 U.S.C. § 2401(a), the six-year statute of limitations applicable to APA actions.

In the alternative, Defendant moves for summary judgment on the grounds that it is already undertaking the actions Plaintiffs claim have been unlawfully withheld and unreasonably delayed. As explained in the Declarations of James Burch and Eric Gormsen, not only has DOJ already made substantial progress to implement NMVTIS, but it is also working diligently to propose and finalize the reporting regulations called for by 49 U.S.C. § 30504(c), and to provide prospective purchasers of automobiles with access to NMVTIS information by the end of this year. The agency's rulemaking work, however, must proceed in accordance with the APA and the relevant procedures that apply to executive branch rulemakings, including time for the next Administration to consider the rule. The Court should allow the agency reasonable time to bring this rulemaking to completion. For these reasons, summary judgment should be entered for DOJ.

STATUTORY BACKGROUND

NMVTIS is an information system designed to provide states with the ability to reliably verify the titling, theft, and damage history of a motor vehicle before a new title is issued. The database is currently operated by the American Association of Motor Vehicle Administrators ("AAMVA"). The Anti-Car Theft Act of 1992 (Pub. L. 102-519) required the Secretary of Transportation to establish a database known as the National Motor Vehicle Title Information System not later than January 31, 1996, to provide States, law-enforcement officials, prospective purchasers of automobiles, and insurers with "instant and reliable" access to motor vehicle history information. The Anti-Car Theft Act of 1992 was amended by the Anti-Car Theft Improvements Act of 1996 (Pub. L. 104-152).[1/] The 1996 legislation transferred responsibility for implementing NMVTIS from the Secretary of Transportation to the Attorney General, and required the Attorney General to establish the database "not later than December 31, 1997." 49 U.S.C. § 30502(a).

The Anti-Car Theft Act directs each state to make its titling information available for use in the operation of NMVTIS and to perform an instant title verification check before issuing a certificate of title. See 49 U.S.C. § 30503(a). The system is to be paid for by user fees, should be self-sufficient, and not dependent on federal funding; the system operator may not collect fees in excess of the costs of the operating the system. 49 U.S.C. § 30502(c). Title 49 U.S.C. § 30504(c) authorizes the Attorney General to establish, by regulation, detailed reporting requirements for both junk- and salvage-yard operators and insurance carriers; these reports would be filed "with the operator of the system." 49 U.S.C. § 30504(a). To date, the regulations called for by 49 U.S.C. § 30504(c) have not been issued, and NMVTIS is not yet searchable by

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[1/] The two statutes, codified at 49 U.S.C. §§ 30501-30505, are collectively referred to as the "Anti-Car Theft Act."

prospective purchasers of automobiles. But as shown below, DOJ is working diligently on both fronts to make progress and ensure that NMVTIS is fully functional. A proposed rule to implement 49 U.S.C. § 30504(c) was recently cleared by the Office of Management and Budget (see http://www.reginfo.gov/public/do/eoDetails?rrid=115756), and DOJ is currently taking the final steps that are necessary for the proposed rule to be published in the Federal Register.

FACTUAL BACKGROUND

As discussed in the Declaration of James H. Burch, II, a Deputy Director of the Bureau of Justice Assistance at DOJ, the purpose of NMVTIS is to provide an electronic means for verifying and exchanging title, brand, and theft data among motor vehicle administrators, law enforcement officials, prospective purchasers, junk and salvage yards, and insurance carriers.[2/] See Declaration of James H. Burch, II, dated August 11, 2008, (hereinafter "Burch Decl.") (attached as Exhibit 1), ¶ 3. Since 1996, DOJ has made significant progress on NMVTIS, particularly with regard to its ability to obtain the involvement and cooperation of the third-parties that are necessary to implement NMVTIS. Id. at ¶ 11. Every day, approximately 200,000 inquiries are made into NMVTIS. Id. Currently, 25 states are involved in NMVTIS (60% of the U.S. vehicle population is represented), with an additional 11 states actively working towards participation in 2008.[3/] Id. By the end of 2008, it appears that DOJ should have close to 80% of

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[2/] Brands are descriptive labels regarding the status of a motor vehicle, such as "junk," "salvage," and "flood" vehicles. Burch Decl., ¶ 3, n.1.

[3/] Participating states provide files of all active titles and brands to the NMVTIS Vehicle Information Number ("VIN") pointer and brand files, ideally in real time or at least once every 24 hours, make inquiries into NMVTIS prior to issuing a new title on an out-of-state vehicle, and provide updates as necessary to the NMVTIS files. Burch Decl., ¶ 11, n.2. Data-only states provide files of all active titles and brands to the NMVTIS VIN pointer and brand files in real time or at least once every 24 hours. Id. States actively working towards participation include those states that have a plan, timeline, and funding in place and are in the process of

(continued...)

the vehicle population included. Id.

