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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 PUBLIC CITIZEN, INC.,
22 CONSUMERS FOR AUTO
23 RELIABILITY AND SAFETY,
24 and CONSUMER ACTION,
25
26 *Plaintiffs,*
27
28 v.
29
30 MICHAEL MUKASEY,
31 Attorney General of the United States,
32
33 *Defendant.*

No. CV 08-0833 (MHP)

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Date: September 22, 2008
Time: 2:00 p.m.
Place: Courtroom 15, 18th Floor

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on September 22, 2008, at 2:00 p.m., before the
3 Honorable Marilyn Hall Patel in Courtroom 15 of the United States District Court for the
4 Northern District of California, located at 450 Golden Gate Avenue, San Francisco,
5 California, plaintiffs Public Citizen, Inc., Consumers for Auto Reliability and Safety, and
6 Consumer Action will move, and hereby move, for summary judgment in this action under
7 Federal Rule of Civil Procedure 56. Under the briefing schedule set by the Court, any
8 opposition to this motion is due on September 1, 2008. This motion is based on the
9 memorandum of points and authorities submitted in support thereof; the proposed order
10 submitted herewith; the papers, pleadings and administrative record on file in this action;
11 and upon such further briefs, evidence, and oral argument as may be presented to the Court
12 in connection with this motion.

13 As described in greater detail in the accompanying memorandum, the plaintiffs seek
14 the following relief in this motion: summary judgment in their favor; a declaration that the
15 Attorney General of the United States has violated the Administrative Procedure Act, 5
16 U.S.C. §§ 706(1) and 706(2), by failing to take action required by 49 U.S.C. §§ 30502 and
17 30504; and injunctive relief in the form of a remedial schedule setting concrete deadlines
18 by which the government must complete the actions unlawfully withheld and provide
19 regular status reports on its progress to the plaintiffs and the Court.

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TABLE OF AUTHORITIES

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Center for Biological Diversity v. Brennan,
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Forest Guardians v. Babbitt,
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In re International Chemical Workers Union,
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NRDC v. Train,
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1 **INTRODUCTION**

2 This is an action to compel the Attorney General of the United States to take action
3 that has been mandated by Congress but unlawfully withheld and unreasonably delayed in
4 violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(1) and 706(2).

5 Sixteen years ago, Congress enacted a statute requiring the federal government to
6 implement the National Motor Vehicle Title Information System (NMVTIS), a single
7 database that would provide public access to vehicle-history information gathered from
8 states, insurance companies, and junk and salvage yards. Before purchasing a potentially
9 dangerous used car, a consumer using the database would be able to instantly check the
10 validity of the vehicle’s title, verify its mileage, and learn whether it had been stolen or
11 deemed a junk or salvage vehicle. Congress viewed the database as an important solution
12 to the problems of auto theft, auto fraud, and the dangers associated with unsafe and
13 unreliable vehicles, and set a deadline of January 31, 1996 for establishment of the system.

14 After that initial deadline came and went, Congress took the unusual step of again
15 enacting legislation to “expedite implementation of the motor vehicle titling information
16 system,” because the government “was required to establish [it] by January 31, 1996,” and
17 had “failed to meet its statutory deadline.” H.R. REP. NO. 104-618, at 2-3 (1996), *reprinted*
18 *in* 1996 U.S.C.C.A.N. 1061. Congress reiterated the importance of prompt “implementation
19 of the much-needed national titling information system, which would prevent thieves from
20 obtaining legitimate vehicle ownership documentation and deter other serious consumer
21 fraud related to transfer of motor vehicle ownership,” and concluded that the “costs
22 imposed on society” by theft and fraud “remain unacceptably high, due in part to the failure
23 to implement [NMVTIS].” *Id.* The new legislation required the Attorney General to
24 establish the database “not later than December 31, 1997.” 49 U.S.C. § 30502(a).

25 It has now been more than a decade since the second deadline and the government
26 still has not discharged its statutory obligation to establish NMVTIS. The facts are not in
27

1 dispute. The government concedes that it has not carried out any of the three statutorily-
2 required actions that the plaintiffs seek to compel—(1) instant and reliable consumer access
3 to a national vehicle-history database, (2) regulations for the reporting of vehicle
4 information by insurance carriers and junk and salvage yards, and (3) a start date for the
5 reporting of that information. Because there are no genuine issues of material fact, this
6 Court should grant summary judgment for the plaintiffs and order the government to
7 adhere to a remedial schedule with concrete deadlines by which it must complete each of
8 these actions.

