

SCHEDULED FOR ARGUMENT ON MAY 13, 2004

No. 03-1304

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, INC., ET AL.

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, AND
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondents,

ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,
AND AUTOMOTIVE OCCUPANT RESTRAINTS COUNCIL,

Intervenors.

On Petition For Review of a Final Rule
Issued by the Department of Transportation,
National Highway Traffic Safety Administration

**BRIEF FOR THE INTERVENORS
IN SUPPORT OF RESPONDENTS**

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January 27, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the Certificate included with Petitioner's brief.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Alliance of Automobile Manufacturers, Inc. ("Alliance") states that it is a non-profit trade organization that was formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The following companies comprise the membership of the Alliance: BMW Group; DaimlerChrysler Corporation; Ford Motor Company; General Motors Corporation; Mazda North American Operations; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

The Automotive Occupant Restraints Council ("AORC") states that it is a New York not-for-profit corporation. Its 45 member companies are engaged in the manufacture of passenger restraint systems for motor vehicles, including seat belts and air bags, and components of those systems. Originally organized in 1961 as

the American Seat Belt Council, AORC adopted its present name in 1988. AORC represents the automotive restraints industry before the public, as well as before governmental and regulatory agencies. Its primary purpose, with and on behalf of its member companies, is to provide the motoring public with effective and reliable occupant restraints and to promote the use of seat belts and public understanding of air bag restraints. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

(B) Rulings Under Review.

References to the rulings at issue appear in the Certificate included with Petitioners' brief.

(C) Related Cases.

This litigation was originally filed in the Ninth Circuit, where it was identified as Case No. 02-70303. The Ninth Circuit transferred the litigation to this Court. *See* 343 F.3d 1159 (2003). Counsel is not aware of any other related cases.

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January 27, 2004

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GLOSSARY

AAMA	American Automobile Manufacturers Association
Alliance	Alliance of Automobile Manufacturers
AORC	Automotive Occupant Restraints Council
NHTSA	National Highway Traffic Safety Administration
LTVs	The technical term for SUVs, light trucks and vans
NTSB	National Transportation Safety Board
TEA-21	Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 7103, 112 Stat. 466 (1998)

INTRODUCTION

Respondents have demonstrated that petitioners' claims must be dismissed as meritless. Rather than reiterate at length the basic administrative-law principles that mandate denial of the petition for review, we will focus mainly on the background of the Final Rule and of the statutory mandate that preceded it. This history helps to clarify how misleading petitioners' brief is. When reviewed in light of this chronicle, it is manifest that the rule under review is neither contrary to law nor arbitrary or capricious.

STATUTES AND REGULATIONS

All applicable statutes and regulations are included in the other parties' briefs or in the Joint Appendix.

STATEMENT OF FACTS

A. Congressional, Public, And NHTSA Concern About Air Bags In The Mid-1990s.

1. On January 9, 1997, the Senate Committee on Commerce, Science and Transportation conducted a hearing entitled "Air Bag Safety." Senator Kempthorne, the leading proponent of conducting that hearing, discussed the event that led him to call for it:

1 day – the day before Thanksgiving of this last year [1996] – this was the headline in Boise, Idaho – "***Air bag kills baby girl.***" The accompanying story reports that 1-year-old Alexandra Greer was in the front passenger seat of a car involved in a minor accident, a fender bender.

The accident caused the passenger-side air bag to deploy so forcefully that little Alexandra was decapitated.

Air Bag Safety: Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 105th Cong., 16 (Jan. 9, 1997) (S. Hrg. 105-49) (hereinafter “*Air Bag Hearing*”) (statement of Sen. Dirk Kempthorne) (emphasis added). Although Alexandra’s death was the impetus for the Senate hearing, to Senator Kempthorne the purpose of the hearing was broader:

I did not ask for this hearing to advocate that air bags be eliminated. Air bags do save lives – 1,600 so far. * * * I asked for this hearing so the Senate understands death[s] like Alexandra’s were predictable and preventable, that ***current regulations and the administration’s reform proposals produce air bags that do not do enough to protect children and women, yet protect adult males who do not wear seat belts.*** The Senate must insist that the administration act immediately to safeguard our children.

Ibid. (emphasis added).

It was the potential for deadly harm caused **by** air bags, particularly to children and small-statured women, that captured the Committee’s and witnesses’ attention.

Thus, in his testimony at the hearing, Dr. Ricardo Martinez, the Administrator of the National Highway Traffic Safety Administration (“NHTSA”) summarized the problem well. He first stressed the advantages of air bags. As Dr. Martinez explained, “air bags do a great job for the crash events in which they were de-

signed – the frontal crashes that account for almost two-thirds of occupant fatalities. In those crashes, [NHTSA’s] data show that [air bags] reduce the chances of fatal injuries for unbelted occupants by more than one-third, and for belted occupants by 20 percent.” *Id.* at 22.

Dr. Martinez also addressed the risks of air bags. As he explained, “to do its job of protecting occupants, the air bag has to move into place quickly – faster than the blink of an eye. * * * Its speed is the secret of its benefits and also the source of its problems.” In an accident, occupants are injured by the so-called “second collision,” “where the occupant rams into the [interior of the] vehicle.” *Id.* at 23. “If the occupant is too close to the air bag when it begins to inflate, ***the energy of the bag itself can cause injury***. If the occupant is extremely close to the inflating bag, the force exerted can be deadly.” *Ibid.* (emphasis added). Children in particular are at risk of experiencing this deadly force: if a child in a rear-facing seat is placed in the front passenger seat, his or her head is directly next to the air bag module; similarly, an unrestrained child in the front passenger seat will often be “thrown forward by pre-impact braking and [is] often up against the dashboard when the bag deploys.” *Ibid.* Small-statured women drivers are also at risk, because they frequently sit very close to the steering wheel. *Id.* at 34, 40.

Other witnesses expanded on Dr. Martinez’ explanation of the problem of air bag safety. In particular, Andrew Card, the president of the American Autom-

Automobile Manufacturers Association (“AAMA”) – a now-defunct organization whose membership comprised a portion of the membership of intervenor the Alliance of Automobile Manufacturers (“Alliance”) – explained that *NHTSA’s own regulations* had helped to exacerbate the risks of air bags.

