UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., Plaintiff, v. NORMAN Y. MINETA, Secretary, U.S. Department of Transportation, Defendant/ Cross-Claim Defendant, and ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., Intervenor-Defendant, and RUBBER MANUFACTURERS ASSOCIATION, Intervenor-Defendant/ Cross-Claimant.	Civil Action No. 04-0463 (RJL)

PLAINTIFF PUBLIC CITIZEN'S COMBINED OPPOSITION TO OTHER PARTIES' MOTIONS/CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When NHTSA announced its intent to establish procedures for submitting early warning information, manufacturers and industry associations used the rulemaking to push for total exemption of the information from FOIA. But they raised only a strained argument that the TREAD Act is an Exemption 3 statute. They did not ask NHTSA to issue binding regulations exempting the early warning information under Exemption 4. Indeed, such regulations were unimaginable for three reasons: (1) NHTSA has no authority to issue binding exemptions; (2) no legal theory permits the exemption of the entire database under Exemption 4; and (3) industry likely did not believe that the data's release would meet the "substantial competitive harm" standard.

NHTSA's final rule was a surprise to all. NHTSA did not realize that it has no authority to issue binding FOIA exemptions or that its decision required more evidence than industry had submitted. The agency also relied on competitive harm arguments that are irrelevant to Exemption 4. The result is an unauthorized rule, of which no one had notice, that applies improper legal standards and lacks evidentiary support.

I. THE TREAD ACT IS NOT AN EXEMPTION 3 STATUTE.

The suggestion that the TREAD Act is an Exemption 3 statute requires little discussion. The relevant provision of the Act (49 U.S.C. § 30166(m)(4)(C)) provides only that early warning data may not be disclosed *under 49 U.S.C. § 30167(b)* unless certain criteria are satisfied. Section 30167(b), however, expressly provides that the specific, affirmative obligation it imposes on the Secretary of Transportation to disclose information related to defects or noncompliance (even in the absence of any request for disclosure and without exemptions similar to those under FOIA) is "in addition to the requirements of Section 552 of title 5." In other words, § 30167(b) imposes disclosure requirements on the Secretary that go beyond those of FOIA. Section 30166(m)(4)(C)

by its plain terms only makes a minor change in the findings that must be made to subject early warning data to the additional requirements imposed by § 30167(b), but says nothing at all about disclosure under FOIA.

II. NHTSA FAILED TO PROVIDE NOTICE AND THE OPPORTUNITY TO COMMENT ON BINDING RULES UNDER FOIA EXEMPTION 4.

NHTSA' Notice of Proposed Rulemaking (NPRM) proposed to establish rebuttable procedural presumptions. Instead, the agency issued binding FOIA exemptions. NHTSA and the RMA have searched the record for a comment clearly addressing the subject of the final rule—binding exemptions under FOIA Exemption 4—and cannot point to one. The Alliance argues that Public Citizen had plenty of opportunities to comment but also fails to cite record evidence showing that Public Citizen or another party commented on the right topic. That is because no one knew NHTSA might create binding exemptions under Exemption 4. Rather than a "logical outgrowth" of NHTSA's proposal, the final rule was a "bolt from the blue." *Shell Oil Co. v. EPA*, 950 F.2d 741, 749-50 (D.C. Cir. 1991).

A. NHTSA Proposed Rebuttable Procedural Presumptions But Established Binding Exemptions.

NHTSA proposed only *presumptive* determinations under FOIA Exemption 4. Specifically, it proposed to maintain three existing presumptions and to create four new presumptions. *See* 67 Fed. Reg. 21,198, 21,199 (April 30, 2002); *id*. at 21,200 ("Based on this review, the agency proposes to determine that certain classes of information are *presumed* not to cause competitive harm if released.") (emphasis added). The agency indicated repeatedly that it was proposing *only* presumptions.[1] It stated that the proposed rules would be *rebuttable* and would have no substantive

[1] *See id.* at 21,198 ("[T]he proposal would continue to provide that the agency may issue class determinations, under which . . . information is *presumed* to cause competitive harm if released.") (emphasis added); *id.* at 21,200 ("[T]he proposal would provide that the agency may determine that

effect on agency practice. *Id*. (explaining that the presumptions would simply "serve to inform submitters of information about the types of materials likely to be granted or not granted confidential treatment").[2] And it stated that the proposed rules would merely "document . . . existing practices." *Id*. The agency also sought comment only on presumptions:

> The agency requests public comment regarding this proposed class determination [*presumptive* nonconfidentiality of certain test data]. We are also interested in receiving comments regarding whether any of the proposed class determinations [four new *presumptions* of nonconfidentiality] should be applicable to the material to be submitted under the agency's "early warning" regulations and whether any additional class determinations should be established. For example, the agency's "early warning" NPRM proposes that manufacturers submit to the agency reports on incidents involving deaths or injuries and copies of field reports. The agency seeks comments regarding whether the agency should *presumptively* determine that these (or a subset of these) types of documents would or would not cause competitive harm to the submitter if released.

Id. at 21,200 (emphasis added). In summarizing its proposal, NHTSA stated that although the proposal "constitutes a significant change in the *presentation* and *style* of Part 512," it "will not alter most of the substantive requirements contained in the regulation." *Id*. at 21,198 (emphasis added).

The final rule differed dramatically from the proposal: Instead of *procedural presumptions*, NHTSA established *binding exemptions*. *See* 49 C.F.R. Part 512, Appendix C. NHTSA and the industry parties consistently conflate them. But the distinction is crucial to understanding this litigation. *Presumptions* are devices that help agencies process information under FOIA. They have

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a class of information is *presumed* not to cause competitive harm if released.") (emphasis added); *id.* at 21,200 ("[T]he agency proposes to create a number of classes of information *presumed* not to cause competitive harm if disclosed.") (emphasis added); *id.* ("The agency is proposing to establish a *presumption* that generally the release of these types of tests do not cause competitive harm.") (emphasis added); *id.* at 21,205-06 (proposed regulations implementing presumptions in sections 512.16(d)-(e) and Appendix B sections (a) and (b)).

[2] *See also id.* at 21,205 (proposed § 512.16(e) ("Class determinations will have the effect of establishing rebuttable presumptions and do not conclusively determine any of the factors set out in paragraph (d) of this section.")).

no material impact on legal standards, evidentiary burdens, or judicial review. Instead, they serve procedural functions. For example:

(1) Presumptions can ease notice requirements. Agencies must require submitters of confidential information to designate it as such. *See* Executive Order 12600 § 3(b). By establishing confidentiality presumptions, agencies can relax this requirement.[3] This practice has no impact on whether the agencies release information under FOIA when requested.

(2) Presumptions can also define when agencies will release information automatically and when they will hold it until requested under FOIA. Many agencies *automatically* release some information for which FOIA requires disclosure. They may place the information in public files or even publish it on the Internet. For these agencies, nonconfidentiality presumptions indicate which information to disclose automatically unless the submitter requests otherwise. Automatic disclosure of nonexempt information is sound policy. It relieves agencies of the burden of processing individual FOIA requests and advances FOIA's purpose by expediting the flow of information to the public. It is this practice—not binding class exemptions—that Public Citizen calls "invaluable." A confidentiality presumption, on the other hand, signals that the agency will not *automatically* disclose information but will hold it and reconsider confidentiality upon receipt of a FOIA request. This practice also does not affect whether the agencies release information when requested.[4]

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[3]The Executive Order expressly permits agencies to designate "specific classes of information that will be treated by the agency as if the information has been [designated confidential] by the submitter." *Id*. § 3.

[4]The FDA's regulations provide a useful example. *See* 21 C.F.R. § 20.20(b),(c) (explaining that all information is disclosed unless deemed "exempt" under the regulations); *id*. § 20.23 (stating that information deemed exempt under the regulations is still subject to ordinary FOIA requests). NHTSA discloses some information automatically but does not have regulations identifying presumptively nonconfidential information. NHTSA has, however, maintained three classes of presumptively confidential information since 1981. *See* 49 C.F.R. Part 512, Appendix B.

NHTSA's new *binding exemptions* are a different beast altogether. NHTSA purports to have ruled, through a legislative rulemaking, that certain information is unequivocally exempt from FOIA. In contrast to the proposed procedural presumptions, NHTSA's final rules directly contradict FOIA in several ways. NHTSA made no effort to ensure that all information covered by the rules merits exemption. In fact, the agency expressly argues that it is not required to prove that all of the information withheld is exempt. NHTSA 19-20;[5] 49 C.F.R. § 512.16 (authorizing binding class exemptions when "most" of the information in a class qualifies). And NHTSA provides no process through which to rebut the rules. Thus, the agency openly ignores its statutory duties to disclose nonexempt information and to avoid limiting the availability of records in any way not specifically authorized by FOIA. 5 U.S.C. § 552(a)(3)(A); *id*. § 552(d).

The rules also contradict FOIA in that NHTSA seeks to place the burden of proof on proponents of disclosure to show that NHTSA's decision was arbitrary and capricious even though the agency acknowledges that courts "have the authority to make the final decision on whether information may be withheld under FOIA." NHTSA 16.[6] These features signal an assertion under FOIA of the kind of authority reserved for agencies acting under broad congressional grants of legislative authority. FOIA grants no such authority. *See infra* § III.

In short, NHTSA proposed commonplace *procedural presumptions* to facilitate FOIA compliance but instead enacted unprecedented *binding exemptions* that contradict FOIA. The final

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[5]In this brief, the citation "NHTSA" refers to NHTSA's summary judgment memorandum; "RMA" refers to the RMA's summary judgment memorandum; "Alliance" refers to the Alliance's summary judgment memorandum; and "Public Citizen" refers to Public Citizen's opening summary judgment memorandum.

[6]NHTSA embraces this characterization. The agency continues its practice, evident throughout the rulemaking, of placing the burden of persuasion on Public Citizen. And NHTSA repeatedly refers only to meeting the arbitrary and capricious standard. *See* NHTSA 17, 19, 27, 29.

rule was not a "logical outgrowth" of the proposal because it deviated sharply from the proposal in every material respect: whether the rules are rebuttable or binding, whether NHTSA will follow or abandon ordinary FOIA procedures, what evidence NHTSA requires to prove a FOIA exemption, who bears the burden of proof, and what standard of review applies. *See AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (stating that a final rule is not a "logical outgrowth" if it "deviates too sharply from the proposal"). Because the agency provided neither the most important details of the final rule nor the rationales underlying them, the parties had no opportunity to dispute the rule or its reasoning. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (holding that agencies must "provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully"); *see also Nat'l Mining Ass'n. v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (finding notice and comment inadequate where "interested parties could not reasonably have anticipated the final rulemaking from the draft rule") (brackets and internal quotation marks omitted).

