

No. 02-4237

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PUBLIC CITIZEN, INC.,
NEW YORK PUBLIC INTEREST RESEARCH GROUP,
and CENTER FOR AUTO SAFETY,
Petitioners,

v.

NORMAN Y. MINETA,
SECRETARY OF TRANSPORTATION,
Respondent.

On Petition For Review
Of A Final Rule Issued By Respondent
Secretary Of Transportation

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In the late 1980s and 1990s, Ford told owners of Ford Explorers to maintain their Firestone tires at a pressure level of 26 pounds per square inch (“psi”), which was 26 percent lower than the maximum specification of 35 psi for those tires. The resulting underinflation was one of the factors that caused tread separations and led to hundreds of deaths and injuries. In response to the Ford/Firestone scandal, Congress enacted the TREAD Act, section 13 of which mandated prompt completion of “a rulemaking for a regulation to require a warning system in new vehicles to indicate to the operator when a tire is significantly under inflated.” Thus, it is ironic, and disturbing, that the performance standard issued by NHTSA to implement section 13 allows tire pressure monitoring systems (“TPMSs”) that cannot detect 26 percent underinflation and cannot detect any underinflation at all when it occurs in all four tires. NHTSA’s rule satisfies neither Congress’s purpose nor the plain language of the TREAD Act.

Not only does the rule violate the Act, it is arbitrary and capricious. Whereas Congress’s overriding concern was safety, the guiding force that drove the formulation of NHTSA’s final rule was not safety, as NHTSA’s brief concedes, *see* Resp. Br. 21, 34, but cost. NHTSA decided to tailor its rule to the capabilities of indirect TPMS technology because—although neither type of TPMS is expensive—indirect systems are cheaper than direct systems. Yet everyone agrees

that current indirect systems cannot detect underinflation as effectively as direct systems: In contrast to direct systems, current indirect systems cannot detect underinflation of less than 25 to 30 percent, cannot detect underinflation when all four tires or most combinations of two tires are low, and do not function on bumpy roads, at high speeds, when the vehicle is first turned on, or when the vehicle is stationary, among other drawbacks. The superior performance capability of existing direct technology—reiterated by NHTSA throughout the final rule—far outweighs the modest cost difference between direct and indirect systems.

ARGUMENT

I. THE TPMS RULE VIOLATES THE TREAD ACT.

A. The Final Rule Is Inconsistent With The Language And Purpose Of The TREAD Act.

NHTSA's brief repeatedly falls back on the false premise that Petitioners want a rule that prohibits indirect systems. *See, e.g.*, Resp. Br. 20, 21, 24, 25. Petitioners' preference, however, is not technology-based; it is performance-based. Although NHTSA has purported to issue a performance-based standard, the agency weakened the standard to cater to the automobile industry's cost-based preference for indirect technology. Current indirect systems can satisfy the rule but cannot satisfy the statute, and the agency makes little attempt to argue otherwise.

Indeed, NHTSA acknowledges that the combined effect of its decision to allow systems that cannot detect underinflation in two or four tires and its decision to require a warning only when the level of underinflation reaches 30 percent is that “TPMSs would not be required to detect many situations involving under-inflation in the real world.” 67 Fed. Reg. 38704, 38718 (2002).¹ The agency’s own words make clear that the standard does not satisfy the statutory mandate that new vehicles have a TPMS that warns when “a tire is significantly under inflated” by November 1, 2003.

1. “A tire”

The TREAD Act requires a TPMS that warns the driver when “a tire” is significantly underinflated. The final rule allows manufacturers to install a TPMS that warns a driver when one tire is or three tires are underinflated, but that gives no warning when four tires or most combinations of two tires are underinflated, SPA-5—situations that occur in millions of vehicles every day. 67 Fed. Reg. 38727. The final rule thus violates the plain language of the Act, for to suggest that “a tire” is not underinflated when four tires are underinflated is sheer nonsense. *See* Pet. Br. 25-26. Indeed, if the Secretary asked his mechanic to check whether his car had “a tire” underinflated, he would think the mechanic crazy (and perhaps malicious) if the mechanic said no when in fact the car had two or four underinflated tires. Perhaps for

¹Cites to 67 Fed. Reg. refer to NHTSA’s final rulemaking notice, which appears in the Special Appendix beginning at SPA-9.

this reason, NHTSA declines to articulate that its rule requires reading the statute like a crazy mechanic. *But see* Interv. Br. 24 (arguing that Act satisfied as long as driver notified when one and only one tire is underinflated).