Air bag risks are intensified because we expect too much of them. We ask them to protect both belted and unbelted people. Airbags do a terrific job of helping people who buckle up the right way. However, the performance needed to protect large unbelted adults increases the number of unbelted small children who are killed. That tradeoff is intolerable. * * * [T]he deaths of an increased number of children are an unacceptable cost to protecting adults who will not buckle up.

Id. at 80-81.

As Dr. Martinez stressed at the hearing, neither the agency nor the industry had fully understood the magnitude of these risks before the mid-1990s. It was only then that enough “air bag vehicles [had] entered the fleet [that the agency was] beginning to get enough data to evaluate air bag effectiveness in real-world crashes.” *Id.* at 23. That data showed, Dr. Martinez explained, that as of January 1, 1997, air bags had saved more than 1,700 lives, but had fatally injured at least 34 children and 19 adult drivers. *Ibid.*

2. Although the January 1997 hearing was the first time that Congress had devoted significant attention to the risks of air bags, the subject had received intense public scrutiny for much of the prior year. A search of Lexis-Nexis finds at

least 324 newspaper stories during 1996 that focused on how air bags could potentially harm children.¹ See, e.g., James R. Healey & Jayne O'Donnell, *Deadly air bags: How a government prescription for safety became a threat to children*, USA TODAY, July 8, 1996, at 1B.

By the time of the 1997 hearing, NHTSA also was well aware of the problem. See Final Rule, 65 Fed. Reg. 30,680, 30,741-30,742 (May 12, 2000) (J.A. 148, 209-210); Resp. Br. 7. Thus, in early 1995 NHTSA promulgated a short-term rule to allow manual air bag deactivation devices in vehicles where a rear-facing infant seat could be placed only in the front passenger seat (such as many sports cars). As Dr. Martinez later explained, in late 1995 the agency also “embarked on a massive public education campaign” to bring the message that “[a]ir bags can be dangerous; everyone should be properly buckled up; children should sit in back * * * to the American public in a host of ways.” *Airbags, Car Seats, and Child Safety: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce*, 105th Cong. (Apr. 28, 1997) (hereinafter “*Airbags, Cars Seats, and Child Safety Hearing*”) (statement of Dr. Martinez, at 6); see also 65 Fed. Reg. at 30,742 (J.A. 210). In 1996 NHTSA changed the warning labels it required manufacturers to place in new motor vehicles to empha-

¹ This number was generated by a search within the LEXIS-NEXIS “ALLNWS” file using the following criteria: “headline ((“air bag” or airbag) and (child! or kid or infant or baby)) and date(geq (1/1/96) and leq (12/31/96)).”

size the importance of placing children in the back seat of those vehicles (see 65 Fed. Reg. at 30,742 (J.A. 210)) – a rule that Dr. Martinez stressed was issued “in literally record time.” *Air Bag Hearing*, at 25. And just three days before the 1997 Senate hearing NHTSA extended for several more years the expiration date of the temporary provision allowing manual air bag deactivation devices.

The most important change NHTSA made in response to the perceived problems with air bags and children was also proposed three days before the 1997 Senate hearing. On January 6, 1997, NHTSA issued an NPRM to allow manufacturers to depower their air bags, thereby lessening the risk that future air bags would pose to children and small-statured adults. See Notice of Proposed Rulemaking, 62 Fed. Reg. 807 (Jan. 6, 1997). The final rule implementing that NPRM was released barely three months later. See Final Rule, 62 Fed. Reg. 12,960 (Mar. 19, 1997) (J.A. 258a); Resp. Br. 7-8.

3. To understand the 1997 depowering rule, one must first understand the preexisting testing regime. Federal Motor Vehicle Safety Standard No. 208, which covers the “occupant crash protection” of motor vehicles, contains the Federal Government’s regulations applicable to air bags. This regulation was first promulgated in 1967, at which point it merely required manufacturers to install seat belts in all new motor vehicles. See Order, 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). The agency first considered mandating air bags in 1969 (see Advanced No-

tice of Proposed Rulemaking, 34 Fed. Reg. 11,148 (July 1, 1969), but a requirement that manufacturers provide *any* form of passive restraint system – either an air bag or an automatic seat belt – only went into effect for Model Year 1987. See 65 Fed. Reg. at 30,741 (J.A. 209). The automatic seat belt option was deleted, in favor of an all-air bag mandate, in Standard No. 208 only after Congress ordered the agency to do so, in 1991 (see 49 U.S.C. § 30,127(b)); the implementing rule was issued on September 2, 1993, and required manufacturers to phase in air bags such that all new passenger cars would include them by Model Year 1998 and all new light trucks would include them by Model Year 1999. See Final Rule, 58 Fed. Reg. 46,551, 46,553 (Sept. 2, 1993); 65 Fed. Reg. at 30,741 (J.A. 209).

Standard No. 208 has long required that vehicles be crash-tested to ensure adequate driver and front-passenger protection. The 1993 Standard required crash tests into a fixed collision barrier resembling a wall, at speeds up to 30 mph, with crash test dummies the size of a 50th-percentile, or average-size, male, where that dummy was both belted and unbelted. See 49 C.F.R. § 571.208, S5.1 (1994).

By early 1997 it was clear that these tests – and in particular the *unbelted* test – although intended to ensure that air bags provided adequate protection in a crash, were a significant part of the problem. In order to protect an unbelted 50th-percentile male dummy in an accident an air bag must be quite large and its inflator must be very powerful so that the air bag inflates extremely rapidly; otherwise, it

will fail to cushion the dummy, who will experience excessive trauma during his “second collision” with the vehicle interior or windshield. But an air bag that inflates with sufficient force to restrain this unbelted 50th percentile male dummy in a 30 mph accident is so powerful that in certain circumstances it could prove fatal to smaller passengers. See pages 3-4, *supra*.