Courts implement the "logical outgrowth" standard functionally: Notice and comment are inadequate if "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Nat'l Exch. Carrier Ass'n, Inc v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001). Here, the agency only "sought comment on whether it should create a series of class determinations of information presumed not to cause substantial competitive harm" under Exemption 4. 68 Fed. Reg. 44,209, 44,210 (July 28, 2003); *id.* at 44,215. And comments on *presumptions* under Exemption 4 are all the agency received. (The agency also received a large volume of unsolicited comments on Exemption 3, which are irrelevant to the adequacy of notice on Exemption 4 rules.)

This is an easy case. Far smaller deviations from a proposal violate notice-and-comment requirements. *Shell Oil*, 950 F.2d at 749-50 (holding that a final rule that closed loopholes in the proposed regulation was not a "logical outgrowth"); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994) (finding lack of notice because the final rule used a "novel" definition of a key term even though the proposal also used a novel definition).

B. Neither Public Citizen Nor Other Commenters Anticipated the Final Rule.

1. NHTSA and the RMA Cite No Evidence Showing that Industry Commenters Had Notice.

NHTSA and the RMA attempt to show that other interested parties had notice and that Public Citizen simply failed to perceive what others did. The attempt fails. Every piece of evidence that NHTSA and the RMA cite to illustrate notice discusses *presumptions* rather than *binding exemptions* or *Exemption 3* rather than *Exemption 4*.

The RMA cites just six pages out of several hundred in the administrative record to create the appearance that "other interested parties" knew "class exemptions" were on the table. RMA 42. But even those comments do not help the RMA because none discusses binding rules under Exemption 4, the subject of NHTSA's final rule. Four of the six statements concern Exemption 3, not Exemption 4. *See id.* (citing AR 53; AR 61; AR 77; AR 78). One seeks the relaxation of NHTSA's requirements regarding the *submission* of information. *Id*. (citing AR 88). And the remaining comment opposes *presumptive* nonconfidentiality. *Id*. (citing AR 84, which appears under the heading, "III. NHTSA's Proposal to Treat Certain Types of Tire Data as *Presumptively* Non-Confidential Is Contrary to Law and the Agency's Past Practice") (emphasis added). Moreover, all of the comments were from either the RMA or the Alliance. *Id*. (citing AR 78 (RMA); AR 77 (same); AR 84 (same); AR 88 (same)); *id*. (citing AR 53 (Alliance); AR 61 (same)). Even if the comments had addressed the subject of the final rule, evidence that two parties submitted comments

on an issue would not demonstrate that all interested parties had notice. *Shell Oil*, 950 F.2d at 751. At most, it would show that two commenters sought special treatment, not that other parties were aware such treatment was under consideration.

NHTSA cites many more comments but finds no better evidence. On page 39 of its brief, the agency identifies twelve commenters that it claims sought "complete confidential treatment for EWR information." Not one of the commenters clearly discussed binding exemptions under Exemption 4, much less requested them. NHTSA did not cite specific pages in the comments. For the Court's convenience, we briefly discuss each comment in its entirety:

> **AR 12-15.** Utilimaster Corporation argues for nondisclosure only under Exemption 3. AR 12-14, 15. On competitive harm, it argues that NHTSA should not automatically place written field reports in "NHTSA's public files." *Id*. at 14-15. The company's comments on this point are barely coherent. At best, Utilimaster appears to argue that NHTSA should not *automatically* disclose field reports because submitters will want the opportunity to argue that they are exempt from FOIA before they are disclosed. *Id*. ("Government and private field operations . . . will strongly object to placement of their written field reports . . . in NHTSA's public files. Their concerns have a highly sensitive competitive overtone.").
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> **AR 16-20.** Reading its comments generously, Bluebird argues for binding confidentiality under Exemption 3. AR 17-18, 19. (It arguably seeks only to prevent "automatic" disclosure. *Id*. at 18.) With respect to Exemption 4, Blubird argues only against placement of production information, warranty claims, and field reports in "the agency's public records." *Id.* at 16; *id*. at 19.
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> **AR 21-27.** TMA opposes NHTSA's proposed nonconfidentiality presumptions and urges NHTSA to "*leave its current class regime in place*, and allow companies to seek confidential treatment of particular submissions on a *case-by-case basis*." AR 24 (emphasis added).
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> **AR 31-33; AR 207-09.** We address the comments of Meritor WABCO and WABCO (collectively, "WABCO") together because they are identical. *Compare* AR 31-33 *with* AR 207-09. WABCO addresses NHTSA's proposal to add the holding of *Critical Mass*[7]—that Exemption 4 covers voluntarily submitted information—to a list of factors that the agency considers relevant to Exemption 4 determinations. *See* 67 Fed. Reg. at 21,199 (proposing to amend § 512.15, entitled,

[7] *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992).

"What confidentiality standards will the Office of Chief Counsel use to make confidentiality determinations?"). WABCO briefly argues about early warning information under the *Critical Mass* standard, AR 31-32, which is irrelevant because early warning submissions are mandatory. Then WABCO incoherently intermingles discussion of Exemptions 3 and 4. *Id*. at 32-33. Notably, NHTSA mentioned the WABCO comments in its final rule only to point out that WABCO misunderstood part of the NPRM. *See* 68 Fed. Reg. at 44,214.

AR 75-143. As discussed above, RMA points to four pages in its own comments that do not address class exemptions under Exemption 4. RMA will undoubtedly claim that two pages of its comments, AR 83-84, request binding rules under Exemption 4. They do not. That section—entitled "NHTSA's Proposal to Treat Certain Types of Tire Data as *Presumptively* Non-Confidential Is Contrary to Law and the Agency's Past Practice," AR 83 (emphasis added)—attempts to rebut NHTSA's proposed nonconfidentiality presumptions by pointing out that the agency granted some confidentiality requests for three types of early warning data in the past, then cites boilerplate Exemption 4 law. *Id.* at 83-84. RMA conspicuously declines to direct this Court to the "Conclusions" section of its comments. There, RMA asserts six conclusions, none of which addresses binding exemptions under Exemption 4. *Id.* at 88. The first two seek confidentiality for early warning information under Exemption 3, stating that disclosure would violate the TREAD Act and that the agency has no authority to disclose the data under FOIA. The third conclusion states that *presumptions* of nonconfidentiality contradict NHTSA's past practice. *Id*. The remaining conclusions are irrelevant to this discussion. Nowhere does RMA urge binding exemptions under Exemption 4.

AR 144-49. In the context of discussing NHTSA's proposal to establish presumptions that certain data should *automatically* be disclosed, AR 146-48, GM requests that field reports and warranty claims data "not be disclosed." *Id*. at 148. Nowhere does GM ask NHTSA to promulgate a rule stating that field reports and warranty claims data will never be disclosed. To the contrary, GM states that it "joins with the Alliance." *Id*. at 144. The Alliance requested only *presumptions* of confidentiality.[8]

[8] *See* AR 57 ("Because the information in this compendium can be used to harm the competitive position of any one submitting manufacturer the compendium of quality and consumer satisfaction information is *presumptively* entitled to protection from disclosure[.]") (emphasis added); *id*. ("The 'early warning' submissions regarding the counts of warranty claims, consumer complaints, property damage claims, and field reports should thus be protected by a class determination *presuming* their confidentiality.") (emphasis added); *id*. at 58 ("A particularly compelling case can be made for the *presumptive* protection of one proposed category of 'early warning' submissions: the warranty claims information.") (emphasis added); *id*. at 59 ("Another practical consideration argues in favor of establishing a class determination in favor of the *presumptive* confidentiality of the 'early warning' information[.]") (emphasis added).

AR 158-66. MEMA & OESA first argue under Exemption 3. AR 159-61. Turning to class determinations under Exemption 4, *id.* at 161-63, they argue only against presumptions of nonconfidentiality. *Id*. at 161 ("The Associations strenuously object to the creation of regulatory presumptions that . . . information regarding consumer complaints, property damage claims and warranty claims will not cause competitive harm if disclsosed[.]"); *see also id.* at 162. In conclusion, they request "'positive' classifications of *presumptive* confidentiality." *Id*. at 163 (emphasis added).

AR 170-83. Cooper Tire endorses the RMA's Exemption 3 argument and raises the issue of confidentiality only to bolster that argument. AR 171 (stating that RMA's *Exemption 3 proposal* is "supported by the statutory language and context, legislative history and strong public policy considerations, *not the least of which is that the disclosure of early warning data . . . would likely cause substantial economic harm to individual competitors*") (emphasis added). Cooper then elaborates that the "possibility that early warning information could be released is so important to Cooper" that it "engaged" an economist to study the impact of disclosure. *Id*. Cooper states that the economist found that disclosure of any of the warning data would cause significant competitive harm. Again, all these comments appear in the context of Exemption 3. *Id*. Cooper *does not mention Exemption 4*, much less the possibility of binding confidentiality under that exemption.

AR 196. Hella North America endorses the MEMO/OESA comments. AR 196.

AR 197-200. Like other commenters, Workhorse primarily discusses Exemption 3. AR 197-99. It then states that it opposes NHTSA's proposed class presumptions "for the reasons discussed in the previous section" (because they should be covered by Exemption 3). *Id.* at 199. Workhorse singles out field reports, arguing that NHTSA "should not adopt a class determination for field reports." *Id*. at 199. Then, it urges NHTSA "not to adopt the proposed class determinations" and argues that FOIA decisions "*should be made on an individual basis*." *Id*.

AR 249-53. Harley-Davidson argues that NHTSA should presume confidentiality for production numbers and should not presume nonconfidentiality for field reports. AR 250 ("The proposal treats this information [production numbers] *presumptively* as not deserving of confidentiality . . . it should instead *presume* that the information is confidential."); *id*. at 251 (arguing that field reports "should not be released *as a matter of course*"). Then it argues under Exemption 3. *Id*. at 252-53. The company does not mention binding confidentiality under Exemption 4.

