

[SCHEDULED FOR ORAL ARGUMENT FEBRUARY 16, 2007]

No. 05-1188 and consolidated cases

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

PUBLIC CITIZEN, INC., et al.,

Petitioners,

v.

MARY E. PETERS, SECRETARY OF TRANSPORTATION, et al.,

Respondents,

ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,

Intervenor.

On Petitions for Review of a Final Rule and of a Denial of
a Petition for Rulemaking
Issued by the Department of Transportation,
National Highway Traffic Safety Administration

**FINAL BRIEF FOR THE INTERVENOR
IN SUPPORT OF RESPONDENT**

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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 Brief for Petitioners, except that Mary E. Peters is Secretary of Transportation.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenor the Alliance of Automobile Manufacturers, Inc. (“the Alliance”) states that the Alliance is a nonprofit trade association incorporated under the laws of the State of Delaware. 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 Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc.

The Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Petitioners.

(C) Related Cases.

Intervenors are unaware of any related cases except for those listed in Respondents' brief.

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GLOSSARY

Alliance	Alliance of Automobile Manufacturers, Inc.
APA	Administrative Procedure Act, 5 U.S.C., ch. 5
Bridgestone/Firestone	Bridgestone/Firestone North American Tire, LLC
Cooper	Cooper Tire & Rubber Company
FMVSS	Federal Motor Vehicle Safety Standard
Goodyear	Goodyear Tire & Rubber Company
MAP	minimum activation pressure
MIL	malfunction indicator light
mph	miles per hour
NHTSA	National Highway Traffic Safety Administration
NPRM	Notice of Proposed Rulemaking
Pirelli	Pirelli Tire LLC
placard pressure	vehicle manufacturer's recommended cold tire inflation pressure
psi	pounds per square inch
Public Citizen	Public Citizen, Inc.
Safety Act	National Traffic and Motor Vehicle Safety Act of 1966, as amended, 49 U.S.C. ch. 301
Safety Standard	Federal Motor Vehicle Safety Standard
TIA	Tire Industry Association
TPMS	tire pressure monitoring system

TRA

Tire and Rim Association

TREAD Act

Transportation Recall Enhancement,
Accountability, and Documentation Act, Pub.
L. No. 106-414, 114 Stat. 1800 (2000)

STATUTES AND REGULATIONS

Except for the statutes and regulations in the Statutory and Regulatory Addendum attached to this brief, all applicable statutes and regulations are included in Petitioners' addendum.

STATEMENT OF THE ISSUES ADDRESSED IN THIS BRIEF

1. Whether Public Citizen, Inc. ("Public Citizen") and the Tire Industry Association ("TIA") should be dismissed from No. 05-1188 because their petitions for administrative reconsideration were pending when the case was filed.

2. Whether the consolidated cases should be dismissed for lack of standing.

3. Whether Petitioners' flawed failure-rate and fatality estimates and their related criticisms of NHTSA's Tire Reserve Study entitle them to the relief they seek.

4. Whether the agency reasonably decided not to require vehicle manufacturers to certify that their vehicles' tire pressure monitoring systems ("TPMSs") are compatible with all replacement tires.

5. Whether NHTSA's adoption of objective, repeatable TPMS test conditions, including a 20-minute detection period, was reasonable and consistent with law.

6. Whether Petitioners' glossary should be disregarded.

JURISDICTIONAL STATEMENT, STATEMENT OF THE CASE, STATEMENT OF FACTS, AND STANDARD OF REVIEW

The Alliance of Automobile Manufacturers, Inc. (“Alliance”) incorporates by reference Respondents’ Jurisdictional Statement, Statement of the Case, Statement of Facts, and argument concerning the Standard of Review.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases relate to three orders issued by the National Highway Traffic Safety Administration (“NHTSA”) in two separate and distinct administrative proceedings. In one of the proceedings, NHTSA promulgated and addressed petitions for administrative reconsideration relating to Federal Motor Vehicle Safety Standard (“FMVSS”) No. 138, which sets standards for tire pressure monitoring systems (“TPMSs”).

In the other proceeding, NHTSA denied a petition for rulemaking to amend FMVSS 110 (49 C.F.R. § 571.110) – an entirely different standard than the one at issue in the TPMS rulemaking – to require that vehicle manufacturers incorporate an additional “tire pressure reserve” into their recommended cold tire inflation pressure(s) (“placard pressure”). Public Citizen did not join the petition relating to the denial of the rulemaking petition.¹

¹ As described by Respondents (Resp. Br. 7), NHTSA recently amended FMVSS 110 to provide an additional tire pressure reserve, an inflation value higher than that specified for a particular load. 68 Fed. Reg. 38116 (June 26, 2003) (JA 903, *et seq.*). Petitioners did not challenge that decision. The petition for rulemaking at

Respondents have shown that Petitioners' challenge to NHTSA's denial of the tire reserve rulemaking petition may not be heard on direct review in this Court, and that even if the case were subject to direct review, venue here would be improper. In addition, Respondents have addressed Petitioners' substantive arguments concerning the TPMS rule and the denial of the rulemaking petition.

In this brief, we will focus on several issues that Respondents did not address, and will elaborate on three others. Specifically, we will show that Public Citizen's and TIA's then-pending petitions for administrative reconsideration of the TPMS rule require that they be dismissed from No. 05-1188, and Public Citizen's petition for review in No. 05-1294 should be dismissed as untimely. When a party withdraws a petition for administrative reconsideration – as did Public Citizen – in all but exceptional cases the time period for filing a petition for review should resume where it stopped, rather than restart all over again.

In addition, all of the petitions for review should be dismissed because the Petitioners lack Article III standing. In fact, Petitioners have failed to satisfy *any* of the elements of Article III standing. Prudential limits on standing also require the dismissal of the tire manufacturers and TIA.

issue here sought imposition of a greater tire pressure reserve than NHTSA chose to establish in 2003.

If the consolidated cases are not dismissed, and the Court considers Petitioners' arguments on the merits, the Court should deny the petitions. We will show that Petitioners' attacks on NHTSA's Tire Reserve Study are unavailing. Their attempt to reanalyze NHTSA's conclusions about the number of fatalities that would be avoided under their tire pressure reserve proposal fails for many reasons, one of which is that they ignore the key variable of time in service. In addition, NHTSA's decision to analyze only original equipment tires in its analysis did not affect the ultimate outcome of that analysis.

Equally meritless are Petitioners' criticisms of NHTSA for not requiring that vehicle manufacturers certify that their vehicles' TPMSs are compatible with every possible replacement tire. Petitioners vastly overstate the problem of incompatible replacement tires, and NHTSA's decision in this respect was the only practicable way to implement the requirements of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. 106-414, 114 Stat. 1800 (2000). Because the National Traffic and Motor Vehicle Safety Act of 1966, as amended (49 U.S.C. § 30101, *et seq.*) ("Safety Act"), forbids the sale of any new vehicle that does not comply with an applicable FMVSS (49 U.S.C. § 30112(a)), a requirement to certify compliance with *any* replacement tire would create a situation in which the existence of even one incompatible replacement tire

on the market would require manufacturers to stop selling new vehicles. NHTSA was fully justified in deciding not to choose this impracticable course.

Petitioners' other attacks on the replacement tire issue also are unavailing. Their claims that the malfunction indicator light ("MIL") provides insufficient warnings actually articulate concerns about drivers ignoring the MIL, not non-functioning TPMSs. And their claims concerning the availability of alternative technologies rest solely on the self-serving statements of a company that has not demonstrated any ability to produce the unproven technology that it trumpets.

Moreover, Petitioners' criticisms of the TPMS rule's 20-minute detection time provisions and the test conditions included in the final TPMS rule are misguided. The 20-minute detection time provision was a reasonable accommodation to technological realities and the laws of thermal dynamics. Petitioners' criticisms of the test conditions betray grave misunderstandings of the statutory requirement that FMVSS compliance tests be objective.

Finally, the Court should disregard Petitioners' argumentative and misleading glossary, which presents misrepresentations and arguments disguised as definitions, in clear violation of the Court's rules.

ARGUMENT

I. **PUBLIC CITIZEN AND TIA SHOULD BE DISMISSED FROM NO. 05-1188, AND NO. 05-1294 SHOULD BE DISMISSED**

The Alliance previously moved to dismiss Public Citizen and TIA from No. 05-1188 and to dismiss Public Citizen's petition for review of the TPMS final rule (No. 05-1294). The Alliance's motion was referred to the merits panel, and the parties were directed to address the issues in their briefs.

If the Alliance motion were to be granted, and if Public Citizen were otherwise deemed to have standing, Public Citizen would remain only in No. 05-1391, which challenges the September 7, 2005 TPMS reconsideration decision. Assuming that the tire manufacturers and TIA do not have standing, the issues in the case would be greatly narrowed. Because Public Citizen withdrew its petition for administrative reconsideration, it can seek review only of those parts of the reconsideration decision that *changed* the original final rule. *See Public Citizen v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003)

A. **Public Citizen and TIA Should Be Dismissed From No. 05-1188.**

Public Citizen and TIA both sought administrative reconsideration of the April 8, 2005 TPMS final rule, and their administrative reconsideration petitions were still pending when No. 05-1188 was filed. "A request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir.

2002) (citation omitted). The requirement of finality is jurisdictional and cannot be waived by a party or dispensed with by the court. *Id.* at 112.

Thus, with regard to Public Citizen and TIA, the petition for review in No. 05-1188 was “incurably premature” and a “nullity.” *Collins v. NTSB*, 351 F.3d 1246, 1250 (D.C. Cir. 2003) (internal quotation marks and citation omitted). Consequently, Public Citizen and TIA should be dismissed from No. 05-1188.