The depowering rule was NHTSA’s *interim* solution to this problem. In order to allow manufacturers rapidly to install air bags that would inflate with somewhat less force, the agency authorized manufacturers to “certify[] the air bag performance of their vehicles with an unbelted dummy in a sled test * * * instead of in [the 30-mph] vehicle-to-barrier crash test.” 65 Fed. Reg. at 30,741 (J.A. 209).² Manufacturers still had to crash-test their vehicles in 30 mph crash tests using *belted* dummies. After the March 1997 modification, however, manufacturers could substitute this “30 mph sled test,” which approximated a 22 mph crash test (see *id.* at 30,689 (J.A. 157)), for the 30 mph *unbelted* crash test. This alteration allowed manufacturers to install somewhat less powerful air bags, which posed a significantly lower risk to children and small-stature adults. NHTSA included a

² “In sled tests, no crash takes place. The vehicle is placed on a sled-on-rails, and instrumented test dummies are placed in the vehicle. The sled and vehicle are accelerated very rapidly backward by means of a generic acceleration pulse. As the vehicle moves backward, the dummies move forward inside the vehicle in much the same way that people would in a frontal crash.” 65 Fed. Reg. at 30,738 (J.A. 206).

“sunset provision” in the depowering rule, such that for vehicles manufactured after September 1, 2001, manufacturers would have to meet the original 30 mph unbelted test rather than the 30 mph sled test. The agency emphasized that the sled test was necessary to “maintain the public acceptability of air bags.” 62 Fed. Reg. at 12,970 (J.A. 258k).

4. Shortly after NHTSA released the depowering rule, the House of Representatives entered the fray; between April 1997 and November 1997 the Subcommittee on Telecommunications, Trade, and Consumer Protection held three separate hearings at which air bag safety was discussed.³

Two main themes were evident at these hearings. First, many witnesses and committee members addressed the problem that, under the preexisting rule, air bags were required to be designed to protect adult passengers who chose not to wear their seat belts, which necessarily increased the risk of air bag injuries faced by infants and children. For example, Sam Kazman, from the Competitive Enterprise Institute, explained that

³ See *Airbags, Car Seats, and Child Safety Hearing; Reauthorization of the National Highway Traffic Safety Administration: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (May 22, 1997) (Serial No 105-30) (hereinafter “NHTSA Reauthorization Hearing”); Markup of H.R. 2691, National Highway Traffic Safety Administration Reauthorization Act of 1997: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Oct. 29, 1997) (Serial No 105-52).*

[t]he air bag mandate is deservedly controversial. Its imposition of deadly risks on infants, children, and small women, and of serious non-lethal risks on such groups as the hearing impaired, raises major ethical questions. In the words of one noted philosopher, the mandate's 'women and children *last*' approach 'contravenes broadly shared moral principles that address the acceptability of forced tradeoffs across persons and that govern the relationship between a liberal government and its citizens.' * * * [Thus,] [a]ccording to a recent CEI poll, Americans favor repeal of the mandate [that all vehicles include air bags] by a ratio of nearly three to one.

NHTSA Reauthorization Hearing 34 (statement of Sam. Kazman) (quoting L. Lomasky, *Sudden Impact: The Collision Between The Air Bag Mandate And Ethics*, at 3 (CEI, 1997)).

The second theme at these hearings was the need to approach future changes to air bag technology deliberately, with caution and care. As Subcommittee Chairman Billy Tauzin explained, "[m]anufacturers need time to design and produce [new advanced] equipment. We need to be cautious about any new technologies so that we do not end up in the same situation we are in today because we have prematurely forced a new technology on the American people." *Airbags, Car Seats, and Child Safety Hearing* (statement of Rep. Tauzin, at 5). In particular, many witnesses objected to the "sunset" provision for the sled test. Andrew Card of the AAMA explained that because of the sunset provision,

in four years the rule will automatically revert to the unbelted barrier crash test requirement developed in the early 1980s that resulted in the higher powered inflators

used in today's air bags. Not only would we be rolling back from the safety enhancement associated with depowered bags, but we also would be potentially limiting technologies that could be used in developing next generation restraint technologies. We see depowering of air bags not as an interim measure, but rather as a first step in the direction of advanced technology systems. And their use effectively would be precluded if this sunset provision is not eliminated.

NHTSA Reauthorization Hearing 12 (statement of Andrew Card).

Based on these hearings the House Committee drafted proposed legislation. House Bill 2691, the "National Highway Traffic Safety Administration Reauthorization Act of 1998," required NHTSA to maximize protection for improperly restrained and positioned occupants, but "only to the extent that doing so would not substantially increase the risk of injury to properly restrained and positioned occupants." See *id.* § 5 (reprinted in H.R. REP. NO. 105-477, at 2 (1998)).⁴

5. The Senate also drafted legislation to mandate that NHTSA focus on protecting belted occupants. Senate Bill 1173, The "Intermodal Surface Transportation Efficiency Act of 1997," would have forbidden NHTSA to require *any* un-

⁴ A few witnesses questioned this measure. The Deputy Administrator of NHTSA objected to the provision because of its potential effects on children, noting that many of the infants and children who had been fatally injured by air bags had either not been wearing seat belts or had been improperly restrained. See *Markup of H.R. 2691, National Highway Traffic Safety Administration Reauthorization Act of 1997: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Oct. 29, 1997) (Serial No 105-52) (statement of Philip Recht, at 5).*

belted testing. See S. 1173, 105th Cong., 1st Sess. § 1407 (1997). The Senate Report stressed that the then-existing “Section 4.1.2.1 [of Standard No. 208] requires that all air bags must be designed to deploy at a force great enough to protect an average sized male not wearing his seat belt. The current standard protects adults who deliberately choose not to obey seat belt laws while it jeopardizes the lives of children, and small statured adults. This is an unacceptable policy choice.” S. REP. NO. 105-95, at 45 (1997).

B. TEA-21’s Air Bag Rulemaking Mandate.

By early 1998, a consensus existed in both houses to order NHTSA to improve air bag safety. Although the final bill differed from those that had been under consideration in both the House and the Senate, it grew out of these predecessor bills; both H.R. 2691 and S. 1173 were still pending when the “Transportation Equity Act for the 21st Century” (referred to as “TEA-21”) reached the floor of Congress, and large portions of H.R. 2691 were inserted into it during the Conference Committee’s consideration of TEA-21. See H.R. CONF. REP. NO. 105-550, at 520 (1998), *reprinted in* 1998 U.S.C.C.A.N. 70, 195. In particular, the conferees included a provision to address air bag safety.