The above review addresses every comment NHTSA cites to dispute Public Citizen's position on notice.[9] NHTSA claims that these comments disprove Public Citizen's notice argument

[9]NHTSA concedes that all other commenters advocated only presumptions (except the Tire Industry Association (TIA), which NHTSA does not classify). *See* NHTSA 39 (citing AR 28-30;

because they "advocat[ed] complete confidential treatment for EWR information." NHTSA 44. But not a single comment unambiguously advocated or opposed binding rules under Exemption 4 for the early warning data that NHTSA exempted. That some comments mention confidentiality or competitive harm is irrelevant. Those comments addressed either Exemption 3 or presumptions under Exemption 4. *See Shell Oil*, 950 F.2d at 750 (rejecting the notion that comments that happen to bear on the final rule constitute evidence of notice when context reveals that the commenter was addressing another issue); *id*. (parsing "precise words" to determine which topic the agency and a commenter discussed at an oral hearing). Even if a few of these comments could somehow be construed more generously as addressing the topic of the final rule, they would be insufficient. A handful of "sparse and ambiguous" comments in an administrative record several hundred pages long does not establish notice. *Id*. at 751.[10]

2. The Record Demonstrates that Industry Commenters Lacked Notice.

The absence of industry statements on binding rules under Exemption 4 is strong evidence that no one anticipated NHTSA's final rule. If the industry commenters thought NHTSA might invoke Exemption 4 to mandate "complete confidential treatment for EWR information," NHTSA 39, they would have submitted very different comments—and NHTSA would not have such difficulty locating evidence of notice. Many commenters—and almost certainly the Alliance and

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AR 50-74; AR 184-95; AR 201-06; AR 254-57). NHTSA likely omits TIA's comments because they advocate neither presumptions nor binding exemptions. TIA mistook NHTSA's proposed confidentiality presumptions as binding. AR 152-54. Indeed, TIA wholly missed the distinction between presumptions and binding rules. *Id*. at 152 (treating existing confidentiality presumptions as binding). TIA's comments are irrelevant because they only illustrate TIA's misunderstanding of the issues.

[10]For the same reason, even if we have missed a stray comment or two (which we concede is possible although we have thoroughly reviewed the record), a few stray comments would not establish notice. For purposes of establishing the adequacy of notice, a near absence of comments addressing the subject of the final rule is equal to a total absence.

RMA—would have dedicated large sections of their comments to advocating binding class exemptions under Exemption 4. Their requests would have been explicit and unambiguous. Exemption 4 arguments would not have consistently taken a backseat to Exemption 3 arguments.

More specifically, the RMA would have urged binding Exemption 4 confidentiality instead of simply trying to dissuade NHTSA from adopting nonconfidentiality presumptions. AR 83-84; *id*. at 88; *see also* AR 161-63 (MEMA/OESA). TMA would not have urged NHTSA to "leave its current class regime in place" and "allow companies to seek confidential treatment of particular submissions on a case-by-case basis." AR 24. The Alliance would not have argued—as NHTSA recognizes—only for confidentiality *presumptions*. NHTSA 39; 44 (citing the Alliance only among advocates of presumptions); *see also supra* note 8.

Commenters also would have bolstered their requests for confidentiality with exhaustive evidence of the type required to secure confidential treatment under FOIA Exemption 4—not general, conclusory statements of the nature that NHTSA flagged in its NPRM as potentially inadequate to support exemption. 67 Fed. Reg. at 21,204 (proposed § 512.12). Indeed, *not a single commenter* submitted information sufficient to meet NHTSA's ordinary requirements for confidentiality requests under Exemption 4. For example, no commenter submitted the required "Certificate of Confidentiality." 49 C.F.R. Part 512, Appendix A.

Many commenters urged complete confidentiality under Exemption 3 even though NHTSA did not request comment on that exemption. This suggests that they advanced every confidentiality argument they could imagine. The only explanation for their failure to urge complete confidentiality under Exemption 4 is that they could not *conceive* of such a rule, much less anticipate that NHTSA would promulgate it. NHTSA's and the RMA's attempt to revise this history rests on a handful of scattered and irrelevant phrases from a record of several hundred pages. As the Alliance noted in

its comments, "NHTSA requested commenters to address in comments to this docket whether the agency should *presume* the confidentiality of some or all of the 'early warning' information[.]" AR 51 (emphasis added). NHTSA did not indicate any interest in establishing binding class exemptions under Exemption 4. And no commenter addressed the possibility.

3. Public Citizen Had No Notice.

Needless to say, the parties also fail to show that Public Citizen had notice. At most, they cite Public Citizen's responses to others' comments. Because industry commenters did not anticipate the final rule, arguments that Public Citizen had notice from other commenters—or that Public Citizen benefited from the ability to respond to industry comments—miss the mark.

The RMA's brief is misleading on these points. RMA argues that Public Citizen was "aware of the issue of whether class determinations should be conclusive" and, as evidence, cites Public Citizen's response to the Alliance's comments on *Exemption 3*. RMA 41-42 (citing AR 312). None of Public Citizen's responses to the Alliance illustrates notice because the Alliance addressed only Exemption 3 and *presumptions* under Exemption 4. In fact, Public Citizen opened its comments on competitive harm by noting that the Alliance's competitive harm claims were "misguided and irrelevant" because the Alliance advanced them under Exemption 3. AR 319; *see also* AR 418 ("The slender thread by which the Alliance attempts to hang its arguments for new exemptions from FOIA is the language of the disclosure section in the early warning statute."). Public Citizen then went on to oppose the Alliance's request for *presumptions* that would relieve submitters of the burden of requesting confidentiality. AR 319. RMA also cites comments in which Public Citizen commended NHTSA's proposed *presumptions* of nonconfidentiality, RMA 42 n.24 (citing AR 314), and comments in which Public Citizen opposed relaxing procedural requirements for information submitters. *Id.* (citing AR 320).

RMA also selectively quotes a paragraph in which Public Citizen struggled to decipher the Alliance's argument, stating that the Alliance "*appears to* ask for both a blanket treatment of warranty data *per se* as secret under FOIA and for a class determination under Part 512." *Id*. (citing AR 321) (first emphasis added). An attempt to decipher another party's comments cannot constitute evidence of notice. So holding would make a mockery of the notice-and-comment requirement by turning it into a "an elaborate treasure hunt." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983); *see also AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) ("As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."); *Shell Oil*, 950 F.2d at 751 ("Under the standards of the APA, notice must come, if at all, from the Agency.") (internal marks omitted); *see also Fertilizer Inst.*, 935 F.2d at 1312 ("The fact that some commenters actually submitted comments suggesting the [rule adopted] is of little significance. Commenting parties cannot be expected to monitor all other comments submitted to an agency.").

That Public Citizen briefly discussed competitive harm in its comments is irrelevant. Public Citizen discussed that issue because of its application to presumptions and to industry's Exemption 3 claims—subjects that require different evidence and different arguments than Public Citizen would have advanced in a discussion of binding Exemption 4 rules. *See Shell Oil*, 950 F.2d at 750 (rejecting as evidence of notice comments that happened to bear on the final rule but were intended to address a distinct, similar issue); *Fertilizer Inst.*, 935 F.2d at 1311 (rejecting "the notion that a reference to a specific topic [here, Exemption 3 or presumptions under Exemption 4] can give rise to notice of the existence of a more general topic [here, exemptions in general] and that the general topic, in turn, can encompass notice of a second specific topic [here, binding exemptions under Exemption 4] only remotely related to the first specific one").

For similar reasons, the parties' case citations on notice are irrelevant. For example, NHTSA and the RMA rely on *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998), for the proposition that a "rule [is] a logical outgrowth where commenters clearly understood that a matter was under consideration, since the agency received comments on the matter from several sources." NHTSA 37, 42; RMA 39-40. And NHTSA relies on *Public Service Comm'n v. FCC*, 906 F.2d 713, 717-18 (D.C. Cir. 1990), and *NRDC v. Thomas*, 838 F.2d 1224,1242-43 (D.C. Cir. 1988), for the proposition that "[a] party is not denied adequate notice when it filed comments on the question at issue." NHTSA 42. These cases are irrelevant because NHTSA and the RMA fail to cite *any* comments addressing the final rule. The RMA's and Alliance's reliance on *National Exchange Carrier Association v. FCC*, 253 F.3d 1, is similarly misguided. In that case, the complainant argued directly against the agency's final rule "throughout" the rulemaking process. *Id.* at 4. The case bears no similarity to the circumstances here.

C. Public Citizen Need Not Show Prejudice, But Was Prejudiced.

Because NHTSA failed completely to provide notice, Public Citizen need not show prejudice. *Shell Oil*, 950 F.2d at 752. But the prejudice is plain. Public Citizen was unable to advance any of its most important arguments regarding NHTSA's binding Exemption 4 rules. Public Citizen was unable to point out that NHTSA lacks authority to issue such rules, *see infra* § III, to argue about the burden of proof and standard of review under the rules, to suggest that NHTSA should not abandon its ordinary evidentiary requirements, to advise NHTSA that it is misinterpreting several important areas of law, *see infra* § IV, or to argue the relative merits of presumptions instead of rules. *See Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (finding inadequate notice prejudicial where an interested party made a "colorable claim that it would have more thoroughly presented its arguments" had it known what the agency was contemplating). NHTSA and the RMA

argue that Public Citizen was not prejudiced because this Court will determine *de novo* whether NHTSA had authority to issue its rules. NHTSA 46; RMA 43 n.25. The argument fails for two reason. First, Public Citizen was deprived the opportunity to convince NHTSA to change its mind on the authority issue before resorting to litigation. Second, Public Citizen would have raised several arguments unrelated to authority that might have convinced NHTSA to opt for a course that Public Citizen believes is within the agency's authority.

One concrete example will suffice. In an effort to identify inconsistency on Public Citizen's part, the Alliance mentions that NHTSA first established class determinations when Joan Claybrook, now Public Citizen's president, was the Administrator of NHTSA. Alliance 36. The Alliance suggests that Public Citizen supports and opposes class determinations opportunistically rather than on a principled basis. The Alliance is half right: Public Citizen only sometimes supports class determinations. But the group supported them in 1981 with the same qualifications that it applies now. The determinations must be presumptive rather than binding, and they must be merited under the law. In that earlier rulemaking, NHTSA had proposed binding rules. Public Citizen successfully argued for presumptions instead. In NHTSA's own words, it "incorporated [Public Citizen's] suggestions into the final rule." 69 Fed. Reg. 21,409, 21,411 n.2 (April 21, 2004). Here, Public Citizen was deprived of the opportunity to make arguments that NHTSA has already once found persuasive.[11]

[11]The Alliance also attempts to identify inconsistency in Public Citizen's position by noting that Public Citizen thinks class determinations "are an invaluable tool" but opposes NHTSA's use of class determinations. Alliance 3. There is no inconsistency. Public Citizen also believes prisons are an invaluable tool but sometimes opposes imprisonment—for example, when imposed without due process or in the absence of any criminal violation. The Alliance not only misses the distinction between presumptions and rules; it also fails to see that there is no inconsistency in removing one's support for the use of a "tool" when the use is unauthorized.