NHTSA’s argument that its rule does not violate the statutory requirement does not rely on the plain language, congressional purpose, or legislative history of the Act. Running from these indicia of statutory meaning, NHTSA’s argument consists wholly of a plea for *Chevron* deference, based on the notion that the statutory language is ambiguous. Resp. Br. 26 (citing *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984)).² The only ambiguity, however, is of NHTSA’s invention: NHTSA makes the perverse argument that Petitioners’ citation to the Dictionary Act, 1 U.S.C. § 1 (“words importing the singular include and apply to several persons, parties, or things”), itself shows that the statutory language is ambiguous. That is, NHTSA claims that by “employing traditional tools of statutory construction,” *Chevron*, 467 U.S. at 843 n.9, Petitioners have demonstrated the ambiguity of the Act. Under that theory, however, no statutory interpretation case would be a *Chevron* step-one case, as the mere act of defining the statutory language would be said to reveal ambiguity. It should come as

²Under *Chevron*, a court construing a statute first considers whether the meaning is clear; if it is, the inquiry is over. If the meaning is ambiguous and “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” the court defers to the agency’s interpretation, if that interpretation is reasonable. 467 U.S. at 843.

no surprise that myriad cases—including *Chevron* itself—prove the fallacy of NHTSA’s theory.

For example, in *Dye v. Wargo*, 253 F.3d 296, 299 (7th Cir. 2001), the Seventh Circuit cited the Dictionary Act to support the proposition that a dog is not a “person” for purposes of a suit under 42 U.S.C. § 1983. Applying NHTSA’s reasoning, the court’s citation to the Dictionary Act would mean that whether a dog is a “person” under section 1983 is ambiguous. Likewise, in *Monell v. Department of Social Services*, 436 U.S. 658, 689 (1978), the Supreme Court used the Dictionary Act to help discern that municipalities were included within the “plain meaning” of “persons” in section 1983. *See also Buckhannon Bd. and Home Care v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001) (using Black’s Law Dictionary to construe plain language of statute); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 307 & n.19 (2000) (using dictionary to discern plain meaning of school board policy). As in these cases, the Dictionary Act elucidates plain meaning; it does not render the language defined therein ambiguous. Here, the Dictionary Act supports Petitioners’ reading and contradicts NHTSA’s claim of ambiguity.

Other traditional tools of statutory construction further support Petitioners’ reading. The purpose of the TPMS provision in the TREAD Act was to prevent the sort of serious and fatal crashes that occurred in Ford Explorers—crashes attributed in part to underinflation of less than 30 percent in all four tires. *See Ford Motor Co.’s*

Recall of Certain Firestone Tires, Joint Hearing Before Subcomms. on Commerce, Trade, and Consumer Protection and Oversight Investigations of House Comm. on Energy and Commerce, 107th Cong., 1st Sess. 105, 111 & n.21, 459 (2001) (available at www.gpo.gov/congress/house/house05ch107.html); Pet. Br. 4-5. A TPMS could satisfy the one-tire, 30 percent standard in NHTSA's final rule, and yet not be capable of detecting the degree of underinflation that contributed to the Ford/Firestone accidents. The one-tire standard, therefore, is blind to the impetus behind the TREAD Act and fails to fulfill the Act's purpose.³

Finally, NHTSA's brief neglects to mention that, even if the plain language of the Act were ambiguous, *Chevron* deference would not require a finding for the agency. Rather, an agency's reading warrants *Chevron* deference only if it is reasonable. *United States v. Mead*, 533 U.S. 218, 229 (2001). The question whether

³Intervenor Alliance of Automobile Manufacturers tries to bolster its argument that a TPMS that cannot detect when four tires or most combinations of two tires are underinflated satisfies the TREAD Act by citing Congressman Markey's reference to the Toyota Sienna. Interv. Br. 23 (citing unofficial meeting transcript). The Sienna has an indirect TPMS, and from this fact the Alliance draws the conclusion that Congressman Markey thought that indirect systems would comply with the Act and, therefore, that the TREAD Act does not require a warning when more than one tire is underinflated. To begin with, both Congressman Markey and NHTSA have expressly rejected such a reading of his statement. 67 Fed. Reg. 38723. And in so doing, Congressman Markey stated that the purpose of the TPMS requirement was to "provide a warning in *all* instances of underinflation." *Id.* (emphasis added). Furthermore, there is no evidence that Congressman Markey was aware of the limitations of the indirect systems installed in the Sienna when he made the remarks cited by the Alliance. The Alliance's suggestion that Congress had the capabilities of indirect systems specifically in mind is wishful thinking.

the agency's reading is reasonable differs from the question whether its rule is arbitrary and capricious; for the first question asks whether the statute can be construed to allow the agency's action and the second asks whether, assuming the statute permits such action, the agency's choice was nonetheless arbitrary. Tellingly, although NHTSA asks the Court to defer to its view that the Act does not require a warning when any combination of tires is underinflated, it makes no attempt to show that it is reasonable to read the statute as requiring a warning when one tire is significantly underinflated, but not in the millions of instances when two tires or all four tires are. *See* Resp. Br. 26-27; *see also* 67 Fed. Reg. 38727 (7 million light vehicles have all four tires significantly underinflated at any time, nearly 30 million have two tires significantly underinflated).