B. Public Citizen’s Petition For Review In No. 05-1294 Was Untimely.

Recognizing that it could not petition for review while it had a pending petition for administrative reconsideration, Public Citizen withdrew the petition for administrative reconsideration, but, unaccountably, waited forty-one days to file a new petition for review (No. 05-1294). The petition for review in No. 05-1294 therefore is untimely.

Despite the fact that 49 U.S.C. § 30161(a) provides that a petition for review must be filed no more than 59 days after the issuance of the rule under review, Public Citizen filed its second petition **87** days later (*not* including the time its petition for administrative reconsideration was pending).

The rule under review was made available for public inspection at the Federal Register on April 7, 2005, and published on April 8, 2005. *See* 70 Fed. Reg. 18136, 18191 (Apr. 8, 2005) (JA 1106, 1161). On May 23, 2005 – some 45 days after the rule’s publication and 46 days after its public inspection filing –

Public Citizen petitioned for administrative reconsideration of the new rule. *See* Ex. A to Public Citizen's Response to the Show Cause Order. On June 6, 2005, Public Citizen and five other Petitioners filed their petition for review in No. 05-1188, challenging the rule. Subsequently, on June 16, 2005, Public Citizen withdrew its petition for administrative reconsideration. *See* Ex. C to Public Citizen's Response to the Show Cause Order. Finally, on July 27, 2005 – 41 days after Public Citizen withdrew its petition for administrative reconsideration – Public Citizen filed its petition for review in No. 05-1294.

The petition in No. 05-1294 was untimely. The time period for filing a petition for review upon the withdrawal of a petition for administrative reconsideration should resume where it was stopped when the petition for administrative reconsideration was filed.

In their response to the Alliance's motion, Petitioners relied on several cases in which this Court appears to have held that, upon the withdrawal of a petition for administrative reconsideration, the period for filing a petition for review begins anew. Specifically, they cited *Columbia Falls Aluminum Company v. EPA*, 139 F.3d 914, 920 (D.C. Cir. 1998); *Southwestern Bell Telephone Company v. FCC*, 116 F.3d 593, 596-597 (D.C. Cir. 1997); and *Los Angeles SMSA Ltd. Partnership v. FCC*, 70 F.3d 1358, 1360 (D.C. Cir. 1995) (per curiam). *Columbia Falls*

Aluminum and *Southwestern Bell* rely on *Los Angeles SMSA Ltd. Partnership*, and do not add to its analysis or reasoning.²

In *Los Angeles SMSA*, this Court concluded that the “general tolling rule,” under which the period for filing an appeal starts over again upon the denial or grant of a petition for reconsideration, should be applied “when an optional administrative petition to reconsider is withdrawn rather than being acted upon by the agency.” 70 F.3d at 1359. The Court rejected the FCC’s proposed alternative, which would have precluded the petitioner from withdrawing its petition for reconsideration and filing a new petition for review because more than thirty days – the statutory period for filing a petition for review – had elapsed since the final rule had been issued. Faced with the choice of allowing the clock to continue running from the issuance of the final rule or allowing the statutory period to start over again when a request for administrative reconsideration is withdrawn, the Court understandably chose the latter option, even though it recognized the possibility that such a rule might be subject to “manipulation.” *Id.* at 1360.

² *Southwestern Bell* addresses whether a petition for reconsideration that is denied as “repetitious” may toll the period for seeking judicial review. *See Sw. Bell Tel. Co.*, 116 F.3d at 596-597. *Columbia Falls* merely applied the tolling principle set forth in *Los Angeles SMSA* without further analysis. Moreover, unlike Public Citizen here, the petitioner in *Columbia Falls* filed its petition for review “immediately” after withdrawing its petition for administrative reconsideration. *See Columbia Falls Aluminum Co.*, 139 F.3d at 919.

In *Los Angeles SMSA*, the peculiarities of the FCC’s statutory provisions governing the time periods for seeking administrative reconsideration and judicial review arguably left the Court with no other reasonable option than to start the statutory period over again upon the withdrawal of the petition for administrative reconsideration. Those unusual statutory provisions set the same time limit for requesting administrative reconsideration of FCC orders as for seeking judicial review. *Compare* 47 U.S.C. § 402(c) *with* 47 U.S.C. § 405(a). Consequently, a party that avails itself of the full period for seeking administrative reconsideration would have used up the entire period for seeking judicial review, and therefore, as a practical matter, merely restarting the clock at the point it stopped when the administration reconsideration petition was filed would foreclose a party that withdraws such a petition from seeking judicial review.³

Here, by contrast, restarting the clock where it stopped when the petition for administrative reconsideration was filed would not be burdensome for petitioners, and would comport better with Congressional intent to limit the period of time in which to seek judicial review of NHTSA orders. Petitioners wishing to challenge

³ In a reply in support of its motion to dismiss, the FCC “suggest[ed]” as a fallback position, that, upon the withdrawal of a petition for administrative review, the clock for filing a petition for review could be restarted at the point at which it stopped when the petitions for administrative review were filed. *See* Consolidated Reply to Oppositions to Motion to Dismiss and Joint Response to Motion to Dismiss (Case Nos. 95-1179, *et al.*) at 7. The Court did not address this suggestion.

the NHTSA regulation at issue here have forty-five days to file a petition for administrative reconsideration (49 C.F.R. § 553.35(a)), but they have *fifty-nine* days to file a petition for judicial review (49 U.S.C. 30161(a)). Thus, parties who withdraw petitions for reconsideration of NHTSA standards will have no fewer than thirteen of the fifty-nine days for filing a petition for review remaining after the withdrawal. This tolling principle, which is readily applicable to NHTSA and most other agencies of which we are aware, affords an ample opportunity for the timely filing of a petition for review after the withdrawal of a petition for administrative reconsideration.

In *not* providing a longer period for seeking judicial review than for petitioning for administrative reconsideration, the FCC's statutes appear to be exceptional. Like NHTSA, many of the agencies that appear frequently before this Court have statutory and regulatory frameworks that afford Petitioners longer periods for petitioning for judicial review than for administrative reconsideration. Thus, for instance, the Federal Motor Carrier Safety Administration provides a thirty-day period (*see* 49 C.F.R. § 389.35(a)) and the Nuclear Regulatory Commission provides a ten-day period (*see* 10 C.F.R. § 2.345(a)(1)) for seeking administrative reconsideration, while the Hobbs Act gives Petitioners sixty days to seek judicial review of those agency's orders (*see* 28 U.S.C. § 2344).

Consequently, there is no reason to import the special tolling rule applicable to the FCC to NHTSA and other agencies.

To our knowledge, no case has directly addressed the choice between restarting the clock at the beginning and restarting it where it stopped when a petition for administrative review is withdrawn. In the FCC context in which the cases cited above were decided, the starker choice – that is, between tolling and not tolling at all – was at issue. And we have not found any cases that have *held* that, upon the withdrawal of a petition for administrative reconsideration, the time period for seeking judicial review starts all over again, *even when* time would remain available to seek judicial review within the review period specified by Congress if the clock were restarted where it stopped when the administrative reconsideration petition was filed.

Accordingly, Public Citizen’s petition in No. 05-1294 should be deemed untimely, and the petition should be dismissed.

II. PETITIONERS LACK STANDING

A. Petitioners Have Failed To Establish That They Have Article III Standing.

As the Supreme Court has explained:

[T]he ‘irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury-in-fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not

conjectural or hypothetical. Second, there must be a causal connection between the injury and conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal citations, alterations, and quotation marks omitted). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Id.* at 561 (citation omitted). The issue before the Court is not whether the Petitioners *could* have demonstrated standing through competent evidence, but whether they in fact have done so. *Am. Chemistry Council v. Dep’t of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). “Broad and conclusory assertions” of generalized grievances are insufficient to establish standing. *See Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 544 (D.C. Cir. 2003).

An association, like Public Citizen, “has standing to sue under Article III of the Constitution of the United States only if (1) at least one of its members would have standing to sue in its own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit.” *Id.* at 542 (citations omitted). Associational petitioners “must support each element of [their] claim to standing by affidavit or other evidence, and their burden of proof is to show a substantial

probability that the Final Rule causes at least one of its members an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Am. Chemistry*, 468 F.3d at 818 (internal quotation marks and citations omitted; alteration in original)). Conclusory assertions are insufficient (*id.* at 15), and the Court will not supply “missing links” in the evidence submitted in support of standing (*id.* at 18).

In addition, “a plaintiff must demonstrate standing for each claim that he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. ___, 126 S. Ct. 1854, 1867 (2006) (citation omitted); *see also Am. Chemistry*, 468 F.3d at 816-817 (petitioners’ focus on unloading requirements did not provide a basis for challenging other aspects of regulation).

Petitioners have not established standing under these principles.

1. Public Citizen’s Declarations Are Insufficient To Establish Standing.

Public Citizen submitted two declarations on standing. The declaration of David Westerlund, a member of Public Citizen, states that he is “interested in making sure that my car’s tires are not under-inflated”; that he relies on “warning lights to tell me when my car is not operating properly or safely”; and that he expects to continue that practice. Westerlund Decl. ¶¶ 3, 4. He does not say, however, whether he regularly checks his tires to determine if they are properly inflated. Moreover, he does not state that he relies *exclusively* on warning lights,

and he even affirms that he “expect[s] to rely on all the warning mechanisms in my car.” *Id.* at ¶ 5. If this is so, then Mr. Westerlund will not suffer any injury as a result of the TPMS rule. Under that rule, the primary method for discovering under-inflated tires is regular routine maintenance by the driver, and a notice (or warning) to this effect is mandated for his owner’s manual. *See* 70 Fed. Reg. at 18187-18188 (JA 1157-1158) (setting forth owner’s manual instruction that “the TPMS is not a substitute for proper tire maintenance, and it is the driver’s responsibility to maintain correct tire pressure”).⁴ Simply put, Mr. Westerlund has not articulated a concrete, non-hypothetical injury at all.

