

Docket No. 02-70303

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PUBLIC CITIZEN INC., ET AL.,  
Petitioners,

v.

NORMAN Y. MINETA,  
Secretary of Transportation,

Respondent.

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On Petition for Review of Order of the National Highway  
Traffic Safety Administration

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**REPLY BRIEF FOR PETITIONERS**

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RE Petitioner’s Record Excerpts

SER Respondent’s Supplemental Excerpts of Record

FRE Petitioner’s Further Record Excerpts

## INTRODUCTION

Respondent's defense of the decision of the National Highway and Traffic Safety Administration ("NHTSA") to set the maximum test speed for unbelted crash tests at 25 mph is based on two key mischaracterizations of the rule.

*First*, NHTSA's rule does not improve the protection afforded by air bags in tests that simulate the injuries to unbelted, median-sized adults in frontal crashes. NHTSA found that, in 25 mph and 30 mph crash tests involving 50<sup>th</sup> percentile male dummies, the 1998 and 1999 vehicles that it tested met or exceeded the occupant protection standards developed in NHTSA's May 2000 rule — including NHTSA's "new injury criteria." SER at 172; Further Record Excerpts ("FRE") at B-4 - B-5 (vehicles were tested under the proposed test). As a result, the new standards to be phased in between 2000 and 2006 require *no* improvement in the protection measured by these tests and, if manufacturers take advantage of the leniency of the 25 mph frontal crash test standard, the protection afforded by air bags *will decline* during this period.

Respondent incorrectly asserts the new rule will "save lives." Respondent at 16. The statistics that the Respondent cites as "saved lives" are actually a comparison between the NHTSA's rule and a hypothetical world in which all vehicles are engineered to minimally comply with a 30 mph sled test. See Record Excerpts ("RE"), 65 Fed. Reg. at 30,689. These lives will not be "saved" because

air bags in production before NHTSA approved the 25 mph rule exceed the level of protection required by the sled test and by the 25 mph crash test that NHTSA adopted. See RE 7, 65 Fed. Reg. at 30,700 (under 25 mph crash test, lives saved by pre-rule making air bags might not be saved). Respondent also omits a significant qualification when he states that NHTSA concluded that “the overall protection offered by current air bags would continue to be improved under the new requirements.” Respondent at 36. NHTSA stated that improvements would occur *if* manufacturers voluntarily make safety advances that are not mandated by the new requirements, and it also recognized that the rule permits manufacturers to “reduce the overall level of high speed protection being provided today.” RE 7, 65 Fed. Reg. 30,704.

Indeed, NHTSA projected that the 25 mph unbelted crash test could result in hundreds of preventable air bag fatalities — fatalities that far outnumber the lives that NHTSA projected could be saved by its other crash test requirements in the new rule. See RE 7, 65 Fed. Reg. 30,735. The potential impact of the rule is dramatically illustrated by a NHTSA bar graph, in which the baseline represents the performance of current vehicles, and the “benefits” of the 25 mph unbelted frontal barrier test are identified as 0 to 395 *additional fatalities*. See SER at 223. The graph also shows an overall decline in occupant protection because the

maximum projected number of lives saved by the crash tests requirements totals only 55 lives. Id.<sup>1</sup>

*Second*, Respondent suggests that NHTSA abandoned its proposal to set the maximum test speed for unbelted crashes at 30 mph because the necessary technology was not yet available, or because a speed above 25 mph would not satisfy the Safety Act’s mandate that standards be “reasonable” and “practicable” Respondent at 14, 19, 42. These statements mischaracterize NHTSA’s action because NHTSA did not cite any of these considerations as the basis for its decision. To the contrary, NHTSA repeatedly stressed that its test results showed that current production vehicles already “incorporate the designs and technologies necessary to enable them to comply” with the standards for driver and passenger protection in 30 mph crash tests for *both* the 50<sup>th</sup> percentile adult male and 5<sup>th</sup> percentile female dummies. RE 7, 65 Fed. Reg. at 30,687.