In any event, the statute is not ambiguous, and NHTSA's plea for *Chevron* deference must be declined. The Court should "not alter the text in order to satisfy the policy preferences of the [agency]. These are battles that should be fought among the political branches and the industry." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

2. "Significantly under inflated"

The TREAD Act instructed NHTSA to require TPMSs that alert drivers when a tire is "significantly under inflated." To effect this requirement, NHTSA's rule requires that the TPMS be capable of alerting the driver either when one tire is 30

percent underinflated or when any one tire or any combination of tires is 25 percent underinflated. The rule thus adopts two different measures of “significant underinflation.” However, the answer to the question whether a tire is significantly underinflated cannot logically depend on which performance standard a manufacturer chooses to satisfy. Having determined for purposes of one standard that 25 percent underinflation was significant, NHTSA violated the statute by adopting an alternative standard that does not require a warning until a tire is 30 percent underinflated.

NHTSA’s response is that it did not define “significantly under inflated,” but simply set two percentages that will warn drivers *before* “significant” underinflation occurs. Resp. Br. 28. Although NHTSA could perhaps have taken that approach, the final rule shows that it did not. For example, the rule equates “significantly under inflated” with 25 percent underinflation when it requires owner’s manuals for vehicles that meet the four-tire, 25 percent standard to state: “When the TPMS warning light is lit, one of your tires is significantly under-inflated.” SPA-5 (49 C.F.R. § 571.138.S4.5.1). The owner’s manual instruction for vehicles that meet the one-tire, 30 percent standard is premised on an inconsistent definition of significant underinflation: “The tire pressure monitoring system on your vehicle will warn you when one of your tires is significantly under-inflated and when some combinations of your tires are significantly under-inflated.” *Id.* (§ 571.138.S4.5.2).

The regulatory commentary also reflects that NHTSA found 25 percent underinflation to be significant. For example, in describing the data from NHTSA's February 2001 survey, NHTSA states that 2.8 percent of passenger cars and 3.9 percent of light trucks had four tires underinflated by at least 25 percent. NHTSA then equates that figure—25 percent—with “significant” underinflation: “[T]hese percentages translate into about 7,000,000 vehicles having all four tires *significantly* underinflated at any time.” 67 Fed. Reg. 38727 (emphasis added). Nowhere in the final rule does NHTSA suggest—let alone provide a reasoned explanation for concluding—that 25 percent underinflation is not significant.

NHTSA is correct that the final rule does not formally state a “definition” of “significantly under inflated.” In contrast, NHTSA's proposed rule asked for comment on two alternative definitions. The four-tire, 20 percent proposed standard was set forth through a definition of “significantly under inflated” that included any inflation pressure 20 percent below the placard pressure, whereas the three-tire, 25 percent proposed standard was established through a definition of “significantly under inflated” that included any tire inflated 25 percent or more below the placard pressure. A-84, A-104, A-105 (66 Fed. Reg. 38982, 39002, 39003(2001)). However, “[a]fter reviewing this approach to drafting and organizing the regulatory text, the agency decided to adopt a simpler, more direct approach.” 67 Fed. Reg. 38724. Therefore, in the final rule, “instead of defining the term ‘significantly under-inflated,’” the

agency decided to incorporate the definition into the standard by “specifying performance requirements, including the threshold level of under-inflation that must trigger a warning.” *Id.*

NHTSA made clear that the change in approach was a matter of form, not substance. For example, in the same discussion NHTSA states that it “is separately addressing below the two most significant aspects of these two alternatives, i.e. the definition of the term ‘significantly under-inflated’ and the number of tires the TPMS should monitor.” *Id.* The commentary then separately addresses these two topics in sections entitled “Threshold Level of Under-Inflation” and “Number of Tires Monitored.” *Id.* at 38724, 38726. Further showing that “threshold level” is consonant in the agency’s mind with the definition of “significantly under inflated,” the discussion of “threshold level” focuses on comments addressing the appropriate definition of “significantly under inflated.” *Id.* at 38724-25.

Accordingly, both the rule and the commentary show that, notwithstanding the decision not to include a “definition” in the final rule, NHTSA’s four-tire performance standard reflects a determination that 25 percent underinflation is “significant”—a determination that renders the alternative one-tire, 30 percent standard at odds with the TREAD Act.