9
10 **STATEMENT OF THE ISSUES**

11 **I. *Actions Unlawfully Withheld:*** The Attorney General concedes that he
12 has failed to: (1) establish an information system that provides prospective purchasers of
13 automobiles with instant and reliable access to vehicle-history information, as required by
14 49 U.S.C. §§ 30502(a) and (e); (2) establish regulations concerning the reporting of vehicle-
15 history information by insurance carriers and junk and salvage yards, as required by 49
16 U.S.C. § 30504(c); and (3) establish a commencement date for the reporting of information
17 by insurance carriers and junk and salvage yards, as required by 49 U.S.C. §§ 30504(a) and
18 (b).

19 Do these failures constitute agency action unlawfully withheld or unreasonably
20 delayed in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(1) and 706(2)?
21

22 **II. *Remedial Schedule with Concrete Deadlines:*** To remedy the Attorney
23 General’s statutory violations, should this Court set a remedial schedule with concrete
24 deadlines by which the Attorney General must complete specific tasks, and retain
25 jurisdiction to enforce its orders?
26
27

1
2 **BACKGROUND**

3 *“Every day that information goes uncollected is a day in which fraudulent resellers and*
4 *fraudulent re-conditioners and re-builders of vehicles can perpetuate fraud.”^{1/}*

5 * * *

6 *“There is an absolute need for the system.*
7 *The federal government must take control.”^{2/}*

8 **A. The Anti-Car Theft Act of 1992**

9 In 1992, Congress sought to combat the growing problems of auto theft and auto
10 fraud by requiring the federal government to establish the National Motor Vehicle Title
11 Information System (NMVTIS), a database that would provide public access to critical
12 information about the reliability and safety of used automobiles. The Anti-Car Theft Act
13 of 1992, P.L. 102-519, §§ 202-04, 106 Stat. 3390-93, required the Secretary of
14 Transportation to establish the NMVTIS “not later than January 31, 1996.” The Act
15 provides that the database shall permit consumers to instantly and reliably establish not
16 only the validity of a vehicle’s title, but also its mileage and theft or damage history, which
17 would indicate whether a vehicle had been branded as a junk or salvage vehicle. 49 U.S.C.
18 § 30502(d). Among other things, the database would prevent and deter the practice of
19 “title-washing,” whereby damaged or stolen cars from one state are re-titled in other states
20 and sold to unsuspecting consumers.

21 NMVTIS’s data is to be provided by states, junk yards, salvage yards, and insurance
22 carriers. The 1992 Act requires junk yards and salvage yards to file monthly reports
23 consisting of an inventory of automobiles obtained and their condition. *Id.* §§ 30502(d),

24 ^{1/} Jeff Brady, *Holes in Monitoring System Let Lemons Get Resold*, National Public Radio, March 5,
25 2007, (quoting David Regan, National Automobile Dealers Association) (AR 1497). Citations to the
26 Administrative Record in this case (Doc. #22) are designated by “AR,” followed by the page number.

27 ^{2/} Presentation on National Motor Vehicle Title Information System by James H. Burch III, Deputy
28 Director, Bureau of Justice Assistance, U.S. Department of Justice, Sept. 19-20, 2006 (AR 0076).

1 30504(a). Similarly, the Act requires insurance carriers to file monthly reports with an
2 inventory of vehicles they have obtained. *Id.* § 30504(b). With respect to both junk yards
3 and insurance carriers, the Act requires that the federal government “shall establish by
4 regulation procedures and practices to facilitate reporting in the least burdensome and
5 costly fashion,” *id.* § 30504(c), and establish a start date for the reporting “that is not
6 sooner than the 3d month before the establishment or designation of [NMVTIS] under
7 section 30502 of this title[.]” *Id.* § 30504(c). The government has not yet issued the
8 required regulations or established the required start date.

9 The Act provides that the database may be operated by a third party operator, which
10 is permitted to collect user fees to cover the cost of operating the system, thereby making
11 NMVTIS “self-sufficient and not dependent on amounts from the United States
12 Government.” *Id.* § 30502(b), (c). After the statute was enacted, the government
13 designated the American Association of Motor Vehicle Administrators (AAMVA) as the
14 system operator.

15 **B. The Initial Failure to Implement NMVTIS (1992-96)**

16 After the 1992 Act was passed, the Department of Transportation delegated
17 responsibility for implementing the database to the National Highway Traffic Safety
18 Administration (NHTSA), which established a task force representing the industries that
19 would be affected by the 1992 legislation, including junk yards and insurance companies.
20 In February 1994, the task force recommended additional legislation to promote nationally
21 uniform methods of titling vehicles,^{3/} and in May 1994, the government sent proposed
22 legislation to Congress that would extend the deadline for implementation of NMVTIS from
23 January 1996 to October 1997.^{4/} According to the government, the delay was required
24 because AAMVA was conducting a pilot study of NMVTIS and NHTSA wanted to evaluate

25
26 ^{3/} AR 0429; *see also* AR 1456.

27 ^{4/} AR 1457.