Unable to cite specific evidence that Public Citizen (or any other commenter) had notice, NHTSA and the industry groups fall back on arguing that Public Citizen had plenty of opportunities, perhaps even more than its fair share, to be heard. *See* NHTSA 45; Alliance 37-38; RMA 41. The parties point out that Public Citizen was allowed to file late comments and supplemental comments, RMA 41, and they suggest that Public Citizen benefited from filing late comments because it could respond to other commenters. NHTSA 45. The Alliance in particular works to create the appearance that NHTSA "bent over backwards" to accommodate Public Citizen's lazy and dilatory ways, providing the organization several "bites at the apple." Alliance 37-38.[12]

These arguments all miss the mark. NHTSA failed to give any notice of its final rule. Public Citizen was therefore commenting on the wrong topics at every turn. Under these circumstances, no amount of opportunity to comment would have given Public Citizen a meaningful say in the rulemaking. No number of bites suffices when one has been handed the wrong apple.

III. NHTSA HAD NO AUTHORITY TO ISSUE THE APPENDIX C REGULATIONS.

NHTSA's regulations were surprising in part because they were unauthorized. It is axiomatic that agencies may issue regulations only pursuant to authority delegated to them by Congress. *American Library Ass'n v. FCC*, 2005 WL 1047587, at *1, No. 04-1037 (D.C. Cir. May 6, 2005). Like other federal agencies, NHTSA "literally has no power to act . . . unless and until Congress confers power upon it." *Id.* at *9 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). Congress has never granted NHTSA the authority to issue binding FOIA exemptions.

FOIA provides authority only to set fee schedules and compliance procedures. 5 U.S.C. § 552(a)(3)(A); *id.* § 552(a)(4)(A)(I). It expressly *denies* authorization to withhold information in

[12]Although the parties point out that Public Citizen Litigation Group filed a petition for rehearing on behalf of other groups, none disputes that the petition did not cure the lack of notice. *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982).

any way not specifically permitted in the statute. *Id*. § 552(d). NHTSA's and the industry groups' citations on authority are irrelevant because *all* involve either agencies regulating under their enabling statutes or courts deciding FOIA cases. None involves an agency's attempt to promulgate substantive regulations that exempt information from FOIA. Little case law addresses this sort of rule, most likely because it is rarely attempted. But the extant case law makes plain that NHTSA has acted far in excess of its authority.

A. NHTSA Has No Regulatory Authority Under FOIA.

The one case closely on point is *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004). There, FERC attempted to modify slightly the Sunshine Act's requirement that agencies disclose *ex parte* communications. The agency decided that its communications with private "market monitors" were the "functional equivalent" of communications with its own employees. *Id*. at 1261. Disclosing all communications with market monitors would have been cumbersome and "counterproductive to the Commission's goals" because FERC depended on market monitors to bring certain issues promptly to its attention. *Id*. at 1264-65. Therefore, FERC reasoned, it need not disclose their communications. Nonetheless, to bolster its compliance with the Sunshine Act, the agency decided to disclose communications with market monitors when they influenced its decisions. *Id*. at 1260, 1265.

Electric Power is very similar to this case. Like NHTSA, the agency there was operating under an open government law that imposes obligations on agencies rather than granting them legislative authority. Like NHTSA, the agency implemented what it thought was a reasonable alteration of ordinary law to avoid what it perceived as counterproductive requirements that impeded agency goals. *Id*. at 1260; 1264-65. And, like NHTSA, the agency claimed its action was subject only to arbitrary and capricious review. *Id*. at 1265.

The D.C. Circuit required only two words to characterize this reasoning: "patently wrong." *Id*. at 1266. Agencies have "no authority whatsoever to change the terms of" the Sunshine Act. *Id*. at 1261. Agency actions purporting to limit the Act's requirements are thus subject to *de novo* review. *Id*. at 1261, 1265-66. And agencies cannot relax requirements Congress imposes on them by citing their own needs. *Id*. at 1265-66. In short, "an agency cannot modify or balance away what Congress has required of it" through a "statute of general applicability." *Id*. at 1266. FOIA is indistinguishable from the Sunshine Act in all these respects.

B. NHTSA's and the Industry Parties' Case Citations Do Not Support, and Often Undermine, NHTSA's Position on Authority.

NHTSA, the RMA, and the Alliance cite mostly irrelevant cases. Where the cases are relevant, they only harm NHTSA. The parties rely most heavily on cases stating that agencies have a choice of how to proceed when carrying out their functions. These cases are irrelevant because each involves an agency acting under an express grant of broad legislative authority, and each concerns whether the agency must proceed via adjudication or rulemaking, not whether the agency has authority to decide the underlying issue at all.

SEC v. Chenery states that an agency acting under a broad statutory mandate may make rules through case-by-case adjudication rather than rulemakings. 332 U.S. 194, 199-200 (1947). No one in the case questioned the SEC's ultimate authority to decide the underlying issue. *Federal Power Commission*, *Storer Broadcasting*, *In re Permian*, and *National Petroleum* all stand for the proposition that a specific hearing requirement in an agency's enabling statute does not carve a substantive area out of the agency's broad grant of legislative authority. *See Fed. Power Comm'n v. Texaco*, 377 U.S. 33, 35-36 (1964); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 754-55, 764 (1968); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202-03 (1956); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676-77 (D.C. Cir. 1973). Again, no one questioned the

agencies' ultimate authority to decide the underlying issues. In each case, the Supreme Court permitted the agency action because Congress had granted the agency sweeping regulatory authority. *See Fed. Power Comm'n*, 377 U.S. at 41; *Permian*, 390 U.S. at 776; *Storer*, 351 U.S. at 201 n.9, 202-03; *Nat'l Petroleum*, 482 F.2d at 676-77.[13]

Here, Public Citizen challenges NHTSA's ability to create binding FOIA exemptions (subject, the agency claims, only to arbitrary and capricious review) regardless of whether the agency acts through rulemaking or individual adjudication. NHTSA is acting under a statute that imposes obligations on the agency, expressly forbids deviation from its terms, and requires the agency to bear the burden of proof under *de novo* review—not a statute that grants sweeping legislative authority. NHTSA's only task under FOIA is to decide whether to disclose information.

Much of the law that NHTSA and the industry parties cite undermines NHTSA's position. For example, several of the "agency choice" cases hold that even when an agency's broad legislative authority authorizes it to issue substantive rules that will apply in specific matters, the agency must allow *rebuttal* of the rules' application to those matters. *See Nat'l Petroleum*, 482 F.2d at 692;

[13]One case the parties cite concerns agency authority rather than choice: *Weinberger v. Bentex*, 412 U.S. 645 (1973). Again, the case involves an agency operating under its enabling act. RMA suggests that *Weinberger* gives agencies authority to make rules "necessary to perform the tasks that are given to them by Congress" and to choose their means of regulating. RMA 35-36. But the case neither concerns choice nor applies so broadly. *Weinberger* held that Congress's statutory scheme gave the FDA implicit authority to decide a question that was fundamental to the agency's ability to carry out *the mission of its enabling act*—a question that was within the FDA's expertise and overlapped with another question over which the Act expressly granted the FDA authority. 412 U.S. at 651-52. As the Court stated in a companion case issued the same day, "[a] decision that FDA lacks authority to determine in its own proceedings the coverage *of the Act it administers* . . . would seriously impair FDA's ability to discharge the responsibilities placed on it by Congress." *CIBA Corp. v. Weinberger*, 412 U.S. 640, 643 (1973). These characteristics do not apply to NHTSA's actions under FOIA.

Federal Power Commission, 377 U.S. at 40-41.[14] *National Petroleum* also affirms that this Court should review NHTSA's action closely rather than defer to the agency. It notes that even agencies acting under broad legislative authority require close scrutiny when they depart dramatically from ordinary procedures: "Because this procedure entirely dispensed with a hearing and because it varied so sharply from the Commission's customary mode of proceeding . . . we structured our review to 'look for some fairly strong indication, backed by sound policy, that Congress meant for the Commission to act in this way.'" *Nat'l Petroleum*, 482 F.2d at 691-92 (quoting *Textile & Apparel Group v. FTC*, 410 F.2d 1052, 1055 (1969)).

NHTSA and the RMA cite *Neal-Cooper Grain Co v. Kissinger* and *EEOC v. Dry Goods Corp.* for the principle that "courts have not questioned the ability of agencies to issue rules regarding the confidentiality of data." *See* 69 Fed. Reg. 21,412 (citing *Neal-Cooper*, 385 F. Supp. 769, 772-73 (D.D.C. 1974); *EEOC*, 449 U.S. 590, 604 (1981)); RMA 37 (citing same). But the agency in *Neal-Cooper* was fighting a reverse-FOIA challenge and attempting to *disclose* information. 385 F. Supp. at 772-73. The agency and the court agreed that FOIA *trumps* other laws and regulations on disclosure. *Id*. at 774. In *EEOC*, the Supreme Court explicitly stated that neither

[14]NTHSA's and the RMA's citations to FDA and EPA confidentiality regulations similarly harm NHTSA more than they help. *See* 69 Fed. Reg. at 21,411; RMA 37. Both the FDA and EPA employ rebuttable presumptions, not binding rules. FDA's rules guide the agency in deciding which information to release to the public automatically and which to hold until someone requests it under FOIA. A determination of "exemption" (including a class determination) only means that FDA will not automatically release the information in the absence of a FOIA request. 21 C.F.R. § 20.20(b),(c). Ordinary FOIA law still applies to the information. *Id*. § 20.23. EPA states that its class determinations exist "simply to make known the Agency's position." 40 C.F.R. § 2.207(d). (Note the similarity to NHTSA's abandoned proposal to issue rules only "to document current practice." 67 Fed. Reg. at 21,200.) EPA specifically provides for the modification of prior determinations. 40 C.F.R. § 2.205(h). When it receives requests for information subject to class determinations, the agency considers whether its determinations are incorrect, *id*. § 2.204(b)(1), permits the appeal of adverse decisions, *id*. §§ 2.104(j); 2.205(a)(2)(i), and only *then* issues final determinations, *id*. § 2.205(e). It also recognizes that it will have to prove its case in court. *Id*. § 2.214.

FOIA nor the agency's authority was at issue. 449 U.S. at 594 n.4. The case concerned a matter of statutory interpretation. And even though the Court granted some deference to the agency's interpretation of its enabling act, *id.* at 600 n.7, it rejected an "administrative convenience" argument that contradicted clear statutory language. *Id*. at 603-04.

C. The "Categorical Rules" Cases Make Clear that NHTSA Is Not Authorized to Issue Binding Class Determinations or to Withhold Nonexempt Information.