The agency challenged manufacturers to show that vehicles could not be designed to satisfy the 30 mph unbelted crash tests using existing technology. RE 5, 64 Fed. Reg. at 60,582. However, no one came forward with convincing evidence. Accordingly, in March 2000, NHTSA told the Office of Management

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<sup>1</sup>Of the alternatives described in this analysis, Alternative 1 is the final rule through the first stage (September 2006) and Alternative 3 represents the final rule after the second stage requirements are fully implemented. See SER 171, 186-192; see also FRE, IV-68 - 74 (benefits summary for each alternative).

and Budget that the manufacturers' claims that entirely new technologies would be needed to meet the 30 mph test speed for unbelted crash tests were "misplaced and unsupported" because the rulemaking record shows that manufacturers can design air bags that satisfy the 30 mph crash test for both dummies "using technology already being installed in some current production vehicles." RE 6, Draft Rule, at 112. In the May 2000 interim rule NHTSA used less dramatic language, but still acknowledged that its testing showed manufacturers did not need to invent new technology because they could comply with the 30 mph standard by re-designing vehicles to incorporate existing technology. RE 7, 65 Fed. Reg. 30,687 n.14; FRE at VII-2, VII-17, B-5.

Thus, NHTSA did not find that the 30 mph standard was impractical. Rather, after intense lobbying by the industry, NHTSA opted for a lower standard to give manufacturers "greater flexibility to choose among and gain experience with advanced air bag technologies." RE 7, 65 Fed. Reg. at 30688. Because NHTSA achieved this "greater flexibility" by adopting a rule that does not improve occupant protection and sacrifices overall safety, the rule should be set aside as both unlawful and as arbitrary and capricious.



**I. RESPONDENT’S PROCEDURAL CHALLENGES ARE WITHOUT MERIT.**

Respondent’s arguments that this petition should be dismissed or transferred warrant only a brief response:

1. On the issue whether the petition is timely, Petitioners do not, as Respondent asserts, ignore the date when the rule was issued. Respondent at 21. Petitioners maintain that a rule is “issued” when the regulatory process is completed by publication in the Federal Register. Prior to this date, the public does not have notice of the rule and the agency may recall or revise its order adopting the rule. This interpretation of “issued” is consistent with the text of 49 USC § 30161, and with the agency’s regulation, which provides that the period begins when the agency “takes final action.” 49 CFR § 553.39. Moreover, it is consistent with decisions by this and other Circuits that have emphasized the need for public notice. See Petitioner’s Brief at 27-29.

2. Respondent seeks to bolster his claim that a request for administrative reconsideration extends the time for seeking judicial review only with respect to persons who are parties to the request by asserting that “NHTSA's understanding of the case law is entitled to respect.” Respondent at 25. However, NHTSA’s views are not entitled to any deference. Congress has not delegated authority to NHTSA to determine the scope of this Court’s jurisdiction, and NHTSA repealed

its regulations stating that reconsideration postpones the deadline for seeking review for “every person adversely affected by the rule,” 60 Fed. Reg. at 63,648, 650 (1995), only because it believed court decisions required that the tolling provision be limited to parties to the reconsideration request. Where, as here, the agency’s position is based on its interpretation of court decisions, no deference is afforded to the agency. See Phillips Petroleum v. FERC, 792 F.2d 1165, 1170 (D.C. Cir. 1986).

3. Respondent’s argument that NHTSA’s position is correct because finality is a “party-based” concept and “we are aware of no case law to support the contrary view,” Respondent at 26, is rhetoric without substance. There are no precedents that reject *or endorse* Respondent’s argument on the effect of reconsideration. Dicta stating that finality is party-based do not support adoption of NHTSA’s post-1995 position because the position that NHTSA endorsed prior to 1995 was also “party-based.” That position, which Petitioners advocate here, recognized that an agency order may be final with respect to some parties (namely, those who file for judicial review and are not parties to requests for reconsideration), and not final with respect to others. This Court should resolve this issue by finding that the California petitioners were entitled to petition for review on all issues after NHTSA issued the decision on reconsideration. That result is (i) consistent with the discussion of reconsideration in ICC v. Brotherhood

of Locomotive Engineers, 482 U.S. 270, 278, 284 (1987); (ii) consistent with the language of 49 USC § 30161 providing for review by any “person adversely affected,” and (iii) supported by the principle that courts should avoid interpretations that require that challenges to agency action be brought before the agency has given its last word on the matter. See Sierra Club v. United States Nuclear Regulatory Commission, 825 F.2d 1356, 1361 (9th Cir. 1987).

## **II. NHTSA’S RULE FAILS TO SATISFY THE STATUTORY REQUIREMENT THAT THE RULE “IMPROVE OCCUPANT PROTECTION FOR OCCUPANTS OF DIFFERENT SIZES, BELTED AND UNBELTED.”**

Congress directed NHTSA to issue a rule that “improve[s] occupant protection for occupants of different sizes, belted and unbelted.” Pub. L. 105-178, title VII, § 7103(a)(1). The final rule must be fully effective by September 1, 2006. Id. § 7103(a)(3). Respondent’s arguments that NHTSA’s rule satisfies this standard are without merit because the final rule (A) does not improve occupant protection for median-sized occupants by 2006; and (B) permits a decline in occupant protection that is directly at odds with the statute’s mandate.