3. Phase-In Period

The TREAD Act stated two deadlines: (1) “Not later than 1 year after the date of enactment [November 1, 2001], the Secretary shall complete a rulemaking to require a warning system in new motor vehicles” (2) “Such a requirement shall become effective not later than 2 years after the date of completion of such rulemaking,” that is, by November 3, 2002. SPA-1. NHSTA recognized that these two deadlines were distinct, and thus the final *rule* is “effective August 2, 2002,” and the *requirement* is effective—at least as to some vehicles—“beginning on November 1, 2003.” 67 Fed. Reg. 38704. The parties’ disagreement, then, is not whether Congress mandated that the TPMS requirement be effective as of November 1, 2003, but whether Congress gave NHTSA discretion to make the requirement effective only as to *some* new motor vehicles. Congress did not. If manufacturers may produce new motor vehicles after November 1, 2003, *without* TPMSs (as NHTSA’s rule would allow), then new motor vehicles are not required to have TPMSs as of that date—contrary to the statute’s plain language.⁴

NHTSA argues that the TREAD Act does not preclude a phase-in period because the Act does not say that the requirement must apply to “all” new motor vehicles, and so it may permissibly read “some” into the text. NHTSA’s argument

⁴NHTSA’s brief contends that compliance with the statutory deadline would be “impossible,” Resp. Br. 45, but NHTSA made no such finding during the rulemaking.

proves too much, for it suggests that NHTSA would *never* have to impose a TPMS requirement on all new motor vehicles, or that it could adopt a phase-in period that affected a trivial number of vehicles, for example two percent. Not only is that suggestion contrary to the statutory purpose and history, but during the rulemaking, NHTSA agreed that its mandate is to require a TPMS in all light vehicles—not just some of them. For example, in its Evaluation of Existing Tire Pressure Monitoring Systems, NHTSA stated: “In the TREAD Act of November 1, 2000, Congress required [NHTSA] to develop a rule requiring *all* new light vehicles to be equipped with a warning system to indicate to the operator when a tire is significantly underinflated.” A-51 (emphasis added). And in its Preliminary Economic Assessment, NHTSA stated: “As required by the [TREAD] Act, the agency is proposing to require [that] a Tire Pressure Monitoring System (TPMS) be installed in *all* passenger cars, multipurpose passenger vehicles, trucks and buses that have a Gross Vehicle Weight rating of 10,000 pounds or less, effective November 2003.” A-108 (emphasis added).

Nonetheless, NHTSA argues that if the Act required that *all* new motor vehicles have a TPMS, then the agency would be violating the Act by not requiring installation of TPMSs in motorcycles and heavy trucks. Resp. Br. 44. In the regulatory commentary, however, NHTSA recognized that the statute required it to impose a TPMS requirement on all vehicles. NHTSA explained that it was focusing first on

light vehicles because the TREAD Act was directed at “problems with certain Firestone tires,” which “were used on light vehicles.” 67 Fed. Reg. 38723-24. The agency further excused its inability to meet the deadline as to other types of vehicles on the grounds that the statutory time frame “was so tight” and that “the issues associated with under-inflated tires on medium and heavy vehicles are different from and more complex than the issues associated with under-inflated tires on light vehicles.” *Id.* at 38724. Thus, here again, the agency recognized the scope of its statutory mandate. Whether or not its reasons for missing the statutory deadline as to other types of vehicles have merit, the fact that it missed the deadline for those vehicles cannot justify its failure to abide by the deadline for light vehicles—vehicles that, as NHTSA has explained, were Congress’s focus when it enacted the TREAD Act.

Petitioners agree that NHTSA has phased in various performance standards in the past. In the only case cited by NHTSA and the Alliance, however, the agency was not issuing a regulation in response to a congressional directive that the agency implement a specific safety requirement by a specific date. *See Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1348 (D.C. Cir. 1979);

see also Pet. Br. 31 n.8. That case, therefore, does not support the agency’s phase-in of the TPMS requirement.⁵

B. The Issue Whether NHTSA’s Rule Violates The Tread Act Is Properly Before This Court.

The Alliance—but not NHTSA—contends that this Court may not consider whether NHTSA’s rule comports with the plain language of the TREAD Act because the issue was not raised in comments submitted to the agency during the rulemaking proceedings. Thus, the Alliance asserts that this Court must limit its review to the arbitrary and capricious standard, blind to whether the rule satisfies the statutory requirements. Contrary to the Alliance’s assertion, the relevant case law does not require this Court to ignore the terms of the Act when reviewing NHTSA’s final rule.

