13-3645

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re Dr. Greg **GULBRANSEN**; Sue Auriemma; Consumers Union of United States; Advocates for Highway and Auto Safety; Kids And Cars, Inc.,

Petitioners,

v.

Anthony Foxx, Secretary of the United States Department of Transportation; United States Department of Transportation,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners seek a writ of mandamus compelling the Department of Transportation (DOT) to promulgate an automobile safety standard that DOT acknowledges will save lives and for which the public has waited almost twice as long as Congress intended the entire rulemaking proceeding to take.

Absent from DOT's opposition to the petition is any disagreement over the importance of the standard to auto safety and particularly to the safety of children, and any rebuttal to the petition's demonstration that relief is warranted under the applicable legal standard. Instead, DOT asks this Court to exempt its delay from judicial review entirely and to eschew the prevailing legal standard that governs cases concerning unreasonable agency delay. This Court should decline these invitations to create an anomalous gap in judicial review of agency inaction and a circuit split on the standard for reviewing agency inaction.

DOT's claim that the opportunity for further study justifies further delay proves too much: if the availability of additional data excused agency delay, agency inaction would become effectively unreviewable, because there is always more information that an agency can gather. By setting a specific deadline for action absent a showing that the agency "cannot" meet the deadline, Cameron Gulbransen Kids Transportation Safety Act, Pub. L. 110-189, 122 Stat. 639 (2008), *codified at* 49 U.S.C. § 30111 note, §§ 2(b), 4 (Gulbransen Act), Congress

indicated that it did not intend for the agency to postpone action indefinitely. Moreover, DOT's submission last month of a draft final rule to the Office of Management and Budget (OMB), only five days after it told this Court that it needed more time, shows that the agency has itself concluded that it has adequate information now to issue a standard. Submission of the draft final rule does not guarantee that the rule will issue absent this court's intervention — for instance, DOT sent a draft final rule to OMB in November 2011 only to withdraw it 19 months later, in June 2013 — but DOT's submission belies its contention that the opportunity to engage in more research justifies further delay.

Finally, although DOT perfunctorily opposes petitioners' standing, DOT does not question the standing of petitioner Kids And Cars, and only one petitioner need have standing. In any event, the government's standing arguments lack merit.

DOT's years-long delay of a critical safety standard fits comfortably within the range of cases in which courts have ordered relief for unreasonable agency delay. Because of the hundreds of preventable deaths and thousands of preventable injuries that have occurred — and continue to occur — while the public waits for a final rule, the Court should declare that DOT has unreasonably delayed in issuing a rear visibility safety rule as required by Congress and order DOT to issue a final rule within ninety days.

ARGUMENT

I. The Agency's Inaction In The Face Of A Congressional Command Is Reviewable By This Court, And The *TRAC* Factors Provide The Appropriate Standard of Review.

A. DOT's principal contention is that where an agency invokes statutory authority to extend a statutory deadline, the agency's action is not subject to judicial review no matter how many times the agency extends the deadline, how weak its basis for doing so, or how long the resulting delay. In other words, in DOT's view, if the agency is permitted to extend a deadline at all, it is exempt from judicial review of agency action "unreasonably delayed." 5 U.S.C. § 706(1). DOT's approach is unsupported by the Administrative Procedure Act (APA) and would leave an unwarranted lacuna in judicial review of agency inaction.

DOT does not dispute that judicial review is available when Congress has set a deadline that cannot be extended, *see, e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932 (5th Cir. 2012); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999), and when no statutory deadline applies at all, *see, e.g.*, *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143, 145, 159 (3d Cir. 2002); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1145, 1150 (D.C. Cir. 1992) (per curiam). The agency nonetheless contends that when Congress gives the agency a level of flexibility lying between these two poles by providing a deadline but granting the agency narrow authority to extend the deadline when the original

deadline "cannot" be met, any agency delay is unreviewable. This position is illogical: under DOT's view, where Congress specifies a deadline and criteria under which the agency can extend it, Congress intends *less* judicial review of agency delay than when Congress has provided no deadline at all.