NHTSA also relies on the "categorical rules" cases as a source of authority—for both the authority to issue binding rules and the authority to withhold information that is not exempt from FOIA. NHTSA is mistaken on both counts. In "categorical rules" cases, *courts* determine whether documents may be withheld, and they require *all* documents in a class to qualify for exemption. No case authorizes agencies to establish binding rules, and none authorizes the withholding of nonexempt documents. The cases also show that NHTSA's particular rules are unlawful.

Judicially recognized classifications of records serve a procedural function in FOIA litigation: When defending their FOIA decisions before courts, agencies may attempt to carry their burdens of proof by classifying records into categories defined so that each record in the category is exempt. This procedure spares courts the trouble of evaluating evidence for each record. Agencies do not issue classification rules; they only offer up classifications to courts. When a court agrees that an agency has defined a class in a manner such that every record in the class is *inherently* exempt, the court will exempt records in the class without requiring an evidentiary showing on each document. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 243 (1978) (permitting the withholding under Exemption 7(A) of witness statements in an ongoing NLRB enforcement proceeding because release of the statements before the proceeding "necessarily would interfere" with law enforcement proceedings); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775, 778-79 (1989) (permitting the withholding under Exemption 7(C) of rap sheets because

there is no FOIA-defined public interest in them, and therefore the balance between the public interest and privacy interests will always tip toward the latter). When agencies define classes too broadly and include some nonexempt records, courts reject the classifications. *See United States Dep't of Justice v. Landano*, 508 U.S. 165, 176 (1993) (rejecting class definition because exemption might not apply to "all" records in the class); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 895 (D.C. Cir. 1995) (rejecting class definition where not "all" records in the class were exempt; instructing the agency that it was free to try drawing a narrower class).

NHTSA mistakes the appearance of the words "generally" and "characteristically" in some opinions to mean that the courts do not require *all* information in classes to qualify for exemption. *See* NHTSA 11-12. Courts sometimes state that documents may qualify for class treatment under a balancing test if "the balance characteristically tips in one direction," *Reporters Committee*, 489 U.S. at 776, or when "a particular set of facts will lead to a generally predictable application of FOIA." *Critical Mass*, 975 F.2d at 879. In these contexts, "characteristically" means *uniformly or distinctively, as a characteristic of the records* and "generally" means *as applied to all*.

NHTSA and the industry groups will dispute these definitions, but they are mistaken. First, these definitions comport with the facts of the cases. As discussed above, courts approve class exemptions only when every document is exempt. Courts carefully examine each class definition in a given case, accepting definitions for which all documents are exempt and rejecting classes that may contain nonexempt information. *See Lopez v. U.S. Dep't of Justice*, 393 F.3d 1345, 1349-51 (D.C. Cir. 2005) (accepting classes that exclusively contained "inherently" exempt records and rejecting classes that potentially contained nonexempt records). Second, the opinions frequently use words such as "inherently," *Lopez*, 393 F.3d at 1349, "necessarily," *Robbins*, 437 U.S. at 243, "always," *Reporters Committee*, 489 U.S. at 779, and "all." *Landano*, 508 U.S. at 178. The only

way to square the words "generally" and "characteristically" with the courts' meticulous review of agency claims, consistent rejection of overbroad classes, and frequent use of more exacting language is to afford the words the definitions described above. These definitions also keep the case law in harmony with FOIA's requirements. Requiring agencies to craft narrow class definitions of inherently exempt documents comports with FOIA's strict disclosure and segregation requirements. In contrast, requiring agencies to show only that "most" documents in a class merit exemption would open a loophole that could swallow FOIA. The rule would invite agencies to evade disclosure by grouping and regrouping documents until they find class definitions that apply to most documents.

The cases do more than illustrate that NHTSA is not permitted to issue binding class exemptions or withhold nonexempt information. They also show that NHTSA's particular class definitions are unlawful because the agency cannot establish that all early warning information is confidential. In *Landano*, the Supreme Court rejected the FBI's argument that the Court should permit the withholding of the identities of all sources under Exemption 7(D) because the FBI could not show that every source was confidential. 508 U.S. at 176. Under Exemption 7(D), a source is only confidential if the source was provided express assurance of confidentiality or could reasonably infer confidentiality. *Id*. at 172. The FBI had made no explicit promises of confidentiality. *Id*. It argued that FBI sources inherently work under "an implied assurance of confidentiality" because of the "risk of reprisal or other negative attention inherent in criminal investigations." *Id*. at 174, 176. The Court firmly rejected this argument. It stated: "It may be true that many, or even most, individual sources will expect confidentiality. But the Government offers no explanation, other than ease of administration, why that expectation always should be presumed." *Id*. at 176.

NHTSA's position is similar to the FBI's, only weaker. Exemption 4 requires that information be confidential to qualify for exemption, and NHTSA cannot prove that all early

warning data covered by its rules—many types of information ranging across hundreds of manufacturers and several different industries—is confidential. NHTSA has not even tried. Ordinarily, NHTSA requires submitters claiming Exemption 4 to certify, under penalty of perjury, that they do not release the relevant records publicly. *See* 49 C.F.R. Part 512, Appendix A. But NHTSA required no such evidence before issuing its early warning rule. It relied on bare assertions of confidentiality from whichever companies happened to make them. Moreover, the FBI's argument regarding fear of reprisal was stronger than any justification NHTSA can offer to suggest that the early warning data is inherently confidential, and the FBI's justification was insufficient. *Landano* rejected even *rebuttable* confidentiality presumptions, 508 U.S. at 174, 177, which are more reasonable than NHTSA's binding exemptions.

Finally, NHTSA and the industry parties point to *Critical Mass* as an Exemption 4 "categorical rules" case. But *Critical Mass* resolved only a statutory interpretation issue. There, the D.C. Circuit interpreted Exemption 4 to cover voluntarily submitted information. 975 F.2d at 879. The court did not purport to evaluate whether particular documents were exempt; rather, it defined a standard for exemption. It certainly did not authorize the withholding of nonexempt information.[15] The parties also cite *FTC v. Grolier, Inc.*, another statutory interpretation case that should not be considered a "categorical rules" case. 462 U.S. 19 (1983). *Grolier* held that the term "routinely available" in Exemption 5 did not include qualifiedly privileged documents merely because the claim of privilege might be overridden in particular cases. *Id*. at 27-28. Cases in which courts define the

[15]The parties also mistake *Critical Mass*'s reference to "workable" rules as a broad endorsement of class exemptions. *Critical Mass*, 975 F.2d at 879. Whether a proposed class exemption is "workable" depends on whether all records in the class are exempt. If not, then the only "workable" solution is to require particularized evidence. *See Landano*, 508 U.S. at 180 ("[T]his more particularized approach is consistent with Congress' intent to provide 'workable' rules of FOIA disclosure.") (internal marks omitted).

contours of a statute in general terms provide no authority for agencies to exempt classes of records through rulemaking.

IV. NHTSA DID NOT ATTEMPT TO MEETS ITS EVIDENTIARY BURDEN UNDER FOIA.

NHTSA's legal errors resulted in an evidentiary showing far short of what FOIA requires. As discussed immediately above, NHTSA misread the "categorical rules" cases as permitting it to withhold some information without proving that the information is exempt. But NHTSA erred in other ways as well. First, NHTSA's brief confirms that the agency thought it was engaging in administrative action, requiring only a "rational link" between record evidence and its conclusions and subject only to deferential arbitrary and capricious review. Second, NHTSA relied on novel theories of FOIA exemption that it cannot justify under the law. These errors have resulted in a stunningly weak evidentiary showing.

A. NHTSA Does Not Claim that It Can Survive Review Under FOIA's Standards.

In addition to failing to provide evidence on all of the early warning data, NHTSA applied too low an evidentiary hurdle for the data on which it did review evidence. NHTSA thought its rulemaking was ordinary agency action. It therefore ignored FOIA's requirement that agencies carry the burden of persuasion under *de novo* review. It sought only a "rational link" between its action and the record evidence and shifted the burden of proof to Public Citizen, believing itself entitled to deference and subject only to arbitrary and capricious review.[16] If this Court agrees with Public Citizen and the RMA that NHTSA must meet FOIA's standards, *see* RMA 38, then it need not examine the evidence because NHTSA does not claim it can meet the burden of sustaining its rules

[16]At one point in its brief, NHTSA claims it "acknowledges the courts' authority to make the final decision on whether information may be withheld under FOIA." NHTSA 16. But it repeatedly discusses only whether its action passes arbitrary and capricious review. *Id*. at 17, 19, 27, 29.

under *de novo* review.[17]

B. NHTSA's Misinterpretation of FOIA Led It to Consider Irrelevant Evidence.

Three additional legal mistakes led NHTSA to consider irrelevant evidence. Industry commenters suggested three erroneous competitive harm theories (often in the context of Exemption 3) on which NHTSA erroneously relied for its Exemption 4 determination.

First, NHTSA continues to assert, with the support of the Alliance and the RMA, that agencies may withhold data from FOIA disclosure on the basis of speculation that consumers could misunderstand it. NHTSA 23-24; Alliance 26; RMA 25, 33. The argument contradicts clear statutory language that requires disclosure of all information unless expressly exempt *and does not exempt information on this basis*. It also ignores the principle upon which FOIA is based—that a democratic populace is entitled to the fullest disclosure of government information practicable so that it can monitor the government. To support their position, NHTSA and the industry groups continue to cite only a single footnote containing no holding. *Worthington Compressors v. Costle*, 662 F.2d 45, 52 n.43 (D.C. Cir. 1981). NHTSA's response to Public Citizen's arguments is to claim that an appellate court's instructions to a district court to consider a factual question can be read as a legal conclusion even though the conclusion appears nowhere in any case. NHTSA 25. The

[17]The Alliance makes the peculiar argument that because this challenge to NHTSA's regulations is brought under the APA, the arbitrary and capricious standard applies, but if a FOIA requester brought a FOIA action for denial of access to the data covered by the regulations, the lawfulness of the regulations would then be subject to *de novo* review. The Alliance's position, which would render this litigation a waste of time, has no support in the APA. The APA calls for the setting aside not only of arbitrary and capricious agency action, but also agency action that is "contrary to law," 5 U.S.C. § 706(2)(A), as well as action that is "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." *Id.* § 706(2)(F). Because neither agency interpretations of FOIA nor agency factual determinations with respect to FOIA exemption are entitled to deference by a reviewing court, these provisions of the APA provide for *de novo* review of NHTSA's attempt through regulation to define records as exempt under FOIA.