Moreover, Mr. Westerlund’s claims defy common sense: he implies that he believes that the TPMS is not safe enough for his purposes, but nonetheless predicts that he will rely on it. Thus, the “injury” that he has asserted appears to be entirely self-inflicted. This Court has “consistently held that self-inflicted harm doesn’t satisfy the basic requirements for standing. Such harm does not amount to an ‘injury’ cognizable under Article III. Furthermore, even if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant’s challenged conduct.” *Nat’l Family Planning & Repro Health Ass’n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (citations omitted); *see also Bhd. of Locomotive Eng’rs*

⁴ Although, the tire manufacturers’ standing declarations allege inadequacies in the TPMS rule’s owner’s manual requirements, Petitioners’ brief does not discuss these issues, and, therefore, they cannot support Petitioners’ standing.

& Trainmen v. Surface Transp. Bd., 457 F.3d 24, 28 (D.C. Cir. 2006) (self-inflicted injury “was not in any meaningful way ‘caused’ by the Board” and, therefore was “insufficient to confer standing upon the union).⁵

The declaration of Public Citizen’s President, Joan Claybrook, does not salvage Public Citizen’s standing. Ms. Claybrook’s declaration includes a rendition of Public Citizen’s long interest and active involvement in TPMS and vehicle safety issues. *See* Claybrook Decl. ¶¶ 3-5. Although this information is relevant to whether “the interest [that the association] seeks to protect is germane to its purpose” (*Rainbow/PUSH*, 330 F.3d at 542), neither Ms. Claybrook nor Mr. Westerlund proffers sufficient evidence to show that “at least one of its members would have standing to sue in its own right” (*id.*).

With regard to that essential issue, Public Citizen provides only broad brush statements about the general effects of the TPMS regulation, and expressions of

⁵ No party of which we are aware has disputed NHTSA’s conclusion that TPMSs are designed to address gradual tire pressure losses resulting from slow leaks, defective valves, or diffusion, rather than sudden and extreme rapid pressure losses. 70 Fed. Reg. at 18148 (JA 1118). These slow losses of pressure “produced over weeks or months” (*id.*) are easily monitored and remedied through routine maintenance. This not only underscores the self-inflicted nature of the injuries that the declarants focus upon, but also raises serious doubts about whether any of these injuries could possibly be regarded as imminent. *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (“[P]laintiff must show that he has sustained or is *immediately in danger of sustaining* some direct injury as the result of the challenged official conduct”) (emphasis added: internal quotation marks and citations omitted).

“concern” that amount to little more than generalized political grievances and interests. Thus, Ms. Claybrook states:

Many of our members drive and, given the number of our members, it is inevitable that some will buy or lease light vehicles on or after October 5, 2005. NHTSA’s final rule regarding tire pressure monitoring systems (“TPMS”) will adversely affect these members by impeding their ability to buy or lease a new vehicle with a TPMS that can notify them when one or more of their tires are significantly under-inflated. Moreover, because under-inflated tires contribute to automobile crashes, Public Citizen’s members will be subjected to a higher risk of injury than they would be if NHTSA required effective TPMSs.

Claybrook Decl ¶ 2.

This averment is insufficient. For one thing, neither Ms. Claybrook nor Mr. Westerlund says that any of Public Citizen’s members actually desire a vehicle equipped with a TPMS that differs from the ones required by the TPMS rule. In addition, Ms. Claybrook neither defines what she means by “significantly-under-inflated” nor explains how her definition would differ from NHTSA’s. Thus, she has not established that the rule at issue will deprive any of her members of a product that they actually want.

With regard to Ms. Claybrook’s claim of increased risk of injury, her argument is inadequate in numerous respects. Her predictions about increased injury rest on “multi-tiered speculation” about hypothetical injury scenarios, and, therefore, the injuries that she discusses are “neither actual nor imminent but

wholly conjectural.” *Grassroots Recycling Network, Inc. v. U.S. EPA*, 429 F.3d 1109, 1112 (D.C. Cir. 2005) (internal quotation marks and citation omitted).

In addition, she has ignored the ability of Public Citizen’s members to address the alleged dangers of TPMSs in their own vehicles simply by following the owner’s manual instructions mandated by the TPMS rule. *See* 70 Fed. Reg. at 18187-18188 (JA 1157-1158) (owner’s manual instruction). Thus, like Mr. Westerlund, Ms. Claybrook improperly relies on self-inflicted injuries, which are neither “cognizable under Article III” nor “fairly traceable to the defendant’s challenged conduct.” *Nat’l Family Planning & Reproductive Health Ass’n.*, 468 F.3d at 831.

For similar reasons, Ms. Claybrook’s declaration fails to show that the relief that she requests is likely to redress the injuries she claims. A TPMS does not *prevent* a driver from operating a vehicle with severely under-inflated tires. Thus, even if vehicles were equipped with a TPMS more to Public Citizen’s liking, nothing would prevent the owners from ignoring the TPMS notification, just as they may ignore the required warning in the owner’s manual to check their tires’ inflation monthly (*see* 70 Fed. Reg. at 18187 (JA 1157)). Accordingly, this aspect of Public Citizen’s claim founders on the issue of redressability, and, to the extent that Public Citizen’s standing argument rests on third-party negligence, it also fails to meet the requirement that an injury “be fairly traceable to the challenged action

of the defendant, and not the result of the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).⁶

Finally, Ms. Claybrook’s other assertions do not support standing. Her declaration includes statements about her organization’s involvement in the TPMS issue, her desire for Congress’s alleged intent to be reflected in the final rule, and her “concern[s]” about various aspects of the TPMS rule, including the test conditions and whether TPMSs function with replacement tires or full-sized spares. Claybrook Decl. ¶¶ 3-7, 10, 11. Generalized concerns and interests, however, are insufficient to support standing. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (“But a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or

⁶ In addition, Ms. Claybrook’s claim that Public Citizen’s members will be subjected to a higher risk of injury than they would otherwise be ignores the fact that, under FMVSS 139, which becomes effective on June 1, 2007, even severely under-inflated tires will be required to operate safely for prolonged periods at high speeds. Under FMVSS 139, tires will be tested at low inflation, at 75 mph, under maximum load, for 90 minutes. Moreover, effective June 1, 2007, FMVSS 110 will mandate an additional tire pressure reserve. Under the new rule, the normal load for the vehicle should be no more than 94% of the tire’s load rating at the placard pressure. 68 Fed. Reg. 38116, 38132 (June 6, 2003) (JA 903, 919).

‘aggrieved’ within the meaning of the APA.”); *Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002) (“Mere interest as an advocacy group is not enough.”).⁷

2. The Tire Manufacturers’ Declarations Are Insufficient To Establish Their Standing.

The tire manufacturers – Goodyear, Bridgestone/Firestone, Cooper, and Pirelli – are petitioners in Case Nos. 05-1188, 05-1265, and 05-1391. According to Bridgestone/Firestone’s Brian J. Queiser, “NHTSA’s final TPMS rule does not

⁷ Ms. Claybrook also states that “NHTSA’s TPMS rule allows for an additional reduction in tire air pressure of 2 psi below the 25 percent under inflation that is allowed under the rule” (¶ 9). Because this feature of the TPMS rule was modified on reconsideration (*see* 70 Fed. Reg. 53079, 53080 (Sept. 7, 2005) (JA 1535, 1536)), it is irrelevant to Public Citizen’s standing.

Ms. Claybrook also expresses dissatisfaction about the alleged lack of a tire pressure reserve (¶ 8). Public Citizen, however, did not join the petition for review of NHTSA’s denial of the tire pressure reserve rulemaking petition. Thus, she cannot ground Public Citizen’s standing on this issue, even though the Court has consolidated the TPMS challenges with the challenge to the agency’s denial of the tire pressure reserve petition. *Cf. Cuno*, 126 S. Ct. at 1866 (rejecting “proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the nature of the deficiency that would keep the former claims out of federal court if presented on their own”); *U.S. v. Tippet*, 975 F.2d 713, 717 (10th Cir. 1992) (“We assume all circuits would hold similarly that no suit filed independently could escape the jurisdiction requirements of federal question or diversity because it was consolidated with another after filing.”); *Kuehne & Nagel (AG & CO) v. Geosource, Inc.*, 874 F.2d 283, 287 (5th Cir. 1989) (“[W]e must view each consolidated case separately to determine the jurisdictional premise upon which it stands.”).