1 the study results. In December 1994, however, NHTSA denied AAMVA's request for
2 funding of the pilot program on the grounds that such a study would be premature.^{5/} In
3 response, Congress provided \$890,000 for the pilot study as part of the Department of
4 Transportation's appropriation for fiscal year 1996.^{6/} On November 29, 1995, then-U.S.
5 Representative Charles Schumer of New York, a supporter of the original legislation, asked
6 the Government Accounting Office (GAO) to look into the anticipated delays in
7 implementing NMVTIS. The GAO's report, issued in April 1996, identified several concerns
8 about the implementation of NMVTIS, but could not identify any reason why the
9 government had not yet issued regulations concerning reporting of information by
10 insurance carriers or junk and salvage yards, set a start date for reporting of that
11 information, or made that information accessible to consumers.^{7/}

13 **C. The Anti-Car Theft Improvements Act of 1996**

14 When the statutory deadline of January 31, 1996 came and went without
15 implementation of NMVTIS, Congress reacted promptly to this delay by passing legislation
16 to "expedite implementation of the motor vehicle titling information system." H.R. REP. NO.
17 104-618 (1996), at 2-3, *reprinted in* 1996 U.S.C.C.A.N. 1060, 1061-61. Known as the Anti-
18 Car Theft Improvements Act of 1996, Pub. L. 104-152, § 2-3, 110 Stat. 1384, the legislation
19 made two amendments to the 1992 legislation relevant here: (1) it transferred responsibility
20 for NMVTIS from the Secretary of Transportation to the Attorney General, and (2) it
21 extended the deadline for implementation of the system from January 31, 1996 to
22 December 31, 1997. The House Report accompanying the legislation observed that the

23
24 ^{5/} *Id.*

25 ^{6/} *Department of Transportation and Related Agencies Appropriations Act of 1996*, P.L. 104-50;
and Conference Report, H.R. REP. NO. 104-286 (1995); *see also* AR 1457.

26 ^{7/} GAO, ANTI-CAR THEFT ACT: IMPLEMENTATION STATUS OF CERTAIN PROVISIONS OF THE 1992 ACT
27 (1996) (AR 1450-79).

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1 government “was required to establish [NMVTIS] by January 31, 1996,” and had “failed to
2 meet its statutory deadline.” *Id.* The Report also reiterated the importance of prompt
3 “implementation of the much-needed national titling information system, which would
4 prevent thieves from obtaining legitimate vehicle ownership documentation and deter other
5 serious consumer fraud related to transfer of motor vehicle ownership.” *Id.* at 3, 1996
6 U.S.C.C.A.N. at 1062. The Report concluded that the “costs imposed on society” by such
7 auto theft and fraud “remain unacceptably high, due in part to the failure to implement
8 [NMVTIS].” *Id.*

9
10 **D. The Continuing Failure to Implement NMVTIS (1996-2008)**

11 Despite this unusually forceful action by Congress, the government’s foot-dragging
12 continued. Missouri-based CARFax, a for-profit corporation that sells vehicle-history data
13 and thus has “a commercial interest in stopping the program,” met with then-Senator John
14 Ashcroft of Missouri.^{8/} On July 23, 1998, Ashcroft wrote to the GAO to express concern
15 about the slow pace of NMVTIS’s implementation and, possibly at the behest of private
16 industry opponents of NMVTIS, to request that the GAO determine the need for an analysis
17 of the system’s costs and benefits.^{9/} In response, the GAO issued a report in August 1999,
18 concluding that a cost-benefit analysis of the system by DOJ was warranted.^{10/} The DOJ
19 cost-benefit analysis, conducted by the Logistics Management Institute, was completed in
20 June 2001, at which time Ashcroft had become Attorney General.^{11/} The analysis concluded

21 ^{8/} Brady, *Holes in Monitoring System*, *supra*, at AR 1497 (noting that “NMVTIS would be a publicly funded competitor to CARFax”).

22 ^{9/} AR 2918-AR2919 (“The NMVTIS, authorized as part of the Anti Cart Theft Act of 1992, was
23 intended to prevent car theft, motor vehicle title washing, and odometer fraud. However, even now, six
years after Congress authorized the NMVTIS, the system is still is not operational . . .”).

24 ^{10/} GAO, ANTI-CAR THEFT ACT: ISSUES CONCERNING ADDITIONAL FEDERAL FUNDING OF VEHICLE TITLE
25 SYSTEM (1999) (AR 0706-AR 728); see also David Goldstein, *GAO urges further review of national car
title system*, KANSAS CITY STAR, Sept. 20, 1999.

26 ^{11/} Logistics Management Institute, NATIONAL MOTOR VEHICLE TITLE INFORMATION SYSTEM COST-
27 (continued...)