NMVTIS allows state titling agencies to verify the validity of ownership documents before they issue new titles. Id. at ¶ 3. NMVTIS also checks to see if the vehicle is reported "stolen" — if so, the states do not issue the new titles. Id. Brands would not be lost when the vehicle travels from state to state because NMVTIS keeps a history of all brands ever applied by any state to the vehicle. Id. In order to perform this check, these states run the vehicle identification number ("VIN") against a national pointer file, which provides the last jurisdiction that issued a title on the motor vehicle and requests details from that jurisdiction, including the motor vehicle's last reported odometer reading. Id. at ¶ 4.

Verification of this data allows fully participating states to reduce the issuance of fraudulent titles and reduce odometer fraud. Id. at ¶ 5. Once the inquiring jurisdiction receives the information, it is able to decide whether to issue a title. Id. NMVTIS also allows fully participating states to ensure that brands are not lost when a motor vehicle travels from state to state. Id. at ¶ 6. As noted above, brands are descriptive labels regarding the status of a motor vehicle, and many brands, such as a flood vehicle brand, indicate that a motor vehicle may not be safe for use. Id. Because NMVTIS keeps a history of brands applied by any state to the motor vehicle, it protects consumers by helping ensure that unsuspecting purchasers are not defrauded or placed at risk by purchasing an unsafe motor vehicle. Id. at ¶ 7.

DOJ has also provided a series of grants (to states and others) in order to fully implement NMVTIS. Id. at ¶ 12. It has also worked hard to persuade more states to fully participate with NMVTIS; in 2007, senior officials from BJA and the Federal Bureau of Investigation jointly signed letters to each administrator of state department of motor vehicles not participating in

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[3/] (...continued)
implementing the plan. Id.

NMVTIS and surveying them to determine why they have not participated to date. Id. at ¶ 14. The results have been used to refine the implementation process with the states and to guide national oversight of the program. Id.

In addition to its grants and outreach to states, DOJ has also organized and held meetings with various NMVTIS stakeholders, including one of the Plaintiffs in this litigation, Consumers for Auto Reliability and Safety. Id. at ¶ 13. One such meeting was held in the Spring of 2007, as part of an effort to discuss progress on NMVTIS, DOJ's plans and approach for supporting NMVTIS implementation, and NMVTIS benefits. Id. Meeting attendees included senior officials from the FBI, DOJ's Fraud Section, a United States Attorney, and officials from other components of DOJ, as well as the Consumer Federation of America, private counsel active in consumer protection litigation, local law enforcement groups, and auto sales industry officials. Id. In addition to hearing the agency's progress on NMVTIS implementation, the participants were given the opportunity to provide their feedback on implementation goals and priorities. Id.

As an overall matter, however, DOJ's implementation of NMVTIS to date has focused more so on establishing access by the states and less so on providing access to other authorized users. Id. at ¶ 15. The statute does not contain any specific penalty for states that do not participate, nor does it contain any financial incentives for states that do participate. Id. Moreover, NMVTIS will not be fully reliable until the percentage of vehicle population included in the system nears 100% (until then, some searches will not yield any results, since the information will not be in NMVTIS). Id. The Act also allows insurance carriers, and junk and salvage yards, to avoid reporting directly to NMVTIS if their relevant inventories are already reported to the states. Id. Thus, DOJ's reasonable priority has been on improving state participation and increasing the percentage of vehicles represented in the system. Id. at ¶¶ 11-16.

State participation also affects NMVTIS finances. As the Burch Declaration explains,

"[f]ocusing on the insurance carrier and junk and salvage yard aspects of the NMVTIS rule would have been hampered by the lack of state participation as well because without state fees (currently only 9 states pay the required fees), AAMVA claims it does not have the resources to expand the functionality of the system." Id. at ¶ 16. While DOJ has invested more than $14 million since 1997, state fees have only been $2.5 million since inception. Id. Despite these challenges, DOJ has worked with AAMVA to develop a plan to provide prospective purchasers of automobiles with access to the contents of NMVTIS by the end of 2008. Id. at ¶ 17.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS

It is axiomatic that "standing is an essential and unchanging part of the case-or-controversy requirement of Article III" and is fundamental to a court's jurisdiction to hear a case. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The "irreducible constitutional minimum of standing" requires a plaintiff to show: (1) that they have suffered an injury which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the existence of a causal connection between the alleged injury and conduct that is fairly traceable to the defendants; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. The plaintiff bears the burden of proving these elements. Id. at 560. Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 316 (1991) (citation and internal quotation marks omitted). It "is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Id. (citation and internal quotation marks omitted). A general complaint about agency inaction is insufficient to confer standing because courts lack jurisdiction to hear claims that consist of nothing more than "generalized grievance[s]" that are

"common to all members of the public." United States v. Richardson, 418 U.S. 166, 176 (1974); see also Lujan, 504 U.S. at 573-74 ("a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy."); Allen v. Wright, 468 U.S. 737, 754 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

An organization may have standing to sue on behalf of its members ("representational" or "associational" standing) or on its own behalf ("organizational" standing). See Smith v. Pac. Props and Dev. Corp., 358 F.3d 1097, 1101 (9th Cir. 2004). An entity's associational standing depends on "the standing of its members to bring suit," while its organizational standing is distinct "from the standing of its members, turning instead on whether the organization itself has suffered an injury in fact." Id. (citations omitted). Plaintiffs lack standing under either theory.