TEA-21 directed the Secretary of Transportation to “issue a notice of proposed rulemaking to improve occupant protection for occupants of different sizes, belted and unbelted, under Federal Motor Vehicle Safety Standard No. 208, while

minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags, by means that include advanced air bags.” Pub. L. No. 105-178, § 7103(a)(1), 112 Stat. 466 (1998). The statute broadly provided that the resulting “final rule” should be “any provision the Secretary deems appropriate, consistent with paragraph (1) [of § 7103(a)] and the requirements of [the Safety Act, 49 U.S.C. § 30,111].” *Id.* § 7103(a)(2), 112 Stat. 466. It set forth a schedule for the rulemaking and for the applicability of the resultant rule, and also specifically blocked the “sunset” provision of NHTSA’s depowering rule; NHTSA was ordered to continue to allow manufacturers to certify air bags using the sled test – included as S13 of the version of Standard No. 208 then in force – “unless and until changed by the [new] rule required by this subsection.” *Id.* § 7103(a)(4), 112 Stat. 466.

Unlike the other bills that had been considered prior to its enactment, TEA-21 did not mandate that NHTSA ignore the safety of unbelted passengers *altogether* – as S. 1173 would have done. Nor did it order NHTSA to address the safety of unbelted passengers only “to the extent that doing so does not substantially increase the risk of injury to properly restrained and positioned occupants” – as H.R. 2691 would have done. Instead, TEA-21 mandated that NHTSA pursue two distinct goals: “to improve occupant protection for occupants of different sizes, belted and unbelted,” while at the same time “minimizing the risk to infants,

children, and other occupants from injuries and deaths caused by air bags.” But TEA-21’s predecessor bills, and the hearings both Houses held during 1997 that led to those bills, nonetheless formed the background of the final statute. Thus, the only concern that the TEA-21 Conference Committee raised in its Report with regards to the air bag rulemaking was that “air bags do not substitute for lap and shoulder belts and all occupants should always wear lap and shoulder belts regardless of whether there is an inflatable restraint in the vehicle.” H.R. CONF. REP. NO. 105-550, at 521, *reprinted in* 1998 U.S.C.C.A.N. at 196.

C. NHTSA’s Resultant Air Bag Rulemaking.

Pursuant to TEA-21, NHTSA issued an NPRM to modify Standard No. 208 on September 18, 1998 (see 63 Fed. Reg. 49,958 (Sept. 18, 1998) (J.A. 307)); after receiving numerous comments on that NPRM, the agency issued an SNPRM a year later (see 64 Fed. Reg. 60,556 (Nov. 5, 1999) (J.A. 379)).

Because Respondents have provided this Court a detailed history of the air bag rulemaking (see Resp. Br. 9-15), we will focus on just two critical aspects of it and of the resultant Final Rule. First, the new rule is vastly more complex, and significantly more protective of occupant safety, than the previous rule had been. Second, the only portion of this rulemaking that generated any serious controversy – and the only portion that petitioners have challenged – is one, albeit important,

test condition in just one of the five crash tests ordered under the new rule.⁵ But NHTSA's policy choice on this issue was eminently rational, and was supported by the vast majority of commenters, including not only automobile and air bag manufacturers but also a wide variety of independent safety experts.

1. Before NHTSA issued its final rule, manufacturers were required to certify that the air bag system in any new vehicle satisfied 12 performance requirements and injury measurements (6 each for the driver and outboard front passenger) in each of two crash tests (belted and unbelted), plus one additional injury criterion for both the driver and the outboard front passenger in the sled test – for a total of 26 specific measurements. In particular, vehicle manufacturers had to certify that head, two chest, and two leg injury measurements were below specified levels for belted 50th-percentile male dummies – in both the driver's and outboard passenger's seats – in a 30 mph collision (head-on or up to ± 30 degrees from perpendicular) into a rigid barrier, and that the dummy remained contained in the vehicle during that crash test. They also had to certify that the same performance requirements and injury criteria, as well as neck injury measurements, were met for unbelted 50th-percentile dummies in the "sled test" discussed above. See 65 Fed.

⁵ There was little more than technical dispute over the many other aspects of the final rule.

Reg. at 30,717 (J.A. 185).⁶ These 26 performance requirements and injury measurements are laid out in the following table:

1997 RULE	Performance Requirements and Injury Criteria													
	Containment		Head injury criterion		Chest acceleration		Chest deflection		Leg force transmission				Neck injury measurement	
	Driver dummy	Passenger dummy	Driver dummy	Passenger dummy	Driver dummy	Passenger dummy	Driver dummy	Passenger dummy	Driver dummy		Passenger dummy		Driver dummy	Passenger dummy
									Left leg	Right leg	Left leg	Right leg		
Belted, 30 mph rigid barrier test*	•	•	•	•	•	•	•	•	•	•	•	•		
Unbelted, sled test*	•	•	•	•	•	•	•	•	•	•	•	•	•	•

* all tests use 50th percentile male dummy

Each of these 26 measurements is present in some form in the 2000 final rule, but under that new rule many new measurements are also required. Thus, the two crash tests required under the earlier rule must now be performed using both 50th percentile male dummies and 5th percentile female dummies – each in both the driver and outboard front passenger seats – and must in each instance be certified to limit neck injuries as well as head, chest, and leg injuries. A fifth crash test at a 40% offset into a “deformable barrier” with 5th percentile female dummies is also required, in order to “ensure that vehicle manufacturers upgrade their crash

⁶ Although manufacturers could have elected to certify compliance for 50th percentile male unbelted dummies in the old 30 mph rigid barrier test, as a practical matter most if not all vehicle models newly certified after the sled-test option was made available were certified to that new option. If a manufacturer had chosen to certify a vehicle using the 30 mph unbelted crash test, it would not have had to test for neck injury measurements. See Final Rule, 62 Fed. Reg. 12,960, 12,970 (Mar. 19, 1997) (J.A. 258a, 238k).

sensing and software systems” (*id.* at 30,708 (J.A. 176)) – again in both positions and for each of the injury criteria. In addition, new risk-minimization tests are mandated under the rule, for four types of passengers: 1-year olds in rear-facing child seats in the front passenger seat, 3-year olds in the front passenger seat, 6-year olds in the front passenger seat, and 5th percentile adult female dummies in the front passenger seat. See *id.* at 30,709-30,716 (J.A. 177-184). For each of these four types of passengers, the manufacturer has a distinct set of risk-minimization certification options involving either suppressing the passenger air bag or certifying that the air bag’s deployment in specified circumstances meets a variety of test measurements designed to ensure that deployment is unlikely to create a risk of injury to the specified type of passenger. Thus, for example, the manufacturer can certify compliance for the 3-year old dummy by certifying either (a) that the air bag will not deploy if that dummy is present; (b) that the air bag will not deploy if that dummy is “out of position”; or (c) that the air bag’s deployment when the dummy is out of position meets five performance requirements and injury criteria designed to minimize risk to the dummy.