Moreover, her assertion (Claybrook Decl. ¶ 8) that “[c]urrently, because NHTSA does not require a tire pressure reserve, automakers may set the recommended tire pressure at the bare minimum pressure necessary” is misleading. As noted above (note 1, *supra*), although a tire pressure reserve requirement is not in effect now for passenger cars, NHTSA already has promulgated such a requirement, which will go into effect on June 1, 2007.

adequately prevent tire overdeflection and permits cumulative tire damage to occur” (Declaration of Brian J. Queiser ¶ 23), and this will lead to warranty claims, lawsuits and other claims for personal injury, death, or property damage, and loss of good will (*id.* at 24-27).⁸

Mr. Queiser also asserts that a “more stringent inflation standard for the TPMS” “would generate more goodwill from their end-users and lead to repeat purchases and reduced disputes. This results in a direct economic benefit to the tire companies, including [Bridgestone/Firestone].” *Id.* at ¶ 28.⁹

In addition, other tire manufacturer declarants assert that their companies will face warranty claims, litigation, and loss of good will as a result of allegedly inadequate testing procedures and mandated owner’s manual language in the TPMS rule. *See* Rump Decl. ¶¶ 36-43; Stroble Decl. ¶¶ 41-44, 46-49; Daniels Decl. ¶¶ 41-44, 46-49.¹⁰ Moreover, some of the manufacturers claim that the same

⁸ Essentially the same alleged injuries are asserted by all of the tire manufacturers. *See* Declaration of Bradley J. Rump (Cooper) ¶ 29, 31, 32, 35, 39, 43, 44; Declaration of James C. Stroble (Goodyear) ¶ 34, 36, 37, 39, 40, 44, 49, 50-52; Declaration of E. Paul Daniels (Pirelli) ¶¶ 34, 36, 37, 39, 40, 44, 49, 50-52. Messrs. Stroble and Daniels also refer to the minimum activation pressure (“MAP”) for load range D and E tires. Stroble Decl. ¶ 45; Daniels Decl. ¶ 45. ¶

⁹ Similar assertions appear in Mr. Rump’s declaration (¶ 46)

¹⁰ As discussed above (note 4, *supra*), Petitioners’ brief does not discuss the owner’s manual language. Accordingly, contentions about alleged inadequacies in the mandated owner’s manual language cannot support the tire manufacturers’ standing.

injuries also will result from the fact that replacement tires are not covered by the TPMS rule. *See* Rump Decl. ¶¶ 33-35; Stroble Decl. ¶¶ 38-40; Daniels Decl. ¶¶ 38-40.

The tire manufacturers' declarations are insufficient to establish standing. Like the Petitioners in *Crete Corp. v. EPA*, 363 F.3d 490 (D.C. Cir. 2004), they “offer only assertions, not facts, to support their claims about the likely response of [third parties]” to the regulation. *Id.* at 494. This is not enough for standing purposes.

In addition, the injuries described by the tire manufacturers' declarants are entirely conjectural and hypothetical. For instance, as the warranties attached to the tire manufacturers' declarations make clear, the tire manufacturers' warranties ***do not even cover*** damage to tires resulting from under-inflation. *See, e.g.*, Rump Decl., Ex. H, at 3 (Cooper limited warranty, stating, “Adjustments will not be made for: . . . (3) Conditions resulting from consumer damages, such as . . . (E) underinflation”); Stroble Decl., Ex. T, at 2 (Goodyear limited warranty, stating, “This limited warranty does not cover the following: . . . Irregular wear or damage due to . . . improper inflation”); Daniels Decl., Ex. S. at 1 (Pirelli

Messrs. Rump, Stroble, and Daniels also refer to the 2 psi issue that Ms. Claybrook also discussed. *See* Rump Decl. ¶¶ 36-37; Stroble Decl. ¶¶ 41-42; Daniels ¶¶ 41-42. As noted above (*see* note 7, *supra*), this provision was modified on administrative reconsideration and is irrelevant to Petitioners' standing.

limited warranty, stating “What Is Not Covered By The Warranty? . . . Tires . . . under inflated . . .”). The notion that customers would nevertheless submit meritless warranty claims, which in turn would cause injury to the companies, is utterly speculative. So too is the injury scenario spun out by the tire manufacturers in which customers negligently fail to maintain their tires, suffer damage as a result of under-inflation, and then post negative statements on the internet that cause the tire manufacturers’ reputational harm and loss of good will. These hypothetical claims cannot support standing. Where the specified injuries are the result of “multi-tiered speculation” about hypothetical injury scenarios, claims of injury will be regarded as “neither actual nor imminent but wholly conjectural.” *Grassroots Recycling*, 429 F.3d at 1112 (quoting *La. Env’tl. Action Network v. Browner*, 87 F.3d 1379, 1383 (D.C. Cir. 1996)).

In short, the tire manufacturers have not shown that they face any imminent or immediate (much less actual) harm. *See Lujan*, 504 U.S. at 560-561; *Lyons*, 461 at 101-102.

The tire manufacturers also fail to demonstrate injury-in-fact because they do not show that “the challenged conduct has created a ‘*demonstrably* increased risk’ that ‘actually threatens the [petitioner’s] particular interests.’” *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) (citations omitted). Indeed, the record created by Petitioners is devoid of any evidence comparing the

harms they claim they will experience under NHTSA's TPMS rule to their current experience, or comparing either their predictions about NHTSA's TPMS rule or their current experience to projections of the harms they would face under a rule more to their liking. As this Court has held, "[a]bstract injury is not sufficient. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *Lyons*, 461 U.S. at 101-102 (internal quotation marks and citations omitted). The tire manufacturers' injury claims are plainly inadequate under this standard.

The tire manufacturers also fail to satisfy the causation requirement. They posit a lengthy causal chain connecting their alleged injuries and the TPMS rule – which, as noted above (*see* note 5, *supra*), concerns a device for notifying drivers that over time one or more of their tires has become significantly under-inflated. In the tire manufacturers' account, in order for their alleged injuries to occur, the alleged inadequacies in the TPMS rule must combine with drivers' persistent and protracted failures to perform the routine maintenance advised in their owner's manual (under the rule); these failures must result in vehicles being driven with severely under-inflated tires; this under-inflation must be ignored; this neglect must result in tire failures; *and then* the drivers experiencing such tire failures

must press claims against the tire manufacturers or make derogatory statements about them (that are widely believed by those who read or hear them), notwithstanding the drivers' own neglect of basic maintenance procedures. Such a chain of causation is far too attenuated to support standing. *See Allen v. Wright*, 468 U.S. 737, 757 (1984) (“attenuated” chain of causation between injury and official conduct complained of cannot support standing).¹¹

In addition, the tire manufacturers' claims hinge on predictions about the actions of third parties not before the Court. “[T]he courts have reiterated that . . . speculative claims dependent upon the actions of third parties do not create standing for the purposes of establishing a case of controversy under Article III.” *Gettman*, 290 F.3d at 435; *see also Lujan*, 504 U.S. at 560 (“Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, *and not* . . . *th[e] result [of] the independent action of some third party not before the court.*”) (alterations in original; internal quotation marks and citations omitted).

¹¹ Even Mr. Westerlund, who avers that he tends to rely on the warning lights in his vehicle, does not buttress all of the links in the causal chain. Thus, he does not say the he relies *exclusively* on warning lights, and he even affirms that he “expect[s] to rely on all the warning mechanisms in my car” (¶ 5). Thus, presumably, he would rely on the instructions and admonitions in his owner’s manual. Moreover, Mr. Westerlund says neither that he would ignore a significantly under-inflated tire nor that, if he did ignore such a tire, and it failed, he would bring a warranty or legal claim, post criticisms on the internet, or otherwise hold the tire manufacturer responsible for the loss.

Moreover, the tire manufacturers' injury claims are largely, if not entirely, preventable by their own actions. The tire manufacturers seek to predicate standing on allegations that *their own products will fail* if more stringent regulations are not imposed on someone else – in this case, the vehicle manufacturers. But the product failure that the tire manufacturers cite – failure due to severe under-inflation – is preventable *by the tire manufacturers themselves*. It is widely recognized that the permeation characteristics of tires (the means by which slow air leaks take place) are affected by the chemistry of the tire, which in turn affects the rate at which a tire loses air to the atmosphere. The tire manufacturers can market tires with different chemistry characteristics that lose air less rapidly, thereby delaying the points at which the tires become severely under-inflated and, presumably, eliminating the incremental harm they allege. As noted above with regard to Public Citizen's declarations, injuries that are within the power of the petitioner to prevent do not give rise to standing. *See Nat'l Family Planning & Reproductive Health Ass'n*, 468 F.3d at 831.

With respect to the tire manufacturers' and TIA's challenge regarding the denial of the tire pressure reserve rulemaking petition, their alleged harms are *clearly* self-inflicted. Petitioners state that "all of these tire companies and TIA recommend that drivers . . . maintain the pressure at the recommended (placard) level." Pet. Br. 40 (footnote omitted). If, without the inclusion of a tire pressure

reserve, placard pressure is insufficient, then the harm that the tire manufacturers and TIA specify is self-inflicted, because the tire manufacturers and TIA could recommend that drivers maintain the pressure at a higher level.

Finally, the tire manufacturers' standing claims suffer from the same defects that prevented Public Citizen from establishing redressability. Because the TPMS does not prevent a driver from continuing to drive on significantly under-inflated tires, there is no basis for concluding that, under a different rule than the one NHTSA adopted, negligent drivers will necessarily heed a TPMS notification instead of continuing to drive on under-inflated tires. And there is no basis for concluding that drivers who ignore a low tire pressure notification governed by a different TPMS rule will *not* make warranty and legal claims or publish derogatory statements about the tire manufacturers when their tires fail, notwithstanding their blatant failures to follow routine maintenance procedures or pay heed to TPMS notifications. Thus, the tire manufacturers have failed to satisfactorily establish that the relief they seek would be likely to redress the injuries they claim.¹²

3. TIA's Declarations Are Insufficient To Establish Standing.

The Tire Dealers' declarations also are insufficient to establish standing. The declaration of Roy E. Littlefield, Executive Vice President of TIA, describes

¹² Mr. Westerlund's assertion that he would heed a TPMS warning light does not mean that the drivers hypothesized by the tire manufacturers' declarations would do likewise, and the tire manufacturers offer no evidence about the relative numbers of claims they would encounter under any particular regulatory regime.

TIA, its safety-related activities, its participation in the TPMS rulemaking, and its support of the tire pressure reserve petition. Littlefield Decl. ¶¶ 1-3. Mr. Littlefield then describes TIA’s “concerns” about the TPMS rule. *Id.* at ¶¶ 2-4.¹³ As we noted above (*supra* at 19-20), however, general expressions of concern – especially those that relate to the achievement of putative legislative intent and other generalized political goals (*see* Littlefield Decl. 2, ¶ 4.A) – do not suffice to establish standing.