A. Plaintiffs Lack Representational/Associational Standing

"To establish representational standing, [an organization] must demonstrate that: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to vindicate are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" Id. at 1101-02 (quoting Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). All three Plaintiffs claim to have representational standing, see Compl. at ¶ 12, but none satisfies the first criteria necessary to establish it, and Plaintiff Consumer Action cannot satisfy the second criteria.

Initially, no Plaintiff has identified specific members who have standing to sue in their own right, an omission which can be "fatal to [an] attempt to plead associational standing." Coalition for ICANN Transparency, Inc. v. Verisign, Inc., 452 F. Supp. 2d 924, 933-34 (N.D.

Cal. 2006).[4/] Even if Plaintiffs were not required to identify such a member by name, they are undoubtedly required to allege specific facts which, if true, would establish that one of their members has suffered concrete injury traceable to Defendant's alleged inaction and would be redressed by judgment in favor of Plaintiffs. Here, Plaintiffs have alleged no specific facts whatsoever, and no facts exist to establish a clear injury that is traceable solely to Defendant.

In the words of the Supreme Court, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973). In their Complaint, Plaintiffs conjure up hypothetical, un-particularized injuries. Plaintiffs allege that members of their organizations are "being deprived of their ability to obtain information that would allow them to learn about the history of their vehicles and thereby avoid the effects of auto fraud and theft." Compl. at ¶ 12. Such pure speculation is insufficient to establish standing. Nor can standing be established simply by claiming that "[a]s a result of the Attorney General's continued failure to implement NMVTIS, and specifically his failure to require reporting by insurance carriers and junk and salvage yard operators, these consumers face an unacceptably high risk of economic injury and physical harm." Id. A vague assertion about "risk" says nothing about whether specific organization members have suffered actual harm. See American-Arab Anti-Discrim.

[4/] See, e.g., Am. Chemistry Council v. DOT, 468 F.3d 810, 820 (D.C. Cir. 2006) ("[A]n organization bringing a claim based on associational standing *must show that at least one specifically-identified member* has suffered an injury-in-fact. It is not enough to show . . . that there is a substantial likelihood that at least one member may have suffered an injury-in-fact. Our standard has never been that it is likely that at least one member has standing. At the very least, the identity of the party suffering an injury in fact must be firmly established.") (emphasis added).

Comm. v. Thornburgh, 970 F.2d 501, 510 (9th Cir. 1991) ("[An organization's] allegations sufficiently give them a 'special interest' in the outcome of the present case; however, this does not provide standing."). Having failed to identify any members who have suffered a concrete injury, Plaintiffs' representational claims must be dismissed.[5/]

Furthermore, even if Plaintiffs could establish that one of their members had suffered an actual, concrete injury, they have not sufficiently alleged that such injury is solely the result of Defendant's alleged inaction, rather than "the result of the independent [in]action of some third party not before the court." Lujan, 504 at 560 (citation and quotation omitted). Similarly, Plaintiffs cannot establish that it is "likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561 (citation and quotations omitted). Plaintiffs cannot prevail on these prongs because the blame for any injury caused by the delay in implementing NMVTIS cannot be borne just (if at all) by Defendant, but is also likely the result of the inaction of third parties not before the Court: the states that are declining to participate with NMVTIS. The Anti-Car Theft Act imposes many of the responsibilities critical to the proper functioning of NMVTIS upon the States. See, e.g., 49 U.S.C. § 30502(a)(1) ("*In cooperation with the States* . . . the Attorney General shall establish a National Motor Vehicle Title Information System . . . .") (emphasis added); 49 U.S.C. § 30503(a) ("*Each State* shall make titling information *maintained by that State* available for use in operating the National Motor Vehicle Title Information System established or designated under section 30502 of this title.") (emphasis added). Any injury alleged by Plaintiffs is equally likely to be the result of the nonparty, nonparticipating states' inaction, and no order from this Court directed at Defendant can spur any further action from them. Accordingly, Plaintiffs cannot establish that their alleged

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[5/] Any such allegation of injury would have to take account of the fact that vehicle information is available through other databases. See Burch Decl., ¶ 18.

injury will be redressed by a favorable decision against the Attorney General. Plaintiffs' concerns should be raised in the appropriate legislative forum where they can secure relief to address the fact that the Anti-Car Theft Act neither provides funds to entice states to participate in NMVTIS nor imposes specific penalties on them if they do not participate. This Court can provide neither the carrot nor the stick to ensure state action — only Congress can.