1 that NMVTIS was a huge bargain: With an initial annual investment in the range of \$10
2 million, the fully implemented system could “achieve benefits in the range of \$4 billion to
3 \$11.3 billion annually,” including significant benefits to consumers of automobiles.^{12/} The
4 cost-benefit analysis process, however, greatly delayed the implementation of NMVTIS.^{13/}

5 In the meantime, AAMVA had conducted a pilot test of its NMVTIS system, finding
6 that the pilot “fulfills the requirements of the Anti Car Theft Act in a way that is technically
7 feasible, and that it also reduces fraud and deters titling of stolen vehicles.”^{14/} AAMVA
8 concluded that although funding was a barrier to full participation by the states, the system
9 was ready to receive and process reports from insurance carriers and junk and salvage
10 yards, as required by Congress. The report concluded that the one thing standing in the way
11 of reporting by insurance carriers and junk and salvage yards was the Justice Department’s
12 continued failure to issue the reporting regulations required by the statute.^{15/}

13 More than a decade after the latest statutory deadline, and nearly sixteen years after
14 Congress first required the establishment of the NMVTIS, the federal government has yet
15 to carry out its obligations to (1) provide instant and reliable access to vehicle-history
16 information to consumers; (2) issue regulations to facilitate reporting by insurance carriers
17 and junk and salvage yards; (2) or set a start date for the reporting of such information.

21 ^{11/} (...continued)
BENEFIT ANALYSIS (2001) (AR 0584-AR 0651).

22 ^{12/} *Id.* at AR 0649.

23 ^{13/} Brady, *Holes in Monitoring System*, *supra*, at AR 1497 (quoting Linda Lewis-Pickett of AAMVA:
24 “We had very strong momentum going at the time the Department of Justice commissioned the cost-
benefit analysis,” she says, “It certainly slowed down the process, there’s no doubt about that.”).

25 ^{14/} AAMVA, NATIONAL MOTOR VEHICLE TITLE INFORMATION SYSTEM PILOT EVALUATION REPORT
26 (2000), at AR 1876.

27 ^{15/} *Id.*

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1
2 **ARGUMENT**

3 In our system of government, Congress makes the laws and the Executive must “take
4 care” that they are “faithfully executed.” U.S. Const. art. II § 3. “Federal courts have come
5 to recognize,” however, “that an agency’s failure to implement or enforce a statutory scheme
6 with reasonable dispatch can subvert the will of Congress as readily as can improper
7 implementation.” *In re American Fed’n of Gov’t Employees, AFL-CIO*, 790 F.2d 116, 117
8 (D.C. Cir. 1986) (internal citations and quotation marks omitted). “When an agency’s
9 recalcitrance, inertia, laggard pace or inefficiency sorely disadvantages the class of
10 beneficiaries Congress intended to protect,” then “judicial review is in order.” *Id.*

11 This is such a case. It has been sixteen years since Congress first required the
12 establishment of a critical auto-safety information system, and over a decade since Congress
13 passed legislation to expedite the system’s implementation, and the government still has
14 not discharged its statutory duty, leaving American consumers at a greater risk of fraud,
15 theft, and injury from unsafe automobiles. To ensure that Congress’s will is carried out in
16 cases like this one, the Administrative Procedure Act (APA) provides that courts “shall
17 compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see*
18 *generally Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-1191 (10th Cir. 1999)
19 (extensively explaining differences between the two categories of agency inaction).

20 Whether inaction is “unlawfully withheld” as opposed to “unreasonably delayed”
21 under the APA turns on whether Congress has specified a timeline: “[W]hen an entity
22 governed by the APA fails to comply with a statutorily imposed deadline, it has unlawfully
23 withheld agency action and courts, upon proper application, *must* compel the agency to
24 act.” *Id.* at 1190 (emphasis added); *see also Ctr. for Biological Diversity v. Brennan*, 2007
25 WL 2408901, at *21 (N.D. Cal. Aug. 21, 2007) (Armstrong, J.). By contrast, if Congress has
26 not supplied a timeline, courts must consider a variety of factors—such as the length and
27 consequence of delay in light of the overall statute—to determine whether the delay has

1 been unreasonable. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th
2 Cir. 2002); *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)
3 (setting out so-called *TRAC* factors). As explained below, the inquiry here is of the former,
4 more straightforward variety: “In this case, Congress has specifically provided a deadline
5 for performance, so no balancing of factors is required or permitted.” *Badgley*, 309 F.3d at
6 1177 n.11.

7
8 **I. The Attorney General’s Failure to Implement NMVTIS Constitutes Agency Action Unlawfully Withheld.**

9 At issue in this lawsuit are three actions specifically required by the Anti-Car Theft
10 Act of 1992 and the Anti Car-Theft Improvements Act of 1996 that the Attorney General has
11 failed to carry out: (1) the establishment of consumer access to NMVTIS, 49 U.S.C. §
12 30502(a), (2) the establishment of procedures for information reporting by junk and
13 salvage yards and insurance carriers to NMVTIS, *id.* § 30504(c), and (3) the establishment
14 of a commencement date for reporting by those entities, *id.* §§ 30504(a) and (b). The
15 Attorney General has violated a clear statutory deadline to carry out these duties “not later
16 than December 31, 1997,” *id.* § 30502(a), and that ongoing violation constitutes agency
17 action unlawfully withheld under the APA.