### **A. NHTSA’s Rule Does Not Improve Occupant Protection for Occupants of Different Sizes.**

As discussed in Petitioners’ Opening Brief and above, NHTSA’s tests found that setting the maximum test speed of 25 mph for frontal barrier crashes with unbelted 50<sup>th</sup> percentile male dummies would not require manufacturers to improve

the performance of air bags in current vehicles because the majority of vehicles tested already satisfied the new tests, even when the crash test speed was 30 mph. Petitioners' Brief at 37-38. Respondent's arguments that the rule nonetheless improves occupant protection miss the mark.

First, Respondent asserts that Petitioners' argument depends on "comparison solely with the 30 mph unbelted barrier test," and that such a comparison is inappropriate because NHTSA's 1993 standard lacks the refinements in injury criteria and test methods incorporated in the May 2000 rule. Respondent at 32, 40-41. This assertion is erroneous. Petitioners argue that NHTSA's rule does not improve occupant protection because it falls below the level of protection actually provided by model year 1998 and 1999 vehicles. NHTSA's testing of these vehicles included evaluation of whether they satisfied the test procedures and revised injury criteria included in the May 2000 rule, and the agency found that, with minor exceptions, air bags currently in production satisfy these requirements. SER at 172; FRE at B-4, IV-24, IV-31-33; RE 5, at 1.2, 1.8, 2.2, 4.2

For this reason, Respondent's assertion that Petitioners fail to consider the modifications to testing requirements in NHTSA's rule that are independent of test speed (Respondent at 32-33, 41), is also mistaken. Increased complexity in air bag testing procedures and injury criteria does not necessarily translate to increased occupant protection. NHTSA's revisions to the injury criteria for the 50th

percentile male dummies in this rulemaking are technical adjustments, not major new requirements.<sup>2</sup> NHTSA found that virtually all of the model year 1998 and 1999 vehicles that it tested met or surpassed the new injury criteria in the May 2000 rule in 30 mph crash tests with both unbelted and belted 50<sup>th</sup> percentile male dummies. FRE at IV-21 - 22, IV-26 - 27, IV-31-32. Thus, the revised injury criteria do not require improvement in occupant protection in these tests, and NHTSA's projections of the safety benefits do not attribute any significance to the revised testing procedures. Respondent does not point to anything in the record that shows that the revised injury criteria in Standard 208 will improve occupant protection above current levels — particularly if manufacturers design vehicles to minimally meet the 25 mph test speed.<sup>3</sup>

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<sup>2</sup> See Docket No. 99-6407-5, Development of Improved Injury Criteria for the Assessment of Advanced Automotive Restraint Systems II, Nov. 1, 1999.

<sup>3</sup> In the notice approving the interim rule, NHTSA surveyed the requirements of the rule other than the 25 mph test speed for frontal crash tests with unbelted dummies and stated that “[b]ecause of all these additional complexities and increased stringency, it is not correct to claim that setting the unbelted rigid barrier test speed below 48 km/h (30 mph) *necessarily* reduces protection to unbelted occupants.” RE 7, 65 Fed. Reg. at 30,705 (italics added). Even this statement implicitly acknowledges that NHTSA had no basis for concluding that the additional complexities and increased stringency would *improve* the protection of unbelted occupants, and the detailed assessment of the standard in the agency's economic analysis shows a dramatic reduction in protection if manufacturers do not voluntarily maintain current levels of protection. See FRE at VI-68 -74.

Indeed, NHTSA’s analysis and testing confirm that the adjustments to testing procedure and injury criteria that NHTSA adopted in this rulemaking have little impact on occupant protection compared to the impact of setting the maximum test speed for frontal crashes at 25 mph rather than 30 mph. A test speed of 25 mph is so lenient that some vehicles will pass the unbelted 25 mph frontal crash test without an air bag.<sup>4</sup> Increasing the test speed to 30 mph requires much greater occupant protection because the measure of the difference between these two tests is not the 20% increase in speed, but the 44% increase in the energy of the crash. See RE 7, 65 Fed. Reg. at 30,687 n. 15; RE 6, Draft Rule, at 107.