Finally, the consumer protection interests asserted by Consumer Action on behalf of its members are not germane to its organizational purpose.[6/] Cf. Salmon v. Pac. Lumber Co., 30 F. Supp. 2d 1231, 1240 (N.D. Cal. 1998) ("'[T]he interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'") (quoting Auto. Workers v. Brock, 477 U.S. 274, 290 (1986)); see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA, 415 F.3d 1078, 1104 (9th Cir. 2005) (finding no connection between "purported environmental interest" asserted in the suit and "trade and marketing" purposes of association). Consumer Action may profess an interest in protecting its members from auto fraud. However, that incidental interest, which is secondary to its core purposes,[7/] is insufficient to rebut the presumption against a

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[6/] Defendant does not contend that the interests Public Citizen and Consumers for Auto Reliability and Safety seek to vindicate are not germane to those organizations' purposes.

[7/] Consumer Action's website states that it "advances consumer rights, nation-wide, by referring complaints, publishing educational materials in multiple languages, advocating for consumers in the media and before lawmakers, and comparing prices on credit cards, bank accounts and long distance services." Consumer Action, "What We Do," http://www.consumer-action.org/about/list/C281/ (last visited August 9, 2008). While admirable, Consumer Action's primary efforts to "advance consumer literacy and protect consumer rights in many areas, *including credit, banking, privacy, insurance, healthcare and utilities*" are incidental to NMVTIS. Consumer Action, "About Consumer Action," http://www.consumer-action.org/about/articles/about_consumer_action (last visited August 9, (continued...)

litigant's ability to raise the rights of third parties. See Ranchers, 415 F.3d at 1104. For this additional reason, Consumer Action cannot show representational standing.

B. Plaintiffs Also Lack Organizational Standing

For an organization to sue on its own behalf, it must, like any other plaintiff, satisfy both the constitutional and prudential considerations of standing. See, e.g., Salmon, 30 F. Supp. 2d at 1239-40. Plaintiffs fail both tests. First, they have alleged no concrete injury fairly traceable to Defendant's conduct and likely to be redressed by a judgment in their favor. As a result, they lack Article III standing. Second, Plaintiffs are attempting to improperly argue on behalf of third parties, and their interests are not within the zone of interests protected by the Anti-Car Theft Act. Therefore, even if Plaintiffs could demonstrate constitutional standing, their claims should be dismissed as a prudential matter.

1. Plaintiffs Lack Article III Standing

An organization may sue on its own behalf if the challenged conduct directly conflicts with the organization's mission and has directly harmed its ability to provide its services. As with individuals, the injury suffered by the organization cannot be conjectural, hypothetical, speculative or abstract; it must be "'certainly impending.'" Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Furthermore, the organization's actual or threatened injury must be "'fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'" Salmon v. Pac. Lumber Co., 61 F. Supp. 2d 1001, 1009 n.3 (N.D. Cal. 1999) (quoting Spann v. Colonial Vill., Inc., 899 F.2d 24, 27 (D.C. Cir. 1990)).

The leading case on an organization's standing to sue in its own right is Havens Realty

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[7/] (...continued)
2008) (emphasis added).

Corp. v. Coleman, 455 U.S. 363, 378-79 (1982). In Havens, a nonprofit organization whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area," sued the owner of an apartment complex for engaging in racial steering in violation of the Fair Housing Act. Id. at 368. The organization alleged that the defendant's illegal housing practices frustrated its efforts to promote equal housing through counseling and other referral services. Id. at 379. It further alleged that it "had to devote significant resources to identify and counteract the defendant's" unlawful housing practices. Id. The Court held that the alleged impairment to the organization's ability to provide its services, caused by the defendant's conduct, constituted an injury-in-fact to the organization. The organization therefore had standing to sue for damages in its own right. Id.; see also Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002) (fair housing organization had direct standing to sue real estate owner where it alleged that defendant's discriminatory practices frustrated its mission and impaired its ability to provide outreach and education services).

Although Plaintiffs purport to bring this action on their own behalf, see Compl. at ¶ 12, all of the alleged harm was suffered by "consumers" or their "members." Id. Despite Plaintiffs' contention that they have standing to sue Defendant on their own behalf, they have alleged no facts to demonstrate concrete injury of their own that is fairly traceable to action or inaction by Defendant, or injury that would be redressed by a judgment in their favor. Unlike the organization in Havens, Plaintiffs do not allege that Defendant has compromised their mission or that any of their organizational efforts have been frustrated or made ineffective as a result of action or inaction taken by Defendant. Plaintiffs have also posed no argument about the level and extent of additional services, if any, they have provided or will provide regarding NMVTIS, nor have they alleged facts sufficient to show that actions taken by Defendant have impaired their ability to provide services to members. Any implication that the organizations themselves are

injured simply because they expend resources fighting to improve consumer protection does not improve their standing to bring suit, as it does not state an obstacle to their ability to carry out their organizational mission. Cf. Havens, 455 U.S. at 379. This lack of any allegation of organizational injury highlights that Plaintiffs have suffered no direct and concrete injury. Furthermore, they have not – and could not – alleged facts sufficient to show that a judgment in their favor would provide redress for any injury they have suffered. As noted above, no injury Plaintiffs allege is fairly traceable to Defendant's alleged failures to implement NMVTIS.