18 The 1996 Act was unambiguous in requiring the Attorney General to implement
19 NMVTIS, including consumer access, by a firm deadline the following year—*i.e.* “not later
20 than December 31, 1997.” *Id.* §§ 30502(a) and (e)(C). With respect to reporting by private
21 entities (insurance companies and junk and salvage yards), Congress clearly contemplated
22 that the Attorney General would establish the start date for reporting to precede or coincide
23 with the overall “establishment” of the system.^{16/} And to facilitate the information reporting
24 by private entities, the statute required the Attorney General to issue regulations

25
26 ^{16/} 49 U.S.C. § 30504(a) (“Beginning at a time established by the Attorney General that is *not sooner*
27 *than the 3d month before* the establishment or designation of the National Motor Vehicle Information
System under section 30502 of this title, an individual or entity engaged in the business of operating a
junk yard or salvage yard shall file a monthly report with the operator of the System.”).

1 establishing procedures and practices for reporting, an action that logically, as the
2 government has acknowledged, would need to occur before the reporting itself.^{17/} By
3 contrast, although Congress required the states to report to the system, it recognized that
4 the federal government could not compel the states to action, and thus required the
5 Attorney General to report to Congress, “[n]ot later than October 1, 1998,” on the progress
6 of compliance by the states. 49 U.S.C. § 30503(d).

7 If there is any doubt about whether Congress intended to announce a firm timetable
8 in the 1996 legislation, it is dispelled by the legislative history. Indeed, the express purpose
9 of the 1996 legislation was to “expedite implementation of the motor vehicle titling
10 information system” because the government “was required to establish [NMVTIS] by
11 January 31, 1996” and had “failed to meet its statutory deadline.” H.R. REP. NO. 104-618
12 (1996), at 2-3, *reprinted in* 1996 U.S.C.C.A.N. at 1061. At that point in 1996, the
13 government had been given four years to complete its task and had failed. More than a
14 decade after it was given a second chance, the government has once again “failed to meet
15 its statutory deadline.” *Id.*^{18/} That failure constitutes agency action unlawfully withheld.
16 *See Forest Guardians*, 174 F.3d at 1190 (“[W]hen an entity governed by the APA fails to
17 comply with a statutorily imposed deadline, it has unlawfully withheld agency action and
18 courts, upon proper application, must compel the agency to act.”); *Badgley*, 309 F.3d at
19 1177 n.11.

20
21
22 ^{17/} 49 U.S.C. 30504(c) (“The Attorney General shall establish by regulation procedures and practices
to facilitate reporting in the least burdensome and costly fashion.”).

23 ^{18/} At the time, the Justice Department itself acknowledged the importance of rapidly implementing
24 NMVTIS: “In our view, an effective motor vehicle titling information system would deter auto theft by
25 reducing the opportunity for car thieves to buy the ‘junk,’ ‘salvage,’ ‘rebuilt’ or other branded titles to
26 wrecked automobiles, switch the VIN plates from the wrecks to similar make/model stolen automobiles,
and then obtain apparently clean or ‘washed’ titles to the stolen vehicles in other jurisdictions. The system
also would deter consumer fraud by preventing unscrupulous auto-rebuilders from obtaining clean or
‘washed’ titles to rebuilt wrecks.” *Id.* at 13-14, 1996 U.S.C.C.A.N. at 1072 (Statement of Andrew Fois,
Assistant Attorney General, presenting “the Department of Justice’s views” on the legislation).

1 In any event, the government’s decade-long failure to act in this case would violate
2 the APA even if there had been no statutory deadline at all, because its delay has been
3 manifestly unreasonable by any measure. *See In re United Mine Workers of America Int’l*
4 *Union*, 190 F.3d 545, 554 (D.C. Cir. 1999) (“Indeed, even if we were to read the statute not
5 as specifying an express ‘timetable’ for decision, but as merely providing ‘an indication of
6 the speed with which Congress expects the agency to proceed,’ it would still be clear that the
7 agency has transgressed congressional expectations,” because “[t]he eight-year delay here
8 is simply not in the same ballpark” as the time period contemplated by the statute);
9 *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1085 (N.D. Cal. 2005) (Patel, J.) (applying
10 traditional six-factor test for unreasonable delay); *see, e.g., In re Int’l Chem. Workers*
11 *Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (characterizing six-year delay in rulemaking as
12 an “extraordinarily long time”); *Oil, Chemical & Atomic Workers Int’l Union v. Zegeer*, 768
13 F.2d 1480, 1487 (D.C. Cir. 1985) (“reasonable time may encompass months, occasionally
14 a year or two, but not several years or a decade”); *Public Citizen v. FDA*, 740 F.2d 21, 34
15 (D.C. Cir. 1984) (four-year delay in issuing proposed rule was “unreasonably dilatory”);
16 *Public Citizen v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (per curiam) (three-year delay in
17 rulemaking constituted unreasonable delay); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir.
18 1975) (“[N]ine years should be enough time for any agency to decide almost any issue.”).
19 Needless to say, the delay here is certainly “not in the same ballpark,” *United Mine*
20 *Workers*, 190 F.3d at 554, as the additional one-year period in which Congress expected the
21 government to implement NMVTIS on an expedited basis.