⁵On this point, the Alliance (at 24 n.33 & 32 n.43) again looks to non-authoritative legislative history—this time, a statement by Congressman Markey one year after enactment of the TREAD Act—to argue that Congress authorized a phase in. Such “history” is entitled to no weight. “[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act’s passage.” *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974). In any event, the major thrust of Congressman Markey’s comments was that a system that detects underinflation in any combination of tires was “the real intent of the Act.” *Implementation of the TREAD Act: One Year Later, Hearing Before Subcomm. on Commerce, Trade, and Consumer Protection of House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. 44 (2002) (available at www.gpo.gov/congress/house/house05ch107.html).

To begin with, the administrative record confirms that issues about the TREAD Act’s mandate were presented to and considered by the agency.⁶ The definition of “significantly under inflated” was “one of the two most significant aspects” of the standards debated in the rulemaking. 67 Fed. Reg. 28724. The inconsistency of the two levels ultimately incorporated in the performance standards was not specifically addressed by Petitioners, but the proposed rule had not made clear that the agency was contemplating adopting two standards at once. *See* A-92 (66 Fed. Reg. 38990) (asking for comment on two levels proposed to “aid agency in selecting a figure for the final rule”); A-104-A-105 (66 Fed. Reg. 39002-03) (setting forth proposed 49 C.F.R. § 571.138.S1.-S.6 twice, using same subsection numbers for each alternative). The acceptability of a TPMS that could not detect multiple underinflated tires was the other central issue in the rulemaking. The Alliance itself argued that a rule that required detection of more than one significantly underinflated tire would not “satisfy Congressional intent” because it would preclude use of indirect systems. A-176. And

⁶Even if the statutory issue had to be addressed during the rulemaking, *but see infra* 17-18, it need not have been raised by Petitioners: “[I]t is not always necessary for a party to raise an issue, so long as the [agency] in fact considered the issue.” *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986); *see also Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1083 (D.C. Cir. 1996) (issue properly raised where briefly alluded to by another commenter and considered by agency); *Cellnet Communication v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992) (“Consideration of the issue by the agency at the behest of another party is enough to preserve it.”).

Petitioner Public Citizen argued that indirect systems did not satisfy the mandate of the TREAD Act, in part because they cannot detect underinflation in all four tires. A-268-A-269. The suggestion that the agency did not consider whether the statute could be satisfied by a system that could not detect underinflation in multiple tires is frivolous.

Likewise, the question whether a phase-in period was consistent with the terms of the TREAD Act was expressly presented to the agency in the rulemaking proceedings. Once again, the Alliance itself addressed the issue, arguing that a phase-in period did not violate the statutory mandate that the TPMS requirement become effective no later than November 1, 2003. A-178-A-179. Consumers Union, by contrast, explicitly objected to a phase-in period on the ground that the statute unambiguously required compliance by the 2003 deadline: “Because tire pressure monitoring systems are not new to the market and have marked benefits for safety, fuel efficiency and tire wear, we support adhering to the Congressional mandate: that passenger vehicles manufactured on or after November 1, 2003 should be equipped with TPMS and a yellow low pressure warning light should be installed on the dashboard.” A-121-A-122. Again, NHTSA was clearly presented with both views.

Not surprisingly, therefore, NHTSA does not contend either that it did not consider whether its rule conformed to the statutory requirements that are the subject of Petitioners’ challenge or that Petitioners are barred from raising their challenge

because of a failure to present the issue during the notice-and-comment process.⁷ Indeed, it is difficult to imagine how the agency could *not* have considered whether its rule satisfied the statutory mandate of requiring a TPMS that would detect whether “a tire is significantly under inflated,” or whether it had authority to phase in the rule over time. And because the agency accepts the propriety of judicial review of the issue, review is not barred on the basis of “waiver” or “failure to exhaust,” even if the agency did *not* consider the issue during the rulemaking. *See ASARCO Inc. v. EPA*, 578 F.2d 319, 321 n.1 (D.C. Cir. 1978) (“The agency’s failure to insist upon exhaustion in this particular case suggests that, in [the agency’s] view, the costs in terms of interfering with agency proceedings, creating an incentive to ignore agency processes in the future, and depriving the agency of a greater opportunity to apply its expertise or of a chance to ‘correct its own errors’ do not outweigh the benefits of this court’s immediate consideration of [the] petition.”); *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 334 (D.C. Cir. 1968) (where issue not raised during administrative proceedings but agency has “chosen to deal with it on the merits, . . . the public interest in effective administration of the new Safety Act argues for our doing the same”).

⁷NHTSA states in a footnote that, during the rulemaking, Petitioners did not raise the issue of its compliance with the terms of the TREAD Act. Resp. Br.24 n.9. NHTSA does not argue, however, that Petitioners are therefore barred from raising their statutory arguments in this Court.