Thus, there are 70 distinct injury measurements from 5 crash tests, and a set of complicated risk-minimization tests, under the 2000 final rule – instead of the 26 measurements from 2 crash tests that had been required under the earlier rule. (The 70 injury measurements and the set of risk-minimization tests are presented in

the table following this paragraph.) Furthermore, although there are parallels to the 26 measurements from the earlier rule in the new rule, every one of these injury measurements under the 2000 rule is significantly more stringent in at least some manner than the equivalent criterion had been under the preceding rule, either in its own right or due to a change in test conditions. Under the new rule the head injury, neck injury, and chest deflection criteria became stricter (see *id.* at 30,717-30,718 (J.A. 185-186)); the sled test (to test injuries to unbelted 50th percentile male dummies) was replaced with a 25 mph rigid barrier crash test (see *id.* at 30,687-30,688 (J.A. 155-156)); and during the second phase of the 2000 rule the 30 mph belted crash test using 50th percentile male dummies will be changed to require a 35 mph crash test (see *id.* at 30,707 (J.A. 175)).

2000 Rule																	
Crash tests				Performance Requirements and Injury Criteria													
				Containment		Head injury criterion		Chest acceleration		Chest deflection		Leg force transmission				Neck injury criterion	
				Driver dummy	Pass. dummy	Driver dummy	Pass. dummy	Driver dummy	Pass. dummy	Driver dummy	Pass. dummy	Driver dummy		Pass. dummy		Driver dummy	Pass. dummy
												Left leg	Right leg	Left leg	Right leg		
Rigid Barrier	Belted, 30 mph test	5% female	•	•	•	•	•	•	•	•	•	•	•	•	•	•	
		50% male**	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	
	Unbelted, 25 mph test	5% female	•	•	•	•	•	•	•	•	•	•	•	•	•	•	
		50% male	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	•*	
40% offset deformable barrier	Belted, 25 mph test	5% female	•	•	•	•	•	•	•	•	•	•	•	•	•		

Risk minimization tests	Compliance Options***					Low risk deployment certification requirements				
	Rear-facing seat with 1-year-old dummy	Suppress air bag if dummy is present	Suppress air bag if dummy is out of position	Low-risk deployment of air bag if dummy is out of position	Contain.	Head injury	Chest accel.	Chest deflect.	Neck injury	
		3-year old dummy	6-year old dummy							5th percentile adult female dummy
	◇			◇ ==>		◇	◇	◇	◇	
	◇		◇	◇ ==>	◇	◇	◇	◇	◇	
	◇		◇	◇ ==>	◇	◇	◇	◇	◇	
			◇	◇ ==>	◇	◇	◇	◇	◇	

Only test at issue in this litigation:

Unbelted, 25 mph test

* tests in **highlights** in the 2000 rule are analogous to tests in the 1997 rule, although the tests in the 2000 rule are more stringent, because (1) the unbelted test is performed using a 25 mph rigid barrier crash test, rather than the sled test, (2) several of the injury criteria are more strict in the 2000 rule; and (3) the belted, 30 mph test with 50th percentile male will be performed at 35 mph during phase 2 of the 2000 rule.

** belted, 30 mph test with 50th percentile male will be performed at 35 mph during phase 2 of the rule.

*** Manufacturer may select one of the starred options; if compliance is certified to "low risk deployment," deployment must satisfy specified tests.

2. The question presented by petitioners in this litigation is whether the agency reasonably decided to require that the rigid barrier crash tests for unbelted dummies – injury measurements to the right of the extracted cell in the above chart – be conducted at 25 mph (as the final rule provides), or if the agency was

instead legally obligated to require those tests to be conducted at 30 mph. As both petitioners and respondents have discussed (see Pet. Br. 13-23; Resp. Br. 9-15), the question of how to design these specific tests troubled the agency, which proposed different versions of them in the NPRM, the SNPRM, the draft of the final rule that the agency sent to the Office of Management and Budget, and the final rule. See 65 Fed. Reg. at 30,692-30,695 (J.A. 160-163). On the one hand, most commenters believed that there was a significant risk that, were the agency to implement a 30 mph crash test for unbelted dummies, it would heighten the risk that the next-generation air bags would pose to infants, children, and small-statured adults. On the other hand, some commenters stressed that a 30 mph crash test would require manufacturers to provide somewhat more protection for unbelted adults.

Rather than discuss all of these comments in detail, we will focus on one in particular: a letter addressing the issue that was sent to Rodney Slater, then the Secretary of Transportation, on February 16, 2000. See NHTSA-1999-6407-109 (J.A. 568). The most remarkable thing about this letter is the breadth and importance of its signatory organizations; the letter was signed by the Chairman of the National Transportation Safety Board, the President of the Insurance Institute for Highway Safety, the Executive Director of the American Trauma Society, the Chairman of the National Association of Governors' Highway Safety Representatives, and senior representatives of the American Automobile Association and the

National Safety Council. As the joint letter explained, “[w]ith one exception, there appear[ed at that point] to be remarkable agreement among the automakers and much of the safety community that [the range of NHTSA’s proposed] amendments will enhance air bag protection, even though meeting the new requirements will not be easy or simple.” J.A. 568. But, the letter continued, there remained a debate over this one important issue in the rule: whether to mandate that air bags be tested using a “30 mph rigid-barrier crash test[] to assess unbelted occupant protection,” or whether performing the same test at 25 mph would be more appropriate. J.A. 568-569. In their letter these leading safety experts came down firmly on the side of promulgating a 25 mph test. As they explained, they “*strongly oppose[d] a mandatory return to 30 mph rigid-barrier tests with unbelted dummies at this time. There is no justification for reinstating such tests.*” *Id.* at 569 (emphasis added).