2. Plaintiffs Should Be Denied Standing for Prudential Reasons

Even if Plaintiffs have organizational standing under Article III, this Court should nonetheless deny them standing for prudential reasons. Prudential standing "embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen, 468 U.S. at 751. Although the prudential standing requirement is not meant to be "especially demanding," Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987), Plaintiffs' Complaint runs afoul of at least two major prudential concerns.

First, Plaintiffs generally cannot rest their claims on the legal rights or interests of third parties. See Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (noting the Supreme Court has "not looked favorably upon third-party standing"); Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (explaining policies justifying limitation include that (i) "it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not" and (ii) "third parties themselves usually will be the best proponents of their own rights"). The Supreme Court has outlined three considerations to be

weighed when assessing whether litigants may assert the rights of others: (1) "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute," (2) "the litigant must have a close relation to the third party," and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411 (1991) (quoting Singleton, 428 U.S. at 112-16). A plaintiff cannot meet this test merely by alleging that a regulatory scheme protects or regulates *someone else's* interests in a way that might indirectly affect his own. See Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 522-31 (1991). Quite simply, there exists no hindrance to the ability of any injured individuals, such as members of Plaintiffs' organizations, to bring suit against Defendant. Plaintiffs' complaint that DOJ has failed to implement NMVTIS as quickly and as completely as Congress directed is the kind of generalized grievance any member of the public could raise, and is thus inadequate to vest them with standing to pursue their claims. See, Argument, Section I, supra. As a result, prudential concerns militate against a finding of standing.

Second, prudential considerations are lacking because Plaintiffs' ability to function as advocacy organizations is not within the "zone of interests protected by the law invoked." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen, 468 U.S. at 751); see also Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 939 (9th Cir. 2005). The Anti-Car Theft Act makes no "mention of advocacy organizations' interests." Ctr. for Law and Educ. v.

Dep't of Educ. 396 F.3d 1152, 1157 (D.C. Cir. 2005). Nor does it regulate the conduct of advocacy groups. Plaintiffs' concerns are therefore not within the law's zone of interests.

II. THE SIX-YEAR STATUTE OF LIMITATIONS APPLICABLE TO APA ACTIONS BARS PLAINTIFFS' CLAIMS

Plaintiffs contend that over ten years have passed since DOJ allegedly had an obligation to take all of the actions related to NMVTIS cited in the Complaint. This delay also has implications for Plaintiffs, as it puts the filing of their Complaint outside the six-year jurisdictional, strictly construed statute of limitations applicable to APA actions. The United States, as sovereign, is immune from suit unless Congress waives its immunity, and the terms of its waiver, as set forth expressly and specifically by Congress, define the parameters of a federal court's subject matter jurisdiction to entertain suits brought against the United States. See United States v. Sherwood, 312 U.S. 584, 586 (1941). The terms of waiver must be construed strictly, and any ambiguities must be resolved in favor of the sovereign. See, e.g., Dept. of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999).[8/] Title 28, Section 2401 of the United States Code controls the time for commencing action against the United States. It provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).[9/]

[8/] The existence of a waiver of its sovereign immunity from suit is a prerequisite in any claim against the United States. See United States v. Mitchell, 463 U.S. 206, 212 (1983) ("government may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"). The Court must address the jurisdictional question before reaching the merits. "The very purpose of the [sovereign immunity] doctrine is to prevent a judicial examination of the merits of the government's position." Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987).

[9/] Defendant recently filed an opposed motion to amend its answer to clarify its intent to raise the statute of limitations defense. In the Answer, Defendant included three affirmative defenses. See Answer at 1 (filed April 7, 2008) (including defenses of lack of subject matter (continued...)

Plaintiffs here claim that a decade has elapsed since DOJ was under a legal obligation to take the actions cited in the Complaint and that agency action has been unlawfully withheld and/or unreasonably delayed.[10/] Thus, if Plaintiffs are correct, and DOJ was under an obligation to take the actions cited in the Complaint by December 31, 1997, missing those deadlines itself would have constituted "final agency action" and triggered the running of the six-year statute of limitations. See Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review."); Ctr. for Biological Diversity v. Hamilton, 453 F. 3d 1331, 1335 (11th Cir. 2006) (holding that a deadline in the Endangered Species Act creates a cause of action "that accrues on the day following the deadline," and that this is a "fixed point in time at which the violation for the failure of the Secretary to act arises").

Because Plaintiffs' cause of action against DOJ first accrued on December 31, 1997, they were required to bring their claims before December 31, 2003.[11/] The United States waived its

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[9/] (...continued)
jurisdiction; failure to state a claim upon which relief can be granted; and laches). While the subject matter jurisdiction defense includes the statute of limitations claim – under an argument to extend the holding of John R. Sand & Gravel Co. v. United States, — U.S. ----, 128 S. Ct. 750, 169 L.Ed.2d 591 (2008) to 28 U.S.C. § 2401(a) – Defendant sought leave to amend the answer and specifically identify the statute of limitations as a separate affirmative defense to clarify the record and avoid any unnecessary ambiguity.