22
23 **II. This Court Should Set Concrete Deadlines By Which the Government**
24 **Must Carry Out Its Statutory Obligations.**

25 As this Court recently explained in another case involving action unreasonably
26 delayed by the Attorney General, courts frequently order “detailed remedies, including the
27 imposition of concrete deadlines, in response to unlawful agency action or failures to act.”

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1 *Santillan v. Gonzales*, 388 F. Supp. 2d at 1085; accord *Brennan*, 2007 WL 2408901, at
2 *25-26 (setting deadlines for agency action and “[r]etaining jurisdiction over this action to
3 ensure compliance with the Court’s decree”).^{19/} That is what this Court should do here, and
4 it should do so in the context of this summary-judgment motion. An additional round of
5 briefing concerning a remedial plan would only compound the delay.

6 With respect to the amount of time to be allowed, plaintiffs seek: (1) as to the
7 regulations required by 49 U.S.C. § 30504(c), an order requiring the government to issue
8 a Notice of Proposed Rulemaking (NPRM) within 30 days (if an NPRM has not already
9 been issued by the time the court decides this motion), and, in any event, a final rule within
10 60 days of the issuance of the NPRM; (2) as to the establishment of the start date for
11 reporting required by 49 U.S.C. §§ 30504(a) and (b), an order requiring the government to
12 establish a start date within 30 days of the issuance of a final rule; and (3) as to the
13 consumer access required by 49 U.S.C. §§ 30502(a) and (e), an order requiring the
14 government to begin providing “instant and reliable” public access to all information in the
15 system within 60 days of the court’s order.

16 As it invariably does in both statutory-deadline and unreasonable-delay cases, the
17 government will likely argue that it should simply be trusted to carry out its responsibilities
18 on its own, without fixed deadlines. At a certain point, however, promises of future action
19 are insufficient and, as one court has put it, “enough is enough.” *Public Citizen v. Brock*,
20 823 F.3d 626, 627 (D.C. Cir. 1987) (“We understand, because we have seen it happen time
21 and time again, that action Congress has ordered for the protection of the public health all
22 too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special
23 interest politics. At some point, we must lean forward from the bench to let an agency

24 _____
25 ^{19/} *Public Citizen v. Auchter*, 702 F.2d at 1157 (ordering OSHA to issue notice of proposed
26 rulemaking within 30 days of delay of only three years); *Env’l Defense Fund v. EPA*, 852 F.2d 1316 (D.C.
27 Cir. 1988) (ordering agency to issue proposed rule within two and one-half months and final rule three
months later); *Env’l Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) (ordering agency to
promulgate regulations within six months, which was one year from date regulations were proposed and
16 months after congressional deadline).

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1 know, in no uncertain terms, that enough is enough.”). At various points over the past
2 decade, the Department of Justice has repeatedly issued identical statements in its
3 regulatory agenda stating that it is in the process of drafting regulations to implement
4 NMVTIS, but the promised regulations have never materialized.^{20/} Only in response to this
5 lawsuit, on the very eve of the case management conference before this Court, did the
6 Department forward draft proposed regulations for review to the Office of Management and
7 Budget. To the extent that the Department issues a Notice of Proposed Rulemaking in the
8 next few months (and there is no reason it should not be able to do so), that is evidence that
9 the very possibility of judicial oversight can result in action, not proof that the government
10 should be left to its own devices.