Respondent can show “improvement” from the 25 mph unbelted crash test standard only if he defines the benchmark for measuring improvement as the protection that would be provided if manufacturers engineered vehicles to just barely satisfy the 30 mph sled test. See Respondent at 32. However, NHTSA’s own analysis explained why this comparison is flawed when it dismissed Chrysler’s argument that a 25 mph crash test increases “overall protection” because it is more stringent than the 30 mph sled test. FRE at B-42. When

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<sup>4</sup> Docket No. 6407-46, Syson-Hille and Associates Comments, Dec. 27, 1999 (in the 1970s GM developed vehicles that satisfied injury criteria more stringent than Standard 208 at 25 mph without restraints or an air bag); see also id. No. 97, Center for Auto Safety Comments, Feb. 24, 2000 (Insurance Institute objected to proposal to reduce unbelted test speed from 30 to 25 mph in 1984 because it was too easy for existing vehicles to satisfy such a standard).

NHTSA approved the sled test option in 1997, it stressed that even first-generation air bags exceeded the minimum performance required by this test, and it made this option temporary so that manufacturers would not be able to re-engineer vehicles to minimally meet this standard. RE 1, 62 Fed. Reg. at 12,968. Congress also provided that the sled test would continue only as a temporary option to be replaced by the advanced air bag rule. Pub. L. 105-178, supra § 7103(a)(4). Consequently, the appropriate standard for evaluating whether occupant protection will be improved is not minimal compliance with the sled test, but the level of occupant protection that vehicles actually provide.

Finally, Respondent erroneously characterizes Petitioners' challenge as suggesting "that every old test should remain unchanged," and argues that NHTSA discarded the 30 mph unbelted test requirement because of "serious problems of public acceptability." Respondent at 42. Petitioners do not argue that old tests may never be modified. We do contend that an agency cannot comply with a statutory mandate to "improve" occupant protection by adopting a rule that permits backsliding in the level of protection provided by current vehicles. To the extent that Respondent is arguing that "problems of public acceptability" permit NHTSA to adopt a regulation that falls short of the statutory mandate, that claim was rejected in Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29, 47-48 (1983).

**B. The Statutory Language Precludes Adoption of a Rule That Does Not Improve Occupant Protection for Occupants of Different Sizes, Belted and Unbelted.**

Petitioners agree with Respondent's statement that the statutory language at issue here mandates that NHTSA promulgate a rule that simultaneously (i) improves occupant protection for occupants of different sizes, belted and unbelted, and (ii) minimizes the risk to infants, children, and other occupants from injuries and deaths caused by air bags. Respondent at 18. However, the statutory language also makes clear that agency may "balance" these two requirements only if it has made certain that the rule provides for both improved occupant protection *and* risk minimization. In other words, the statute does not permit the agency to adopt a rule that does not include occupant protection because it believes that this will facilitate risk minimization. Nor does it permit NHTSA to contend that risk minimization or improving protection for belted occupants satisfies its statutory obligation to improve protection for unbelted occupants. Because NHTSA's rule is based on such impermissible trade-offs, it is contrary to law.

Respondent argues that the language of the advanced air bag statute requires "even more [respect]" for Respondent's position than ordinarily applies in review under the Administrative Procedure Act. Respondent at 17, 28. However, the statutory language makes explicit that Respondent's discretion is bounded by the requirement that the final rule satisfy all of the requirements of paragraph (a)(1) of



the statute. See Pub.L. 105-178, supra, § 7103(a)(2). Moreover, Congress chose language that imposes significant boundaries on the agency’s discretion. The statute does not give the agency authority to do whatever it deems appropriate to advance air bag performance. Rather, the agency must adopt a rule to improve occupant protection for both “belted and unbelted” and “for occupants of different sizes,” at the same time that it minimizes the risk of injury from air bags. A rule that fails to fulfill these requirements is “contrary to law,” under 5 U.S.C. § 706 and Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984).<sup>5</sup>

Deference is accorded to an interpretation of statutory language only if the interpretation is articulated by the agency. SEC v. Chenery Corp., 318 U.S. 80, 87-88, 95 (1943). Here, the agency’s description of what Section 7103 requires is consistent with Petitioners’ argument that NHTSA’s rule is unlawful if it does not both “improve occupant protection for occupants of different sizes” and minimize risk. See RE 7, 65 Fed. Reg. at 30688. It is the Intervenors who advocate different constructions in three alternative interpretations of the statutory mandate. Brief for

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<sup>5</sup> Respondent’s suggestion that he is entitled to something more than Chevron deference also fails because even the cases cited in Respondent’s Brief to support this claim cite Chevron and the “arbitrary and capricious” standard of the APA as the applicable standard of review. See Air Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981).

the Intervenor at 29-35. The third alternative appears to be roughly equivalent to Respondent's position, but the first two are the Intervenor's own invention. Because these two interpretations were never articulated by Respondent, and because they are inconsistent with the legislative language, they cannot provide a basis for defending NHTSA's rule.