[10/] See Compl. at ¶ 27 ("More than *a decade after the latest statutory deadline*, and nearly sixteen years after Congress first required the establishment of the NMVTIS, the federal government has yet to carry out its obligations to (1) issue regulations to facilitate reporting by insurance carriers and junk and salvage yards, (2) set a start date for the reporting of such information, or (3) make such information available to prospective purchasers of automobiles.") (emphasis added).

[11/] While Plaintiffs may, in their opposition, argue that not all of DOJ's actions had to be taken by December 31, 1997, such an argument would be at odds with the way in which they (continued...)

sovereign immunity from suits for six years following the first accrual of the action, and no more. "Six years is a long time, ample time within which to pursue an administrative appeal to completion or, in instances of agency delay, to invoke the aid of the court." Spannaus v. U.S. Dept. of Justice, 824 F.2d 52, 56 (D.C. Cir. 1987). In this instance, the remedy Congress provided for DOJ's alleged failure to fulfill its statutory duty was to permit any person to "invoke the aid of the court" at any time between December 31, 1997, and December 31, 2003. In that "ample time," Plaintiffs did nothing.

A. 28 U.S.C. § 2401 IS JURISDICTIONAL AND NOT SUBJECT TO TOLLING VIA THE CONTINUING VIOLATIONS DOCTRINE

Plaintiffs may argue that DOJ's alleged failure to take the actions required by the Anti-Car Theft Act to implement NMVTIS constitute "continuing violations," which bar the application of the statute of limitations to their claims. The continuing violations doctrine allows a court to consider an entire course of related conduct, where some wrongful acts occurred within the statute of limitations period and others occurred outside it. But strict construction of the waiver of sovereign immunity in 28 U.S.C. § 2401(a) does not allow the extension of the limitations period beyond the six years specified in the statute.

Plaintiffs will likely claim that the general six-year statute of limitations is not a jurisdictional bar and that the statute of limitations can be tolled because failure to perform a nondiscretionary duty is a continuing violation. In contrast to some other circuits (see Center for Biological Diversity, 453 F.3d at 1334), the Ninth Circuit has previously determined that 28

[11/] (...continued)
have drafted their Complaint. See Compl. at ¶ 27. Moreover, even if it were the case, that different deadlines applied to the various actions cited by Plaintiffs as unlawfully withheld and/or unreasonably delayed, it has been at least 5.5 years since the statute of limitations expired as to the first such action. Thus, whether DOJ's "deadline" was December 31, 1997, or some later date, Plaintiffs were on notice, well in advance of six years before the filing of their Complaint.

U.S.C. § 2401 is not jursidctional. See Cedars-Sinai Med. Ctr. v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997). But recent case law from the Supreme Court, John R. Sand & Gravel Co. v. United States, --- U.S. ----, 128 S. Ct. 750 (2008), provides new support for the argument that 28 U.S.C. § 2401 is jurisdictional and cannot be tolled, even by an alleged continuing violation.

In Sand, the Supreme Court addressed whether 28 U.S.C. § 2501, the statute of limitations for matters brought before the Court of Federal Claims, is jurisdictional. 128 S. Ct. at 753-54. The Court explained that "[s]ome statutes of limitations . . . seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims . . . [or] limiting the scope of a governmental waiver of sovereign immunity." Id. at 753 (citations omitted). Such statutes of limitations, the Court noted, are read "as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." Id. at 753-54. The primary question in Sand was whether intervening decisions, such as Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990), had undermined that assessment of 28 U.S.C. § 2501 as jurisdictional. The Court rejected that proposition. Sand, 128 S.Ct. at 755.

Sand casts doubt on the continued viability of the Cedars-Sinai holding for two reasons. First, § 2501 and § 2401(a) contain very similar language.[12/] Second, since both statutes are Congressional waivers of sovereign immunity, the Sand determination that § 2501 is

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[12/] Section 2501 provides, in relevant part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. That phrasing in § 2501 is nearly identical to § 2401(a) – "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The dissent by Justice Ginsburg in Sand explicitly noted the similarities between the wording of 28 U.S.C. § 2501 and 28 U.S.C. § 2401. See 128 S. Ct. at 760-61 (noting "28 U.S.C. § 2401(a) contains a time limit materially identical to the one in § 2501").

jurisdictional strongly suggests the same conclusion with respect to § 2401.