11 Moreover, in attempting to excuse its delay in implementing NMVTIS, the Justice
12 Department has spoken out of both sides of its mouth. In its statements to this Court, the
13 government has blamed the slow pace of implementation on the unwillingness of states to
14 participate in the system, and has suggested that the agency has prioritized state
15 participation over the required rulemaking. *See* Joint Case Management Statement (Doc.
16 13) at 4. But in other forums, the Justice Department has more candidly acknowledged that
17 the situation is just the opposite—that it is the federal government’s failure to issue the
18 regulations concerning reporting by private entities that has inhibited state participation.
19 *See* Bureau of Justice Assistance Presentation to Law Enforcement Working Group on
20 NMVTIS, September 19-20, 2006 (AR 0036) (“Regulations requiring states and
21 salvage/junk yard operators to participate have never been issued and states claim absen[t]

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23
24 ^{20/} *See, e.g.*, 65 Fed. Reg. 22973 (Apr. 24, 2000) (stating that the Department of Justice “will issue . . .
25 regulations to implement the National Motor Vehicle Title Information System”); 67 Fed. Reg. 33251-02
26 (May 13, 2002) (same); 67 Fed. Reg. 74691-03 (Dec. 9, 2002) (same); 69 Fed. Reg. 37772-01 (June 28,
27 2004) (same); 69 Fed. Reg. 73438-02 (Dec. 13, 2004) (same); 70 Fed. Reg. 27151-01 (May 16, 2005)
28 (same); 71 Fed. Reg. 22882-01 (Apr. 24, 2006) (same); 71 Fed. Reg. 73527-01 (Dec. 11, 2006) (same); 72
Fed. Reg. 22811-01 (Apr. 30, 2007) (same).

1 the requirement, NMVTIS participation must compete with other priorities.”)^{21/} Whatever
2 the real story, the priorities here have been set by Congress, by means of a mandatory
3 deadline, and the agency does not have discretion to deviate from that command.

4 In any event, as the D.C. Circuit explained in the leading case on point: “Requiring
5 the courts to rely on mere exhortation to move with expedition toward compliance within
6 a ‘reasonable time’ would undercut their ability to spur reticent defendants to tender the
7 performance to which the plaintiff[s] and the public are entitled.” *NRDC v. Train*, 510 F.2d
8 692, 705 (D.C. Cir. 1975). Accordingly, courts have “[t]he authority to set enforceable
9 deadlines both of an ultimate and an intermediate nature.” *Id.* To the extent that this
10 lawsuit has already spurred the agency to action (and particularly if the agency is able to
11 issue a Notice of Proposed Rulemaking while this motion is pending), that is all the more
12 reason to hold the agency to an accelerated remedial schedule that takes into account the
13 work that has already been done. *See, e.g., NRDC v. EPA*, 797 F. Supp. 194, 198 (E.D.N.Y.
14 1992) (“EPA is sufficiently far along in the process of devising regulations to comply with
15 the schedule plaintiff proposes”); *In re Int’l Chem. Workers Union*, 958 F.2d at 1150 (“The
16 agency is now in the concluding phase of the rulemaking; it predicts final issuance of the
17 rule in five months from now. . . . [W]e have great concern that if we do not insist on a
18 deadline now, some new impediment will be pleaded five months hence. OSHA’s asserted
19 justifications for the delay become less persuasive the longer the delay continues. . . . There
20 is a point when the court must ‘let the agency know, in no uncertain terms, that enough is
21 enough.”) (quoting *Public Citizen v. Brock*, 823 F.3d at 627).

22 More to the point, the APA provides that the court “shall” compel agency action that
23 has been unlawfully withheld, 5 U.S.C. § 706(1), and this has been interpreted to mean that

24 ^{21/} See also *Factors Contributing to NMVTIS Implementation Failure*, Briefing for the National
25 Governors’ Association, July 2007 (AR 0251) (“NMVTIS is missing salvage and junk yard data which is
26 critical for states and others to know the disposition of vehicles where those businesses are located.”); see
27 also Letter from James H. Burch III, Deputy Director, Bureau of Justice Assistance to Robert M. Byrant,
National Insurance Crime Bureau (AR 0005) (“[T]his data (insurance total loss and recycler inventories)
is important to the successful implementation of the Act and would be tremendously helpful to law
enforcement, States, and prospective purchasers.”).

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1 the federal courts cannot look the other way where, as here, the government has failed to
2 meet a statutory deadline. *See Forest Guardians*, 174 F.3d at 1187 (“‘Shall’ means ‘shall’”).
3 In fashioning relief in such cases, courts are to issue injunctions “necessary to effectuate the
4 congressional purpose behind the statute.” *Badgley*, 309 F.3d at 1177. In the case of the
5 Anti-Car Theft Improvements Act of 1996, we know precisely what the congressional
6 purpose behind the statute was: to “expedite implementation of the motor vehicle titling
7 information system,” because the government had “failed to meet its statutory deadline.”
8 H.R. Rep. 104-618, at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 1061. And we know that
9 Congress wanted the implementation to occur rapidly, and in no event later than 1997.
10 Under these circumstances, “the clear objectives and language of Congress . . . [have]
11 removed the traditional discretion of courts in balancing the equities before awarding
12 injunctive relief.” *Badgley*, 309 F.3d at 1177 (discussing Endangered Species Act and
13 holding that “[t]he Service’s failure to complete the [action] within the mandated time
14 frame compelled the court to grant injunctive relief. The court had no discretion to consider
15 the Service’s stated priorities.”); *Forest Guardians*, 174 F.3d at 1192 (“[T]he Secretary’s
16 inadequate resource argument must fail with respect to the appropriate remedy. Section
17 706 requires us to compel the unlawfully withheld agency action.”). Thus, the government
18 cannot seek additional time based on traditional equitable defenses, such as competing
19 priorities or resources, or even based on promises that it is finally taking voluntary action
20 in response to this lawsuit after a decade of delay.