First, the Intervenor hypothesizes that the government could have concluded that "overall" improvement of occupant protection satisfies the statute and there is no need to consider the effect on subgroups. Brief for the Intervenor at 30-31. Thus, Intervenor maintains that it is not a problem if NHTSA's rule provides *less* protection for unbelted adults and teenagers of median size. As we discuss below, NHTSA's rule does not result in an "overall" improvement in occupant protection. See below at 17. But this interpretation would also render meaningless the statutory language directing that the rule improve protection for occupants of different sizes and for both belted and unbelted occupants. See *TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) (courts have a duty to avoid interpretations that would render part of the statutory language superfluous, void, or insignificant). Perhaps most relevant here, the statutory language does not permit *degradation* in the protection of an identifiable group, which is the result that NHTSA endorsed when it elected to make the maximum test speed for unbelted barrier crash tests 25 mph instead of 30 mph.

Second, Intervenor's opine that the government might have interpreted the statute to require improvement only with respect to belted occupants, and allow degradation of the protection for unbelted occupants. Brief for the Intervenor's at 31-33. This hypothesis is twice flawed. First, the "belted and unbelted" language of the statute precludes such an interpretation. Second, NHTSA's rule does not require any improvement in the protection measured by the frontal crash test for 50<sup>th</sup> percentile adult male dummies within the time period covered by the statute. During this period, from the present to model year 2007, the maximum test speed for this test will continue to be 30 mph. RE 7, 65 Fed. Reg. 30690, 30707.

Thus, the regulations require no improvement in occupant protection for belted, median-sized adults by the end of the statutory period because current vehicles already provide the level of protection required by NHTSA's rule. SER at 202-203.<sup>6</sup> Although the rule provides for an increase in the test speed to 35 mph during the second stage of the rule, this requirement does not begin to be phased-in until *after* September 1, 2006, the date by which NHTSA must have a fully effective rule that satisfies both the requirements of the statutory mandate for advanced air bags. The fact that NHTSA's rule does not require improved protection for the vast majority occupants, even if they are belted, until after the

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<sup>6</sup> As discussed above, NHTSA's test found that existing vehicles satisfied the new injury criteria in belted tests. See supra at 9.

statutory deadline, is a perfect illustration of how the rule fails to fulfill the statutory mandate.<sup>7</sup>

### **III. NHTSA’S ADVANCED AIR BAG RULE IS ARBITRARY AND CAPRICIOUS.**

Even if the statutory language did not require Respondent to adopt a rule that requires both improved occupant protection and risk minimization, the trade-off that NHTSA has approved in this rule could not withstand review under the arbitrary and capricious standard because NHTSA’s stated reasons for approving the rule are not supported by the record, and because a critical factor in NHTSA’s decision was its reliance on manufacturers undertaking improvements in occupant protection that are not required by its rule.

#### **A. NHTSA’s Rule Does Not Improve “Overall” Safety.**

NHTSA’s rule does not provide for an “overall” or net improvement in air bag protection. As explained in Petitioners’ opening brief, NHTSA’s own statistics show that air bag performance in the frontal crash test with 50<sup>th</sup> percentile male dummies affects a much larger population, and relates to a much larger

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<sup>7</sup> The Insurance Institute for Highway Safety (“IIHS”) has requested leave to file an amicus brief that describes the IIHS’s independent views on air bag safety. In adopting the interim rule, NHTSA explained at some length why it disagreed with IIHS’s approach. See FRE at B-30 - 41. Because NHTSA’s reasoning is the only analysis that can be considered in reviewing the rule, IIHS’s alternative approach is irrelevant here.

number of real-world automobile accidents, than the crash tests with 5<sup>th</sup> percentile female dummies, or the tests designed for risk minimization. See SER at 200-201. Consequently, NHTSA's own analysis shows that the greatest safety benefits are associated with the high speed crash tests. FRE, Final Economic Assessment, V-19-20 and VI-7 -12. The fatalities that NHTSA projected could result from its decision to set the maximum test speed for frontal crash tests with 50<sup>th</sup> percentile unbelted male dummies at 25 mph far exceed the number of lives that NHTSA projected could be saved by the crash tests for 5<sup>th</sup> percentile female dummies or risk minimization tests. SER at 200, 205, 207, 222-224.