DOT's proposed gap in judicial review under the APA would flout the will of Congress by transforming a narrow grant of authority to extend a statutory deadline into a license to ignore the deadline entirely. By legislating a specific deadline (February 2011), Congress indicated that the agency should act promptly. In urging this Court to hold unreviewable DOT's pattern of delay — including four self-granted extensions that expand the three-year rulemaking period envisioned by Congress to seven years — DOT would read Congress's provision for a deadline right out of the statute. Moreover, under the agency's view that it has unreviewable discretion to delay the rule indefinitely, this Court would be equally powerless to act whether DOT extended the deadline four times or forty, and whether DOT reset its deadline to 2015 or 2025. The Court should reject this extreme position.

The agency suggests that, because "the Secretary determines" whether the extension criterion applies, Gulbransen Act, Pub. L. 110-189, § 4, the decision whether to extend the deadline is "committed to agency discretion by law" and therefore unreviewable under 5 U.S.C. § 701(a)(2). *See* Resp. in Opp'n to Pet. for Writ of Mandamus (Resp.) 13. But the § 701(a)(2) exception to judicial review is

narrow, applying only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation and internal quotation marks omitted); *see also Christianson v. Hauptman*, 991 F.2d 59, 62-63 (2d Cir. 1993) (holding that agency land management was subject to judicial review where Congress directed that the land be managed "[f]or the purpose of conserving and preserving for the use of future generations" and "with the primary aim of conserving the natural resources located there" (citations, internal quotation marks, and emphasis omitted)). Here, the Gulbransen Act provides a specific standard against which to measure an agency's decision to extend the statutory deadline: an extension is permitted if the deadline "cannot be met." Gulbransen Act, Pub. L. 110-189, § 4. Therefore, there is "law to apply," *Volpe*, 401 U.S. at 410, and judicial review is available.

Then-Chief Judge Breyer's decision in *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), refutes DOT's suggestion, Resp. 13, that the particular words that Congress used in the Gulbransen Act — "if the Secretary determines" — foreclose judicial review. *Ward* held that DOT's refusal to waive a safety rule was judicially reviewable where the applicable statute permitted waiver "*if the Secretary determines* that such waiver is not contrary to the public interest and is consistent

with the safe operation of motor vehicles." *Id.* at 160 (citation and internal quotation marks omitted, and emphasis added).

DOT's authorities, *see* Resp. 13 n.4, do not suggest a different result. *Drake v. FAA*, 291 F.3d 59 (D.C. Cir. 2002), concerned an agency's enforcement discretion, which is "presumptively outside the bounds of judicial review." *Id.* at 70. *Claybrook v. Slater*, 111 F.3d 904 (D.C. Cir. 1997), concerned an agency decision "made on the spot — under time pressure and in the middle of an ongoing meeting" not to adjourn the meeting. *Id.* at 908. In contrast, here, the statutory standard for taking an extension (that the deadline "cannot be met") provides a basis for evaluating the agency's decision. Further, the Secretary's desire to take additional time to "refine [the agency's] understanding," Ex. M, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce, at 2 (June 20, 2013), plainly does not satisfy that standard. Indeed, the Secretary's extension letter never claims that the otherwise-applicable deadline "cannot be met." Gulbransen Act, Pub. L. 110-189, § 4.

B. On the merits, the agency seeks to avoid *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*). But this Court has already indicated that *TRAC*, regularly applied for thirty years by the D.C. Circuit, provides the standard of review for an unreasonable delay case. *See Natural Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013) (*NRDC*).

The fact that this case seeks a writ of mandamus does not alter the *TRAC* analysis; indeed, the *TRAC* case itself involved a petition for mandamus. 750 F.2d at 72. Other courts of appeals have applied *TRAC* to mandamus petitions challenging agency delay. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *Towns of Wellesley, Concord & Norwood v. Fed. Energy Reg. Comm'n*, 829 F.2d 275, 277 (1st Cir. 1987). This Court should do the same.

C. Under *TRAC*, petitioners are entitled to relief for the reasons explained in the petition. *See* Pet. 15-27. The government does not argue that its delay is justified under the *TRAC* analysis.

The agency's one substantive justification for delay — to conduct additional research — is belied by the fact that only five days after filing its response in this case, DOT submitted a draft final rule to OMB for review. *See* Ex. N, OIRA, Pending EO 12866 Regulatory Review (attached to this brief).[1] This action does not obviate the need for judicial enforcement of the deadline — indeed, the last time DOT sent a final rear visibility rule to OMB, it languished there for 19 months before being withdrawn when DOT took its most recent 18-month extension, *see* Pet. 12-13 — but it does show that DOT, the agency required by statute to regulate, in fact has been able to prepare a final rule without the further research that it has told the Court it needed to develop a final rule.