It is only on page 4 of his declaration that Mr. Littlefield reaches issues related to the elements of standing, and his showing there is far from sufficient. He asserts that “[h]igher rates of disablement and destruction of the tire increases the likelihood of warranty claims, higher dispute resolution costs and loss of goodwill. Thus, TIA remains convinced that the Final Rule will not prevent significant under-inflation as required by the TREAD Act.” *Id.* at 4, ¶ B. This assertion is conclusory and purely speculative. *See Am. Chemistry*, 468 F.3d at 818 (conclusory one-sentence assertion was insufficient).

The next paragraph and remaining lettered paragraphs of his declaration are equally conclusory and abstract. Mr. Littlefield states that the “increased tire failures” that the final rule would allegedly cause “will result in an increase in

¹³ Because the numbering of the paragraphs of Mr. Littlefield’s declaration is confusing, we cite the portions of his declaration subsequent to paragraph 3 by reference to both page numbers and paragraph numbers and letters.

warranty claims and lawsuits directed both against resellers and tire manufacturers” (Littlefield Decl. 4, ¶ D), but, like the similar assertions made by the tire manufacturers, this claim is devoid of any supporting evidence comparing existing claims and lawsuits to projections of claims and lawsuits under NHTSA’s TPMS rule, or comparing either of these to projections of claims or lawsuits under a desired alternative. His claim about the loss of goodwill (*id.* at 5, ¶ F) is equally conclusory, speculative, and devoid of evidentiary support. None of these claims amount to anything more than “hypothesized ‘increased risk[s].’” *Ctr. for Law & Educ.*, 396 F.2d at 1161. Thus, these injury claims are merely conjectural and hypothetical, and certainly do not set forth injuries that are actual or imminent or immediate. *See Lujan*, 504 U.S. at 560; *Lyons*, 461 U.S. at 101-102.

Mr. Littlefield also engages in outright speculation in discussing a number of the injuries that he describes. He says that “[t]here *could* be more lawsuits against members of TIA alleging a failure to warn” (Littlefield. Decl. 4, ¶ D) (emphasis added), that a “further result of the Final Rule *may be* to undermine and diminish the effectiveness of the safety and education programs (*id.* at 5, ¶ G) (emphasis added), and that the Final Rule “*may well* result in a substantial increase in the amount of tires returned to retail outlets as a result of customer dissatisfaction” (*id.* (emphasis added)). Such assertions are inconsistent with the requirement that a party show “a substantial probability that the Final Rule causes at least one of its

members an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Am. Chemistry*, 468 F.3d at 818 (internal quotation marks and citations omitted; alteration in original).

Tire dealer Anthony Vizyak’s declaration does not remedy Mr. Littlefield’s failure to establish injury-in-fact. Aside from repeating virtually verbatim one of Mr. Littlefield’s confusing claims (*compare* Littlefield Decl. 5, ¶ E) *with* Vizyak Decl. ¶ 4), Mr. Vizyak expresses a series of “concerns” with the TPMS rule (Vizyak Decl. ¶¶ 2-3), speculates about the same possible outcomes as does Mr. Littlefield (increases in warranty claims, the possibilities of lawsuits, and loss of goodwill) (*id.* at ¶¶ 6-7), and asserts that customers will complain and his employees will have to address those complaints (*id.* at ¶ 3). These injuries are utterly hypothetical and speculative, and unsupported by any evidence. In addition, Mr. Vizyak’s assertions about time spent dealing with customer complaints are highly abstract.

Thus, TIA has failed to establish that its members face an actual or imminent injury. Moreover, like the other Petitioners, TIA also fails to satisfy the causation and redressability elements of standing.

Specifically, TIA fails to establish a clear and direct causal chain linking NHTSA’s final rule to alleged exposure to legal and warranty claims and loss of goodwill. Rather, TIA’s declarants rely principally on speculation about the

independent actions of third parties. With regard to TIA's claims about the need to train employees and the time and costs incurred in determining whether a particular vehicle has a functioning TPMS, TIA has utterly failed to establish causation. TIA does not show that the TPMS rule as promulgated by NHTSA causes these costs. Indeed, because there were millions of TPMS-equipped vehicles on the road before the TPMS rule was first adopted, TIA's members have been bearing these costs for some time. *See* 67 Fed. Reg. 38704, 38716 (June 5, 2002) (JA 420, 432) (final rule promulgating first TPMS regulation) (discussing vehicles already equipped with TPMSs).

With regard to redressability, TIA's assertions about lawsuits, warranty claims, and loss of goodwill suffer the same infirmities as the similar claims by the tire manufacturers. With regard to its claims about training costs and installation costs, TIA members would incur comparable costs under a different TPMS rule.

This is so, because the TPMS rule, like most other NHTSA standards, prescribes a performance standard, not a design standard. *See* 49 U.S.C. § 30102(9) (defining a "motor vehicle safety standard" as a "minimum standard for motor vehicle or motor vehicle equipment performance"). Even if NHTSA promulgated a regulation consistent with TIA's desires, vehicle manufacturers would not employ identical TPMS designs. Consequently, even under a different TPMS rule, the tire dealers would have to incur the costs of training their personnel

about TPMS systems, and they would have to examine vehicles to ascertain the specifics about the TPMSs with which the vehicles were equipped. Thus, TIA has failed to establish that the remedy it seeks would redress the injuries it posits. Accordingly, TIA has not established that it has standing.

B. The Tire Manufacturers And TIA Lack Prudential Standing.

As Respondents have explained (Resp. Br. 24-27), although the challenge to the TPMS final rule is subject to judicial review under 49 U.S.C. § 30161, the challenge to the *denial* of the petition for rulemaking is reviewable – if at all – solely under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 702.

Petitioners have argued that 49 U.S.C. § 30161(a)'s authorization of suits by “any person adversely affected” by the promulgation of a safety standard reflects the intent of Congress to extend standing to the limits of Article III. Pet. Br. 45-46. This argument ignores *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697 (D.C. Cir. 1994), in which this Court held that prudential limitations on standing apply to the Federal Power Act’s judicial review provision, 16 U.S.C. § 825l, which “authorizes judicial review for ‘[a]ny party . . . aggrieved by an order issued by the Commission.’” *Id.* at 702 (quoting 16 U.S.C. § 825l(b)); *see also id.* at 704 (Federal Power Act imposes prudential standing barrier). The Safety Act similarly grants standing to a “person adversely affected by an order prescribing a motor

vehicle safety standard.” 49 U.S.C. § 30161(a). Thus, under *Liquid Carbonic Industries* and contrary to Petitioners’ assertion, Petitioners’ challenge to the TPMS final rule and reconsideration decision is subject to prudential limitations on standing. *Cf. FEC v. Akins*, 524 U.S. 11, 19-20 (1998) (applying zone-of-interests test where statute provided judicial review to any “party aggrieved by an order of the Commission”).

Moreover, it is indisputable that prudential standing requirements apply to claims brought under the APA’s judicial review provision. *See, e.g. Liquid Carbonic Indus.*, 29 F.3d at 702. Thus, the tire manufacturers’ and TIA’s challenge in No. 05-1265 to the denial of the rulemaking petition clearly is subject to prudential limitations on standing.

This Circuit’s prudential standing inquiry “uses a zone of interests test. That test requires that we ask whether a would-be challenger to an agency action is pursuing an interest arguably within the zone of interests Congress intended either to regulate or protect. There must be some indicia – however slight – that the litigant before the court was intended to be protected, benefited or regulated by the statute under which suit is brought.” *Liquid Carbonic Indus.*, 29 F.3d at 704 (internal quotation marks and citations omitted).

The tire manufacturers and TIA cannot satisfy this modest requirement. They are not the entities regulated by the TPMS rule, and they would not be

regulated under the tire pressure reserve rule that they seek. The petitioners have offered no evidence to suggest that the Safety Act or Section 13 of the TREAD Act were enacted to protect tire manufacturers and dealers from product liability litigation, warranty claims, training costs, or disgruntled consumers. Thus, the tire manufacturers and TIA have not established that they have prudential standing.

* * * *

For the foregoing reasons, none of the Petitioners have demonstrated that they have Article III standing. In addition, the tire manufacturers and TIA also lack prudential standing. Accordingly, the consolidated cases should be dismissed.¹⁴

III. PETITIONERS' CRITICISMS OF NHTSA'S STUDY ARE ERRONEOUS AND MISLEADING

Petitioners (Pet. Br. 58-74) attack a NHTSA study that showed that the additional regulation sought by the tire industry would produce negligible safety benefits. Petitioners claim that their own estimates – which are not part of the

¹⁴ Unlike Petitioners, the Alliance's members are regulated by the TPMS rule and would be regulated by a tire pressure reserve rule, and therefore would bear the compliance costs imposed by Petitioners' proposed rules. When an entity is “an object of the action (or forgone action) at issue” . . . there should be “little question” that the entity has standing. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 561-562). For these reasons, the Alliance's standing is “self-evident; no evidence outside the administrative record is necessary for the court to be sure of it.” *Id.*

rulemaking record – show that their tire pressure reserve proposal would produce far more benefits than are shown in NHTSA’s study.

Respondents (Resp. Br. 39-43, 62-63) rebutted Petitioners’ criticisms of the study and showed that Petitioners’ tables, charts, and other, new, extra-record evidence must be excluded because they were never presented to the agency in the first instance, and because they misrepresent the information actually in the record. Respondents have amply demonstrated that the Petitioners’ criticisms are unfounded and erroneous. We agree with NHTSA’s arguments and will supplement them with only a few additional points.