Despite these projections concerning overall fatalities, Respondent argues that reducing the unbelted crash test speed is justified for three reasons. First, Respondent argues that focusing on these safety statistics ignores other factors identified by the National Traffic and Motor Vehicle Safety Act of 1966, namely whether the standard “is reasonable, practicable and appropriate.” Respondent at 42 (quoting 49 USC § 30111(b)). This response, however, has no merit because NHTSA did not identify any of these considerations as its basis for selecting 25 mph rather than 30 mph as the test speed for unbelted frontal crash tests. Rather, the agency stated that 25 mph was selected because this speed would be “in the best overall interests of safety.” RE 7, 65 Fed. Reg. at 30,687. Because the

agency's stated rationale is contrary to the evidence, NHTSA's rule must be set aside. State Farm, 463 U.S. at 43, 50.

Second, Respondent asserts that NHTSA considered both "predicted injuries as well as predicted fatalities." Respondent at 44. NHTSA's projections concluded that, under some assumptions, setting the test speed at 30 mph rather than 25 mph could result in as many as 1,345 additional serious, but not fatal, injuries. RE 7, 65 Fed. Reg. at 30,735. Using the same methodology, NHTSA projected that adoption of 25 mph as the maximum speed for unbelted crash tests could result in as many as 395 additional fatalities. Id. Respondent provides no citation to support the assertion that NHTSA concluded that the risk of non-fatal injuries outweighed the hundreds of additional *fatal* injuries that NHTSA projected could result from the lower standard, nor does he show how NHTSA rationalized a trade-off between fatalities and non-fatal injuries.

Moreover, NHTSA's estimate of non-fatal injuries was based on the assumption that manufacturers would use single-stage air bags. When NHTSA's model considered the use of multi-stage air bags, the additional non-fatal injuries associated with the 30 mph test disappeared. Id. at 30,735 n.33; FRE at VI-71-73. Consequently, the injuries estimate cannot be used to justify the 25 mph test speed because, as State Farm makes clear, the agency cannot justify a decision to relax a

safety standard by assuming that manufacturers will choose to use technology that defeats the purpose of the standard. State Farm, 463 U.S. at 49-50.

Finally, Respondent dismisses the projections of hundreds of additional fatalities under a 25 mph unbelted crash test standard as “worst case estimates.” Respondent at 44. The maximum numbers in these projections do represent the “worst case,” but even if the tally of fatalities does not reach the maximum, the direction of the change is the same; NHTSA’s decision to set the test speed at 25 mph will decrease overall safety.

Moreover, NHTSA’s rationale for selecting 25 mph rather than 30 mph for unbelted barrier tests assumes that the degradation that would lead to these increased fatalities is a significant possibility. NHTSA’s conclusion that manufacturers should be afforded “flexibility” presumes that, in the course of redesigning vehicles to meet the risk minimization standards, manufacturers will adopt designs that degrade the high-speed performance of at least some vehicles so that these vehicles will no longer satisfy a 30 mph unbelted frontal crash test with a 50<sup>th</sup> percentile male dummy. RE 7, 65 Fed. Reg. 30,688. Respondent cannot justify the rule by assuming that manufacturers may degrade performance to comply with the minimization requirements, and simultaneously dismiss the fatalities that would result from this degraded performance in evaluating whether the lower standard produces an “overall” benefit to safety.

**B. The Statute Does Not Permit NHTSA To Rely On Manufacturers Voluntarily Maintaining and Improving Air Bag Performance.**

Petitioners also challenge NHTSA's rationale for the 25 mph test speed because NHTSA found that the reduced speed was justified "as long as the manufacturers improve the already substantial overall level of air bag protection provided by current redesigned air bags." RE 7, 65 Fed. Reg. at 30,688.

Respondent's response to this challenge misses the mark because it mischaracterizes Petitioners' argument.

Although Petitioners disagree with NHTSA's conclusion that it is "unlikely" that manufacturers will reduce the performance of air bags in the 25 mph frontal barrier test with 50<sup>th</sup> percentile male dummies, that dispute is not the basis for this Petition. Rather, Petitioners argue that, even if NHTSA's prediction were reasonable, reliance on voluntary improvements to satisfy the statutory mandate is impermissible as matter of law. See Petitioner's Brief at 24-25, 50. The statute requires that the agency promulgate a *regulation* "to improve occupant protection," and that mandate is not satisfied by the agency adopting a regulation that does not require improvement, and hoping that manufacturers will magnanimously surpass the regulatory standard. Significantly, the statute does not direct the Secretary of Transportation to study whether a regulation is necessary in light of manufacturers' plans, or otherwise suggest that the Secretary may elect to rely on voluntary efforts



rather than a rule to improve occupant protection. Because the statute mandates that the agency adopt a regulation that improves occupant protection, NHTSA was not permitted to rely on the assumption that manufacturers will exceed the regulatory standard in order to justify degradation of the regulatory protections.