Accordingly, if 28 U.S.C. § 2401 is jurisdictional, it cannot be tolled by the continuing violations doctrine, even in a case alleging agency action unreasonably delayed. See Ctr. for Biological Diversity, 453 F.3d at 1335 (holding sovereign immunity prevented court from extending the continuing violation doctrine to suits to compel the performance of an agency's duty to regulate according to a statutory deadline); West Virginia Highlands Conservancy v. Johnson, 540 F. Supp. 2d 125, 143 (D.D.C. 2008) (holding Sand and relevant circuit precedent compelled conclusion that 28 U.S.C. § 2401 was jurisdictional and could not be tolled even in the context of a claim for delayed agency action), currently on appeal, No. 08-5153 (D.C. Cir.).

The consequences of finding that the continuing violation doctrine applies to cases challenging agency action as unlawfully withheld and/or unreasonably delayed would be directly contrary to the purposes of 28 U.S.C. § 2401(a). If failure to meet a statutory deadline were a continuing violation, then a plaintiff effectively would be able to sue forever, since no alternative statute exists to provide agencies with repose – a result which the Court should avoid. See Klehr v. A.O. Smith Co., 521 U.S. 179, 187 (1984) (describing a rule that would permit a series of violations to continue indefinitely as beyond what "Congress could have contemplated" and in conflict with "a basic objective – repose").

Plaintiffs will likely respond that the use of the statute of limitations defense to bar their claims in the context of agency action unlawfully withheld and/or unreasonably delayed is "inappropriate." But the effect of any statute of limitation is to bar otherwise valid claims. Second, while some courts have criticized the assertion of a limitations defense in a delay case, Am. Canoe Ass'n, Inc. v. EPA, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998) (applying "statute of limitations to a claim of unreasonable delay is grossly inappropriate, in that it would mean that EPA could immunize its allegedly unreasonable delay from judicial review simply by extending

that delay for six years"), another district court in this Circuit has refused to be swayed by such logic. Inst. for Wildlife Prot. v. United States Fish and Wildlife Serv., No. 07-358-PK, 2007 WL 4118136, at *8 (D. Or. 2007) ("However, in light of the plain language of Section 2401(a), the date certain for performance of the duty set forth in Section 1533(b)(6)(C), and this court's duty to construe waiver of sovereign immunity strictly in favor of the government, in the absence of clear guidance from the Ninth Circuit this court declines to adopt the reasoning of these cases."). See also Cherosky v. Henderson, 330 F.3d 1243, 1248 (9th Cir. 2003) ("the application of the continuing violations doctrine should be the exception, rather than the rule") (cited in Inst. for Wildlife Prot., 2007 WL 4118136, at *8). As a result, Plaintiffs are entitled to the six years authorized by section 2401(a), and no more; thus, their claims are too late.

III. SUMMARY JUDGMENT SHOULD BE ENTERED FOR DOJ BECAUSE DOJ IS MAKING ADEQUATE PROGRESS TOWARDS TAKING THE ACTIONS PLAINTIFFS CONTEND HAVE BEEN UNLAWFULLY WITHHELD AND/OR UNREASONABLY DELAYED.

The attached declarations demonstrate that DOJ is complying with the Anti-Car Theft Act and making significant progress towards taking the actions Plaintiffs contend were unlawfully withheld and unreasonably delayed. The Burch Declaration reviews DOJ's overall NMVTIS progress and shows that prospective purchasers of automobiles should be able to access to the contents of NMVTIS by the end of this year. See Burch Dec., ¶¶ 1-17. Likewise, with respect to the delayed rulemaking and commencement date claim, the Declaration of Eric Gormsen demonstrates that DOJ is preparing to publish a proposed rule but needs time to follow the steps required by the APA and the requirements of Executive Order 12866. See Declaration of Eric Gormsen, dated August 12, 2008 ("Gormsen Decl.") (attached as Exhibit 2), ¶¶ 2, 17-18.

The first step in the rulemaking process would be for DOJ to draft the text of the proposed rule and a preamble explaining its basis and purpose. Id. at ¶ 7. Once the proposed rule has been approved by DOJ, E.O. 12866 requires that the draft rule be submitted for review

and approval to OMB, which evaluates the rule for consistency with applicable law, the actions or policies of other agencies, and Presidential priorities. Id. at ¶¶ 3-9. E.O. 12866 allows up to 90 days for OMB review of a draft rule. Id. at ¶ 7. In order to submit the proposed rule to OMB, DOJ must also consider the applicability of other legal provisions, including the Regulatory Flexibility Act, E.O. 12132, the Paperwork Reduction Act, and/or any information-collection or record-keeping burdens that the proposed action would impose. Id. at ¶¶ 3-6.

Once the draft rule has been cleared by OMB, DOJ must publish it in the Federal Register as a proposed rule and extend an opportunity for public comment, as required by the APA. Id. at ¶ 10. E.O. 12866 provides that agencies should normally afford no less than 60 days to comment on a proposed rule. Id. Once that period has closed, DOJ must then review the comments, determine what amendments, if any, should be made to the rule in light of those comments, and prepare written responses to significant comments for publication in the Federal Register with the final rule, all as required by the APA. Id. at ¶ 11. Following the review and evaluation of public comments, a draft final rule must be prepared, which must then undergo a series of reviews within DOJ, OMB, and elsewhere. Id. at ¶¶ 12-15. If DOJ envisions substantial revisions to the rule, a revised regulatory analysis may be required. Id. at ¶¶ 12-15. OMB's review of the draft final rule may take up to 90 additional days. Id. at ¶ 13.