First, Petitioners’ statistical arguments should be rejected because Petitioners have failed to state the assumptions underlying their statistical analysis and have ignored the potentially confounding variables that NHTSA identified as pertinent to an assessment of the causes of tire failures.

In addition, Petitioners assert (Pet. Br. 60, Table 1) that up to 412 fatalities would be avoided by the adoption of their proposals, rather than the four avoided fatalities estimated by NHTSA (70 Fed. Reg. 28888, 28895 (May 19, 2005) (JA 1510, 1517) (denial of petition for rulemaking). NHTSA based its conclusion on a study prepared by its Office of Vehicle Safety in response to the petition for rulemaking. *See* Docket No. NHTSA-2005-20967-2 (“Tire Reserve Study”) (JA 1411, *et seq.*); *see also* 70 Fed. Reg. at 28894 (describing study) (JA 1516); Docket

No. NHTSA-2005-20967-3 (“*An Analysis of Tire Reserve Load, FMVSS 110*”) (hereinafter “*Analysis of Tire Reserve*”) (JA 1465, *et seq.*).

The Tire Reserve Study “was designed to examine tire failure rates as a function of tire pressure reserve for the entire population of light vehicles sold in the United States from model years 1996 through 2002.” 70 Fed. Reg. at 28894 (JA 1516). In deriving failure rates (and fatalities avoided) from the underlying data, NHTSA properly adjusted the failure rate estimates for exposure (time in service). *See* Tire Reserve Study at 28 (JA 1444); *Analysis of Tire Reserve* at 4 (JA 1470). This was appropriate because an analysis that focuses only on the vehicle population, without factoring in exposure, could give a completely distorted view of the relative performance of the tires. Thus, a failure rate is properly measured as a function of failures over the time in service of the vehicles, rather than failures per vehicle.¹⁵

Unaccountably, however, Petitioners failed to adjust for exposure in their estimates of failure rates and fatalities avoided. Thus, in Table 1 of their brief (Pet.

¹⁵ To appreciate the necessity of taking product time in service into account, consider two products, one which has been in service for three years, and another in service for ten years. Assume further that the population of each product is ten, and that failures involving them caused two injuries each. It would be absurd to conclude that the two products present identical hazards. Rather, the product with a ten-year exposure has a failure rate of 2 per 100 years of usage (ten years times a population of ten), whereas the other has a failure rate of 2 per 30 years of usage (three years times a population of ten).

Br. 60), Petitioners present a “Revised Estimate of Fatalities Avoided Using All Data,” purporting to show “the percentage reduction in tire failure rate as the reserve pressure at [gross axle weight rating] increases from 2 psi to 8 psi (Pet. Br. 58). Petitioners claim that at 2 PSI, the tire failure rate is 6.5 per 100,000 vehicles produced, while the tire failure rate at 8 PSI is 2.9 per 100,000 vehicles. Pet. Br. 60 (Table 1).¹⁶ It appears that Petitioners based their estimates on tables 4 and 6 in the Tire Reserve Study (JA 1426, 1428), which set forth failure rates not adjusted for time in service. As noted above, NHTSA, by contrast, correctly relied on the age-adjusted failure rate data. *See* Tire Reserve Study at 28 (JA 1444); Analysis of Tire Reserve at 4 (JA 1470). Because Petitioners’ estimate of fatalities avoided is derived from erroneous estimates of failure rates, their analysis is misleading and skews their estimates of the number of fatalities that would be avoided if their tire pressure reserve proposal were adopted. Thus, Petitioners vastly overstate the expected impact of the tire pressure reserve rule that they advocate.

Petitioners also contend (Pet. Br. 71-73) that NHTSA’s analysis improperly failed to account for the fact that vehicles would have replacement tires during their lives (beginning in year three and increasingly thereafter (*id.* at 72)). The effect of such an omission on the overall analysis, however, was insubstantial. As

¹⁶ The values in Table 1, also are drawn from Figures 5 and 6 in Petitioners’ brief. Pet Br. 68, 70.

shown in Table 8 of the Tire Reserve Study (JA 1431), failures and claims involving vehicles after the third year account for a small percentage of the total failures and claims. Thus, even if it is assumed that all vehicles will have their original tires replaced at the end of the third year – a dubious assumption at best – a revision of NHTSA’s estimates to account for that fact would result in an increase in the estimate of fatalities avoided from four to about five, which is nowhere near the 412 fatalities avoided claimed by Petitioners.

For all the reasons cited in Respondents’ brief, and for the additional reasons discussed above, Petitioners’ estimates and their criticisms of NHTSA’s fatality and failure rate analyses are meritless.¹⁷

IV. NHTSA’S DECISION NOT TO REQUIRE VEHICLE MANUFACTURERS TO CERTIFY THAT TPMSs WILL WORK WITH ALL REPLACEMENT TIRES WAS REASONABLE

The TPMS final rule does not require a vehicle manufacturer to certify that its vehicles’ TPMSs will be compatible with any replacement tire that could be used with the vehicle. Rather, an incompatible replacement tire will activate the MIL. 70 Fed. Reg. at 18159-60 (JA 1129-1130). Petitioners attack this aspect of the rule. Pet. Br. 78-83.

¹⁷ With regard to Petitioners’ criticisms concerning NHTSA’s exclusion of fatalities avoided from skidding accidents and decreased stopping distances, NHTSA’s omission of recalled tires from its analysis, and NHTSA’s use of subcategories of vehicle-tire combinations, Respondents have shown that these criticisms are profoundly misguided. Resp. Br. 40-43, 62-63.

As noted above, Petitioners (other than Public Citizen) manufacture or sell tires, or represent tire dealers. Tire manufacturers have it entirely within their power to manufacture replacement tires that are compatible with TPMSs, and, indeed, the vast majority of replacement tires are compatible with TPMSs.

This is not enough for Petitioners. Instead, they seek to pass the burden of ensuring compatibility between replacement tires and TPMSs onto vehicle manufacturers, arguing that the latter should be guarantors of replacement tire compatibility, even though vehicle manufacturers – unlike tire manufacturers – have no control over the replacement tires that are introduced to the market.

In making their argument, Petitioners distort the mandate of Safety Act. The Safety Act prohibits a *vehicle* manufacturer from selling, or offering for sale, any vehicle that does not comply with all applicable safety standards. 49 U.S.C. § 30112(a). This prohibition is “absolute,” even when the noncompliance is deemed to be inconsequential. *See, e.g.*, Additional Information submitted by Alliance of Automobile Manufacturers, Inc., dated October 20, 2003, at 2 (docketed as NHTSA-2000-8572-277) (JA 970) (citing NHTSA Letter of Interpretation to James T. Pitts, Esq., Nov. 1, 2002).

Because of this absolute prohibition, the requirement advocated by Petitioners effectively would bar vehicle manufacturers from selling any vehicle for which there is, at the time of sale, any replacement tire on the market that is not

compatible with the vehicle's TPMS. Thus, even if, at the time the manufacturer certifies a vehicle as complying with all FMVSSs, there is no replacement tire that is incompatible with the vehicle's TPMS system – a predicate that itself would be very difficult to establish because it requires proof of a negative – the manufacturer would be required to cease sale of the vehicle whenever a non-compatible tire comes on the market.¹⁸

It bears emphasizing that, under the regulatory rubric upon which Petitioners insist, the presence of *even one* incompatible replacement tire on the market precludes a vehicle manufacturer from selling a vehicle.¹⁹ And because the prohibition on sale is absolute, there would be nothing that the manufacturer could

¹⁸ The prohibitions of 49 U.S.C. § 30112(a) relate to the date of sale of a motor vehicle. *See id.* (a manufacturer may not “sell, offer for sale, introduce or deliver for introduction in interstate commerce . . . any motor vehicle . . . unless the vehicle . . . complies with the standard”). For example, if on August 30, 2007, a manufacturer certifies its 2008 Model X as complying with all applicable FMVSSs, and on January 2, 2008, a new replacement tire comes on the market that fits the 2008 Model X but is not compatible with Model X's TPMS, the vehicle manufacturer would not be able to sell the 2008 Model X on or after January 2008, because the vehicle would no longer comply with FMVSS No. 138 (as Petitioners seek to have it rewritten).

¹⁹ In an analogous context, NHTSA recognized the infeasibility and impracticability of requiring compliance with aftermarket wheel rims. 67 Fed. Reg. at 38730 (JA 446). The practicability concerns about certifying compliance with replacement tires are at least as great as the concerns that led NHTSA not to require compliance with replacement rims, while the real world risk of encountering an incompatible replacement tire is far less than the real-world risk of encountering an incompatible replacement rim.

do to cure the problem, as long as the problematic replacement tire remained on the market.²⁰

In short, there is no exemption, or other relief, available to allow the sale of a noncompliant vehicle. Thus, NHTSA’s decision not to require TPMSs to be compatible with all replacement tires is the only practical way to implement a TPMS mandate consistent with this requirement of the Safety Act. As NHTSA explained, “[b]ecause no one is certain which tires, either produced now or in the future, will cause various TPMSs to malfunction, it is not practicable to require vehicle manufacturers to certify that the TPMS will continue to function properly with all replacement tires.” 70 Fed. Reg. at 18159 (JA 1129).

²⁰ Petitioners assert that “NHTSA could have conducted a formal exemption analysis under 49 U.S.C. § 30113, to determine whether an equivalent level of safety could be provided without the TPMS warnings for specific types of tires. . . .” Pet. Br. 82. This proposal betrays Petitioners’ misunderstandings of pertinent statutory provisions. First, such an exemption is only “temporary” (49 U.S.C. § 30113(b)(1)) and in no case may apply for a period of more than five years (49 U.S.C. § 30113(e)). Second, exemption proceedings under Section 30113 must be initiated by petition (49 U.S.C. § 30113(b)(2)), which would unfairly place the onus on vehicle manufacturers to identify incompatible tires as tire manufacturers place them on the market. And third, and most importantly, the exemption for equivalent level of safety (49 U.S.C. § 30113(b)(3)(B)(iv)) is available “only if the Secretary determines the exemption is for not more than 2,500 vehicles to be sold in the United States in any 12-month period” (49 U.S.C. § 30113(d)), which effectively precludes major vehicle manufacturers from availing themselves of it as a solution to the replacement tire dilemma. Thus, Petitioners’ Section 30113 argument is nothing more than the proverbial red herring.