**C. NHTSA’s Reliance on Uncertainty Is Arbitrary and Capricious.**

In addition to relying on voluntary action to maintain and improve occupant protection, NHTSA stated that it chose to reduce the unbelted test speed to 25 mph because reducing unbelted protection is the best way to resolve “the uncertainty involved in meeting the challenge to improve high-speed protection and minimize risk simultaneously.” RE 7, 65 Fed. Reg. at 30,688. Respondent’s defense of the agency’s reliance on uncertainty does not withstand scrutiny.

First, Respondent asserts that NHTSA’s action is justified because the new rule is designed to require “technology that will be developed in the future.” Respondent at 47. As noted above, however, NHTSA found that existing technologies are capable of satisfying both the 25 mph and 30 mph unbelted crash test standards for both 50<sup>th</sup> percentile and 5<sup>th</sup> percentile dummies, and it adopted the lower speed to allow manufacturers “design flexibility” and time to “gain experience” with existing technologies. RE 7, 65 Fed. Reg. 30,688; see also FRE, Final Economic Analysis at B-5; RE 7, 65 Fed. Reg. 30,704 (cost of compliance assumed to be the same for 25 mph or 30 mph speed). Although the Safety Act

contemplates that motor vehicle standards will be technology forcing, see State Farm, 463 U.S. at 49, NHTSA’s amendments to Standard 208 do not require the invention of new technology.<sup>8</sup>

Second, Respondent asserts that NHTSA’s reference to uncertainty here is not an “empty invocation” because, in this case, NHTSA “carefully explained the

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<sup>8</sup> Respondent’s statement that “[n]o MY 2000 vehicle could meet all the requirements in the new Standard,” Respondent at 35-36, is of no import because NHTSA did not identify any vehicles that it had subjected to all of the tests, and identified only one, pre-production, model year 2000 vehicle that had been included in its tests. RE 5, at 1.2. The key issue that NHTSA examined in these tests is whether vehicles could simultaneously pass frontal crash tests for both unbelted 50<sup>th</sup> percentile male and 5<sup>th</sup> percentile female dummies; if a vehicle passed these crash tests, the addition of weight sensors and existing suppression technologies would allow the vehicle to pass the risk minimization test designed to prevent deployments that could injure infants, children or out-of-position drivers. See SER at 172, 190. To determine whether vehicles could satisfy the new injury criteria with both the 50<sup>th</sup> percentile and 5<sup>th</sup> percentile dummies, NHTSA tested model year 1998-99 vehicles and found that their “air bags generally meet our new injury criteria” for *both* 50<sup>th</sup> percentile male dummies in a 30 mph test, and 5<sup>th</sup> percentile female dummies in a 25 mph test. SER 172; see also RE 4, at 1.7. When the test speed for the 5<sup>th</sup> percentile female dummies was increased from 25 to 30 mph, five of the twelve vehicles tested met the criteria on the driver side and five of eleven met the criteria on the passenger side. SER 172. While Respondent is correct that these results showed that “less than half” satisfied the unbelted test for both dummies at 30 mph, Respondent at 36, the proportion of vehicles passing both tests is higher when the 5<sup>th</sup> percentile female dummy is tested at 25 mph. See FRE, IV-24-33. Moreover, these tests indicated that the 1998 and 1999 vehicles that did not meet the new standards could be designed during the phase-in period to satisfy the crash test for unbelted 50<sup>th</sup> percentile dummies at 30 mph, and unbelted 5<sup>th</sup> percentile dummies at 25 mph or 30 mph, if manufacturers adopted the designs used in the vehicles that passed the test, such as recessing the air bag, improving fold patterns, or installing baffles in the air bag. SER at 172; FRE, B-4-5.

nature of the uncertainty, and the reason for resolving it in favor of risk minimization.” Respondent at 47. That is not so. NHTSA’s discussion of uncertainty is “empty” because the agency provided no factual or other basis for concluding that there is a meaningful risk that the protective measures manufacturers implement to comply with this rule could have adverse safety consequences that are both significant enough and probable enough to outweigh the potential fatalities associated with lowering the unbelted crash test speed to 25 mph. To the contrary, the “uncertainties” NHTSA pointed to relate to the details of how manufacturers will modify vehicle designs to comply with the various requirements, and there is no reason to believe that those details will give rise to harms that rival, let alone exceed, the injuries that could flow from NHTSA’s decision to permit lower protection for unbelted occupants.