Three months later, NHTSA issued its Final Rule, which mandated the 25 mph test called for by these independent safety experts. As respondents discuss at length), the agency gave *six distinct* reasons to justify its decision. See Resp. Br. 12-15.

SUMMARY OF ARGUMENT

NHTSA reasonably adopted a rule that is consistent with TEA-21’s mandate to improve overall occupant protection. Under *Chevron*, this Court must defer to

the agency's reasonable construction of TEA-21. Congress afforded the agency substantial discretion to balance the conflicting goals in the statute in such a way that the protection for some particular subgroups might not, in fact, be improved. But the agency did not go down that route, because the final rule *does* improve occupant protection for all subgroups, including for unbelted large men.

The agency's final rule is also not arbitrary or capricious. The agency gave six distinct reasons for its decision to require that the 50th percentile male unbelted dummy crash test be conducted at 25 mph rather than 30 mph; most of these reasons would *independently* have been sufficient to justify the final rule. While we do not repeat each of the agency's reasons for its final rule, we note in particular one of those reasons: the agency reasonably concluded that a rule imposing different tests on automobiles than on LTVs (the technical term for SUVs, light trucks and vans) was unacceptable, because a rule focused on LTVs would have been over- and under-inclusive. Finally, it is important to note that the automobile and occupant-restraints industries who supported the final rule had no particular financial incentive to press for the 25 mph test as compared to the 30 mph test; rather, we joined with a wide range of safety advocates to urge NHTSA to adopt the rule that best addresses the overall needs of automobile safety and the mandates of TEA-21.

ARGUMENT⁷

I. NHTSA'S DECISION TO IMPLEMENT A 25 MPH UNBELTED CRASH TEST DID NOT VIOLATE TEA-21.

Petitioners claim that anything less than a 30 mph unbelted crash test would not “improve” occupant protection for large unbelted males, and assert that the final regulation therefore is “contrary to law” because TEA-21 required the agency to improve occupant protection for this group of people. See Pet. Br. 27-32. There are two obvious flaws with this argument: it is factually inaccurate and legally incorrect.

On the legal side, petitioners notably do not acknowledge the relevant standard of review, which is the familiar *Chevron* test. Where a litigant argues that a regulation conflicts with a statute, the first question is whether “Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984). If, however, “the statute is silent

⁷ Pursuant to the parties’ Joint Motion Concerning Future Proceedings On Transfer Of Petition For Review (Oct. 16, 2003) and this Court’s orders of December 24, 2003 and January 21, 2004, the intervenors are refiled the brief they filed in the Ninth Circuit with those changes necessary to conform the brief to this Court’s rules (including shortening the brief by approximately 2000 words) and to omit the argument on jurisdictional and venue issues already decided by the Ninth Circuit.

or ambiguous with respect to the specific issue,” courts must defer to the agency’s reasonable construction of that statute. *Id.* at 843.

Here, the statute in question is silent about whether NHTSA should require manufacturers to crash-test vehicles containing unbelted 50th percentile male dummies into a rigid barrier at 25 mph, or instead at 30 mph. Rather, the statute merely instructs the agency to “improve occupant protection” while at the same time “minimizing the risk” that air bags pose. Thus, the legal question is whether the agency’s view that TEA-21 did not require the unbelted crash test to be conducted at 30 mph is based on a reasonable construction of the statute. There are at least three distinct reasons why it is: First, the agency could legitimately interpret the statute not to require the agency to conduct a subgroup-by-subgroup analysis of occupant safety, but instead merely to ensure an *overall* increase in occupant safety. Second, given TEA-21’s conflicting goals the agency reasonably could have concluded that even if a subpopulation-by-subpopulation analysis were appropriate the statute did not require there to be an increase in safety for each and every possible subpopulation of vehicle occupants. Finally, even if the agency were to have interpreted the statute as petitioners would interpret it – that is, that the final rule needed to mandate an improvement of occupant safety in all subpopulations, including unbelted large males – as a factual matter the rule NHTSA adopted requires just that.

1. Petitioners' argument is based on an analysis that focuses on the effects of NHTSA's final rule on discrete occupant subpopulations, rather than on occupants viewed collectively. However, there is no clear requirement in TEA-21 that the agency undertake such a subpopulation-by-subpopulation analysis of improvements in occupant protection. Rather, the statute requires NHTSA's revised Standard No. 208 to "improve occupant protection for occupants of different sizes, belted and unbelted." Pub. L. No. 105-178, § 7103(a)(1), 112 Stat. 466. This statutory mandate can reasonably be interpreted merely to require the agency to ensure an improvement in *overall* occupant protection, taking into account the various types of vehicle occupants; it does not require a monocular focus on safety improvements for 50th percentile unbelted males, 97th percentile belted females, 8th percentile belted males, 6.2 year old unbelted children, or any other specific subtype of vehicle occupant. It is indisputable that the final rule will significantly increase *overall* occupant protection compared to the version of Standard No. 208 in effect when Congress enacted TEA-21. See 65 Fed. Reg. at 30,734-30,735 (J.A. 202-203).⁸ But that is all that TEA-21's mandate obviously requires, and thus under *Chevron* petitioners' statutory argument must fail.