Not only do Petitioners fail to come to grips with the legal impediments to their proposal, but they also vastly overstate the importance of TPMS compatibility with replacement tires. Asserting that replacement tires “account for the majority of all tires in use” (Pet. Br. 79) and that “many more vehicles on the road have replacement tires than original tires” (*id.* at 80), they conclude that the benefits of TPMSs are “substantially lost or reduced” because the final rule does not apply to replacement tires. *Id.*

This is a non sequitur. The proportion of replacement tires to original tires does not provide any evidence of the number of *incompatible* replacement tires on the market. Indeed, the vast majority of replacement tires – more than 99% – are compatible with TPMSs. *See* 70 Fed. Reg. at 18159 (JA 1129) (“NHTSA has been presented with data demonstrating that a very small number of replacement tires (estimated at less than 0.5 percent of production) may have construction characteristics and material content that cause the vehicle’s TPMS to exhibit functional problems”).²¹

²¹ Petitioners cite NHTSA’s Final Regulatory Impact Analysis (“FRIA”) to argue that the number of incompatible replacement tires may be as high as ten percent. *See* Pet. Br. 82. However, the “less than 10 percent” figure was “[a]t the high end” and included not only tire designs that are incompatible with TPMSs, but also tires that “will have other malfunction problems.” *See* FRIA on TPMS, Docket No. NHTSA-2005-20586-2, at p. II-10 – II-12 (JA 1181-1183).

Petitioners, however, contend (Pet. Br. 81-82) that NHTSA’s conclusion that very few replacement tires are incompatible with TPMSs was based on information obtained in 2003, and they assert that, because “TPMSs were still relatively new in 2003,” because “these four million TPMSs were mainly installed on cars that are far newer (and far more upscale) than the average vehicle,” and because “[t]he replacement tires on these vehicles . . . are by definition newer still,” past compatibility provides no guidance as to future performance. Pet. Br. 82. Thus, according to Petitioners, “what NHTSA did not know . . . was whether the TPMSs would properly function over the long run with replacement tires” *Id.* But that argument misses the point. The long-term reliability of a given TPMS system is not at issue here. Rather, at issue is whether TPMSs work with a given replacement tire in the first place. In all but a tiny minority of circumstances, they do. And in the unlikely event that they do not, the MIL will illuminate because there is a malfunction in the system.

Moreover, to the extent that there is any remaining concern regarding the compatibility of certain replacement tires with TPMSs, that concern can be ameliorated through the publication of a list of tires that are incompatible with specific TPMS systems. To that end, NHTSA has committed to “notify vehicle manufacturers when incompatible tires are discovered during compliance testing”;

moreover, NHTSA has explained that “the results of such tests are publicly available.” 70 Fed. Reg. 18160 (JA 1130).

The remainder of Petitioners’ arguments fall by the wayside. For example, they argue that the MIL provides an insufficient warning that a replacement tire is incompatible with TPMS, because “[t]he same light would also be on whenever there is any other kind of TPMS malfunction, for example, ‘when a [replacement] tire is significantly under-inflated.’” Pet. Br. 79. Similarly, Petitioners assert that “drivers with even only one or two incompatible replacement tires installed on their vehicle will operate with a malfunction light on for the duration of their operation, meaning that the system is essentially disabled for all four tires.” *Id.* But the problem with Petitioners’ hypothetical is not that the TPMS is “disabled”; it is that the driver is ignoring the TPMS’s warnings. And no matter how well designed, a TPMS system is completely useless if a motorist ignores its warnings.

Finally, Petitioners assert that “[c]ertain tire pressure monitoring systems on the market are capable of working with the full range of tires.” Pet. Br. 81 n.73. But all that Petitioners can scrape together in support of this assertion is a reference to a system that was recently “exhibited” at an automobile convention by an Australian company named ETV. *See* ETV Pet. at 1, Docket No. NHTSA-2005-20586-27 (JA 1531). There is no independent proof that ETV’s system will actually work as ETV claims, and ETV’s comments say nothing about the

production status of its system, much less whether it is capable of being implemented 68 million times per year – the number of light duty vehicles that are manufactured for sale in the United States (17 million) times four (the number of tires per vehicle).²² There is nothing in the record indicating that ETV is capable of producing TPMSs at all, much less on the massive scale and cost-efficient basis required to supply all of the automobiles manufactured for sale in the United States and, hence, ensure that TPMSs will work with any conceivable replacement tire.²³

V. NHTSA’S DETECTION TIME AND TEST CONDITIONS REQUIREMENTS ARE REASONABLE

A. NHTSA’s Adoption Of A 20-Minute Detection Time Was Supported By Ample Evidence In The Record.

Petitioners claim that NHTSA’s requirement that a TPMS give notification of significant under-inflation within 20 minutes was arbitrary and capricious. *See* Pet. Br. 83-85. Their position has no support in the record.

²² Indeed, ETV’s website indicates that ETV is not yet at the production stage on its system. *See* <http://www.etv.com.au> (last visited Nov. 16, 2006).

²³ To be sure, at the heart of the TREAD Act is the adoption of new safety systems to monitor tire pressures and increase the safety of motor vehicle occupants. Nonetheless, as this Court has noted in the context of safety standards for seat belts, “[w]hen dealing with a ‘technology-forcing’ rule . . . , the agency must consider the abilities of producers to comply with the new requirement” *Pac. Legal Found. v. Dep’t of Transp.*, 593 F.2d 1338, 1348 (D.C. Cir. 1979). To that end, NHTSA “is correct to look at the costs as well as the benefits” of establishing specific safety standards. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983). And the decision whether to prod manufacturers to adopt new technology “is one committed to the Agency’s discretion.” *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659, 673 (6th Cir. 1972).

Petitioners present two circumstances in which they argue that NHTSA's 20-minute detection time would be inadequate to warn a driver of under-inflated tires. First, they assert that "tires certainly can fail with less than 20 minutes of operation while under-inflated, especially when the vehicle is repeatedly operated at shorter intervals." *Id.* at 84 (footnote omitted). They support this assertion with a hypothetical about how "a driver who drops children at school, goes to work and goes shopping, all with short drives, *may* go weeks with under-inflated tires" *Id.* (emphasis added).

In designating the 20-minute detection time, however, NHTSA relied (70 Fed. Reg. at 18148) (JA 1118) upon a U.S. Census Bureau study that found that average commuting times for 60 out of 69 major cities were equal to or greater than 20 minutes. Docket No. NHTSA-2004-19054-99 (JA 1099-1101).²⁴ In any event, NHTSA tire research has found that vehicles can be operated safely for more than 20 minutes at 20 psi without an appreciable risk of tire failure. 70 Fed. Reg. at 18148 (JA 1118).

Petitioners fare no better in arguing that a 20-minute detection time would be inadequate to detect a rapid loss of tire pressure resulting from a nail puncture.

²⁴ The Census Bureau study found that average commute times were between 20 and 30 minutes for most major cities. Docket No. NHTSA-2004-19054-99 (JA 1099-1101). On that basis, NHTSA refused to extend the low tire pressure detection time beyond 20 minutes. 70 Fed. Reg. at 18148 (JA 1118).

See Pet. Br. 84. That argument ignores the purpose of TPMSs, which are intended to detect a slow loss of tire pressure – not a sudden, catastrophic loss of tire pressure. *See* footnote 5, *supra*. Indeed, because “a driver would be well aware of the tire problem [with a rapid loss of pressure], . . . the TPMS would provide little added benefit.” 70 Fed. Reg. at 18148 (JA 1118).

Finally, Petitioners ignore NHTSA’s finding that, because of inherent limitations in TPMSs, a 20-minute detection time is necessary for purposes of practicability. *See* 70 Fed. Reg. at 18148 (JA 1118); *see also* Resp. Br. 71-73. After vehicle ignition, a TPMS needs time to receive and process the information that it is receiving from the four tires to determine whether the data are valid and whether one or more of the vehicle’s tires is actually under-inflated, to avoid undesirable nuisance illuminations. Petitioners’ only response to NHTSA’s practicability finding is to cite ETV’s self-serving assertions that it is capable of building a TPMS that can detect under-inflation “immediately.” *See* Pet. Br. 84 & n.75. Petitioners, however, implicitly concede that any so-called “immediate[]” system has inherent flaws, because “operation of a tire warms it and, through the application of Boyle’s law, increases pressure.” *Id.* at 85. Thus, any tire that immediately registers as “under-inflated” upon ignition may, within several minutes, reach an acceptable inflation pressure. Petitioners leave this seemingly intractable issue hanging, however – blandly stating that “[t]his factor can and

should be dealt with as a matter of TPMS technology” *Id.* But – not surprisingly – they cite no technology capable of being produced on a mass-market scale that can side-step an irrefutable law of thermal dynamics.

Petitioners’ confidence in the appearance of a *deus ex machina* to address their complaints about the 20-minute detection time provides no basis for concluding that NHTSA’s rule is arbitrary and capricious.