Moreover, the rule provides a substantial lead time for implementation. NHTSA has the ability to make adjustments in the regulations if serious implementation issues arise, and it has exercised that authority. See 68 Fed. Reg. 4961 (Jan. 31, 2003) (granting manufacturers’ request to reduce first year requirements in May 2000 rule in light of supplier problems with suppression devices). NHTSA’s reliance on uncertainty is unfounded because it identifies no uncertainty that it could not be addressed as the regulatory requirements are phased-in.

**D. NHTSA’s Decision to Completely Drop the 30 MPH Unbelted Crash Test from its Rule Lacks Any Justification.**

Even if all of NHTSA’s assertions concerning uncertainty about how manufacturers will comply with the first-stage of requirements imposed by its rule are considered valid, the agency’s decision to drop the 30 mph test speed for unbelted frontal crash tests — even from the second stage covered by its rule (2007-2010) — lacks a rational basis. Respondent’s efforts to dismiss this decision as inconsequential are without merit.

Respondent argues that NHTSA’s decision was justified because it “provides greater flexibility by allowing the agency to collect data and monitor the real-world implementation of the amended Standard.” Respondent at 48-49. This assertion is false. Establishing a 30 mph test speed for the first or second stage of this rule would not restrict NHTSA’s ability to collect data or monitor compliance in any way.

Respondent also seeks to minimize the consequences of NHTSA’s action by asserting that “NHTSA consistently concluded -- even as a preliminary matter -- that the new Standard should specify the 25 mph maximum speed for the unbelted barrier test during the first phase of the new Standard, until MY 2007.”

Respondent at 39-40. This assertion is also false. In the Notice of Proposed Rulemaking, NHTSA identified 30 mph as the unbelted barrier test speed that all

vehicles should be required to satisfy by model year 2006. RE 2, 63 Fed. Reg. 49,971, 49,979, 49,988. When NHTSA issued its “supplemental” notice shortly before the deadline for promulgating the final rule, it again identified 30 mph as the test speed that it favored for the first stage of the rule, and identified the possibility of accepting a lower speed during the first stage as the manufacturers’ proposal. RE 3, 64 Fed. Reg. 60,559. Most importantly, when NHTSA dramatically changed its position six months later by promulgating a rule that does not require 30 mph, even in the second stage, the agency did not provide a rational explanation for its shift from expecting manufacturers to show that all vehicles have maintained the protection currently provided in a 30 mph frontal crash test with unbelted dummies when the rule is fully implemented in model year 2006, to declining to require that manufacturers match the protection for unbelted occupants achieved by model year 1998 and 1999 vehicles -- even by model year 2010.

NHTSA’s “interim rule” is no different than a decision to reject the 30 mph test that it originally proposed, and the agency cannot avoid scrutiny of whether it has a reasonable basis for rejecting the 30 mph test by claiming that it might consider adopting such a test 30 mph in the future. See Public Citizen v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984). The fact that some of NHTSA’s statements affirming the importance of adopting a standard that required manufacturers to maintain or improve the current level of performance in the unbelted barrier test

appear in documents prior to the May 2000 notice adopting the rule does not erase their significance. The May 2000 notice does not identify a basis in the administrative record for ignoring or reversing NHTSA's findings in earlier stages of the rule making. An agency's departure from its prior conclusions and declared course of action without support in the administrative record is one of the earmarks of arbitrary and capricious action. State Farm, 463 U.S. at 41-43, 47-49.

### **CONCLUSION**

For the reasons stated above and in Petitioners' Brief, the Court should declare that NHTSA's decision to reduce the maximum crash test speed for unbelted barrier crashes is contrary to law or, in the alternative, declare that the agency's stated explanation for this action is arbitrary and capricious.

Respectfully submitted,

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January 31, 2003

**CERTIFICATE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND  
CIRCUIT RULE 32-1 FOR CASE NUMBER 02-70303**

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief for petitioners is Proportionately spaced, has a typeface of 14 points or more and contains 6,342 words.

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Michael Tankersley

## CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2003, I served copies of the foregoing Reply Brief for Petitioners and Further Excerpts of Record by first class mail, postage pre-paid, addressed to counsel for Respondent and the Intervenors at the addresses below:

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