Finally, the law does not require Petitioners even to have *participated* in the notice-and-comment process to obtain judicial review of the lawfulness of the regulation, let alone to have raised particular legal issues in that process. Rather, the National Traffic and Motor Vehicle Safety Act (“Safety Act”) permits any “person” who is adversely affected to seek judicial review of a NHTSA standard, 49 U.S.C. § 30161(a), and contains no restriction limiting review to issues previously raised before the agency. This case is thus wholly unlike *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), which involved a request for judicial review by a party to a formal agency adjudication. Likewise inapposite is *Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001), which involved an agency adjudication subject to judicial review under the Hobbs Act, which limits review to persons who were “parties” to the agency proceedings. Absent a statute requiring participation in agency proceedings and/or the presentation of issues before the agency as a prerequisite to judicial review, the imposition of an “issue exhaustion” requirement is inappropriate. *See Sims v. Apfel*, 530 U.S. 103, 107-10 (2000); *Darby v. Cisneros*, 509 U.S. 137 (1993).

II. THE TPMS RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS TAILORED TO THE LIMITATIONS OF AN INEFFECTIVE SYSTEM.

NHTSA concedes that it tailored the performance standards to the capabilities of indirect TPMSs. It did so even though it concluded that indirect systems are not

as sensitive as direct systems, 67 Fed. Reg. 38705, that indirect systems cannot detect underinflation in various combinations of tires that occur in millions of vehicles every day, *id.* at 38727, that they cannot detect 30 percent underinflation even in a single tire if all the tires are underinflated and the difference in the tire pressures is not 30 percent or more, *id.* at 38718, that they cannot detect underinflation until the vehicle is moving, *id.* at 38728, that they cannot notify the driver which tire is underinflated, *id.* at 38716, that they do not operate properly on bumpy roads or at high speeds, *id.* at 38729, and that they need recalibration at various times, during which they neither function nor alert the driver that they are not functioning. *Id.* at 38730. In every one of these respects, according to NHTSA, direct systems perform better.

NHTSA's defense of its final rule has three components. First, NHTSA suggests that Petitioners have overstated the agency's conclusions. Resp. Br. 30-31. NHTSA does not offer even one example of how Petitioners do so, and the reason for that omission is simple: Petitioners' arguments are faithful to the agency's findings. Indeed, in contrast to the many docket entries cited in NHTSA's brief, the vast majority of the record evidence cited in Petitioner's brief is to NHTSA's regulatory commentary and NHTSA reports.

Second, NHTSA states that both direct and indirect systems have advantages and disadvantages, and that the final rule therefore draws an appropriate balance. Yet on this point, it is NHTSA that distorts its own conclusions. The agency did not

conclude that “[o]n balance, neither type is demonstrably superior to the other.” Resp. Br. 31. The agency concluded just the opposite: that considering all relevant characteristics of existing TPMSs, “the four-tire, 25 percent option would best meet the mandate of the TREAD Act,” 67 Fed. Reg. 38706, 38718, 38722, 38727, and direct systems are capable of meeting that standard. *Id.* at 38725. In fact, NHTSA found that current direct systems can detect significant underinflation in every instance, whereas current indirect systems cannot do so 49 percent of the time. *Id.* at 38718. In explaining its decision to lower the performance standards to accommodate indirect systems, the agency said nothing to suggest that “on balance” the two types of TPMS were equally good choices. The agency said only that it wanted to allow use of indirect systems to provide time for those systems to improve. *Id.* at 38725, 38727.

Moreover, even the direct TPMS “drawbacks” listed in NHTSA’s brief—cost, maintenance, and component robustness—do not reflect the agency’s findings. Resp. Br. 31, *see also id.* at 8-9. To begin with, the agency did not conclude that components of direct systems were less robust. In its proposed rule, NHTSA asked for comment on whether the wheel components of direct systems were more susceptible to damage than the wheel components of indirect TPMSs. A-90 (66 Fed. Reg. 38988). In the final rule, NHTSA described two comments on the topic, both of which suggested that damage to direct TPMS wheel components was *not* a problem. 67 Fed. Reg. 38711. These comments apparently allayed NHTSA’s concerns because

the agency did not make a finding on the point and did not mention the matter again, not even in setting forth the estimated costs of direct systems. *See generally id.* at 38740-41; *see also* A-321 (Final Economic Assessment).

As for the second disadvantage, the one maintenance issue discussed by the agency was that direct TPMSs require a battery change once every 90,000 to 100,000 miles, or about once every five to ten years, at a cost of approximately \$40.91. Given the infrequency of the battery change, NHTSA addresses this maintenance issue only as a cost consideration, and not as a matter of performance, reliability, or consumer satisfaction. *Id.* at 38741.⁸ NHTSA's one other discussion of maintenance comes under the heading "Unquantified Costs," where NHTSA expresses equal concern about maintenance of direct and indirect TPMS components: "[W]ith indirect TPMSs, there may be problems with wheel speed sensors and component failures. With direct TPMSs, the pressure sensors may be broken off when tires are changed. The agency requested comments on this issue in the [proposed rule], but received none." *Id.* Thus, on this record, the agency had no basis for concluding, and indeed did not conclude, that maintenance concerns weighed in favor of indirect technology.