[1] As of the filing of this brief, a copy of this document was also available at: http://www.reginfo.gov/public/do/eoDetails?rrid=123679.

DOT's arguments for further research are, in any event, unconvincing. The agency's point that "Congress plainly did not mandate that the Secretary require installation of new technology without considering a variety of studies, simulations, experiments and real-world data," Resp. 18, counsels for, rather than against, relief here: the administrative record reflects a plethora of "studies, simulations, experiments and real-world data," *id.*, all considered in the Notice of Proposed Rulemaking. *See* Pet. 9-12. The agency implies that the choice now available is between a hasty rule with little study and a carefully considered rule that will not issue for a year or more. *See* Resp. 18. That is false choice, belied by the regulatory history and the extensive research the agency has already conducted in formulating not one but two separate draft final rules for OMB review (one in November 2011 and one in December 2013). An agency can always add to existing research; if the ability to acquire more data justified delay, then any rule could be delayed indefinitely as the agency updated the data again and again.

Even if DOT were justified in continuing to undermine Congress's intent that a rule be issued promptly, the additional information DOT would like to review is negligible. DOT cites only one specific case it wishes to consider: a backover crash from February 2013 analyzed through the Special Crash Investigation program (SCI). *Id.* at 15-16. Because SCI data from 2006-10 include only four cases in which a car with any type of rearview technology was involved

in a backover crash, *see id.* at 15, a single new "anecdotal"[2] data point will not be statistically representative of a large set of data from which conclusions may be reliably drawn or that could alter the agency's prior analysis. *See id.* at 16-17 (summarizing competing views the agency considered); Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements; Proposed Rule, 75 Fed. Reg. 76186, 76230 (Dec. 7, 2010) (hereinafter "Proposed Rule").

Approaching the six-year anniversary of Congress's passage of the Gulbransen Act directing DOT to regulate within three years, the agency offers no meaningful rebuttal to petitioners' case for relief under *TRAC*. DOT's submission of a draft final rule to OMB reveals that the agency itself believes its study complete. Because the delay is nonetheless continuing and because prior signs of progress have been followed by further extensions, this Court should declare the continuing delay unreasonable and set a deadline for issuing the safety standard.

II. Petitioners Have Standing Based On Harm To Organizational Mission, Economic Harm, And Risk Of Physical Harm.

The government's cursory standing discussion does not cast doubt on any of petitioners' bases for standing.

[2] SCI provides "an anecdotal data set useful for examining special crash circumstances or outcomes from an engineering perspective." NHTSA, Special Crash Investigations, *at* http://www.nhtsa.gov/Data/Special+Crash+Investigations+(SCI)/Special+Crash+Investigations+Overview (last viewed Jan. 8, 2014).

A. First, DOT does not question the standing of Kids And Cars, Inc. (KAC), whose standing is easily established.

Diversion of an organization's resources is an injury sufficient to support standing. *See Nnebe v. Daus*, 644 F.3d 147, 156-58 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904-05 (2d Cir. 1993). As described in the Petition, KAC spends 45% of its annual budget on public education to prevent backover crashes. Ex. H, Fennell Decl. ¶ 8. If DOT promulgated the backover rule as required by the Gulbransen Act, KAC would not have to spend nearly as much time and money on this issue because the public needs far less education about a safety feature that is mandatory, and thus KAC would be able to devote more time and money to its other auto-safety priorities. *Id.* ¶ 11.

"[B]ecause the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and KAC's standing is clear and uncontested, the Court need inquire into standing no further. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

B. The other petitioners, in any event, also have standing. Petitioners have offered evidence that consumers, including petitioner Gulbransen and members of petitioner Consumers Union, *see* Ex. A, Gulbransen Decl. ¶¶ 4-5; Ex. E, Shecter Decl. ¶¶ 7-9, will pay more for cars with rear visibility safety features in the absence of a regulation requiring these features. *See* Ex. F, Mannering Decl.

¶¶ 15-23. Petitioners have also offered testimony that the insurer members of petitioner Advocates for Highway and Auto Safety will pay more in claims until the backover rule is issued. *See* Ex. G, Gillan Decl. ¶¶ 6-9. Economic harm is well recognized as an injury in fact. *See, e.g.*, *NRDC*, 710 F.3d at 85 ("Even a small financial loss is an injury for purposes of Article III standing.").