B. Petitioners’ Criticisms Of The Final Rule’s Test Conditions Are Misplaced.

NHTSA’s final rule sets forth objective procedures for testing TPMSs to ensure that they will function properly “at operating conditions that are typically encountered during normal driving.” 70 Fed. Reg. at 53093 (JA 1549). Petitioners criticize these procedures, claiming that TPMSs should be tested under a much broader set of conditions. *See* Pet. Br. 85-86. Their criticisms are both misguided and ironic.

The final rule mandates TPMS compliance testing on the Southern Loop of the Treadwear Test Course near San Angelo, Texas, a course that “has been used for several years for testing [tires] under [NHTSA’s] Uniform Tire Quality Grading Standards.” 70 Fed. Reg. at 53093 (JA 1549).

Petitioners, however, are not content with having TPMSs tested over the same course that is used for tires made by the tire manufacturer Petitioners. Rather they contend that vehicle manufacturers should have to certify TPMSs under a

much broader – and much less objective – set of testing conditions, including in snow, rain, and below-freezing conditions. *See* Pet. Br. 86.

The irony does not end there. In the final rule implementing one of the TREAD Act’s other requirements – that NHTSA update safety standards for tires – the Rubber Manufacturers Association (“RMA”), which represents tire manufacturers, consistently objected to NHTSA’s proposals as incorporating *too broad* a range of test conditions:

- RMA objected to NHTSA’s proposal to increase the temperature at which tires will be tested because such a change “*will create considerable complexity to the industry.*” 68 Fed. Reg. 38116, 38126 (June 26, 2003) (JA 903, 913) (emphasis added). RMA suggested that NHTSA retain the requirement that all tires be tested at just one temperature – 38 degrees Celsius. *Id.*
- RMA suggested *lowering* the speed of a tire endurance test. *See id.* at 38126-38127 (JA 913-914).
- RMA suggested that a low-pressure test should be run at 90% of the tire’s maximum load capacity rather than 100% of the tire’s load capacity. *Id.* at 38127 (JA 914).

Whatever the merits of these positions, they reflect the tire manufacturers’ understanding that equipment testing under the Safety Act is intended to serve as a proxy for real-world conditions, rather than to duplicate every conceivable condition that occurs in the real world. To that end, testing requirements that are overly broad and indefinite cannot be squared with the Safety Act’s requirement that standards “be stated in objective terms” (49 U.S.C. § 30111(a)), which means that “tests to determine compliance [are] capable of producing identical results

when test conditions are exactly duplicated.” *Chrysler Corp. v. DOT*, 472 F.2d 659, 676 (6th Cir. 1972).

Of course, there is no way to “exactly duplicate[]” test conditions that are vaguely described and fundamentally variable from instance to instance. For example, requiring TPMSs to be tested “in the rain” eliminates any possibility of consistent or repeatable test conditions because an automobile manufacturer cannot duplicate, from test to test, the rate and direction of rainfall, or the amount of rain standing on the road. Thus, the manufacturer would have “no assurance that his own test results will be duplicated in tests conducted by the agency.” *Id.* at 675. And without that assurance, the manufacturer would be forced to test its TPMSs in every conceivable wet weather condition, from dew to drizzle to downpour. Far from an “objective” test, such a requirement would, in RMA’s own words, “create considerable complexity to the industry.” 68 Fed. Reg. at 38126 (JA 913).

Moreover, Petitioners have failed to show that a broader set of weather conditions would have any effect on the functioning of a TPMS. The only support for their position that Petitioners scrape together is an extra-record cite to ETV’s self-serving website. *See* Pet. Br. 86 n.76. But, as NHTSA pointed out in its brief, Petitioners’ citations of extra-record evidence and analyses cannot support overturning a rule that, like the TPMS rule, is well supported by the record.

VI. PETITIONERS' GLOSSARY SHOULD BE DISREGARDED

Finally, the Court should disregard Petitioners' argumentative and misleading glossary (Pet. Br. xiv-xvi). The purpose of the glossary in briefs is to explain abbreviations, including acronyms. *See* Cir. R. 28(a)(3) ("All briefs containing abbreviations, including acronyms, must provide a 'Glossary' defining each such *abbreviation* *Abbreviations* that are part of common usage need not be defined.") (emphasis added).

The glossaries that this Court has supplied reflect the limited purpose of glossaries. *See, e.g., St. Elizabeth's Med. Ctr. of Boston v. Thompson*, 396 F.3d 1228, 1230 (D.C. Cir. 2005); *Sentara-Hampton Gen'l Hosp. v. Sullivan*, 980 F.2d 749, 751 (D.C. Cir. 1992) (per curiam); *Int'l Fabricare Inst. v. U.S. EPA*, 972 F.2d 384, 400 (D.C. Cir. 1992) (per curiam).

Petitioners' glossary, however, consists of arguments and background information parading as definitions. For instance, Petitioners provide a paragraph of explanation of "R-Squared," explaining Microsoft Excel's abilities to generate R-Squareds and describing the use of R-Squareds in data analysis. They also use their glossary to provide explanations of "random censoring"; describe the reasons why manufacturers perform "recall[s]"; and offer a tendentious and misleading definition of "reserve pressure" (defining it in terms of safety and attempting to equate safe operations with values specified by the Tire & Rim Association

Yearbook and other tire standards). *See* Pet. Br. xv. Even worse, they use the glossary to misleadingly imply that the Tire and Rim Association sets “safety standards” and that the “tire pressure reserve” is linked to such “standards.” *Id.* at xvi. And they define a “TPMS” as a Tire Pressure Monitoring System” that is “designed to warn the driver when one or more tires are under-inflated” (*id.*), omitting the statutory requirement that it alert the driver of “significant[]” under-inflation. *See* TREAD Act, Pub. L. 106-414, § 13, 114 Stat. 1800, 1806 (2000) (mandating a “warning system” that will “indicate to the operator when a tire is *significantly* under inflated”) (emphasis added).

Petitioners’ glossary is misleading at best. Whether it is the result of a calculated attempt to evade the word limits or a lack of familiarity with the norms and rules of this Circuit, we respectfully request that the Court disregard it.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully Submitted.

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January 18, 2007

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) AND
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 12,966 words and thus complies with Circuit Rule 32(a)(3)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2007, I served copies of the foregoing Final Brief for the Intervenor in Support of Respondents by e-mail and overnight delivery on Petitioners and Respondents, herein at the following addresses:

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STATUTORY AND REGULATORY ADDENDUM

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Section 13 of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000), provides:

Tire Pressure Warning.

Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall complete a rulemaking for a regulation to require a warning system in new motor vehicles to indicate to the operator when a tire is significantly under inflated. Such requirement shall become effective not later than 2 years after the date of the completion of such a rulemaking.

5 U.S.C. § 702 provides, in pertinent part:

Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * *

16 U.S.C. § 825l provides, in pertinent part:

* * *

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for

rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.
* * *

28 U.S.C. § 2344 provides in pertinent part:

Review of orders, time, notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. * * *

47 U.S.C. § 402(c) provides in pertinent part

Judicial Review of Commission's orders and decisions

(c) Filing notice of appeal; contents; jurisdiction; temporary order

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. * * *

47 U.S.C. § 405(a) provides in pertinent part:

Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority with the Commission pursuant to section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. * * *

49 U.S.C. § 30112(a) provides:

Prohibitions on manufacturing, selling, and importing noncomplying motor vehicles and equipment

(a) **General.** – Except as provided in this section, sections 30113 and 30114 of this title, and subchapter III of this chapter, a person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or motor vehicle equipment manufactured on or after the date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or equipment complies with the standard and is covered by a certificate issued under section 30115 of this title.

10 C.F.R. § 2.345 provides:

§ 2.345 Petition for reconsideration.

(a)(1) Any petition for reconsideration of a final decision must be filed by a party within ten (10) days after the date of the decision.

(2) Petitions for reconsideration of Commission decisions are subject to the requirements in § 2.341(d).

(b) A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid. The petition must state the relief sought. Within ten (10) days after a petition for reconsideration has been served, any other party may file an answer in opposition to or in support of the petition.

(c) Neither the filing nor the granting of the petition stays the decision unless the Commission orders otherwise.

49 C.F.R. § 389.35 provides:

§ 389.35 Petitions for reconsideration.

(a) Any interested person may petition the Administrator for reconsideration of any rule issued under this part. The petition must be in English and submitted in five (5) legible copies to the Administrator, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590, and received not later than thirty (30) days after publication of the rule in the Federal Register. Petitions filed after that time will be considered as petitions filed under § 389.31. The petition must contain a brief statement of the complaint and an explanation as to why compliance with

the rule is not practicable, is unreasonable, or is not in the public interest.

(b) If the petitioner requests the consideration of additional facts, he/she must state the reason they were not presented to the Administrator within the prescribed time.

(c) The Administrator does not consider repetitive petitions.

(d) Unless the Administrator otherwise provides, the filing of a petition under this section does not stay the effectiveness of the rule.

49 C.F.R. § 553.35 provides:

§ 553.35 Petitions for reconsideration.

(a) Any interested person may petition the Administrator for reconsideration of any rule issued under this part. The petition shall be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC, 20590. It is requested, but not required, that 10 copies be submitted. The petition must be received not later than 45 days after publication of the rule in the Federal Register. Petitions filed after that time will be considered as petitions filed under Part 552 of this chapter. The petition must contain a brief statement of the complaint and an explanation as to why compliance with the rule is not practicable, is unreasonable, or is not in the public interest. Unless otherwise specified in the final rule, the statement and explanation together may not exceed 15 pages in length, but necessary attachments may be appended to the submission without regard to the 15-page limit.

(b) If the petitioner requests the consideration of additional facts, he must state the reason they were not

presented to the Administrator within the prescribed time.

(c) The Administrator does not consider repetitious petitions.

(d) Unless the Administrator otherwise provides, the filing of a petition under this section does not stay the effectiveness of the rule.