Alliance simply minimizes FOIA's animating principle in favor of the footnote. Alliance 27.[18]

Second, NHTSA improperly based its rulemaking in part on the speculation that manufacturers might use the early warning information in advertising. *See* Public Citizen 20-21 (citing 68 Fed. Reg. at 44,222; *id*. at 44,224; 69 Fed. Reg. at 21,420). The parties have essentially given up on defending this aspect of the rulemaking. NHTSA responds with a *non sequitur* and an abrupt change of subject. *See* NHTSA 25 ("Plaintiff asserts that NHTSA assumed that comparative advertising itself would cause competitive harm . . . But, as NHTSA made clear, EWR warranty data are not data on violations or safety problems. 69 Fed. Reg. at 21419, 21422. More importantly, NHTSA found that the release of the warranty information would cause competitive harm because competitors could use the data to avoid undertaking their own market research and field testing."). The Alliance claims that the problem with comparative advertising is not the advertising itself; it is that disclosure of the data is "inherently unfair" because of ambiguities. Alliance 28. This is a repackaging of the Alliance's *Worthington-Compressors*-footnote argument—that the government may withhold information on the speculation that people might not understand it.

The parties continue to assert a third theory that finds no support in the case law—their "comprehensive compendium" argument. They avoid discussing *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), which makes plain that the D.C. Circuit accepted the "mosaic" theory only with great reservation, out of deference to the executive branch on national security issues. *See* Public Citizen 22. They ignore that *Trans-Pacific Policing Agreement* was not a "comprehensive compendium" case because no one disputed that the release of just *one record* would have caused substantial competitive harm. *See Trans-Pacific*

[18]The RMA only re-cites the case without argument. RMA 25, 33. RMA sets off the case with the signal "*see, e.g.*," *id*. at 25, although no party has found another supporting case.

Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1026-27 (D.C. Cir. 1999). Likewise, they ignore that *Timken* also addresses the release of three confidential documents, not a "mosaic" or "comprehensive compendium." *Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557 (D.D.C. 1980). The parties also ignore that each case they cite involved far stronger evidence of likely harm from disclosure than NHTSA has provided here. Each court relied on affidavits explaining precisely how the information would reveal costs and profit margins. *See Trans-Pacific*, 177 F.3d at 1026 ("[A]ppellants did not seriously dispute . . . that release of [the dispute information] would likely cause importers serious competitive harm. The affidavits . . . explain precisely how a knowledgeable person can, by linking HTS numbers to specific shipments, uncover information concerning the nature, cost, profit margin, and origin of the shipments."); *Timken*, 491 F. Supp. at 559 ("Affidavits submitted by the government explain that release of the unit price data may allow the competition to approximate the production costs . . . and the profit margin[.]").

Finally, the Alliance suggests that *this Court* has "embraced" the mosaic theory. Alliance 21. But it cites a passage that mentions cases without endorsing them: "*Some courts* have found competitive harm and protected information that would not, in and of itself, cause harm, if the infromation, when combined with other readily available information, could cause harm[.]" *Center for Auto Safety v. NHTSA*, 93 F. Supp. 2d 1, 11 (D.D.C. 2000) (citing *Trans-Union* and *Timken*). This is an exceedingly weak showing to support the wholesale exemption of a database under Exemption 4. Moreover, a class exemption under Exemption 4 is particularly unwarranted because of the difficulty of proving the confidentiality of several types of records from hundreds of companies in different industries—a feature that distinguishes this case from national security cases.

C. NHTSA's Legal Errors Have Resulted in a Deficient Record.

NHTSA's legal errors fatally infect its evidentiary showing. The law requires NHTSA to cite

evidence demonstrating that all exempted early warning information is likely to cause *substantial* competitive harm. But NHTSA thought it needed only to support a "rational link" to the conclusion that *most* of the information would cause competitive harm. Moreover, NHTSA believed it could rely on evidence that is irrelevant under FOIA.

Therefore, NHTSA did not seek out necessary evidence, and industry commenters did not submit it. No commenter submitted evidence of the kind required to support an exemption. (As discussed above, none submitted the confidentiality certification that NHTSA ordinarily requires. *See* 49 C.F.R. Part 512, Appendix A.) Most submitted only conclusory comments. Not surprisingly, NHTSA cannot find enough record evidence to withstand even arbitrary and capricious review.[19]

NHTSA's brief reflects an agency searching the record for scraps of evidence to justify its decision *post hoc*. For example, NHTSA frequently justifies exempting a whole class of early warning information for an entire industry by citing a stray remark, which contains no evidence, from a single company. *See* NHTSA 18-19 (production numbers); *id.* at 23-24 (warranty data). Often, NHTSA fails to find a single comment to cite, meaning that there is no evidence that any manufacturer in an industry keeps the relevant data confidential, much less that release of the information would cause competitive harm. *See* NHTSA 23 (failing to cite evidence from the motorcycle industry on warranty data); *id*. at 31 (failing to discuss industries separately for field reports); *id*. at 33-34 (failing to discuss industries separately for consumer complaints). The answer cannot be that NHTSA believes it is permissible to extrapolate from one industry to another. To the

[19]The study submitted by Cooper Tire is an outlier. This is why NHTSA and the RMA are forced to rely on it so heavily. RMA has a difficult time avoiding the study's clear statements that some of its arguments apply only to Cooper and not to larger tire companies. AR 173, 177-78. Moreover, Cooper's comments still fall short of what FOIA requires. For example, they contain no certification that Cooper keeps early warning data confidential. This is likely because Cooper submitted its comments, including the study, to support its *Exemption 3* arguments. *Id*. at 171.

contrary, NHTSA opposes "speculative leap[s] from one industry to another" without "factual basis." NHTSA 21.[20] By its own standards, NHTSA has failed to cite *any* evidence justifying exemptions for several types of early warning data in several industries.

Even when NHTSA finds comments to cite, they almost invariably contain insufficient evidence. Sometimes they are only speculative. *See, e.g.*, NHTSA 24 (citing only speculative statements as "evidence" of competitive harm from misleading comparisons).[21] Many comments

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[20]If NHTSA will extrapolate from one industry to another, then evidence from the FAA suggests that field reports are unlikely to cause substantial competitive harm. The FAA publishes monthly alerts containing detailed information about particular mechanical problems. The alerts identify specific parts and manufacturers and sometimes include diagrams and color illustrations. *See, e.g.*, FAA, Advisory Circular 43-16A, *Aviation Maintenance Alert*, No. 284, Mar. 2002, 1, 4, 6, 7, 8, 12, & 13, *at* http://av-info. faa.gov/data/alerts/2002_03.pdf. They even identify similar past complaints. For example, one report identifies the aircraft and problem involved as "Cessna; Model 172RG; Main Landing Gear Pivot Assembly Failure; ATA 3230," and states specifically:

> During flight, the left hand landing gear would not come down. The pilot was able to manually lower the gear down and locked. Upon investigation, the technician discovered the left main landing gear pivot assembly shaft (P/N 2441100-1) had broken where the actuator attaches. When the gear was selected to the down position, the actuator could not move the left hand gear. It appears the shaft material was flawed at manufacturing. Over time, the shaft cracked halfway around the circumference, which caused the final failure of the shaft. The submitter suggested the part 91 operators should be required to remove the gear to conduct a detailed inspection. The area of failure on this pivot assembly could only be seen after removing the landing gear.

See FAA, Advisory Circular 43-16A, *Aviation Maintenance Alert*, No. 314, Sept. 2004, 2, *at* http://av-info.faa.gov/data/alerts/alerts- sep2004.pdf. The report then identifies 21 similar incidents and the dates they occurred. *Id*. The disclosure of these reports should have no less competitive impact on aircraft manufacturers than field reports have on auto manufacturers, and yet they are not exempt from FOIA disclosure.

[21]NHTSA cites the following: AR 56 ("[t]his *potential unfairness* of facilitating invalid and misleading comparisons of performance indicators is yet another reason to protect the compendium of 'early warning' information from automatic public disclosure") (emphasis added); AR 180 ("release of detailed warranty adjustment data out of context *could* lead to erroneous inferences about tire safety which, in turn, could lead to erroneous and unjustified competitive harm") (emphasis added); AR 189 (stressing that disclosure would create "misunderstanding and mischaracterization, *potentially leading to* unfair competition") (emphasis added); AR 202 (explaining that consumer misuse *may* have significant competitive consequences) (emphasis added).

apply only to a single manufacturer. For example, NHTSA apparently exempted production numbers for all medium-heavy vehicle manufacturers solely on the basis of the following two sentences from Utilimaster Corporation's comments:

> Risk of competitive harm to Utilimaster is especially of concern with respect to production information, warranty claim information, and field reports (see below with respect to the latter). These types of information in the hands of Utilimaster's competition could and undoubtedly would be used in their marketing and promotional efforts to attempt to gain a competitive advantage over Utilimaster.

NHTSA 18 (citing AR 14). The statement is conclusory and unsupported by any evidence. It applies only to one company, which may have idiosyncratic concerns. It addresses a type of "harm"—use of information in marketing—that neither NHTSA nor the Alliance seriously claims is relevant under Exemption 4. *See supra* § IV.B. And, most important, the comment is irrational. How will Utilimaster's competitors use the company's production numbers in *marketing and promotional efforts*? Neither Utilimaster nor NHTSA explains.

This example is not atypical. An attempt to document every such example would require far more space than this Court's rules permit and would only waste the Court's time. The agency cannot survive even arbitrary and capricious review and does not claim it can meet FOIA's more exacting evidentiary standards.

V. NHTSA HAS FAILED TO REBUT PUBLIC CITIZEN'S SPECIFIC ARGUMENTS.

In addition to its failure to provide affirmative evidence, NHTSA has also failed to rebut Public Citizen's many specific challenges to its reasoning and evidence.

A. NHTSA Has Failed to Rebut Public Citizen's Arguments on Impairment.

NHTSA exempted three types of information—warranty claims, field reports, and consumer complaint data—in part because disclosing them would likely impair NHTSA's ability to obtain information in the future. Public Citizen argued that NHTSA failed to meet its burden on

impairment—actually, failed to attempt to meet its burden—in three ways, none of which NHTSA has succeeded in defending.

First, Public Citizen argued that NHTSA neglected its legal duty to make a *specific* showing of *significant* impairment with respect to any of the data. Public Citizen 26-28. Public Citizen showed that NHTSA relied solely on four patently insufficient comments—some that did not even mention the information for which NHTSA cited them and others that included only a few speculative statements that applied only to some of the data. *See* Public Citizen 27 (discussing NTHSA's reliance on AR 50-74 (no discussion of impairment with respect to warranty claims, field reports, or consumer complaints); AR 156 (speculative; no mention of any specific type of data); AR 190 (speculative; no mention of warranty claims or consumer complaints); AR 199 (same)). NHTSA responds only by citing the same pages in the Federal Register that Public Citizen criticized or citing the comments themselves. *See* NHTSA 23 (warranty); *id*. at 32 (field reports); *id*. at 34 (consumer complaints). Its failure to do more is not for any lack of effort. NHTSA attempted to add additional support. For field reports, NHTSA added citations to two previously uncited speculative comments. *Id*. at 32 (citing AR 19; AR 25). Apparently, it could not find other evidence in the record to support its impairment claims.