⁸NHTSA also concluded that "there is a very good chance" that suppliers of direct TPMSs will develop battery-less systems within a few years. A-320 (Final Economic Assessment).

Accordingly, NHTSA’s list of the drawbacks of direct TPMSs boils down to cost. Although NHTSA is correct that cost is one permissible factor for the agency to consider when developing performance standards under the Safety Act, cost does not justify the agency’s rule in this instance for several reasons. First, the TREAD Act’s directive to the agency says nothing to suggest that cost was a permissible consideration, much less a predominant one. *See* Pet. Br. 43-44. Second, even if a permissible consideration, the cost differential at installation—about \$45 per vehicle—is not significant enough to justify the final rule. 67 Fed. Reg. 38740. The net cost differential—about \$10 per vehicle—which takes into account vehicle and maintenance costs, and subtracts fuel savings and tread life savings, further highlights the insignificance of cost as a factor here. *Id.* at 38741. Notably, neither NHTSA nor the Alliance mentions that, looked at in terms of cost per equivalent life saved, the more stringent performance standard—which only direct TPMSs can currently satisfy—is cheaper than the weaker standard adopted to accommodate indirect systems. *Id.* The agency’s argument that indirect systems are less expensive is like saying that it is cheaper to buy six eggs for \$1.00 than to buy twelve for \$1.25.⁹

⁹NHTSA describes as “disingenuous” Petitioners’ citation to the agency’s own calculations of cost per equivalent life saved, which NHTSA says are not “realistic” because “there is no reason to believe . . . that indirect TPMSs would be installed on all vehicles without [antilock brakes].” Resp. Br. 37. That NHTSA criticizes Petitioners for relying on the agency’s own calculations shows how far the agency’s

(continued...)

Furthermore, even putting aside the TREAD Act, NHTSA’s decision to put cost ahead of safety is unsupported by the Safety Act and the case law. Indeed, NHTSA cites no cases for the proposition that cost considerations can justify using an approach that is significantly less safe. NHTSA’s choice was not between a high-performing performance standard so costly as to be out of reach for American consumers and a lesser but affordable standard. Rather, the cost differential was modest but the performance difference substantial. NHTSA’s suggestion that the two types of TPMSs are equal choices because one performs much better and the other is slightly cheaper is irrational and unfaithful to the TREAD Act and the Safety Act, both of which place predominant emphasis on safety.¹⁰

NHTSA’s third defense of its decision to allow a TPMS that can detect underinflation in only half the instances in which it occurs is flexibility. Resp. Br. 40.

⁹(...continued)

brief must distance itself from NHTSA’s own findings to justify the final rule. In any event, the criticism rests on a misreading of the regulatory commentary, which explains that the calculations are based on the assumption that indirect TPMSs will *not* be installed on vehicles without antilock brakes. 67 Fed. Reg. 38740.

¹⁰For this reason, NHTSA’s reliance on *Automotive Parts & Accessories Ass’n v. Boyd* is misplaced. There, although the court noted the agency “must of necessity consider many variables, and make ‘trade-offs’ between various desiderata,” 407 F.2d at 342, in issuing the performance standard upheld in that case the agency had prioritized safety and had chosen the standard that “best accomplished the stated purpose and policy of the [Safety Act] ‘To reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.’” *Id.* at 341 (principal elements in decision were ease of enforcement and enhancement of protection).

NHTSA states that flexibility—by which it means giving manufacturers the choice of using either direct or indirect systems—is needed to encourage innovation. NHTSA’s cursory argument on this point is that only by allowing use of indirect TPMSs can NHTSA provide incentive for manufacturers to improve them. In other words, NHTSA says that if manufacturers had to use the higher-performing direct technology now they would not try to improve indirect technology. NHTSA’s argument is logically backward. By issuing a performance standard that can be satisfied using indirect technology in its current form, NHTSA has provided no incentive to improve indirect systems. By contrast, if NHTSA had required satisfaction of a standard that current indirect systems could not meet, the cost advantages trumpeted so loudly by the agency would have given manufacturers incentive to improve the systems to meet the standard, if such improvement were possible. (And if it is not possible, NHTSA’s technology improvement argument evaporates anyway.)