At this time, the proposed NMVTIS rule requiring reporting by insurance carriers and junk and salvage yards has already been reviewed by OMB, and DOJ is taking the final steps to publish the proposed rule in the Federal Register. Id. at ¶¶ 17-18. DOJ cannot provide a precise schedule for the proposed and final rule at this time, for several reasons. Id. at ¶¶ 16-25. First, the agency does not yet know what kind of comments it will receive after the proposed rule is published, nor does it know what its responses to those comments will be, nor whether additional regulatory analyses will be required. Id. at ¶¶ 19-22. Another complication with respect to a

timeframe for the publication of the NMVTIS proposed rule and the 60-day comment period is the upcoming change in Administration. Id. at ¶ 24. Based on when the NMVTIS rule will likely be proposed, DOJ needs to allow sufficient time for the new Administration to review and weigh in on the proposed rule. Id. Providing the new Administration with a chance to weigh in on the proposed rule may not be a legal requirement, but it reflects sound principles of good government, by creating an environment in which there is no suggestion that a regulation has been "rushed through"[13/] at the last minute to escape scrutiny. Id. at ¶ 24.

In other words, it is contrary to both reason and the public interest, to expect DOJ to evaluate and resolve all the issues associated with the reporting required by NMVTIS on a less than optimal schedule. Courts recognize that agencies must be given the "time necessary to analyze [the issues presented] so that [they] can reach considered results . . ." Sierra Club, 828 F.2d at 798, even when confronted with circumstances of agency delay not presented here. See United Mineworkers of Am. Int'l Union, 190 F.3d 545, 554-56 (D.C. Cir. 1999); United Steelworkers of America v. Rubber Mfrs. Ass'n, 783 F.2d 1117, 1120 (D.C. Cir. 1986). A hasty rulemaking schedule would be ill-advised.[14/] See Pub. Citizen Health Rsch. Grp. v. Chao, 314 F.3d 143, 159 (3d Cir. 2002) (referring parties to 60-day mediation after determining that "[w]hile we are certain that the time for [agency] action has arrived, we are cognizant of our lack of expertise in setting permissible exposure limits, and we recognize the damage that an

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[13/] Such "midnight regulations" have sometimes been criticized as a way to avoid scrutiny. See generally Veronique de Rugy, Antony Davies, *Midnight Regulations: An Update, Mar. 28, 2008*, Mercatus Center, George Mason University, available http://www.mercatus.org/repository/docLib/20080403_midnightregulations_final.pdf.

[14/] Moreover, "by decreasing the risk of later judicial invalidation" of a rule as arbitrary and capricious, the "additional time spent reviewing a rulemaking proposal before it is adopted may well ensure earlier, not later, implementation of any eventual regulatory scheme." Sierra Club, 828 F.2d at 798-99.

ill-considered limit might cause."). The appropriate course would be for the Court to withhold relief and permit DOJ to complete the process it has already begun. See In re Am. Fed. of Gov't Employees, 790 F.2d 116, 119 (D.C. Cir. 1986) (declining to enter order requiring agency action where agency demonstrated it planned to "diligently pursue[ ] its current case management endeavors"); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 943 & n.15 (D.C. Cir. 1986); Oil, Chemical & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985) ("We are satisfied that MSHA is now proceeding toward completion of its rulemaking within a reasonable time; there is accordingly no need, at this juncture, for a court order compelling agency action unreasonably delayed."); Ottis v. Shalala, No. 92-425, 1993 WL 475518 at *7 (W.D. Mich. 1993) (declining to decide whether pre-NPRM delay was unreasonable and noting that even if it were, "alteration of the Secretary's proposed schedule would not be in the best interest of the public [because it] is reasonable in light of the number of comments received and the procedure the Secretary must follow to respond to the comments and finalize the regulations."). Since DOJ is proceeding toward completion of its proposed rulemaking, and providing prospective purchasers of automobiles with access to the contents of NMVTIS, there is no need for a court order compelling agency action.

CONCLUSION

The Court should dismiss this action for the reasons set forth above, or, in the alternative, enter summary judgment for Defendant.

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Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

GREGORY G. KATSAS
Assistant Attorney General

SANDRA M. SCHRAIBMAN
Assistant Branch Director

\s\ Diane Kelleher

DIANE KELLEHER
Senior Counsel
PETER LEARY
Trial Attorney

Department of Justice
Civil Division, Federal Programs Branch
E-mail address: Diane.Kelleher@usdoj.gov

Courier Address:
20 Massachusetts Ave., NW, Room 7318
Washington, D.C. 20004

Attorneys for Attorney General Michael Mukasey