Second, Public Citizen argued that NHTSA neglected its legal duty to prove that other factors would not counterbalance the likelihood of impairment. Public Citizen 28-29. Public Citizen argued that providing good warranties and collecting information from employees and consumers are activities far too important for manufacturers to curtail them merely to avoid publicizing counts of their warranty claims and consumer complaints or whole copies of field reports. (By NHTSA's evidentiary standards, the record provides strong evidence that this information is very valuable to manufacturers. Several said so. *See, e.g.*, AR 251.) With respect to field reports and consumer

complaints, NHTSA fails to answer Public Citizen's argument at all. NHTSA 32 (field reports); *id*. at 34 (consumer complaints). For warranty data, NHTSA simply cites one of the comments discussed above, NHTSA 31 n.6 (citing AR 156 (speculative and does not mention warranty data)), then oddly relies on three new unsupportive comments. *See* NHSTA 31 n.6 (citing AR 607-08; AR 19; AR 202). One of the comments is speculative. AR 19. The other two do not mention warranty data. AR 607-08; AR 202.

Third, Public Citizen argued that NHTSA neglected its legal duty to balance the extent of impairment against the importance of the information to the public. Public Citizen 29-30. Public Citizen argued that when NHTSA purported to do the balancing analysis, it used an improper definition of importance to the public—whether the information would reveal specific safety defects, as opposed to whether it would be useful for FOIA's fundamental purpose of knowing "what the government is up to"—and thereby sidestepped the analysis entirely. *Id*. NHTSA does not respond. Again, it merely repeats the same argument and cites the very portions of the Federal Register that Public Citizen criticized. NHTSA 31, 32, 34.

B. NHTSA Has Failed to Rebut Public Citizen's Arguments on Competitive Harm.

Public Citizen argued that NHTSA failed to show how the early warning data could be competitively harmful in light of several important features: The database provides only *counts* of potential problems among whole *systems* of parts. Public Citizen 34. It does not even provide an accurate number of counts of problems with particular systems because pieces of data in different fields (warranty claims, field reports, consumer complaints) are not linked to show whether they reflect the same or different incidents. *Id*. Furthermore, because the data are historical rather than prospective, they provide no direct insight into future plans (in contrast to, say, engineering blueprints). *Id*. And comparable information may be available from other sources. *Id*. at 31-32.

When combined, these factors render it extremely difficult to learn anything from the data that will cause *substantial* competitive harm.

NHTSA and the Alliance fail to answer these charges, in part because they address each feature of the database piecemeal to avoid acknowledging the features' collective impact. *See* NHTSA 27-28; Alliance 23-26. To better illustrate these problems, we elaborate on the example provided in our opening brief.

Assume that a manufacturer reports 900 consumer complaints, 1,200 field reports, and 500 warranty claims related to a system. Public Citizen 34. This information does not reveal a problem with a specific part, and it may not even reveal a problem with a specific system. (General Motors explained that different manufacturers might classify the same problem as pertaining to a different system. AR 147.) The information also does not reveal the actual numbers or types of problems. Entries in different fields may reflect identical incidents or different incidents. (For example, one incident generates a field report, a consumer complaint, and a warranty claim; another generates only two of the three; another generates only one.) The counts may reflect wholly different problems with wholly different parts. They do not reveal anything about the manufacturer's costs because they do not explain whether the issues were major or minor and expensive or inexpensive. They do not reveal whether the problems were covered by a warranty or the manufacturer treated them as covered as a "goodwill" gesture. They do not reveal whether the manufacturer's overall experience with the affected system is positive or negative because even systems that generate relatively high counts may carry benefits that outweigh their costs. Nor do the numbers reveal the manufacturer's future plans. Finally, in the event that the database indicates a potential problem, NHTSA will investigate and release documents relevant to the investigation. Thus, on the very occasions when the information in the early warning database may be most useful, it will be released anyway, along with much more

specific and more valuable information.

These features reflect the database's purpose: to provide only abstract, preliminary data that will provide NHTSA *clues* as to what might need further investigation, *without being competitively sensitive*. Indeed, the database is so unspecific that the DOT's Inspector General expressed concern that NHTSA would be unable to discern problems without first creating specialized analytical tools. *See* U.S. Department of Transportation, Office of the Inspector General, *Follow-Up Audit of the Office of Defects Investigation, NHTSA*, Report No. MH-2004-088, at 2-3 (Sept. 23, 2002).

For these reasons, disclosure of the database itself emphatically does not provide enough information to cause a manufacturer *substantial* competitive harm. It does not provide enough information to evaluate even whole systems, much less individual parts. Nor does it provide significant insight into business practices, costs, profitability, marketing strategies, or future plans. Comparable (if not better) information is likely available from other sources. Finally, even if the data could somehow cause substantial competitive harm, that harm might be diminished by withholding some of the data. Public Citizen 40. Even if one imagined a very different database—one that identified precise problems—the value of the information would be substantially diminished if NHTSA were to withhold just production numbers. The knowledge that a part failed 500 times loses much of its value if we do not know how many total parts there are. Without production numbers, competitors cannot discern whether the failure rate was 1% or 100%. *Id*.

NHTSA's response on these issues—and indeed, all its "evidence"—has two fatal flaws. First, NHTSA relies almost exclusively on self-serving and conclusory claims from an industry seeking to avoid oversight, coupled with occasional claims of agency expertise. *See, e.g.*, NHTSA 27-28. But conclusory remarks are insufficient evidence under FOIA, *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), and agency FOIA decisions are given no deference. *See Ass'n of*

Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd., 830 F.2d 331, 334 (D.C. Cir. 1987). Second, NHTSA shifts the burden of persuasion to Public Citizen and argues that Public Citizen provides no evidence. NHTSA 27-28. This response is both unlawful (FOIA places the burden on NHTSA) and inherently unfair (the best evidence—the early warning database itself—is in NHTSA's possession). *See Landano*, 508 U.S. at 177 (noting the unfairness of placing the burden on private citizens *even to rebut a presumption of confidentiality* under FOIA because requesters inherently know less than the agency about information requested).

These flaws infect all of NHTSA's and the industry parties' competitive harm theories. But the agency and industry also fail to rebut arguments about specific features of the data.

1. Counts. Regarding the fact that the database includes only *counts* rather than specific information, NHTSA argues that Public Citizen is simply disagreeing with the "competitive concerns demonstrated by other commenters" and that Public Citizen's "disagreement does not render NHTSA's action arbitrary and capricious." NHTSA 27. NHTSA points to no evidence other than conclusory comments from companies and industry groups. And it unlawfully shifts the burden to Public Citizen and hides behind arbitrary and capricious review. The Alliance similarly labels Public Citizen's argument a restatement of its general complaints. Alliance 23. But elsewhere the Alliance provides evidence that mere counts of consumer complaints are not competitively harmful. It points out that manufacturers will submit counts even for "ludicrous" consumer complaints. Alliance 17. If the complaints are so unreliable, then disclosing their number without revealing their content can hardly cause "substantial" competitive harm.

2. Whole systems. Regarding the facts that most of the counts address whole systems, rather than individual parts, and that manufacturers may classify the same problem differently, both the Alliance and NHTSA cite the same evidence from *one* commenter (General Motors) explaining that

some manufacturers, *in one industry*, purchase *some systems* whole. NHTSA 27 (citing AR 146 ("Increasingly, vehicle manufacturers purchase entire systems from suppliers[.]") (emphasis added)); Alliance 23-24 (citing same). These comments do not aid NHTSA. They reveal that at least some manufacturers (perhaps even most) in the industry do not purchase whole systems for at least some (perhaps even most) parts. And they say nothing of other industries. Meanwhile, the same commenter argues that even data on whole systems are unreliable because different manufacturers may associate an identical problem with different systems in their reporting. AR 147. These comments provide more evidence against NHTSA's position than they do in support.

3. Duplicate entries. Public Citizen also argued that duplicate reports of the same incident in different fields of data will diminish the data's competitive value by obscuring the true number of problems with each component. To maintain the same example, if there are 900 consumer complaints, 1,200 field reports, and 500 warranty claims related to a system, the data fail to reveal whether these entries double- or triple-count problems. The system may have had anywhere between 1,200 and 2,600 problems. The Alliance is confused on this point. It labels the argument "utterly incoherent" and then provides an incoherent response—that the inability to determine aggregate counts properly is no reason to disclose individual counts. Alliance 24. The Alliance seems to have forgotten that its task is to rebut the argument that ambiguous counts should be less competitively harmful than more accurate counts. It would be difficult to claim that, on the one hand, the disclosure of counts causes substantial competitive harm but, on the other, the counts' potentially broad ambiguity does not diminish their competitive value. NHTSA understands the argument but cannot answer it. The agency simply argues that "the reality is" that counts of consumer complaints and warranty data will not duplicate one another because consumer complaints are usually received after a warranty has expired. NHTSA 27-28. The assertion is particularly dubious in light of the

DOT Inspector General's contrary position, which NHTSA fails to address.[22] And NHTSA cites no evidence. It relies on its own statement in the Federal Register indicating that consumer complaints may provide the agency's first notice of safety-related defects, particularly after a vehicle's warranty has expired—not that consumers file fewer complaints while their vehicles are under warranty. NHTSA 27-28 (citing 67 Fed. Reg. 45,822, 45,849 (July 10, 2002)).

4. Historical data. Public Citizen also argued that the database is historical and therefore provides no direct insight into manufacturers' current plans. Public Citizen 34. Neither the Alliance nor NHTSA responds to this claim. Rather than addressing the inability to gain direct insight into others' plans by examining historical data, each simply states the obvious fact that people use historical knowledge when making *their own* future plans. NHTSA 28; Alliance 24-25. They offer no evidence that whatever usefulness historical data may have in aiding planning renders its disclosure a source of *substantial* competitive harm.