NHTSA’s theory might have some force if the agency had issued a long-term rule that required compliance with a higher standard, as in that situation the industry would have known that it had just a few years to improve indirect technology. Yet NHTSA has issued no long-term rule. Thus, as of today, manufacturers have no deadline for improving indirect TPMSs and free reign to use them. And the only clear incentive identified by NHTSA—money—suggests that indirect systems will be the norm. Indeed, NHTSA assumes that manufacturers will install indirect TPMSs in

vehicles with antilock brakes. 67 Fed. Reg. 38740. By setting the phase-in percentages to top off at 65 percent—a figure that coincidentally approximates the percentage of light vehicles manufactured with antilock brakes—NHTSA’s rule does all it can to stack the deck against the indisputably more effective system.

III. THE AGENCY HAS FAILED TO OFFER A RATIONAL CONNECTION BETWEEN ITS FINDINGS AND ITS DECISION TO LOWER THE FIRST PERFORMANCE STANDARD OPTION FROM 20 PERCENT TO 25 PERCENT.

Petitioners have argued that NHTSA acted arbitrarily and capriciously when it lowered the higher TPMS performance standard from a four-tire, 20 percent standard to a four-tire, 25 percent standard. The only reason NHTSA offered for this decision was that indirect TPMS technology, even if improved, could not meet a 20 percent standard. 67 Fed. Reg. 38705. This explanation is irrational in light of the agency’s factual findings regarding the ability of existing direct technology to meet a 20 percent standard and the number of additional lives that such a standard would save.

NHTSA begins its defense of the decision to lower the higher TPMS performance standard from 20 percent to 25 percent by repeating the brief’s mantra that the agency is not required to maximize safety. Resp. Br. 41. However, although some of the cases cited by NHTSA state such a proposition, in each case NHTSA had in fact acted in the way that it determined did maximize safety. For example, in *Simms v. NHTSA*, 45 F.3d 999, 1005-06 (6th Cir. 1995), cited by NHTSA, the court

rejected the petitioners' challenge to NHTSA's choice of testing methods for wheelchair securement and occupant restraining devices because the method preferred by the petitioners posed several important technological problems and NHTSA had determined that the delay required to resolve those problems was unreasonable. In *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1345 (D.C. Cir. 1985), the difference between the two systems at issue, in terms of their ability to prevent accidental injuries and deaths, "was not 'measurable' and did not constitute a significant safety consideration." And in *State Farm Mutual Insurance Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), although the court stated in a footnote that NHTSA's consideration of factors *in addition* to safety did not violate the Safety Act—a point Petitioners do not contest—the court said nothing to suggest that the agency does not act arbitrarily and capriciously when safety is not its primary concern or when it puts a small cost differential ahead of saving lives.

NHTSA's citation to *Public Citizen v. Steed*, 851 F.2d 444 (D.C. Cir. 1988), is also misplaced. In *Steed*, the court upheld the agency decision at issue because it was based on "overall safety benefits": "It was within NHTSA's province to balance estimated long-term safety benefits against the possibility of a marginal short-term reduction in safety." *Id.* at 449. In contrast, in issuing the TPMS rule, the agency never suggested that weakening the rule in the short term might increase safety in the long term. In fact, although the agency has suggested that weakening the TPMS

standard now might result in improved indirect technology in the future, *but see* Pet. Br. 45-46, the agency has never suggested that improved indirect systems will function as well as, much less better than, current direct systems. *See also* Interv. Br. 23 n.32 (“current and *foreseeable* indirect TPMSs cannot always detect when combinations of tires are underinflated”) (emphasis added); Resp. Br. 48 n.15 (rule will enable development of wider range of practicable TPMSs “over wider range of costs”).

NHTSA’s next point is that it was not bound to finalize the rule as proposed. Resp. Br. 42. Petitioners agree. What NHTSA neglects to say, however, is that it is bound to offer a rational explanation for the changes it makes. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Such an explanation is lacking here. NHTSA’s findings show that TPMS technology that can meet the four-tire, 25 percent standard can also meet a four-tire, 20 percent standard, at no additional cost, and can prevent additional fatalities and serious injuries. To forgo those benefits on the speculation that future indirect TPMSs may be able to meet a 25 percent standard, but not a 20 percent standard, is irrational.

CONCLUSION

For the foregoing reasons, this Court should declare NHTSA’s final TPMS rule arbitrary, capricious, an abuse of discretion, and contrary to law, and remand to the agency with instructions that it promulgate a rule requiring that, by November 1,

2003, all new light vehicles have a TPMS that can detect 20 percent underinflation in one or more tires.

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RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief contains 6,869 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2002, I served the foregoing REPLY BRIEF FOR PETITIONERS on the parties listed below, by causing two true and correct copies thereof to be served by mail on counsel at the following addresses:

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