2. Even were it the case that TEA-21 should be interpreted to require the

⁸ As we discuss below (at pages 27-29), it also increases protection for each specific subgroup, including 50th percentile unbelted males.

agency to look at the new final rule's effects on individual subpopulations, and even if the agency had decided to provide slightly less protection to unbelted large adults (which it did not do), given the conflicting goals of TEA-21 it would have been perfectly reasonable to interpret the statute to authorize such a choice, particularly because these unbelted large adults could avoid any such increased risk entirely by simply fastening their seat belts, as they are legally required to do in every state but New Hampshire. As the agency and most commenters recognized, TEA-21 places on NHTSA somewhat conflicting missions: to increase the protectiveness of air bags but also to minimize the risks that air bags themselves can pose. See pages 13-14, *supra*; 65 Fed. Reg. at 30,687-30,688 (J.A. 155-156). The Alliance elaborated on the tension between the various requirements of TEA-21 in its rulemaking comments:

[D]esign conflicts are inevitable even with today's state-of-the-art restraint technology. * * * For example, if front seat occupants always used seat belts properly, vehicle manufacturers would install air bags that are designed differently than those that have to be designed to protect unbelted occupants. Similarly, if a hypothetical air bag were designed solely to protect larger adult male occupants, it would be designed differently than a hypothetical air bag designed solely to protect small females or children.

This does not mean that a reasonable level of occupant protection cannot be offered to a broad range of front seat occupants. However, *maximum or optimal* protection cannot be provided to any specific occupant, especially those who are unbelted, without affecting protection of-

ferred to occupants of different size, age, or physical condition involved in crashes of different types and severity.

J.A. 477-478 (emphasis in original).

Because TEA-21's statutory goals are in some tension with each other and because TEA-21 specifically requires the new Standard also to comply with the Safety Act (49 U.S.C. § 30,111) – which requires that all Safety Standards be practicable, meet the needs of motor vehicle safety, and be objective – any of a broad range of alternative methods of balancing these factors would satisfy the statute. See Resp. Br. 23-24.⁹ In particular, given the number of times legislators stressed to the agency how important it was that the agency prevent air bags from harming children (see pages 1-2, *supra*), NHTSA's choice to balance TEA-21's conflicting goals in a fashion that protected unbelted adult males but at the same time particularly addressed the risks air bags could pose to children and others would plainly have been a reasonable interpretation of the statute's dichotomous mandate under *Chevron*.

3. As we've just explained, *Chevron* deference is sufficient to defeat petitioners' statutory argument. However, there is no need to rely on deference here, because petitioners' argument fails by its own terms: the 2000 rule significantly

⁹ It is, of course, conceivable that NHTSA's decision could avoid running afoul of the statute, yet nevertheless be arbitrary or capricious – but as we discuss below in this case the final rule is not arbitrary or capricious.

improves safety even for unbelted large men when compared to the preexisting regulatory scheme, and thus cannot be said to be “contrary to law” even under petitioners’ reading of the statute:

- Under the prior version of Standard No. 208, manufacturers could certify compliance for purposes of 50th percentile unbelted male dummies using a sled test equivalent to a rigid barrier crash test conducted at 22 mph; the new version requires a rigid barrier crash test conducted at 25 mph. See 65 Fed. Reg. at 30,689 (J.A. 157). Petitioners’ argument (Pet. Br. 30) that the appropriate comparison is with the 30 mph crash test that was required before 1997 is absurd; Congress *specifically ordered* the agency to continue allowing certification under the sled test until and unless the new rule modified that requirement. See page 13, *supra*.
- Under the prior – that is, 1997 – version of Standard No. 208, head injury criterion measurements were undertaken over a 36 millisecond time period, and each measurement – including the measurements taken during the 50th percentile male unbelted dummy crash test – had to be below 1000 on NHTSA’s scale for the manufacturer to be able to certify that a vehicle complied with Standard No. 208. The new version measures this criterion over a 15 millisecond time period, and requires the value to be less than 700. The agency noted that this new version of the head injury criterion is stricter than the prior version in certain types of crash pulses. See *id.* at 30,717 (J.A. 185).
- Under the prior version of Standard No. 208, the chest deflection limit for 50th percentile adult male dummies in any crash test was 76 mm; this injury measurement under the 2000 final rule has been reduced to 63 mm for all crash tests (including the 50th percentile male unbelted dummy crash test). See *id.* at 30,718 (J.A. 186).
- Under the prior version of Standard No. 208, manufacturers who certified their vehicles using the sled test were required to monitor and minimize neck trauma to dummies using four distinct measurements. The new version instead uses the “Nij” criterion, which is an “improvement over [the four distinct tests] because it accounts for the superposition of loads and movements, and the additive effects on injury

risk.” See *id.* at 30,717-30,718 (J.A. 185-186).

- The 40 percent offset deformable crash test in the new rule will increase occupant safety for all front-seat occupants, including unbelted 50th percentile male dummies. (That the test is performed using 5th percentile female dummies is irrelevant to this broader benefit.) The purpose of this test is to ensure that air bags deploy sooner in an accident than under the old rule, thus increasing protection and minimizing air bag-caused injuries for all occupants. See *id.* at 30,708-30,709 (J.A. 176-177).

Thus, unbelted 50th percentile male dummies are *significantly* better protected under the final rule adopted by NHTSA than they were under the previous version of Standard No. 208. So even were it the case that the final rule would violate TEA-21 if unbelted 50th percentile male dummies received less protection than they had received under the prior rule, NHTSA’s final rule would nonetheless be valid under TEA-21. But given the fact that TEA-21 did not place an unambiguous mandate on the agency to improve occupant protection specifically for large unbelted males, petitioners’ statutory claims should be dismissed as unsupportable.

II. THE FINAL RULE IS NOT ARBITRARY OR CAPRICIOUS

Petitioners’ argument that the final rule is arbitrary or capricious is as baseless as their argument that the final rule violates TEA-21.¹⁰ As respondents dem-

¹⁰ Notably, petitioners fail to elaborate on the relevant standard of review. See Pet. Br. 26. Under the Administrative Procedure Act, this court must uphold an order of an administrative agency unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5. U.S.C. § 706(2)(A). “The scope of review under the ‘arbitrary and capricious’ standard is narrow and *a court is not to substitute its judgment for that of the agency.*” *Hopi Tribe v. Navajo*

onstrated at length in their brief, NHTSA appropriately balanced many complex, competing factors before issuing its final rule, and in that final rule carefully explained the basis for its choices. In particular, the agency chose to focus initially on the risks of air bags, and to require manufacturers to pay special attention to reducing those risks. See 65 Fed. Reg. at 30,687-30,688 (J.A. 155-156); Resp. Br. 26-27, 29. At the same time, the agency added a host of new crash tests and injury criteria (see pages 16-19, *supra*), which will ensure that new air bags increase occupant safety for all occupants (including, as we showed above (at pages 27-29), large unbelted males). These were utterly reasonable decisions for the agency to make.