5. Public availability when most valuable. Public Citizen argued that when the early warning information reveals a notable potential problem, NHTSA will investigate the matter and release all relevant data anyway. Thus NHTSA's rule anomalously serves to prevent disclosure of only the *least* competitively harmful information. Public Citizen 35. NHTSA responds by arguing that the data is useful even when it contains few counts, NHTSA 28, and cites a portion of the Federal Register that, in turn, cites the Alliance's comments. But the Alliance only argues that comparative data across each manufacturer's product line "would be far more interesting to an aftermarket part manufacturer" than information released during a defect investigation. Alliance 25-26. Public Citizen does not dispute that the information may be "interesting" to manufacturers. It disputes that

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[22] *See* U.S. Department of Transportation, Office of the Inspector General, *Follow-Up Audit of the Office of Defects Investigation, NHTSA*, Report No. MH-2004-088, at 2-3 (Sept. 23, 2002) (assuming that both consumer complaints and warranty claims may arise from the same problem).

the information will cause "substantial competitive harm" in their hands.

6. Segregability. Public Citizen argued that NHTSA must attempt to segregate the data in two ways. First, if any particular portions of the early warning data are not exempt, they must be disclosed. Public Citizen 41-42. Second, assuming *arguendo* that the "mosaic" theory is applicable outside the national security context, it requires that no piece of the data can be safely released even if other pieces are withheld. As above, Public Citizen used the example that production numbers may be a crucial tile in the "mosaic" and that withholding production numbers alone could deeply diminish potential harm from other information. Public Citizen 42.

NHTSA's only response is its mistaken interpretation of the "categorical rules" cases. NHTSA argues that it need not prove that information is exempt before withholding it under a class exemption, NHTSA 19, then argues that it need not segregate and disclose nonexempt portions of records if they are subject to class exemptions. NHTSA 21, 29; *see also* Alliance 22-23. The argument is circular and violates FOIA's basic requirements. FOIA requires the disclosure of all nonexempt information. When portions of records are exempt, FOIA requires segregation of the exempt portions and disclosure of the remainder. 5 U.S.C. § 552(b). NHTSA cannot avoid these requirements simply by overbroadly classifying records as exempt.

The Alliance barely answers at all. It mistakenly accuses Public Citizen of inconsistency in supporting redaction for some early warning information but not VINs. Alliance 21-22 & n.5. The only inconsistency is the Alliance's. The Alliance endorses redaction to render certain information nonexempt—that is its VIN argument—but opposes even *considering* whether redaction could render other early warning data nonexempt. Public Citizen consistently opposes the redaction of any nonexempt information and supports redaction of exempt information whenever it will permit the disclosure of nonexempt information. This position is not only consistent; it is the law.

7. Availability from other sources. Finally, Public Citizen argued with respect to all the early warning information that NHTSA failed to bear its burden of proving that the information, or similar information, is not otherwise available to competitors. Public Citizen 31-32. For example, Consumer Reports provides reliability ratings for cars based on thousands of consumer surveys, broken down by various systems, some of which overlap with the early warning reporting systems. *See* http://www.consumerreports.org. NHTSA accepts consumer complaints on its website and publishes them in a searchable Internet database. *See* http://www-odi.nhtsa.dot.gov/cars/problems/ complain/. Likewise, NHTSA requires manufacturers to submit to the agency all bulletins and notices on defects that they send to other manufacturers, distributors, dealers, lessees, lessors, owners, or purchasers, 49 C.F.R. § 579.5, and NHTSA publishes these "Technical Service Bulletins" online in a searchable database. *See* http://www-odi.nhtsa.dot.gov/cars/problems/ tsb/. It is hard to see how the disclosure of "early warning" warranty claims data, counts of consumer claims, and field reports would cause substantial competitive harm in light of these more reliable (and often more comprehensive) information sources. Public Citizen also pointed to lists of common green tires as providing only information that is likely available by examining tires bought in stores. Public Citizen 32 n.3 (citing *Worthington Compressors*, 662 F.2d at 45). Neither NHTSA nor the RMA answered this argument. In short, there are numerous sources of information similar to, and likely more valuable than, the information in the early warning database. NHTSA has failed to demonstrate that information from other sources does not reduce potential competitive harm from disclosure of early warning data to something less than "substantial."

VI. NHTSA'S EXEMPTION OF THE LAST SIX DIGITS OF VINs IS UNLAWFUL.

NHTSA's exemption of the last six digits of Vehicle Identification Numbers (VINs) submitted with reports of incidents involving injuries and fatalities is unlawful. NHTSA enacted the

rule in response to a petition for reconsideration without giving notice or opportunity to comment. Additionally, NHTSA had no authority to issue a binding exemption, and its rule suffers a flaw similar to that of the Exemption 4 ruling in that it exempts even non-private information. NHTSA exempts VINs from disclosure even for vehicle owners who have already revealed publicly the information that could be gleaned from the numbers.

In any event, Exemption 6 does not protect the VINs because their release would not cause any invasion of privacy. And even if an invasion of privacy would result from releasing the digits, it would clearly be outweighed by the VINs' importance to the public in monitoring what NHTSA "is up to." *Reporters Committee*, 489 U.S. at 772-73.

Exemption 6 protects personal information from disclosure that would cause a "clearly unwarranted invasion of privacy." Assuming *arguendo* that the Alliance's assertions are true—for example, that we can sometimes learn from a VIN the social security number of the vehicle's owner or whether someone has a lien on a vehicle—their release does not cause an invasion of privacy. VINs themselves are public; they can be found by looking through a vehicle's window. For disclosure to cause an invasion of privacy, the VINs must be linked to particular facts that would lead to embarrassment or unwarranted intrusions. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989). VINs included in incident reports reveal no such information.[23]

Manufacturers must report each incident involving death or injury for which a "claim" was filed with the manufacturer, or for which the manufacturer received a "notice," involving a possible

[23]The Alliance and NHTSA have researched multiple VINs and derived only one social security number. Alliance 40. Neither suggests in light of this poor evidence that VINs provide a particularly easy means of obtaining social security numbers. They do not suggest why anyone would seek social security numbers by using VINs as opposed to some other public information, and they do not explain why anyone would be interested particularly in the social security numbers of individuals whose vehicles are referenced in incident reports.

manufacturing defect. *See, e.g.*, 49 C.F.R. § 579.21(b)(1). NHTSA defines "claim" broadly to include virtually any demand for relief, and "notice" to include any other identification of an incident. *Id.* § 579.4. NHTSA does not require that the claims be accurate or that the manufacturer have provided relief. *Id.* Therefore, the reports do not necessarily identify whether any individual was killed or injured, much less the individual's identity. Even assuming that reports of deaths and injuries are generally accurate, knowing the vehicle's owner provides no specific information about the owner or about the person injured or killed. The VIN number does not reveal whether the owner was injured or killed, whether the owner was even acquainted with the individual injured or killed (possibly another motorist or a pedestrian), or whether the owner even witnessed the incident.

Moreover, NHTSA and the Alliance cannot explain why someone would contact vehicle owners based on reports of fatalities and injuries. Any reason they might identify would either be speculative or would result in only a *de minimis* invasion of privacy: "threats to privacy interests [must be] more palpable than mere possibilities," and "courts may properly discount the probability of invasion of privacy in light of attendant circumstances." *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983) (internal marks, brackets, and citation omitted) (holding that requests for names, unit prices, quantities, and dates of shipments of prescription drugs for prescriptions for congressional members and their families and staff pose only the "mere possibility" that particular diseases could be linked to particular individuals); *cf. Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35-36 (D.C. Cir. 2002) (holding that even where the disclosure of property with certain characteristics might cause people to trespass on it, the intrusion is speculative and its degree weak). The Alliance is therefore mistaken to rely on cases in which the requester desired to contact particular individuals. *See Horner*, 879 F.2d 873; *Lakin Law Firm, P.C., v. FTC*, 352 F.3d 1122, 1123 (7th Cir. 2003); *Center for Auto Safety v. NHTSA*, 809 F. Supp. 148 (D.D.C. 1993).

Perhaps NHTSA and the Alliance are concerned that lawyers will contact the vehicle owners. The concern is exceedingly speculative in light of the likely volume of incident reports (NHTSA recorded 44,065 traffic fatalities in 2002 alone)[24] and the paucity of information contained in each. Vehicle owners may not have claims, or they may be adverse to claims arising out of incidents with which their vehicles are associated. And if the vehicle owners have claims, it would be "overly paternalistic" to assume they do not wish to be contacted by lawyers. *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999).

Finally, even if release would cause an invasion of privacy, the interest in public disclosure would outweigh it. The last six digits of VINs are crucial to the public's ability to monitor NHTSA.

The last six digits of VINs are the only unique vehicle identifier in NHTSA's records. This means they provide the only means of determining whether NHTSA collects, and bases its decisions on, accurate counts of incidents. NHTSA's database is prone to both under- and over-counting. For example, manufacturers may fail to provide required reports to NHTSA. Only with the last six digits of VIN numbers can an individual ascertain whether NHTSA's early warning database contains his or her *own claim* for death or injury. In another example, if several individuals file claims on a single incident, the manufacturer may accidentally file multiple reports on the same incident. Without the last six digits of VINs, there is no means of tracking individual vehicles in NHTSA's records and, therefore, no means of ascertaining whether NHTSA is enforcing the TREAD Act and using accurate information to guide its decision. The public interest in monitoring NHTSA is even stronger than usual under the TREAD Act, a statute passed to remedy the agency's recent failures. *See Washington Post Co. v. Dep't of Health and Human Servs.*, 690 F.2d 252, 264 (D.C. Cir. 1982);

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[24]Rajesh Subramanian, *Traffic Safety Facts*, at 2, Jan. 2005, *at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809831.pdf.

Washington Post Co. v. Dep't of Agriculture, 943 F. Supp. 31 (D.D.C. 1996). And the public interest is particularly likely to outweigh privacy interests where the individuals whose privacy is at stake have an interest in the disclosure, such as the interest in ensuring NHTSA's effectiveness among people whose vehicle's defects caused death or injury. *See, e.g.*, *S. Utah Wilderness Alliance, Inc. v. Hodel*, 680 F. Supp. 37 (D.D.C. 1988) (public interest in disclosure outweighed privacy interest in names of visitors to certain national parks where nonprofit environmental group sought to warn park users of environmental threats from nuclear waste dumps, coal strip-mining, and commercial development); *Nat'l Ass'n of Atomic Veterans v. Dir., Def. Nuclear Agency*, 583 F. Supp. 1483, 1487 (D.D.C. 1984) (public interest in disclosure outweighed privacy interest in names and addresses of servicemen who participated in atmospheric nuclear weapons testing where requester was nonprofit veterans association seeking to study the adverse effects of the testing and inform veterans about benefits).

CONCLUSION

For the above reasons, this Court should vacate the Appendix C regulations in their entirety.

Respectfully submitted,

/S/

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