DOT does not contest that economic benefits would flow from issuing the safety standard. Instead, the government argues that these benefits would not be "imminent." Resp. 19. But standing requires that the *injury in fact* must be imminent, not that this imminent injury must also be imminently *redressable*. Here, the injury is already occurring and is ongoing; it is causally related to DOT's inaction; and it is would be redressed if DOT were to act. DOT cites no authority suggesting that the length of time it takes to redress the injury is a question relevant to standing. Indeed, the Supreme Court has explained that "the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant" to the redressability inquiry. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007).

C. Finally, injury to the parent-members of petitioner Consumers Union and to petitioner Auriemma is established by their children's risk of physical harm. *See* Ex. B, Auriemma Decl. ¶¶ 3-6; Ex. D, Halford Decl. ¶¶ 4-7; Ex. E, Shecter Decl. ¶¶ 3-6. As this Court has held, "the injury contemplated by exposure to a

potentially harmful product is not the future harm that the exposure risks causing, but the present exposure to risk." *NRDC*, 710 F.3d at 81 (finding standing to challenge FDA's failure to regulate triclosan, a chemical used in soap, based on risk of harm, because exposure increases a person's likelihood of developing cancer, thyroid problems, and liver damage); *accord Baur v. Veneman*, 352 F.3d 625, 627-28, 633-34 (2d Cir. 2003) (finding standing to challenge USDA's failure to ban "downed cattle" in the food supply due to the risk of transmission of dire neurological diseases, including the one popularly known as "mad cow disease").

"To establish injury in fact based on exposure to a potentially harmful product, a plaintiff must show 'a credible threat of harm' due to that exposure," *NRDC*, 710 F.3d at 81 (quoting *Baur*, 352 F.3d at 637), and that threat, in turn, depends on both the seriousness of the harm and its likelihood of occurring. *NRDC*, 710 F.3d at 81; *Baur*, 352 F.3d at 637. No one, including DOT, disputes the seriousness of the danger from backover crashes. *See* Gulbransen Act, Pub. L. 110-189, § 2(b) (ordering regulation for the purpose of reducing deaths and injuries due to cars backing into people); Proposed Rule, 75 Fed. Reg. at 76187 (noting that hundreds die and thousands are injured by backover crashes annually); Resp. 6 (same). DOT's own acknowledgement of the risk buttresses the claim of injury. *See NRDC*, 710 F.3d at 82; *Baur*, 352 F.3d at 637.

Although the risk that any particular child will be injured or killed in a backover collision is hard to quantify, the magnitude of the harm — a child's serious injury or death — is enormous. In *Baur*, this Court found standing under the same type of circumstance: a risk of uncertain likelihood but extreme severity. *See Baur*, 352 F.3d at 637, 641 ("Baur alleges that downed cattle may transmit vCJD, a deadly disease with no known cure or treatment" although "a chain of contingencies may need to occur for Baur to actually contract vCJD as a result of his exposure to contaminated beef"); *cf. Massachusetts*, 549 U.S. at 526 (finding standing to challenge EPA's refusal to regulate greenhouse gas emissions where "[t]he risk of catastrophic harm, though remote, is nevertheless real"). Likewise, here, petitioners have standing based on the risk to their children from backover injuries.

The fact that the rule will not entirely eliminate the risk of backover injuries and deaths does not diminish petitioners' standing. *See id.* at 525 ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."); *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) ("[E]ven a small probability of injury is sufficient to create a case or controversy — to take a suit out of the category of the

hypothetical — provided of course that the relief sought would, if granted, reduce the probability.").

DOT's argument that supervision of children is necessary no matter the level of risk they face attacks a straw man. The petitioners do not claim that the need to supervise their children is itself injurious. Rather, the *risk* that threatens their children is the injury. As DOT agreed in its proposed rule and as Congress found when it enacted the Gulbransen Act, the final rule, when in effect, will substantially reduce that risk to children.

CONCLUSION

The Court should declare that DOT has unreasonably delayed in issuing a backover rule as required by the Gulbransen Act and issue a writ of mandamus directing DOT to issue a backover rule within ninety days. The Court should also retain jurisdiction to monitor DOT's compliance with the Court's order.

January 10, 2014

Respectfully submitted,

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