Rather than reiterate respondents' extensive rebuttal of petitioners' arbitrary-or-capricious argument, we will instead discuss two specific points that warrant further attention.

1. In the final rule NHTSA gave six separate reasons for choosing to require that unbelted crash tests be conducted at 25 mph rather than 30 mph. See Resp. Br. 12-15. Petitioner focuses on the fourth reason – that manufacturers would have particular difficulty meeting a 30 mph crash test in vehicles with a

Tribe, 46 F.3d 908, 914 (9th Cir. 1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added). “This is especially [true] where * * * the challenged decision implicates substantial agency expertise.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000) (internal quotation marks and citation omitted)

“stiff crash pulse,” such as many SUVs – and argues that NHTSA should have subdivided its rule, requiring automobiles to use a 30 mph unbelted test but allowing LTVs (the technical term for the category including SUVs, light trucks and vans) to use a 25 mph unbelted crash test. See Pet. Br. 46-47.¹¹ The agency reasonably chose not to do this, for two reasons.

First, as NHTSA explained in response to a petition for reconsideration raising this issue (filed by the petitioners in this litigation (see NHTSA-2000-7013-19, at 2-3)), the agency has provided *five other reasons* in the final rule to justify its decision to mandate a 25 mph unbelted crash test. These reasons apply to vehicles whether they have a stiffer or softer crash pulse, and thus suffice to support the decision to mandate a 25 mph test even in vehicles with softer crash pulses. See Fi-

¹¹ The agency explained what “crash pulses” are in Appendix A to the final rule:

Crash Pulses. A crash pulse is the graph or picture of how quickly the vehicle occupant compartment is decelerating at different times during a crash. *Stiff crash pulses.* In crashes with stiff pulses, the occupant compartment decelerates very abruptly. * * * In crashes involving comparable reductions in velocity, an unrestrained occupant would hit the vehicle interior * * * at a much higher speed in a crash with a stiff pulse than in a crash with a soft pulse.

65 Fed. Reg. at 30,740 (J.A. 208). The crash pulse of an accident depends both on the specifics of that accident – a head-on crash into a wall or another vehicle produces a much stiffer crash pulse than a crash into “sand-filled barrels such as those seen at toll booths”; *ibid.* – and on characteristics of the specific vehicle.

nal Rule, 66 Fed. Reg. 65,376, 65,380 (Dec. 18, 2001) (J.A. 100, 105).

Second – as NHTSA also explained in response to the petition for reconsideration – petitioners’ proposal to establish a different crash test for LTVs than for automobiles is unjustifiably both over- and under-inclusive. As noted above, the agency’s concern was that in vehicles with *stiff crash pulses* it would be especially difficult to balance competing concerns while using a 30 mph unbelted crash test. But, as the agency explained, although some LTVs have stiff crash pulses, some do not; moreover, some small cars also have stiff crash pulses. See *id.* at 65,381 (J.A. 106). Thus, a rule that mandated a 30 mph unbelted crash test for automobiles and a 25 mph unbelted crash test for *LTVs* would not address the balance of concerns for *all* vehicles with stiff crash pulses, to which NHTSA was responding. In fact, there is no generally accepted way to differentiate the group of vehicles with stiff crash pulses from those with “softer” crash pulses *ex ante*, and thus no consensus on how to define the regulatory subcategory of vehicles to which a 30 mph requirement should apply that petitioners suggest.

2. To support their arbitrary-or-capricious argument petitioners litter their brief with aspersions on the motives of industry in this rulemaking. See, *e.g.*, Pet. Br. 39, 42. Petitioners’ arguments ignore the fact that a broad cross-section of independent safety experts also urged NHTSA to implement a 25 mph unbelted crash test. See pages 20-21, *supra*. Moreover, there is no support for the implication

that manufacturers were motivated by cost in objecting to the 30 mph unbelted crash test. As the Alliance and the Insurance Institute for Highway Safety explained to NHTSA, “the cost of technology is not the issue for this rulemaking. * * * [T]he industry is developing and implementing all of the advanced air bag technologies.” J.A. 528. Rather, the Alliance – and most other commenters – disputed that technology yet exists that will adequately minimize the risk of air bag-induced injuries but at the same time be consistently able to pass a 30 mph unbelted crash test.

Similarly unsupported is the allegation that automobile manufacturers have any plans to depower their air bags so as minimally to comply with the final rule. As the Alliance and its members “state[d] unequivocally for the record” in a letter to the Office of Management and Budget during this rulemaking, “the assertion that industry will reduce the high speed protection of airbags systems through widespread depowering is false, without foundation, and counter to our commitment above.” J.A. 578. Automobile and occupant restraint manufacturers are actively developing the range of advanced air bag technologies (see, *e.g.*, *id.* at 528), rather than relying on preexisting equipment (which in any event could not meet the many new strictures of Standard No. 208). See 65 Fed. Reg. at 30,687, 30,700, 30,704 (J.A. 155, 168, 172). There is neither a cost advantage nor any other reason for manufacturers to design ineffective air bags in this process.

* * * * *

Air bags have saved many lives over the years, and will save many more in the future. NHTSA's task in revising Standard No. 208 was to ensure that next-generation, advanced air bags are even better than those that exist today. To do this, and to address the dichotomous concerns of TEA-21 – reducing the risk of air bag-related injuries and improving occupant safety – the agency issued a complex new rule imposing numerous new requirements on air bag systems. The final rule reflects a careful and sensible balancing of the objectives of the statute, does not violate the statute, and is neither arbitrary nor capricious.

CONCLUSION

For the foregoing reasons, the petition should be denied in its entirety.

Respectfully Submitted.

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January 27, 2004

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(A)(3)(B)(i)

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 8744 words, and thus complies with the limitations contained in Circuit Rule 32(a)(3)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2004, I served copies of the foregoing Brief for the Intervenors in Support of Respondents by e-mail and overnight delivery on Petitioners and Respondents herein, at the following addresses:

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