21 Instead, the relevant standard is that of “impossibility”; an agency “may avoid
22 implementing a statute *only* by showing that attainment of the statutory objectives is
23 *impossible*.” *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983) (emphasis added). The
24 government “bears a heavy burden of proving impossibility as a defense to non-compliance’
25 with the statutory deadline,” and “courts must carefully scrutinize an agency’s claims of
26 impossibility or infeasibility.” *Communities for a Better Environment v. EPA*, 2008 WL

1 1994898, at *2-*3 (N.D. Cal. May 5, 2008) (quoting *Maine Ass'n of Handicapped v. Dole*,
2 623 F. Supp. 920, 926 (D. Me. 1985)); *see also* *Sierra Club v. Gorsuch*, 551 F. Supp. 785,
3 787 (N.D. Cal. 1982). That burden “is especially heavy where, as here, the [government] has
4 failed to demonstrate any diligence whatsoever in discharging its statutory duty . . . and has
5 in fact ignored that duty for several years.” *Communities for a Better Environment*, 2008
6 WL 1994898, at *3. “Where, as here, Congress has established a clear time frame for
7 regulatory action, deferring to the agency is inappropriate.” *Sierra Club v. Thomas*, 658
8 F.Supp. 165, 171 n.6 (N.D.Cal. 1987) (Schwarzer, J.).

9 Agencies typically argue that they cannot comply with an accelerated schedule to
10 remedy delay because of “the legal and factual complexity of the rule,” or “the number and
11 variety of public comments” to be taken into account, or “the amount of internal review
12 required.” *Ctr. for Biological Diversity v. Kempthorne*, No. 08-1339, 2008 WL 1902703,
13 at *3 (N.D. Cal. April 28, 2008) (Wilken, J.). But in the face of a history of delay, and
14 particularly in the face of a long unheeded statutory deadline, those generalized excuses will
15 not suffice. *Id.* (“Other than the general complexity of finalizing the rule, the Defendants
16 offer no specific facts that would justify the existing delay, much less further delay.”)
17 (ordering publication of listing at issue within 17 days of the court’s order).

18 Finally, there is no basis for the government to seek additional time within the
19 proposed remedial schedule for review of the Attorney General’s activities by the Office of
20 Management and Budget (OMB) or any other entity in the Executive Branch. OMB lacks
21 any authority to review regulations beyond the date of a statutory deadline. *See United*
22 *Mine Workers*, 190 F.3d at 551. (“Needless to say, the President is without authority to set
23 aside congressional legislation by executive order, and the 1993 executive order does not
24 purport to do so.”) (rejecting agency’s argument that executive order “requiring agencies
25 to submit their rules for up to ninety days of pre-publication review by the Office
26 Management Budget” excused compliance with deadlines); *accord* *Env’tl Defense Fund v.*

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1 *Thomas*, 627 F. Supp. at 571 (“[I]f a deadline has already expired, OMB has no authority to
2 delay regulations subject to the deadline in order order review under the Executive
3 Order.”); *NRDC v. Ruckelshaus*, 1984 WL 6092, at *4 (D.D.C. 1987) (“OMB review is not
4 only unnecessary, but in contravention to applicable law.”); *NRDC v. EPA*, 797 F. Supp. at
5 198 (“OMB’s review of regulations does not apply where it would conflict with statutory
6 deadlines.”); *see also* Executive Order 12,866 § 10 (Sept. 30, 1993) (“Nothing in this
7 Executive order shall affect any otherwise available judicial review of agency action.”). Thus,
8 this Court should not include any additional time in its remedial schedule for OMB review
9 in addition to the time already contemplated for notice and comment under the APA.
10 Rather, it should order the Attorney General to undertake the mandatory actions according
11 to the schedule proposed by the plaintiffs.

12 **CONCLUSION**

13 For the foregoing reasons, the Attorney General should be declared to have violated
14 the Anti-Car Theft Act of 1992, the Anti-Car Theft Improvements Act of 1996, and the
15 Administrative Procedure Act in withholding the actions necessary to establish the National
16 Motor Vehicle Title Information System within the time frame mandated by Congress. The
17 Court should order the Attorney General to complete its responsibilities according to the
18 remedial schedule proposed by the plaintiffs, as set forth in the accompanying proposed
19 order.

1 Dated: August 12, 2008

Respectfully submitted,

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3 */s/ Deepak Gupta*

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